THE ULTIMATE SOLUTION

By Shubham Singal, AIR - 4

QUESTION BANK

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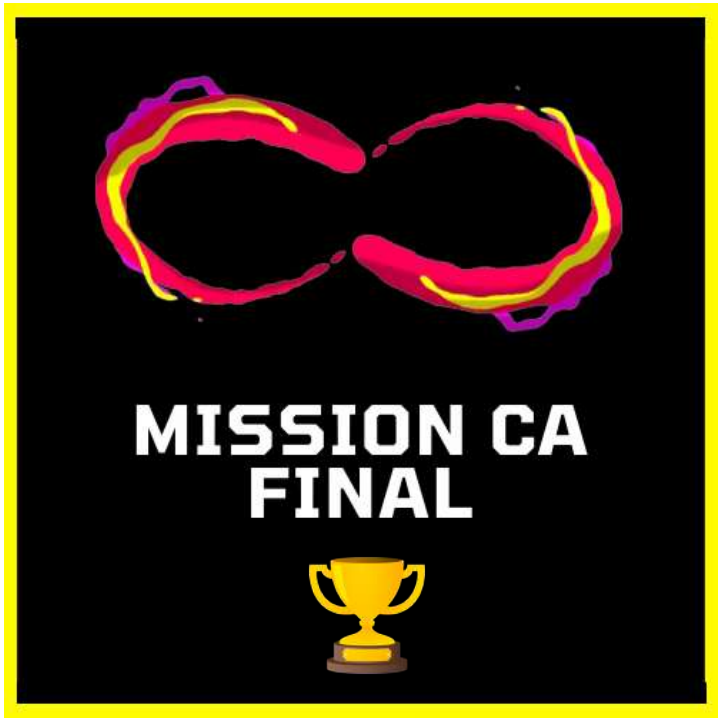

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Message from the Author!

Dear Future CA,

Hope you are taking good care of yours and your family's health.

My name is Shubham Singhal, and I am the co-author of this book (well, feels good to say so). I had cleared my CA Final in Nov 2018 attempt (new syllabus) with an All India Rank 4. Having completed my Articleship with Deloitte, I am currently working with a venture capital firm as a Senior Analyst. I am a teacher by passion and been teaching law for quite some time now!

The other co-author to this book is CA Priyal Rathi. Without her help, it would not have been possible to prepare a question bank with such comprehensive coverage. Special thanks to her!

Key features of this book:

1. 430+ questions covered. It covers all ICAI Module, RTPs, MTPs and Past Paper questions including RTP and MTPs applicable for Nov/Dec 21 with all answers amended till date.
2. All answers are as per Suggested Answer and the way ICAI prefers you to write.
3. Student's confusion has been proactively answered by the Author via comments.
4. Tricky/important/interesting questions are highlighted.

I dedicate this book to my mom!

Warm regards,
Shubham Singhal
Chartered Accountant

In case if you find any errors, typo or otherwise, in this question bank - Feel free to highlight via email at - therankerway@gmail.com

All the best, Future CA!

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Index and Number of Questions

*Target to bring this down to just 100 questions on the last day before exam

How to use this question bank:

1. Read the ICAI module or The Ultimate Solution - Summary Notes before you read this Question Bank
2. Watch Revision videos on YouTube along with the summary notes
3. Once revision is done, solve all the questions of this question bank
4. Mark all the questions which you find tricky, unique or controversial for your last day revision
5. Ensure that the no. of questions that you keep for last day revision is < 50 in total.

[1] Please go through all the questions after reading summary notes and then mark the questions which you find difficult for last day revision. What is difficult for me may not be difficult for you and vice-versa and hence I have not marked them.

Chapter 1 – Appointment and Qualification of Directors

Question 1:
The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall not exceed 10. Presently, the company has 8 directors. Its Board of Directors desires to increase the number of directors from 8 to 16. Advise whether under the provisions of the Companies Act, 2013, the Board can do so?

[ICAI Module]

Answer:
Relevant provision
Under Section 149(1) of the Companies Act, 2013 every company shall have a Board of Directors consisting of individuals as directors and shall have a minimum number of 3 directors in the case of a public company, 2 directors in the case of a private company, and one director in the case of a One Person Company. The maximum number of directors shall be 15.

The First Proviso to Section 149(1) states that a company may appoint more than 15 directors after passing a special resolution.

From the provisions of section 149 (1) as above, though the minimum number of directors may vary depending on whether the company is a public, private or a one person company, the maximum number of directors is same for all types of companies i.e. 15 directors.

Given case:
In the given case since the number of directors is proposed to be increased from 8 to 16, the company will be required to comply with the following provisions:

(i) Alter its Articles of Association as per the provisions of Section 14 of the Act by passing a special resolution, so as to increase the number of directors in the Articles from 10 to 16;

(ii) Also take approval for increasing the maximum number of directors from 8 to 16 by means of a special resolution passed by the members at a duly convened general meeting.

Question 2:
KMR Limited, a listed public company, has 15 directors on its Board. The Articles of Association of the said company provide for the maximum number of Directors in the company to be 15. Due to diversification and expansion of activities, the Board of Directors of the said company desire to increase the number of Directors to 18. Decide with reference to the applicable provisions of the Companies Act, 2013:

(i) Whether the Board of Directors can do so?

(ii) Will your answer differ if the said Company would have been a Government Company?

[May 2019 - Old]

Answer:
According to Section 149(1) of the Companies Act, 2013, the minimum number of directors in the case of a public company is 3. The maximum number of directors shall be 15.

The proviso to Section 149(1) states that a Company may appoint more than 15 directors after passing a special resolution.

(i) Yes, the Board of Directors can do so by following the below mentioned provisions:

(1) A special resolution of members will be required to alter the Articles of Association under Section 14 of the Companies Act, 2013, so as to increase the number of directors in the Articles from 15 to 18;

(2) Further, the number of directors is proposed to be increased beyond 15 directors, such authority must be obtained from the members through a special resolution and only after that approval, new directors can be appointed.

(ii) In case of a Government company, the Ministry of Corporate Affairs has clarified vide Notification G.S.R. 463(E) dated 5th June, 2015, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Government Company. Thus, in case of a Government Company the Board of Directors can increase the number the directors without following the provisions as mentioned in part (i).

Question 3:

The composition of the Board of Directors of a listed company as on 31-03-2017 comprised of:
(i) Mr. A, Director,
(ii) Mr. B, Director
(iii) Mr. C, Director
(iv) Mr. D, Director,
(v) Mrs. E, Independent Director,
(vi) Mr. F, Independent Director and
(vii) Mr. G, Independent Director.

Mr. D & Mrs. E vacated their office of Director on 15-04-2017.

You are required to examine with reference to the provisions of the Companies Act, 2013 and what course of action would you suggest which can be taken up by the Company in this regard?

[May-18/May-17 -Old]

Answer:

Relevant provision:

The second proviso to section 149(1) provides that such class or classes of companies as may be prescribed, shall have at least one women director.

Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one women director -
(1) every listed company;
(2) every other public company having-
- paid-up share capital of one hundred crore rupees or more; or
- turnover of three hundred crore rupees or more.

It further provides that any intermittent vacancy of a women director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Given case:

In this case the Company is a listed and under the provisions of the Companies Act, 2013, it is required to have at least 1 Women Director on its Board.

The provision of section 149(4) provides that every listed company shall have at least 1/3rd of the total number of Directors as Independent Directors.

As per the facts stated in the question, composition of board of directors of listed company as on 31-3-2017 comprised of total 7 directors. Out of which 4 were directors and 3 were independent directors.

Later Mr. D (Director) and Mrs. E (Independent Director) vacated their offices of director on 15-4-2017.

So accordingly, listed company as stated above, shall have at least one women director and 1/3rd of the total number of directors as independent directors in the Board.

However, on 15-4-2017, total number of directors left were 5 due to vacation of Mr. D and Mrs. E.

Conclusion:
As per the requirement of the above sections, there is compliance of section 149(4) as 1/3rd of the total number of directors comprises of Independent Director [(1/3x5) 1.6 rounded off as 2]. There is a compliance of minimum requirement of 2 independent directors in the board.

However, pertaining to women director, Board have to fill up the intermittent vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

Question 4:
Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:
The Board of Directors of MNP Limited appointed Ms. Neha as a Women Director in the Board Meeting held on 10th September, 2014. The said appointment was made to fill the vacancy of the Woman Director, which had occurred as a result of resignation of Ms. Sheela on 30th June, 2014.
Will your answer differ if the Board Meeting of the company was held on 8th November, 2014?

[May 2015,Old]

Answer:
Relevant provision:
At least one woman director shall be on the Board of such class or classes of companies as may be prescribed (second proviso to section 149(1) of the Companies Act, 2013).

Further, any intermittent vacancy of a woman director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

Given case and analysis:
As per the above provisions, the appointment of Ms. Neha is valid. The vacancy of a woman director of MNP Limited which arose on 30th June 2014, due to the resignation of Ms. Sheela, should be filled up latest by 29th September 2014 or the day of the next Board Meeting, whichever is later.

Since Ms. Neha was appointed in the next Board Meeting after the vacancy arose, i.e., on 10th September 2014, her appointment is valid.

The answer will remain the same, even if MNP Ltd. appoints Ms. Neha in the Board Meeting held on 8th November 2014, provided the said meeting is the first meeting of the Board after 30th June 2014 i.e., after the resignation of Ms. Sheela.

Question 5:

M Ltd. is an unlisted company engaged in FMCG sector having 11 directors on its Board. The company has paid-up share capital of Rs. 300 crores and a turnover of Rs. 500 crores. The provisions contained in the Companies Act, 2013 require the companies to have the following categories of directors on their Board

(a) Woman director

(b) Independent director

Keeping in view of the provisions of the Companies Act, 2013, M Ltd appointed the directors as required by the Act. State the relevant provisions

[May 17 - Old]

Answer

1. Woman Director:

   Relevant provision

   Proviso to Section 149(1) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one woman director. These companies under the provisions are:

   (1) Every listed company; and

   (2) Every other public company having -

   (a) paid-up share capital of Rs. 100 crore or more; or

   (b) a turnover of Rs. 300 crore or more.

   Current case and conclusion:

   Accordingly, since M Limited is a public company and the paid-up capital of company is Rs. 300 crores, and turnover is Rs. 500 crores the company shall appoint at least one woman director.

2. Independent Director

   Relevant provision:

   As per Section 149(4), every listed public company shall have at least 1/3rd of the total number of directors as independent directors. The Central Government, may however, prescribe the minimum number of Independent Directors in case of any class or classes of public companies.

   According to Rule 4 of the Companies (Appointment and qualification of Directors) Rules, 2014 provides that the following companies are required to have at least 2 directors as independent directors:

   (i) The public companies having paid up share capital of Rs. 10 crore or more; or

   (ii) Public companies having turnover of Rs. 100 crore or more; or

   (iii) Public companies which have, in aggregate, outstanding loans, debentures, and deposits exceeding Rs. 50 crores.

   Current case and conclusion

   In the given case, since company fulfils the conditions as required in respect of paid- up capital and turnover, the company must appoint at least 2 independent directors.

Question 6:

Sky Limited, a listed company has been incorporated under the Companies Act, 2013. An intermittent vacancy of a woman director has arisen on 15th June 2016. Advise the company to fill the vacancy as per the provisions of the Companies Act, 2013. The Board meeting was held on 14th August 2016.

[Nov 16 - Old]

Answer

Relevant provision:

According to second proviso to section 149(1) of the Companies Act, 2013, at least one woman director shall be on the Board of such class or classes of companies as may be prescribed.

Further, any intermittent vacancy of a woman director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

Given case:
An intermittent vacancy of a woman director has arisen in Sky Limited on 15th June 2016. The said vacancy shall be filled up by the Board at the earliest but not later than immediate next Board meeting (14th August 2016) or 3 months from the date of such vacancy (14th September 2016), whichever is later.

Conclusion:
Thus, the vacancy can be filled by 14th September 2016.

Question 7:
Royal Limited is a company listed at Bombay Stock Exchange, incorporated on 1st January, 2015. The Board of Directors of the company decides to appoint in its Board, a 'Women Director' and the 'Resident Director'.

i. Explaining the provisions of the Companies Act, 2013, state whether it is mandatory for the company to appoint such directors in its Board.
ii. What would be your answer in case the company is a non-listed company and the Board of Directors decided not to have the Women Director in the company's Board?
iii. What shall be your answer in case the company in question is not listed at any of the Exchanges. The paid-up share capital of the company is Rs. 50 crore and the turnover of the company is Rs. 200 crores. Decide whether the company is mandatorily required to appoint the woman director.

[Nov 16 - Old]]

Answer:
Relevant provision:
As per section 149 of the Companies Act 2013 read with Rules, following is the provisions related to Women Director and Resident Director:

Women Director:
At least one woman director shall be on the Board of such class or classes or companies as may be prescribed. [second proviso to section 149(1)].

Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following classes of companies shall appoint at least one woman director:

(1) Every listed company; and
(2) Every other public company having -
    (a) paid-up share capital of Rs. 100 crore or more; or
    (b) a turnover of Rs. 300 crore or more.

Further, any intermittent vacancy of a woman director shall be filled up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

Resident Director:
Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the financial year. [Section 149(3)]

Applicability of above provision to current case:
Thus, according to the above provisions:

i. In the first case, since the Royal Limited company is a listed company, it is required to comply with the above provisions and should appoint the women director and the Resident Director accordingly.

ii. In the second case, since the Royal Limited Company is a un-listed company, it is not mandatory to have a woman director on the Board.

iii. In the third case, since the paid-up share capital of the company is Rs. 50 crore and the turnover of the company is Rs. 200 crore and the company is non listed company, it is not mandatory to have a woman director on the Board.

Question 8:

XYZ Limited is an unlisted public company having a paid-up capital of Rs. 20 crores as on 31st March, 2017 and a turnover of Rs. 150 crores during the year ended 31st March 2017. The total number of directors is 13.
State the following Answer:

i. Minimum number of directors appointed as Independent Director in XYZ Limited.

ii. What will be the consequences where XYZ Ltd. ceases to fulfill any of the required conditions with respect to appointment of independent directors for 3 continuous years?

iii. If suppose XYZ Ltd. is a dormant company, what shall be the law related to the appointment of independent director?

[Mar 18 - MTP(New)]

Answer:

Relevant provision:

According to Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of companies shall have at least 2 directors as independent directors:

(1) the Public Companies having paid up share capital of 10 crore rupees or more; or

(2) the Public Companies having turnover of 100 crore rupees or more; or

(3) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

As per Rule 4(2) of the Companies (Appointment and Qualification of Directors) Rules, 2014 the following classes of unlisted public company are not covered under Rule 4(1), namely:-.

(a) a joint venture;

(b) a wholly owned subsidiary; and

(c) a dormant company as defined under section 455 of the Act.

Moreover, where a company ceases to fulfil any of 3 conditions for three consecutive years, it shall not be required to comply with these provisions (i.e., related to appointment of independent directors) until such time as it meets any of such conditions.

Given case:

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of Rs. 20 crores as on 31st March 2017 and a turnover of Rs. 150 crores during the year ended 31st March 2017. Thus, as per the Companies (Appointment and Qualification of Directors) Rules, 2014,

i. XYZ Limited shall have at least 2 directors as independent directors.

ii. If XYZ ceases to fulfil any of 3 conditions for three consecutive years, it shall not be required to comply with provisions related to appointment of independent directors until such time as it meets any of such conditions.

iii. XYZ, a dormant company does not require to fulfil the conditions stated in Rule 4 for appointment of Independent Directors.

Question 9:

Examine the validity of the following appointments with reference to the provisions of the Companies Act, 2013:

(i) Mr. Person together with one of his relatives holds 3% of the total voting power of XYZ Ltd. The Board of Directors of XYZ Ltd. appointed him as an independent director.

(ii) ABC Ltd., a listed company having 5,000 small shareholders, upon receiving notice from 400 of such small shareholders has refused to appoint a small shareholders' director under section 151 of the Companies Act, 2013.

(iii) Mr. D, who fails to get appointed as a director in the general meeting of AJD Limited, subsequently was appointed as an additional director by the Board of Directors of the company.

[May 16 - RTP(Old)]

Answer:

(i) An independent director means a director who, neither himself nor any of his relatives holds together with his relatives 2% or more of the total voting power of the company [Section 149(6) of the Companies Act, 2013].

In the given problem, Mr. Person holds together with his relatives 3% of the total voting power of XYZ Ltd. Hence his appointment as an independent director is not valid.

(ii) According to section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as given in Rule 7 of the Companies (Appointment and Qualification of directors) Rules, 2014.

As per the rule, a listed company, may upon notice of not less than lower of:

(a) 1,000 small shareholders; or

(b) 1/10th of the total number of such shareholders,

have a small shareholders' director elected by the small shareholders.

Thus, according to the provisions stated above, since the number of small shareholders of ABC Ltd. who applied is less than 1000 and 500 (1/10th of the total 5000) small shareholders, ABC Ltd. can validly refuse to appoint such a director.

(iii) According to section 161(1) of the Companies Act, 2013, a person who fails to get appointed as a director in a General Meeting, cannot be appointed as an additional director.

Hence the appointment of Mr. D as an additional director in AJD Ltd. is not valid.

Question 10:

VGP Ltd. is a listed public Company with a paid up capital of Rs. 100 crores as on 31st March, 2018. Mrs. Jasmine, who was one of the promoters of PDS Ltd. (a Joint Venture Company of VGP Ltd.), was appointed as Woman Director on the Board of VGP Ltd. VGP Ltd. has the following proposals :

(1) To remove Mr. Z, an Independent Director who was re-appointed for a second term.

(2) To appoint Mr. N, a nominee Director in the Board as an Independent Director.

(3) To appoint Mrs. Jasmine as 'an Independent-cum-Woman Director.

With reference to the relevant provisions of the Companies Act, 2013, examine:

(i) The validity the above proposals and the appointment of Woman Director already made.

(ii) Whether Mr. N, can be appointed as an Independent Director of PDS Ltd.?

(iii) Is an Independent Director entitled for stock option?

[Nov 2018 - New]

Answer:

Given case:

As per the stated facts, VGP Ltd., a listed public company with a paid up capital of Rs. 100 crore appointed Mrs. Jasmine (Promoter of PDS Ltd., a joint venture of VGP Ltd.) as woman director on the Board of VGP Ltd. VGP Ltd. made the following proposals:

(1) Removal of Mr. Z, an Independent Director(ID) who was re-appointed for a second term.
(2) Appointment of Mr. N, a nominee director in the Board as an Independent Director.
(3) Appointment of Mrs. Jasmine as an Independent- cum-woman Director

Following are the Answer in the light of the above given facts under the Companies Act, 2013:

(i) With respect to this part of the question, Proposal no. (1) will be valid only on the compliance of the proviso given under section 169(1). According to the said proviso an independent director re-appointed for second term under section 149(10) shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.

W.r.t. proposal nos. (2), it will be invalid as per section 149(6). As per the stated section, in relation to a company, an independent director means a director other than a managing director or a whole-time director or a nominee director.

W.r.t. proposal nos. (3), it will be valid as per requirement of section 149(6) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014. Person so appointed as ID, is or was not a promoter of the company or its holding, subsidiary or associate company. Since here, Mrs. Jasmine is a promoter of PDS Ltd. which is joint venture co. of VGP Ltd, it is out of the purview of the above disqualification and is in compliance with Rule 3, so she is eligible to be appointed as Independent -cum-Woman director in VGP Ltd.

Alternate Answer to proposal (3):

As per Section 2 (6) of the Act, associate company includes a joint venture company, therefore Mrs. Jasmine, a promoter of an associate company cannot be appointed as independent director.

(ii) As per Notification G.S.R. 839(E) dated 5th July, 2017, an unlisted public company which is a joint venture, a wholly owned subsidiary or a dormant company will not be required to appoint Independent Directors. So, Mr. N cannot be appointed as an Independent Director of PDS Ltd.

(iii) As per section 149(9), notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option.

Question 11:

Considering the regulatory provisions of the Companies Act, 2013 and the rules thereof regarding the appointment of independent directors on a company's Board, state whether Z Limited, a listed public company is required to appoint Independent Directors. Also state whether appointment of Independent Director is required in the following cases:

(1) The public company has a paid up share capital of Rs. 10 crores
(2) What shall be your answer in case the company's paid up share capital is only Rs. 2 crores.
(3) Whether a person who holds the position of a Key Managerial Personnel in the same company can be appointed as an Independent Director?
(4) In relation to mandatory women directors as required under the Companies Act, 2013 should such directors also be Independent Directors?

[Nov 2018 - Old]

Answer:

According to section 149(4) of the Companies Act, 2013, every listed public company shall have at least one-third of the total number of directors as independent directors. Hence, Z limited, being a listed public company, shall have at least one-third of the total number of directors as independent directors.

(1) According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the Public Companies having paid up share capital of 10 crore rupees or more, shall have at least 2 directors as independent directors.

Thus, if the paid- up share capital of the public company is Rs. 10 crore, the company shall have at least 2 directors as independent directors.

(2) If the paid- up share capital of the public company is Rs. 2 crore, the company is not required to have independent directors.

Author's Note:
In this question, ICAI seems to have assumed that the co. is also unlisted. Students are advised to clearly state their assumptions. Fair assumption would be that this company is listed company and hence despite the fact that paid up share capital is Rs. 2 crores, the provision of Independent Director would still apply.

(3) According to section 149(6), a person in order to be appointed as an independent director shall neither himself nor any of his relatives hold or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

Thus, a person who holds the position of a Key Managerial Personnel cannot be appointed as an Independent director.

(4) Women director:
Proviso to section 149(1) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014 states that the following class of companies shall appoint at least one women director-
(a) every listed company;
(b) every other public company having-
- paid-up share capital of one hundred crore rupees or more; or
- turnover of three hundred crore rupees or more.

From the above, it can be concluded that provisions make it mandatory to appoint a woman director in the condition prescribed above. However, it does not make it mandatory that the woman director should also be independent.

Question 12:

Examine the following with reference to the provisions of the Companies Act, 2013:

a) Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed time. What would be the status of Mr. Arthav if the company fails to intimate about the resignation of Mr. Arthav to RoC?

b) The Board of Directors of Superwood Limited decides to appoint on its Board, Mr. Ramakant as a nominee director upon the request of a bank which has extended a long term financial assistance to the company. The Articles of Association of the company do not confer upon the Board any such power. Also, there is no formal agreement between the company and the bank for any such nomination.

[RTP May 2018 (New)]

Answer:

a) Relevant provision

As per Section 168 of the Companies Act, 2013, a director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same.

The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR -12 and post the information on its website, if any.

Such director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in FORM DIR-11 along with the prescribed fee. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

Given case:

In the present case, Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of resignation in e-form DIR-11 to the RoC within the prescribed time.

Conclusion:

If the company fails to intimate about the resignation of Mr. Arthav to RoC, even then the resignation of Mr. Arthav shall take effect from the date on which the notice is received by the company or the date, if any, specified by Mr. Arthav in the notice, whichever is later.

b) According to section 161 (3) of the Companies Act, 2013, subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

In the given case, the Articles of Association of Superwood Limited do not confer upon the Board of Directors any such power.

Hence, the Board cannot appoint Mr. Ramakant as a nominee director even on the request of a bank which has extended a long-term financial assistance to the company

Question 13:

State the legal position in the given situations:

(1) Can Mr. Khan appointed as an Independent Director in the Board of a company, be appointed in its subsidiary or its holding or its associate company.

(2) Mr. D, proposes his candidature as a director in X Ltd. along with the deposit of 1 lac rupees. Later Mr. D failed to be appointed but received 30% of total votes. Mr. D asked X Ltd. to refund the deposit but the company denied to pay as he failed to be elected.

[MTP Oct-2018,Old]

Answer:

(1) As per the definition of the independent director given under section 149 of the Companies Act, 2013, an independent director means a director other than a managing director or a whole time director or a nominee director and who fulfills the criteria laid out under section 149(6).

Section 149 (6) doesn't include any provision through which it restricts any person who is independent director of the company to be appointed in its subsidiary or its holding or its associate company.

Therefore, if ID meets the above qualifications, then the same person can be appointed as an ID in the company or its holding, subsidiary or associate company.

So Mr. Khan can be appointed.

(2) As per section 160 of the Companies Act, 2013, a company shall refund amount deposited along with the candidature of a person who has been elected as a director or who has received more than 25% of total votes. Since in the given case, Mr. D though failed to be appointed but acquired 30% of the total votes, so he is eligible for the refund of the deposit amount of 1 lac rupees.

Question 14:

Mr. Azad, an independent director of X company, was appointed in the AGM for a period of 3 years. After the expiry of 3 years, he was re-appointed for a period of 5 years. Considering that though Mr. Azad has completed two tenures/terms but hasn't completed ten years in total, therefore he may be appointed in the upcoming AGM for another 2 years to complete his total term of 10 years. Conferring in the light of the Companies Act, 2013, state the validity of reappointment of Mr. Azad for further term in the company.

[RTP Nov 2017, Old]

Answer:

Relevant provision:

As per provision of section 149(10) and 149(11), subject to the provisions of Section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

No independent director shall hold office for more than two consecutive terms.

However, such independent director shall be eligible for appointment after the expiration of 3 years of ceasing to be an independent director:

Provided that during the said period of 3 years, such independent director shall not, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

Given case

As per the given fact, Mr. Azad, an independent director, was appointed in the AGM for a period of three years. After the expiry of 3 years he was re-appointed for a period of 5 years. Since he has completed two tenures but hasn't completed ten years in total, therefore X company thought to appoint Mr. Azad as independent director in the upcoming AGM for another 2 years to complete his total term of 10 years.

Analysis:

As per the above provision, since the sections 149(10) provides for a term up to 5 years for an independent director which means that an independent director can be appointed for a term less than 5 years.

Further section 149(11) states that no independent director shall hold office for more than two consecutive terms but he shall be eligible for appointment after expiration of 3 years of ceasing to become an independent director.

Therefore, as the Mr. Azad has already completed two consecutive terms, so he cannot be re-appointed for another 2 years so as to complete his total term of 10 years.

Conclusion

Reappointment of Mr. Azad for further term in the X Company is not valid.

Question 15:

B Ltd. is a listed company, and it has been served with a notice for appointment of a small shareholders' director. Referring to the provisions of the Companies Act, 2013, examine the following:

(1) The tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure?

(2) Whether he can be appointed as an officer of the Company on expiry of his tenure as small shareholders' director.

[May 2019 - Old]

Answer:

According to Section 151 of the Companies Act, 2013, read with Rule 7 of Companies (Appointment and Qualifications of the Directors) Rules, 2014, a listed company may have one director elected by small shareholders in such manner and on such terms and conditions as may be prescribed.

(1) The tenure of small shareholders' director shall not exceed a period of 3 consecutive years and on the expiry of the tenure, such director shall not be eligible for re- appointment.

(2) A small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly

Question 16:

The Board of Directors of M/s. Diya Steels and Aluminium Limited, a listed Company having a paid up equity share capital of Rs. 15 crore and preference share capital of Rs. 1 crore and 1,100 small shareholders holding equity shares, seeks your advice on the following:

1. Is it mandatory for the Company to appoint a director to represent Small Shareholders?
2. If the Company decides to appoint such a director, the procedure to be followed by the Company for such appointment and the tenure for which such appointment can be made.
3. Whether such a director be considered as an Independent Director?
4. When does a person appointed as a small shareholders Director vacate his office?

Advise suitably in the light of the provisions of the Companies Act, 2013 and the rules framed thereunder.

[May 2018 - New]

Answer:

1. According to section 151 of the Companies Act, 2013, a listed company **may** have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed. So, it is not mandatory for the company to appoint a director to represent small shareholders.
2. Procedure for appointment: The Board of Directors of M/s Diya Steels and Aluminium Limited is advised that:

   The Companies (Appointment and Qualification of directors) Rules, 2014 provides for procedure for appointment of small shareholders. director according to which:

   A listed company, may upon notice of not less than

   A. one thousand small shareholders; or

   B. one- tenth of the total number of such shareholders,

   whichever is lower, have a small shareholders director elected by the small shareholders.

   However, a listed company may opt to have a director representing small shareholders suo motu and in such a case the provisions of sub-rule (2), given below, shall not apply for appointment of such director.

   (1) The small shareholders intending to propose a person as a candidate for the post of small shareholders director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing

such person for the office of director.

However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholders director stating:
(a) his Director Identification Number;
(b) that he is not disqualified to become a director under the Act; and
(c) his consent to act as a director of the company.

Tenure: A small shareholders director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

3. Small shareholder director as Independent Director:
Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.

4. Vacation of office by small shareholder director:
A person appointed as small shareholders director shall vacate the office if -
(a) the director incurs any of the disqualifications specified in section 164;
(b) the office of the director becomes vacant in pursuance of section 167;
(c) the director ceases to meet the criteria of independence as provided in sub- section (6) of section 149.

Question 17:
M/s. Bharat Pharma Limited is a company listed with Bombay Stock Exchange. The company were having 500 small shareholders in the said company, so they wanted to appoint Mr. A as a Director as their representative on the Board of Directors of the said company. Mr. A is holding 1,000 equity shares of 10 each in the said company. State in the light of the Companies Act, 2013 whether the proposal to appoint Mr. A as a Small Shareholders' Director can be adopted by the company. Examine, if Mr. A is already holding a position of small shareholders' director in more than two companies.

[RTP Nov-2015, old]

Answer:
Relevant provision:
Section 151 of the Companies Act, 2013 provides that a listed company may have one director elected by such small shareholders in such manner and with such terms and conditions as may be prescribed.
Further, the explanation to section 151 clarifies that for the purposes of this section —small shareholders means a shareholder holding shares of nominal value of not more than twenty thousand rupees or such other sum as may be prescribed.

The Companies (Appointment & Qualifications of Directors) Rules, 2014 clearly provides that a listed company, may upon notice of not less than one thousand small shareholders or one- tenth of the total number of such shareholders, whichever is lower, have a small shareholders' director elected by the small shareholders.
Given case and analysis:
In the given case, the company is a listed one, hence the provisions of section 151 will apply. Therefore, the number of small shareholders who can send the notice for the appointment of a small shareholders director must not be less than 1,000 or one tenth of the total number of small shareholders i.e., 50 small shareholders

may propose a person as a candidate for the post of small shareholders.

They must give 14 days notice to the company under their signatures specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

Conclusion:
Thus, as per the above provision, Company may appoint Mr. A as small shareholders' director in the company.

Also, that Mr. A shall not hold the position of small shareholders' director in more than two companies at the same time. Provided that the second company in which he has been appointed shall not be in a business which is competing or is in conflict with the business of the first company.

Question 18:
B Ltd. is a listed Company, and it has been served with a notice for appointment of a small shareholders' director. Referring to the provisions of the Companies Act, 2013, examine the following:

(i) The tenure of small shareholders' director and whether he can be re-appointed as such, after expiry of his tenure?

(ii) Whether he can be appointed as an officer of the Company on expiry of his tenure as small shareholders' director.

[Nov-2019]

Answer:
According to Section 151 of the Companies Act, 2013, read with Rule 7 of Companies (Appointment and Qualifications of the Directors) Rules, 2014, a listed company may have one director elected by small shareholders in such manner and on such terms and conditions as may be prescribed.

(i) The tenure of small shareholders' director shall not exceed a period of 3 consecutive years and on the expiry of the tenure, such director shall not be eligible for re- appointment.

(ii) A small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

Question 19:
Mr. Intelligent, was appointed as a small shareholder's director of XYZ Limited, which is in the business of Oil refining. Subsequently, A Limited and B Limited have also appointed him as small shareholder's director. Is the appointment valid?

[Nov-2016, Old]

Answer:
Relevant provision:
As per the Rule 7of the Companies (Appointment and Qualification of Directors) Rules, 2014, read with section 151 of the Companies Act, 2013 regarding the appointment of small shareholders' director, no person shall hold the position of small shareholders' director in more than 2 companies at the same time.

However, the second company in which he has been so appointed shall not be in a business which is competing or is in conflict with the business of the first company.

Given case:
In the given case, Mr. Intelligent was appointed as a small shareholder's director of XYZ Ltd. Subsequently A Ltd. and B Ltd. have also appointed him as small shareholder's director.

Conclusion:
Considering the above provision, appointment of Mr. Intelligent in both A Ltd. and B Ltd. is invalid. However, he can accept appointment in either A Ltd. or B Ltd., subject to the maximum limit of 2 companies provided either A Ltd. or B Ltd. is not having a business which is competing or is in conflict with the business of the XYZ Ltd.

Question 20:
DD Ltd. is a listed company, and it has been served with notice for appointment of small shareholders' director. Referring to the provisions of the Companies Act, 2013, advise on the following:
(1) Define the expression 'small shareholder' and specify the number of small shareholders who may serve notice on the company for a director representing them.
(2) Is it possible to appoint a person who does not hold any share in the company, as small shareholders' director?
(3) What is the tenure of small shareholders' director and whether he can be re- appointed as such, after expiry of his tenure? Also state whether he can be appointed as an officer of the company on expiry of his tenure as small shareholders' director.

[May-2016, Old]

Answer:
1. According to section 151 of the Companies Act, 2013, a listed company may have one director elected by small shareholders in such manner and on such terms and conditions as may be prescribed.

   Here, "Small Shareholders" means a shareholder holding shares of nominal value of not more than Rs. 20,000 or such other sum as may be prescribed.

   A listed company may upon notice of not less than
   (a) one thousand small shareholders; or
   (b) one- tenth of the total number of such shareholders,
   whichever is lower, have a small shareholders' director elected by the small shareholders.

2. The small shareholders intending to propose a person as a candidate for the post of small shareholders' director shall leave a notice of their intention with the company at least fourteen days before the meeting under their signature specifying the name, address, shares held and folio number of the person whose name is being proposed for the post of director and of the small shareholders who are proposing such person for the office of director.

   However, if the person being proposed does not hold any shares in the company, the details of shares held and folio number need not be specified in the notice.

3. The tenure of small shareholders' director shall not exceed a period of 3 consecutive years and on the expiry of the tenure, such director shall not be eligible for re-appointment.

   A small shareholders' director shall not, for a period of 3 years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

Question 21:

GSTL Ltd., a listed company, has total number of 20 directors on its board. Following is the composition given as under:

6 directors are independent directors as per the provisions of the Companies Act, 2013, 3 directors are nominee directors appointed by State Bank of India (the financial institution from whom GSTL has taken financial assistance) and 2 directors are nominee directors appointed by Finance Limited to represent its interest (a financial institution with whom the company has long-term lease agreement of land).

Advise Board of Director as to computation of total number of directors who are rotational directors and total number of directors who are liable to retire by rotation.

[MTP April 2021, Old/New]

Answer:

Relevant provision:

As per Section 152(6) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation; and save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

Explanation— For the purposes of this sub-section, "total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

Any person appointed as a nominee director being nominated by any institution in pursuance of the provisions of any law or any agreement (financial institution that has been created by the Act of Parliament) cannot be considered as a director liable to retire by rotation.

Given case:

In the above question, total number of directors = 20 - 6 (Independent Directors) - 3 (Nominee Directors appointed by State Bank of India) = 11

The nominee directors appointed by Finance Limited to represent its interest (a financial institution with whom the company has long-term lease agreement of land) are not deducted from total number of directors because Finance Limited is not the financial institution set up under the Act of Parliament.

Total number of directors who are rotational directors = 11*2/3 = 7.33= 8 (not less than 2/3rd) Total number of directors to retire by rotation = 8*1/3 = 2.6=3 (nearest to 1/3rd)

Therefore, the total number of directors who are rotational directors and total number of directors who are liable to retire by rotation are 8 and 3 respectively.

Author's Note:

The question seems to be factually incorrect and not in compliance with provision of Sec 149 (4) because as this is a Listed company, the number of ID has to be 1/3rd of total directors i.e., 7 directors. In the question, it is given 6 directors are independent. Students may prefer to mention this point as a note towards the end of their answer.

Question 22:
A and B were appointed as first directors on 4th April, 2014 in Sun Glass Ltd. Thereafter, C, D and E were appointed as directors on 6th July 2014 and F, G and H were also appointed as directors on 7th August 2014 in the company. In the Annual General meeting (AGM) of the company held after the above appointments, A and B were proposed to be retired by rotation and re-appointed as directors.
At the AGM, resolution for A's retirement and re-appointment was passed. However, before the resolution for 'B' could be taken up for consideration, the meeting was adjourned. In the adjourned meeting also, the said resolution could not be taken up and the meeting was ended without passing the resolution for B's retirement and re- appointment.
In the light of above and with reference to relevant provision of the Companies Act, 2013, answer the following:
(i) Whether proposals for retirement by rotation and re-appointment of A and B only were sufficient?
(ii) What will be the status of B as a director in the company?

[Nov 2015 - Old]

Answer:
Relevant provision:
According to section 152(6)(a)(i) of the Companies Act, 2013, unless the articles provide for the retirement of all directors at every annual general meeting, not less than two- thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.

Further, section 152(6)(c) of the Act states that at the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

Section 152(6)(d) further states that the directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

Section 152(7) (a) provides that if the vacancy of the director retiring by rotation, is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Section 152 (7)(b) further provides that if at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless:

a) at that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;
b) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;
c) he is not qualified or is disqualified for appointment;
d) a resolution, whether special or ordinary, is required for his appointment or re- appointment by virtue of any provisions of this Act; or
e) section 162 is applicable to the case.

Analysis and conclusion:

(i) In the given case there are total 8 directors, out of which A and B were appointed as first directors of Sun Glass Ltd.

As per the provisions of section 152 of the Companies Act, 2013, the number of directors liable to retire by rotation at the next Annual General Meeting are 2 [1/3 of (2/3 of 8)].

Therefore, in the given case, 2 directors will be liable to retire by rotation at the next AGM of the Company, which in this case will be A and B as they are who have been longest in office since their last appointment. Thus, the proposals for retirement by rotation and re-appointment of A and B only were sufficient.

(ii) According to section 152(6)(c), at the annual general meeting, one-third of rotational directors shall retire from office. Thus, B shall retire at the Annual General Meeting in which he was due to retire even though it was adjourned without the resolution for B's retirement could have been taken up.

Further, at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting as he does not fall in the category of any of the exceptions mentioned in section 152(7)(b).

Hence, B will be deemed to be re-appointed as a director in the company.

Question 23:

The Promoters of M/s Frontline Limited, a listed public company propose to have the strength of the Board of Directors as eleven. They also propose to make the Managing Director and whole-time directors as directors not liable to retire by rotation. Advise on the following matters as per the provisions of the Companies Act, 2013:

(i) Maximum number of persons, who can be appointed as directors not liable to retire by rotation.

(ii) How many of the remaining directors will have to retire by rotation every year at the Annual General Meeting (AGM)?

(iii) For the purpose of increasing the strength, certain nominations were received to nominate candidates for contesting elections. One of the nominations was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received.

(iv) Can the Board of Directors increase the strength of companies' directors to 18 from 11 by appointing additional directors through passing a single resolution?

[May 2018 - Old]

Answer:

(i) According to Section 152(6) of the Companies Act, 2013, Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two- thirds of the total number of directors of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.

Directors liable to retire by rotation: 11 * 2/3 =7.3 or 8

So, maximum number of persons, who can be appointed as directors not liable to retire by rotation: 11-8 = 3.

(ii) According to Section 152(6)(c) of the Companies Act, 2013, 1/3rd of such of the directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the

number nearest to the 1/3rd shall retire from office.

Therefore, the Directors liable to retire by rotation are 11*2/3 i.e. 7.3 or 8.

No. of directors to retire at AGM: 8 * 1/3 i.e.2.67. Hence nearest to 1/3rd is 3.

(iii) According to Section 160 of the Companies Act, 2013, a person who is not a retiring director in terms of Section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director.

In the instant case, one nomination was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received i.e. 14th day. Hence, the contention of the directors is valid.

Be mindful of the confusion that ICAI is trying to create in the question by mentioning - "received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received".

At first reading, it seems as if the nominations were received on the last due date for sending notices for AGM (i.e., 21st day). However, the notice was, in fact, received on the last day on which it should have been received (i.e., 14th day) after the working hours and therefore this is not a valid notice.

(iv) According to Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than 15 directors, it can do so after passing a special resolution.

Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.

But, these appointments cannot be done through single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement.

A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved.

ICAI answer likely incorrect:
The provision of Sec 162 is only applicable to appointment of directors at the GM and not at the Board meeting. And therefore, for appointing additional directors, the Board can pass a single resolution at the Board meeting.

Extra points - Although not mentioned in the ICAI's answer, it would fetch a bonus point to mention that the company would breach the provision of Sec 152(6) by appointing 7 additional directors as that would increase the no. of non-rotational director to more than 1/3rd of total no. of directors.

Question 24:

Two (2) out of Ten (10) directors on the board of XYZ Limited have retired by rotation at an Annual General Meeting. These two (2) vacancies or place of retiring directors is not filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. Neither place of retiring directors could be filled up at this adjourned meeting nor did the meeting expressly resolve 'not to fill the vacancy'.

Analyse & apply relevant provisions of the Companies Act, 2013 and decide:

(i) Whether in such a situation the retiring directors shall be deemed to have been reappointed at the adjourned meeting?

(ii) What will be your answer in case at the adjourned meeting, the resolutions for reappointment of these directors were lost?

(iii) Whether such directors can continue in case the directors do not call the Annual General Meeting?

[May 2019 – New and ICAI Module]

Answer:

Relevant provision:

In accordance with the provision of the Companies Act, 2013, as contained in section 152(7)(a) which provides that if at the annual general meeting at which a director retires and the vacancy is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned to same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

Section 152(7)(b) further provides that if at the adjourned meeting also, the place of the retiring is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless at the adjourned meeting or at the previous meeting a resolution for the reappointment of such directors was put and lost or he has given a notice in writing addressed to the company and the Board of Directors expressing his desire not to be re- elected or he is disqualified.

Given case and analysis:

Therefore, in the given circumstances answer to the Question as asked shall be:

(i) In the first case, applying the above provisions, the retiring directors shall be deemed to have been re-appointed.

(ii) In the second case, where the resolutions for the reappointment of the retiring directors were lost, the retiring directors shall not be deemed to have been re- appointed.

(iii) Section 152(6)(c) states that 1/3rd of the rotational directors shall retire at every AGM. They retire at the AGM and at its conclusion. Hence, they will retire as soon as the AGM is held.

Further, as per section 96 (dealing with annual General Meeting) of the Companies Act, 2013, every company other than a One Person Company shall in each year hold an Annual General Meeting. Hence, it is necessary for the company to hold the AGM, whereby these directors will be liable to retire by rotation.

Further Section 97 states that, if any default is made in holding the annual general meeting of a company under section 96, the Tribunal may, on the application of any member of the company, call, or direct the calling of, an annual general meeting of the company. Such general Meeting shall be deemed to be an annual general meeting of the company under this Act.

Question 25:
Mr. Vinay Kumar, applied for the first time for allotment of Directors identification Number (DIN) on 1st November, 2016 as he is planning to incorporate a private limited company in Form No. DIR-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.

[Nov 2017]

Answer:
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 to obtain a fresh DIN.

Question 26:
Mr. Thangavel is a director in 7 Companies with a DIN (Director Identification Number) allotted to him. Again, another DIN was inadvertently allotted to him which was never used for filing any document with any Authority. He desires to surrender the second DIN and keep all his directorship with the first DIN. Advise him the procedure to be followed under the provisions of the Companies Act, 2013 and the Rules made thereunder for surrendering the second DIN inadvertently obtained by him.

[Nov 2019 - New]

Answer:
According to Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014:

The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with fee as specified from any person, cancel or deactivate the DIN in case on an application made in Form DIR-5 by the DIN holder to surrender his DIN along with declaration that the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

Question 27:

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.

[May 2015, Old]

Or

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?

[May 2017, Old]

Answer:

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 28:

Mr. Abhi was appointed as an additional director of Pioneer Limited on 14th March, 2016. The annual general meeting of the company was scheduled to be held on 29th September, 2016 but due to heavy rains and floods all records of the company were destroyed. In order to rebuild the records, the company approached the Registrar of Companies for extension of time for holding the annual general meeting till 30th December 2016. In the light of the Companies Act, 2013 advise Mr. Abhi, who was appointed as additional director during the year.

[May 2017 - Old]

Answer:

Relevant provision:

As per section 161(1) of the Companies Act, 2013:

i. The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.
ii. A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.
iii. Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Given case and analysis:

As per the stated fact, before the scheduled annual general meeting of 29th September 2016 takes place, due to heavy rains and floods all the record of the company were destroyed. So, company to rebuild the records, approached the Registrar of Companies for extension of time for holding of the Annual General Meeting till 30th December 2016.

As per the third provision to the section 96 of the Companies Act, 2013, Registrar may, for any special reason, extend the time within which any annual general meeting, other than the first annual general meeting, shall be held, by a period not exceeding three months.

Conclusion:
So, accordingly Mr. Abhi may continue as an additional director of Pioneer Limited till 30th December 2016.

Question 29:
Prince Ltd. desires to appoint an additional director on its Board of directors. The Articles of the company confer upon the Board to exercise the power to appoint such a director. As such M is appointed as an additional director. In the light of the provisions of the Companies Act, 2013, examine:

i. Whether M can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?
ii. Can the power of appointing additional director be exercised at the Annual General Meeting by the members?
iii. As the Company Secretary of the company what checks would you make after M is appointed as an additional director?

[ICAI - Module]

Answer:
Section 161(1) of the Companies Act, 2013 provides that the articles of association of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director at the general meeting, as an additional director at any time and such director will hold office upto the date of the next annual general meeting or the last date on which such annual general meeting should have been held, whichever is earlier.

Based on the above provisions:

i. M cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

   Such an additional director shall vacate his office latest on the date on which the annual general meeting should have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held, or it could not be called within the time prescribed.

ii. The power to appoint additional directors vests with the Board of Directors and not with the members of the company. The only condition is that the Board must be conferred such power by the articles of the company.

iii. As a Company Secretary, I would put the following checks in place in respect of M's appointment as an additional director:
   a. He must have got the Directors Identification Number (DIN).
   b. He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013.
   c. He must give his written consent in Form DIR-2 on or before his appointment as director and such consent stands filed with the Registrar within 30 days of his appointment.
   d. His appointment is made by the Board of Directors.
   e. His name is entered in the statutory records as required under the Companies Act, 2013.

Question 30:

Mr. Ramakant, the non-independent director of Superb Industries Limited (SIL) is planning to go abroad for 4 months for resolving of some family issues related to her daughter. The Board of Directors of SIL proposed to appoint Mr. Subh as an alternate director in the company in place of Mr. Ramakant.

Following were the legal issues in the given situation:

1. Mr. Subh does not satisfy the eligibility criteria to become Independent Director of SIL as given under section 149(6) of the Companies Act, 2013.
2. Mr. Ramakant returned to India within 2 months before the scheduled arrival.
3. Mr. Subh (in addition to Mr. Ramakant), to be included in the "total number of directors" used for calculating rotational directors under sec 152(6).

Examine in the given scenario, the aforementioned legal issues in the light of the Companies Act, 2013.

[MTP March 2021, New]

Answer:

Relevant provision:

As per Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

Provided that no person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.

Provided further that an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Provided also that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Given case:

In the above question, Mr. Ramakant was going abroad for personal cause of family issue related his daughter, does not effect on the appointment of alternate director. Even if Mr. Subh does not satisfy the eligibility criteria to become Independent Director of SIL, it does not affect on his appointment as Alternate Director because Mr. Ramakant, the original director is also not an Independent Director.

Since Mr. Ramakant has returned to India within 2 months before his scheduled arrival, Mr. Subh shall vacate the office on return of Mr. Ramakant (Original Director) to India.

Therefore, Mr. Subh can be appointed as alternate director of SIL and he shall vacate his office on returning of Mr. Ramakant to India.

The alternate director, Mr. Subh, shall not be included in the "total number of directors" for the purpose of section 152(6), as alternate director is holding alternate directorship in place of the original director.

Further as per the above provisos given under section 161(2), it is clearly stated that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

For this very purpose, Mr. Subh, will not be included in the "total number of directors" as rotational director under section 152(6) of the Companies Act, 2013.

Question 31:
The Board of Directors of Tours Ltd., in terms of the Articles of the Company, filled up the casual vacancy caused by the resignation of Mr. Philip (who was appointed in a duly held general meeting) by appointing Mr. Max as a director on 18th May, 2018. Unfortunately, Mr. Max expired on 10th May, 2019 after working for few days as a director. The Board now intends to fill up the casual vacancy by appointing Mrs. Nini (Wife of late Mr. Max) in the forthcoming meeting of the Board. Referring to and analysing the provisions of the Companies Act, 2013, advise the Board whether it can do so.

[May 2019 - old]

Answer:
Relevant provision:
As per Section 161(4) of the Companies Act, 2013, if the office of any director appointed by the Company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the Articles of the Company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Given case and analysis:
In view of the above provision, in the given case, the appointment of Mr. Max in the place of the resigned director Mr. Philip was in order. In normal course, Mr. Max could have held his office as director up to the date up to which Mr. Philip would have held the same.

However, Mr. Max expired on 10th May 2019 and again a vacancy has arisen in the office of director owing to the death of Mr. Max who was appointed by the Board.

Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy does not create another casual vacancy as Sec. 161(4) clearly mentions that such vacancy should have been created by the vacation of office by any director appointed by the Company in general meeting.

Conclusion:
The Board cannot fill in the vacancy arising from the death of Mr. Max. The Board may, however, appoint Mrs. Nini as an additional director under Sec. 161(1) of the Companies Act, 2013, provided the Articles of Association authorizes the Board to do so, in which case Mrs. Nini will hold the office up to the date of the next annual general meeting or the last date on which the Annual General Meeting should have been held, whichever is earlier.

Question 32:
M/s Bright Motors (P) Limited at the Annual General Meeting (AGM) held on 30.09.2016 appointed Mr. Anmol as a Non-Executive Director on the board of the company for a period of three years. On 2nd October, 2017 Mr. Anmol suffered a severe heart failure and expired. The board of directors of the company on 16th October, 2017 appointed Mr. Prateek to fill the casual vacancy so created. The appointment of Mr. Prateek was made for a term of three years by the board. Subsequently at the AGM held on 29-09-2018 Mr. Prateek's appointment was not proposed or approved as the board was of the view that it is not required. But the CFO of the company is of the opinion that the board of directors have contravened the provisions of the Companies Act, 2013 in respect of non-approval of the appointment of Mr. Prateek and his office tenure. Decide.

[May 2019]

Answer:

Relevant provision:

According to section 161(4) of the Companies Act, 2013, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board which shall be subsequently approved by members in the immediate next general meeting.

Provided that any person so appointed shall hold office only up to the date up to which the director in whose place he is appointed would have held office if it had not been vacated.

Given case and analysis:

In the given question, the casual vacancy caused due to death of Mr. Anmol (who was appointed by the company in AGM held on 30.9.2016, for a period of 3 years) is filled by the Board of Directors by appointing Mr. Prateek for a period of three years.

However, the appointment of Mr. Prateek for a period of three years is in contravention of above stated provisions as he can hold office only up to the date up to which Mr. Anmol would have held office if it had not been vacated.

Further, as per the provisions of the Act, the appointment of Mr. Prateek ought to be approved by members in the immediate next general meeting. However, the appointment of Mr. Prateek was not even proposed or approved in the AGM held on 29.9.2018.

Conclusion:

Hence, the appointment of Mr. Prateek is in contravention of the provisions of the Companies Act, 2013.Therefore, the opinion of CFO is correct.

Question 33:

Referring to the provisions of the Companies Act, 2013, examine the validity of the following:
The Board of Directors of AJD Limited appointed Mr. N as an alternate director for a period of two months against a director who has proceeded abroad on leave for a period of six months. Articles of Association of the company are silent.

[Nov 2014 - Old]

Answer:

According to section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person to act as an alternate director for a director (original director) during his absence for a period of not less than three months from India.

In the present case, the Board of Directors of AJD Limited appointed Mr. N as an alternate director for a period of two months against a director who has proceeded abroad on leave for a period of six months and Articles of Association of the company are silent. The said appointment is not valid because the power to appoint alternate director is not authorized by its articles or by a resolution passed by the company in general meeting.

Question 34:

Mr. Narayan, a Director of KPR Limited who is proceeding on a long foreign tour, appointed Mr. Shankar as an alternate director to act for him during his absence. The Articles of the company provide for appointment of alternate directors. Mr. Narayan claims that he has a right to appoint an alternate director.

[May 2017 - Old]

Answer:
According to section 161 (2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

Hence, the Board of Directors of KPR Ltd. may appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence, as:

a) The Articles of KPR Limited provides for appointment of alternate director.
b) Mr. Narayan, director of company is proceeding for a long foreign tour.

However, the power to appoint alternate director lies with the Board of Directors and not with the director himself. Hence, Mr. Narayan cannot himself appoint Mr. Shankar as an alternate director to act for him during his absence.

[**Presumption:** The duration of 'long foreign tour' is not less than three months.]

Question 35:
You are the CFO and in-charge of legal compliances of large multi-national company in India. The Board of Directors of the Company are broad based and comprise of competent directors who are Indian as well as Foreign Nationals. Mr. "X", who is a Director (Business Development) on the Board is very often on business tour abroad. He approached you and wants to know from you the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors. Analyse the following situations and advise suitably, Mr. X referring to the provisions of the Companies Act, 2013.

a. To how many directors can a person be appointed as an alternate director and how many votes does he have in one Board Meeting.
b. If the original director joins the Board Meeting through video conferencing without returning to India, then, can the alternate director appointed in his place attend the same board meeting? If yes, whose presence and vote will be counted?
c. In case of private company, where an alternate director is appointed in place of a non-executive director whose term is indefinite, then, what will be the tenure of such alternate director, provide the original director does not return to India for a longer period say 3-4 years?
d. Can an Executive Director/Whole Time Director/Managing Director appoint alternate directors?

[May 2019]

Answer:

a. According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

   According to section 165, no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

   Hence, in the instant case, a person can be appointed as an alternate director for only one director in the same company but maximum twenty different companies.

   An alternate director will have only one vote as he can hold alternate directorship for one director only in the same company.

b. The office of alternate director is separate from the attendance of the original director in the Board Meeting and as per section 161(2) of the Companies Act, 2013, an alternate director is appointed to hold the office of original director during his absence from India.

Accordingly, as far as attendance in Board Meeting by the original director is concerned, an alternate director may continue to hold office even if the original director joins the meeting by video conferencing, but the original director will be deemed to have joined only as an invitee and the attendance of the alternate director shall be counted for the purpose of the Board Meeting. This is specific only with respect to matters which shall not be dealt with through video conferencing. In such matters where video conferencing is allowed, voting of original director will be counted.

c. According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India, even if the period is as long as 3-4 years.

d. As per section 161(2), the Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

From the above provision, it is clear that an alternate director can be appointed for any director.

Hence, an alternate director can be appointed for Executive director/ Whole time Directors / Managing Director however, not by them but by the board of directors.

Question 36:

Referring to the provisions of the Companies Act, 2013, examine the validity of the following:
On the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the Company do not confer upon the Board of Director any such power. Further, there is no agreement between the company and the bank for any such nomination.

[Nov 2014 - Old]

Answer:

According to section 161(3) of the Companies Act, 2013, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company, subject to the articles of a company.

In the present case, on the request of bank providing financial assistance the Board of Directors of PQR Limited decides to appoint on its Board Mr. Peter, as nominee director. Articles of Association of the company do not confer upon the Board of Directors any such power and further there is no agreement between the company and the bank.

Thus, the appointment of Mr. Peter as nominee director is not valid as Articles do not confer upon the Board of Directors any such power.

Question 37:
Mr. Bond and Mr. James were appointed as Directors of Jamesbond Ltd. at the AGM held on 30th September, 2017 by a single resolution. State the relevant provisions of the Companies Act, 2013 and identify is it possible to appoint the above Directors by a single resolution?

[May 2018 - New]

Answer:
According to Section 162 of the Companies Act, 2013, at a general meeting of a Company, a motion for the appointment of two or more persons as Directors of the Company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it.

A resolution moved in contravention of above shall be void, whether or not any objection was taken when it was moved.

A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

In the instant case, it is not possible to appoint Mr. Bond and Mr. James as Directors of James Bond Ltd. by a single resolution.

Question 38:
Mr. John is a director of MNC Ltd., which had accepted deposits from public. The financial position of MNC Ltd. took a southward turn and became bad to worse and ultimately, it failed to repay the deposits which fell due for payment on 10th April, 2018 and such repayment has not been made till 5th May, 2019. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to be held on 6th May, 2019. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.

[ICAI -Module]

Answer:
Section 164 (2) (b) of the Companies Act, 2013 states that where a person is or has been a director of a company which has failed to repay its deposit on due date and such failure continues for one year or more, then such person shall not be eligible to be appointed as a director of any other company for a period of five years from the date on which such company, in which he is a director, failed to repay its deposits.

In the instant case, MNC Ltd., has failed to repay its deposit on due dates and the default continues for more than one year. Hence, Mr. John will not be eligible to be appointed as a director of JKL Ltd.

Question 39:
State with reference to the relevant provisions of the Companies Act, 2013 whether the following persons can be appointed/reappointed as a director of a company:

i. Mr. A, who has huge personal liabilities far in excess of his Assets and Properties, has applied to the court for adjudicating him as an insolvent and such application is pending.
ii. Mr. B, who was caught red-handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.
iii. Mr. C, a former Bank Executive, was convicted by a court eight years ago for embezzlement of funds and sentenced to imprisonment for a period of one year.
iv. Mr. D is a Director of DLT Limited, which has not filed its Annual Returns pertaining to the Annual General Meetings held in the years 2014, 2015 and 2016.

[May 2017 - Old]

Answer:

The first 3 cases stated in the question are based on the provisions of Section 164 (1) of the Companies Act, 2013 and the fourth case is dealt with in section 164 (2) of the said Act. Based on the provisions of the said sections, each case can be discussed as follows:

i. Section 164 (1) (c) states that a person shall not be eligible for appointment as a director of a company if he has applied to be adjudicated as an insolvent and his application is pending.

Therefore, in present case, Mr. A cannot be appointed as a Director of a co.- whether public or private.

ii. Section 164 (1) (d) states that a person shall not be eligible for appointment as a director of a company if he has been convicted by a court for any offence involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than six months, and a period of five years has not elapsed from the date of expiry of the sentence.

In the present case, although the sentence was only two years ago, but the period of sentence was only eight weeks, i.e., less than six months. Hence, Mr. B does not come under the purview of this disqualification and can be appointed as a director of a company.

iii. The third case also falls within the provisions of section 164 (1) (d). In this case the imprisonment was for a period of one year, i.e., for six or more months, but since more than five years have elapsed from the expiry of the sentence, Mr. C is no longer disqualified and can be appointed as a director of a company.

iv. Section 164 (2) states that a person who is or has been a director of a company which has not filed the financial statements or annual returns for any continuous period of three financial years, then such a person shall not be eligible either to be appointed as a director of other company or reappointed as a director in the same company.

In the present case, DLT Limited has failed to file annual returns. Hence, the disqualification for Mr. D is attracted and he cannot be appointed as a director in other company, nor can he be reappointed in the same company.

Question 40:

Mr. Vikram, a director of M/s Tube light Limited has made default in filing of annual accounts and annual returns with Registrar of Companies for a continuous period of 3 financial years ending on 31st March 2016. Examine the validity of the following under the Companies Act, 2013:

i. Whether Mr. Vikram can continue to be a director of M/s Tubelight Limited (defaulting company) and also M/s Green Light Limited, where he is also a director? Also state whether he can be re-appointed as director in these two companies.
ii. What would your answer be in case Mr. Vikram is a nominee director of a Public Financial Institution?
iii. What would be your answer in case the defaulting company (i.e., M/s. Tubelight Limited) is a private limited company?

[Nov 2017]

Answer:

Relevant provision:

According to section 164(2) of the Companies Act, 2013, a person who is or has been a director of a company which:

a. has not filed the financial statements or annual returns for any continuous three financial years; or
b. has failed to repay the deposits accepted by it or pay interest thereon on due date or redeem its debentures on due date or pay interest due thereon or pay any dividends declared and such failure continues for one year or more.

shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Further, pursuant to Section 167(1)(a) of the Companies Act,2013, the office of a director shall become vacant in case he incurs any of the disqualification specified in Section 164.

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

A joint reading of both the sections i.e. 164(2) and 167(1)(a), we may decide the case as under:

(i) In the first case, in view of provision of section 167, Mr. Vikram can continue to be director of the defaulting company namely M/s Tubelight Limited.

However, he cannot continue as a director in Green Light Limited, because the director has to vacate office of director in all companies other than the defaulting company.

Mr. Vikram cannot be re-appointed in M/s Tube light Limited or appointed in any other company for a period of 5 years

(ii) In Case Mr. Vikram is a nominee director of a Public Financial Institution, then in such case, section 164 is not applicable.

Author's Note:
This answer of ICAI seems to be incorrect. There is no such exclusion to nominee directors of a PFI. There were certain exclusions in Companies Act, 1956 but those are not applicable to Companies Act, 2013.

In my opinion, the answer should remain the same as (i). There are no exemptions to Nominee Director.

(iii) In case Tube light Limited is a Private Limited Company:
Section 164 and 167 are applicable to private company as well. Moreover, according to section 164(3), a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164.

Thus, in this case the answer would be same as above

Question 41:
Mr. Dhruv is a Director of M/s. LT Limited and XT Limited respectively. M/s. LT Limited did not file its financial statements for the year ended 31st March 2016, 2017 & 2018 respectively with the Registrar of Companies (ROC) as mandated under the Companies Act, 2013. M/s. LT Limited also did not pay interest on loans taken from a public financial institution from 1st April 2017 and also failed to repay matured deposits taken from public on due dates from 1st April, 2017 onwards.
Answer the legality of the following in the light of the relevant provision of the Companies Act, 2013:
(i) Whether Mr. Dhruv is disqualified under Companies Act, 2013 and if so, whether he can continue as a Director in M/s LT Limited? Further can he also seek reappointment when he retires by rotation at the AGM of M/s. XT limited scheduled to be held in September, 2019?
(ii) Mr. Dhruv is proposed to be appointed as an Additional Director of M/s. MN Limited in June 2019. Is he eligible to be appointed as an Additional Director in M/s. MN Limited? Decide.

[May 2019 - New]

Answer:

Relevant provision:

According to sec 164(2) of the Companies Act, 2013, no person who is or has been a director of company which:

a. has not filed financial statements or annual returns for any continuous period of three financial years; or
b. has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on due date or pay interest thereon or pay dividend declared & such failure continues for 1 year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Also, according to section 167(1)(a), the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164;

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

Given case and analysis:

In the light of the said provisions of the Act and the facts of the question:

(i) Yes, Mr. Dhruv is disqualified under the Companies Act, 2013, as M/s LT Limited did not file financial statements for a period of three years. Also, the M/s LT Limited has defaulted in the repayment of matured deposits taken from public since 1st April, 2017 (i.e. the default has continued for more than one year).

Mr. Dhruv can continue as a director in M/s LT Limited as proviso to section 167(1)(a) provides that where the director incurs disqualification under section 164(2), the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

Whereas he has to vacate the office of director in M/s XT Limited.
Mr. Dhruv cannot be reappointed (in the AGM to be held in September 2019) as director in M/s. XT Limited.

Note: Default in repayment of loans from Public Financial Institutions doesn't attract disqualification u/s 164(2) as loans are not covered in Sec 164(2).

(ii) Mr. Dhruv cannot be appointed as an Additional Director (in the AGM to be held in June 2019) of M/s MN Limited because as per section 164(2), he is not eligible to be appointed in other company for a period of five years from the date of such default.

Question 42:

Mr. Vikram, a director of M/s Tube light Limited has made default in filing of annual accounts and annual returns with Registrar of Companies for a continuous period of 3 financial years ending on 31st March 2016. Examine the validity of the following under the Companies Act, 2013:

i. Whether Mr. Vikram can continue to be a director of M/s Tubelight Limited (defaulting company) and also M/s Green Light Limited, where he is also a director? Also state whether he can be re-appointed as director in these two companies.
ii. What would your answer be in case Mr. Vikram is a nominee director of a Public Financial Institution?
iii. What would be your answer in case the defaulting company (i.e., M/s. Tubelight Limited) is a private limited company?

[Nov 2017]

Answer:

Relevant provision:

According to section 164(2) of the Companies Act, 2013, a person who is or has been a director of a company which:

c. has not filed the financial statements or annual returns for any continuous three financial years; or
d. has failed to repay the deposits accepted by it or pay interest thereon on due date or redeem its debentures on due date or pay interest due thereon or pay any dividends declared and such failure continues for one year or more.

shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Further, pursuant to Section 167(1)(a) of the Companies Act,2013, the office of a director shall become vacant in case he incurs any of the disqualification specified in Section 164.

Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section.

A joint reading of both the sections i.e. 164(2) and 167(1)(a), we may decide the case as under:

(iv) In the first case, in view of provision of section 167, Mr. Vikram can continue to be director of the defaulting company namely M/s Tubelight Limited.

However, he can continue as a director in Green Light Limited, because the director has to vacate office of director in all companies other than the defaulting company.

Mr. Vikram cannot be re-appointed in M/s Tube light Limited or appointed in any other company for a period of 5 years

(v) In Case Mr. Vikram is a nominee director of a Public Financial Institution, then in such case, section 164 is not applicable.

This answer of ICAI seems to be incorrect. There is no such exclusion to nominee directors of a PFI. There were certain exclusions in Companies Act, 1956 but those are not applicable to Companies Act, 2013.

In my opinion, the answer should remain the same as (i). There are no exemptions to Nominee Director.

(vi) In case Tube light Limited is a Private Limited Company:

Section 164 and 167 are applicable to private company as well. Moreover, according to section 164(3), a private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164.

Thus, in this case the answer would be same as above

Question 43:

State with reference to the provisions of the Companies Act, 2013, whether the following persons can be appointed as a director of a company.

i. Mr. L, who has not paid any calls in respect of any shares of the company held by him and five months have passed from the last day fixed for the payment of calls.
ii. Mr. G is Director of LDT Limited, who has not filed the company's annual return pertaining to the annual general meeting held in the calendar years 2014, 2015 and 2016.

[Nov 2016]

Answer:

i. According to section 164(1)(f), A person shall not be eligible for appointment as a director of a company, if he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call

In the given case, Mr. L has not paid any calls in respect of any shares of the company held by him and five months have passed from the last day fixed for the payment of calls.

As the disqualification is attracted only when six months have elapsed, in this case, Mr. L is not disqualified and is eligible to be appointed as director.

ii. According to section 164(2)(a) of the Companies Act, 2013, no person who is or has been a director of a company which has not filed financial statements or annual returns for any continuous period of three financial years shall be eligible for re-appointment in that company or appointment in other company as a director for a period of 5 years from the date on which the said company fails to do so.

In the present case, Mr. G is director of LDT Limited, who has not filed the company's annual return pertaining to the annual general meeting held in the calendar years 2014, 2015 and 2016. It means that the LDT Limited has not filed the annual return for the continuous period of three financial years i.e., 2013-14, 2014-15 and 2015-16. Hence, Mr. G who is a director of LDT Limited cannot be appointed as a director of a company.

Question 44:

The Petitioners were directors in NPP Limited. Due to default in NPP Limited under section 164(2)(a) of the Companies Act, 2013 on the account of non-filing of financial statements for continuous period of three financial years, the said Petitioners were disqualified to be as director in one or the other companies.

They came for the legal counselling against their holding of disqualifications as directors in order to challenge before the Tribunal. Following were the position of the petitioners: One of the petitioner, Mr. X, was also holding directorship in GPS Ltd. and CDM Ltd. Whereas the petitioner, Mr. Y was appointed one month before in NPP Ltd. Whereas Petitioner, Mr. Z, was within a year of commission of default, offered directorship by RSM Ltd.

Advise, in the light of the given facts, the following legal issues:

a. On the validity of attracting of disqualification of Petitioners in NPP Ltd. and vacation of their directorship.
b. What will be consequences of default caused in NPP Ltd. on the holding of Mr. X's directorship in GPS Ltd. and CDM Ltd.
c. On the validity of offered directorship to Mr. Z by RSM Ltd.

Legal position of Mr. Y who was appointed one month before, in NPP Ltd

[MTP April 2021]

Answer:

Relevant provision:

As per the section 164 (2) of the Companies Act, 2013, no person who is or has been a director of a company which—

a. has not filed financial statements or annual returns for any continuous period of three financial years; or
b. has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Further section 167 (1) of the Companies Act, 2013 states that the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164. Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default.

Given case and analysis:

Accordingly following are the Answer to the Question:

a. In the given case, the petitioners have incurred disqualification under section 164(2), and falling under section 167, whereby the office of the directors shall become vacant in all the companies, except in the defaulted company. The petitioners, being disqualified under section 164(2) have to vacate the directorship in all the other companies except in NPP Ltd.
b. On the basis of the section 167(1), Mr. X has to vacate directorship in GPS Ltd. and CDM Ltd.
c. Offer of directorship to Mr. Z by RSM Ltd. was within a year of commission of default, so it's not valid. As per section 164(2), disqualified director shall not be eligible to be appointed in other company for a period of five years from the date on which the said company committed the default.
d. Petitioner, Mr. Y was appointed one month before in NPP Ltd. which is in default, he shall not incur the disqualification for a period of six months from the date of his appointment as he is freshly appointed.

Question 45:

Ms. Jai Shvitha is a qualified Chartered Accountant and is known for her in -depth knowledge of Corporate and Economic Laws. She is a Woman Director in PQR Ltd. Due to her tight pre-occupation, she could not attend any Board Meetings of the Company held for a period of 12 months though she has taken leave of absence. Despite the fact that though under Section 167(1)(b) of the Companies Act, 2013 her office of directorship gets vacated, nevertheless, due to her professional competency:

i. The Board of PQR Ltd. wants to keep Ms. Jai Shvitha's Directorship in the Company and hence proposes to waive the event of absence and/or condone her absence from attending Board meetings.
ii. Ms. Jai Shvitha also wants to keep the Directorship in PQR Ltd. In the light of the relevant provisions of the Companies Act, 2013, analyse the above situations and advise the Board on the course of action that they can adopt.

[Jan 2021, New]

Answer:

Relevant provision:

Section 167 of the Companies Act, 2013 contains provisions detailing out as to when the office of a director shall become vacant. As soon as, any such event occurs, the director is required to demit the office of director of the company.

According to Section 167 (1), the office of a director shall become vacant in case where he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board.

In the light of the stated provision:

1. Ms. Jai Shvitha is required to vacate the office of director in PQR Limited. The proposal of Board of PQR Limited to waive the event of absence or condone her absence from attending meeting is not permissible.

2. Ms. Jai Shvitha desires to keep the directorship in PQR Limited is also not tenable. However, the board is advised to co-opt her as an additional director in the subsequent board meeting as there is no prohibition in the Act for such co-option and reappointment.

Question 46:

Mr. 'K' is a small shareholder director in M/s KGP Tyres Limited from 1st April 2018 and in M/s VSR Cotton Mills Limited from 1st April 2019, in compliance with the relevant provisions of the Companies Act, 2013. M/s KGP Tyres Limited has not paid interest on the public deposits due from 1st July 2018. In the light of the information given above, examine the following under the provisions of the Companies Act, 2013.

i. Whether the office of Mr. 'K', small shareholder director, shall become vacant in M/s KGP Tyres Limited and M/s VSR Cotton Mills Limited?

ii. If yes, state the period from which the office of the directorship shall become vacant.

[Nov 2019,New]

Answer:

Relevant provision:

According to Rule - 7, Companies (Appointment and Qualification of Directors) Rules, 2014, a person shall not be appointed as small shareholders' director of a company, if the person is not eligible for appointment in terms of section 164.

Also, a person appointed as small shareholders' director shall vacate the office if the director incurs any of the disqualifications specified in section 164.

According to Section 167(1)(a), the office of a director shall become vacant in case he incurs any of the disqualification specified in section 164. Provided that when he incurs disqualification under section 164(2), the office of the director shall become vacant in all companies, other than the company which is in default under that sub section

According to proviso of section 164(2) of the Companies Act, 2013, where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment.

Given case:

In the instant case, M/s KGP Tyres Limited has not paid interest on the public deposits due from 1st July, 2018 and disqualification under section 164(2)(b) of the Companies Act, 2013 occurs on a person who is or has been a director of a company which has failed to repay the deposits accepted by it or pay interest thereon and such failure to pay or redeem continues for one year or more.

Conclusion:

Accordingly, following are the Answer:

i. Yes, the office of Mr. K shall become vacant in M/s VSR Cotton Mills Limited as he has become disqualified under section 164(2)(b) from 1st July 2019 but not in M/s KGP Tyres Limited.

ii. Mr. K's office of the directorship shall become vacant from 1st July, 2019.

Question 47:

Referring to the provisions of the Companies Act, 2013, examine the validity of the following appointment of Directors:

a. Brown Limited, having a turnover of Rs. 60 crores in the financial year 2016-17 appoints Ms. Rose as the women director on 1st March 2017. Ms. Rose already holds directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice.

b. Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited.

[Nov 2017]

Answer:

Relevant provision:

As per section 165(1) of the Companies Act, 2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

Private companies that are either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

a. In the instant case, Ms. Rose was appointed as a women director on 1st March, 2017 in Brown Limited. She was already holding directorship in twelve companies including ten public companies. She is whole time Cost Accountant in practice.

   As Ms. Rose was already a director in ten public companies, her appointment in Brown Limited is not valid as it will lead to her directorship in 11 public companies.

   In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies.

b. In the instant case, Ms. Jasmine holds directorship in eight public companies including managing directorship in two companies and directorship in six companies. In addition, she also holds alternate directorship in three companies and independent directorship in three subsidiary companies of Brown Limited.

   Ms. Jasmine was already holding directorship in eight public companies and alternate directorship in three companies (assuming these companies as private) and independent directorship in three subsidiary companies of Brown Limited. Directorship in three subsidiary companies of Brown Limited will be considered as directorship in three more public companies.

   Hence, total holding of directorship by Ms. Jasmine in public companies amounts to 11 (8+3) which is invalid.

   In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies.

   Assumption: As nothing is mentioned that whether three companies in which Ms. Jasmine is holding alternate directorship are private or public, we are assuming that these companies are private in nature. Even if the student writes the answer based on assumption that Ms. Jasmine is holding alternate directorship of a public company, conclusion will not change.

Question 48:

Excel limited is a listed company with a turnover of Rs. 60 crores in the FY 2016-2017. The company appoints Ms. R as the women director on 1st March 2017. Ms. R is already a director in twelve companies including ten public companies. Also, Ms. R is chartered accountant in practice.

Further, also, Ms. R, is a director in Supreme Ltd. where she is acting in a professional capacity. Since lots of proposal for the holding of directorship in various companies are lined up before the Ms. R, so in order to retain him, Remuneration and nomination committee proposed to enhance the remuneration of Ms. R from 4 Lac per month to 6 Lac per month. However, Supreme Limited was running in losses for last 2 years.

Evaluate in the light of the given facts, the following situations with reference to the provisions of the Companies Act, 2013-
The validity of an appointment of Ms. R in Excel Limited.

[RTP May 2018, New]

Answer:

Relevant provision:

As per section 165(1) of the Companies Act, 2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10.

Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

Given case:

In the instant case, Ms. R was appointed as a women director on 1st March 2017 in Excel Limited. She was already holding directorship in twelve companies including ten public companies.

Conclusion:

As Ms. R was already a director in ten public companies, her appointment in Excel Limited is not valid as it will lead to her directorship in 11 public companies.

In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies to maintain the limit of holding of directorship.

Question 49:

Super Specialty Hospital Limited has a paid up share capital of Rs. 10 crores and annual turnover of Rs. 90 crores. There are 5 directors in its board. Two doctors Mr. ZA and Mr. AZ are appointed as independent directors. Mr. ZA was appointed for a period of 5 years on 1st August, 2015 while Mr. AZ was originally appointed for 3 years on 1st August, 2014 and was subsequently reappointed for 5 years on 1st August, 2017. Now, in August, 2019 the Company wants to remove both the independent directors. Referring to the relevant provisions of Companies Act, 2013, decide whether the company can do so.

[Nov 2019 - Old]

Answer:

1. According to Section 149(4) of the Companies Act, 2013, read along with relevant rules, every Public Company having paid up share capital of Rs. 10 crore rupees or more shall have at least two directors as Independent Directors.

   Super Speciality Hospital Limited is having a paid up share capital of Rs. 10 crores, hence, it is required to have at least two directors as Independent Directors, which it has complied through the appointment of Mr. ZA and Mr. AZ.

   If the hospital removes both the directors in August, 2019, they have to appoint two other independent directors in order to comply with the requirement of law.

2. According to Section 169(1), a Company may, by ordinary resolution, remove a director other than a director appointed by the Tribunal under Section 242 of the Act, before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

   Mr. ZA was appointed on 1st August, 2015 for a term of 5 years. Thus, his period of service would have expired on 31st July, 2020. If Super Specialty Hospital wants to remove Mr. ZA in August, 2019 (i.e. before the expiry of his term), they would have to pass an ordinary resolution after giving him a reasonable opportunity of being heard.

3. Section 149 also provides that an Independent Director shall hold office for a term up to five consecutive years on the Board of a Company, but shall be eligible for reappointment on passing of a special resolution by the Company and disclosure of such appointment in the Board's report.

   Thus, Mr. AZ's reappointment would have been done by passing a special resolution.

4. Proviso to Section 169(1) provides that an Independent Director re-appointed for second term under Section 149(10) shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard.

   Mr. AZ's second term of appointment would have expired on 31st July, 2022. If Super Specialty Hospital wants to remove Mr. AZ in August, 2019 (i.e. before the expiry of his term), they would have to pass special resolution and after giving him a reasonable opportunity of being heard.

Question 50:

The Board of Directors of the UN Ltd., which is a MNC, comprising of directors who are Indian as well as of Foreign Nationals, Mr. X, who is a Director on the Board is very often on business tour abroad. He approached you, being legal expert of the Company, to know the regulatory provisions of the Companies Act, 2013 relating to appointment of Alternate Directors.

Examine the following situations and advise, Mr. X suitably as per the provisions of the Companies Act, 2013.

i. Number of directors for which a person, say Mr. Y can be appointed as an Alternate Director.
ii. If Mr. Y is appointed as an alternate director in place of a director whose term is indefinite, then, what will be the tenure of Mr. Y?

[May 21 - New]

Answer:

i. According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so, authorized by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

   Further, section 165 provides that no person shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. However, the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

   Hence, in the instant case, Mr. Y can be appointed as an alternate director for only one director in the same company but shall not hold office as a director, including alternate directorship in maximum twenty different companies.

ii. According to second proviso to section 161(2), an alternate director shall not hold office for a period longer than that permissible to the director in whose place he has been appointed and shall vacate the office if and when the director in whose place he has been appointed returns to India.

Third proviso says that if the term of office of the original director is determined before he so returns to India, any provision for the automatic reappointment of the retiring directors in default of another appointment shall apply to the original and not to the alternate director.

Hence, in the instant case, the alternate director shall hold office till the time original director returns to India. In this case, Y will hold office till the time original director returns to India.

Question 51:

As on 31-3-2021, Mr. K. Muthusamy is holding directorship in 4 listed Companies, 4 unlisted Public Companies and 4 Private Limited Companies. He has obtained two Director Identification Number (DINs) allotted to him inadvertently. Out of the 12 directorships, he holds 10 with the DIN allotted to him first and the rest with the DIN allotted to him later. He wants to surrender one of his DINs, but to keep all his 12 Directorships. In the light of the relevant provisions of the Companies Act, 2013, examine the following:

i. Which DIN sourced by Mr. K. Muthusamy be surrendered?
ii. What procedure he needs to follow and what actions will be done by the Central Government in this regard?
iii. In what way can he keep all his 12 Directorships with one DIN?

[May 21 - New]

Answer;

i. Prohibition on obtaining more than one DIN: According to Section 155, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.
Mr. K. Muthusamy can hold the DIN which was allotted to him first and he can surrender the DIN which was allotted to him subsequently.
Rule 11 of the Companies (Appointment and Qualification of Directors) Rules, 2014 lays down the procedure for cancellation or surrender or deactivation and re- activation of DIN.

ii. Accordingly, the Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received along with prescribed fee from any person, cancel or deactivate the DIN in case the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number.

iii. To keep all the 12 directorships with one DIN: In compliance with Rule 11 by Mr. K Muthusamy, on surrender of 2nd DIN, data related to both the DINs shall be merged with the valid DIN. Thereby all 12 directorships shall migrate with DIN 1.

Question 52:

ABC Ltd. is incorporated in December, 2010 under the Companies Act, 1956. For the year ended on 31st March, 2020 and 31st March, 2021, the financial and other relevant information of the company were as under:

(Rs. in crores)

Particulars	31.03.2020	31.03.2021
(a) Paid-up capital	8	18#
(b) Reserves	16	6
(c) Turnover	75	98
(d) Borrowings from Banks /FIs (The sanctioned limit is 60 crores rupees)	50	45
(e) No. of directors	10	10

Part amount of the Reserves was capitalised, by issue of Bonus shares during the FY 2020-21

The Company Secretary apprised the Board, of requirement of appointment of Independent Director (ID). Few candidates were shortlisted, out of which 2 candidate were nominated and got approval of the shareholders in the General Meeting. The appointment of both the IDs were approved for a tenure of one year only.

Enumerate in the given situation, the following issues in the light of the Companies Act, 2013:

i. Whether ABC Ltd. was required to appoint Independent Director (ID) based on info. as on 31st March, 2020.
ii. In the given case, the tenure of the appointment of both the IDs is for one year only. Comment upon the validity of the term of appointment of the Independent Directors

[RTP Nov 21]

Answer:

i. As per Section 149 read with the Rule 4(1)(iii) of the Companies (Appointment and Qualifications of Directors) Rules, 2014, which provides that the following class or classes of companies shall have at least two directors as independent directors –
   a) the Public Companies having paid-up share capital of ten crore rupees or more; or
   b) the Public Companies having turnover of one hundred crore rupees or more; or
   c) the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding fifty crore rupees.

   Here, the words used in the law is 'exceeding 50 crore rupees', whereas the banks borrowings in the given case is only Rs. 50 crore and not exceeding Rs. 50 crore. Hence, no need to appoint ID on the basis of information as on 31st March, 2020.

   Further, the words used in the said Rule is 'Outstanding Loans' and not the 'Sanctioned limit'. The limit is Rs. 60 crore, but the outstanding loans is only Rs. 50 crore.

   Therefore, in line with the stated legal provision, there is no need to appoint Independent Directors as on 31/3/2020.

ii. According to Section 149(10) read as 'Subject to the provisions of section 152, an independent director shall hold office for a term up to five consecutive years on the Board of a company and shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

   Further, Vide MCA General Circular No. 14/ 2014 dated 9th June, 2014, under Para (iii) Section 149(10), it has been clarified that section 149(10) of the Act provides for a term of "upto five consecutive years" for an ID. As such while appointment of an ID for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10).

   Therefore, the tenure of the appointment of both the IDs for one year only, will be considered as valid.

Question 53:

XYZ Ltd. is a newly incorporated listed company formed on 01.01.2021. At present there are 10 directors and 1,500 shareholders. Turnover as on 31.03.2021 is Rupees 320 crores.

1. There are no women directors as on 31.03.2021 Discuss how far the company can continue its operation without any women directors on board.
2. 150 Small shareholders of the company gave the notice to appoint a director representing them. Can they appoint Mr. A who is already a small shareholders director in 2 other companies. However those other companies are not in conflict with the business of XYZ Ltd. Would your answer be different if Mr. A has no other directorship?
3. Can XYZ Ltd. appoint another 6 more directors on board? Would your answer be different if XYZ Ltd. was a company where 52% of the paid-up share capital was held by State Government?

[MTP - Dec 2021]

Answer

1. As per the Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014, following classes of companies shall appoint at least one woman director:
   a. every listed company;
   b. every other public company having -
      i. paid-up share capital of one hundred crore rupees or more; or
      ii. turnover of three hundred crore rupees or more;

   A company which is covered under provisions of second proviso to section 149(1) shall comply with such provisions within a period of six months from the date of its incorporation.

   In the given case, XYZ is a listed company and hence has to mandatorily have a woman director on Board. However, because the period of 6 months from date of commencement has not expired, it can continue its operation till 30th June, 2021 without a woman Director on board.

2. According to Section 151 of the Companies Act, 2013, a listed company may have one director appointed by the small shareholders. Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014 prescribes requirements with respect to the appointment of small shareholder director through serving upon notice of not less than one thousand small shareholders or one-tenth of the total number of such shareholders, whichever is lower.

   Maximum number of directorship held by SSD - No person shall holds the position of small shareholder's director in more than 2 companies at the same time. Also, the second company is which he is appointed should not be in a business which is conflicting or competing in nature.
   In the given case, number of shareholders who served the notice for appointment of SSD, is 150 ($1/10^{th}$ of 1500). The fact that other businesses are not in conflict or competing in nature is irrelevant as limit of directorship in two companies have already exceeded. Hence Mr. A is not eligible.

   If Mr. A was not a small shareholder's director in any other company, then Mr. A is eligible to become small shareholder's director in XYZ Limited.

3. Section 149 of the Companies Act, 2013 requires every company to constitute a Board of Directors. According to which, maximum number of Directors shall be 15 which can be increased by passing a special resolution.
   If XYZ Ltd. appoints 6 more directors in the BoD, the maximum limit of 15 directors in a company will be exceeded. However, by passing a special resolution, XYZ Ltd. can appoint additional directors.
   However, if 52% of XYZ Ltd. was held by the State Government, it becomes a Government Company and as the provisions of the Act, a Government Company is exempted from the application of the Section 149(1)(b) requiring a company to have maximum fifteen directors. Subject to that, it has not defaulted in filing its Financial Statements under section 137 or Annual return under section 92 with the registrar.

Chapter 2 - Meetings of Board and its powers

Question 1:
The Board meeting of A Ltd. was held on 15.03.2020. The next board meeting could not be held during the quarter ending 30.06.2020 amid covid-19 pandemic and it was held on 01.09.2020 for approval of financial statement for the year ending 31.03.2020. Examine whether A Ltd. has contravened any provision of the Companies Act, 2013 in this case as regards to the frequency of the board meetings.

[Jan-21 (Old)]

Answer:

Relevant provision:

As per Section 173 of the Companies Act, 2013, every Company shall hold minimum of 4 meetings every year provided the gap between two consecutive board meetings shall not be more than 120 days.

As per mandatory Secretarial Standards -1, the Company shall hold at least four Meetings of its Board in each Calendar Year with a maximum interval of one hundred and twenty days between any two consecutive meetings.

Given case:

In the given question, a Board Meeting of A Limited was held on 15.03.2020. The next board meeting was held on 1.9.2020. Hence, the Board Meetings were held at a gap of more than 120 days.

Conclusion:

Thus, there is contravention with regard to frequency of the Board Meetings

Please note, ICAI answer seems incorrect:

Vide General Circular No. 11/2020 dated 24th March, 2020, the Ministry of Corporate Affairs had, in view of the pandemic, provided one-time relaxation to gap between two consecutive meetings of the board. The gap may extend to 180 days instead of 120 days. This relaxation was applicable till 30th Sept 2020.

In the given case, the gap between the two board meeting is 169 days (15th March to 1st Sept) and hence the company is in compliance with the requirement of Section 173.

Question 2:
Seafood Limited, a public limited company was incorporated on 1st April, 2015. The company has conducted four Board meetings during the financial year 2015-16 i.e., on 6th April, 2015, 28th August, 2015, 30th September, 2015 and 30th March, 2016.

i. Has the company contravened the provisions of the Companies Act, 2013 in respect of the conduct of the meetings?
ii. Will your answer differ if the company was incorporated under Section 8 of the Companies Act, 2013?

[Nov-2016]

Answer:

Relevant provision

Section 173(1) of the Companies Act, 2013 provides for the holding of the Board meetings. According to the section, every company shall hold the first meeting of the Board of Directors within 30 days of the date of its incorporation and with respect to the subsequent board meetings, every company shall hold minimum of 4 every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government vide its Notification G.S.R. 466(E) dated 5th June 2015, notified that section 173(1) shall apply to the company formed under section 8 of the Companies Act, 2013 only to the extent that the Board of Directors, of such companies shall hold at least one meeting within every six calendar months.

Given case:

As per the given facts, Seafood Ltd. was incorporated on 1st April, 2015 and conducted four Board meetings during the financial year 2015-16 on 6th April, 2015, 28th August, 2015, 30th September 2015 and 30th March 2016.

Analysis and conclusion:

Considering the above provisions in the given situations-

i. Company has contravened the provisions of the Companies Act, 2013 in respect of the conduct of the subsequent board meetings. The gap between two consecutive board meetings i.e., the meeting held on 6th April, 2015 and 28th August, 2015 is 143 days which is more than 120 days and similarly the gap between the meeting held on 30th September 2015 and 30th March 2016 is 181 days which is again more than 120 days.

ii. In the case of company incorporated under section 8 of the Companies Act, 2013, since the board meetings have been conducted within 6 calendar months, so there is no contravention of the provision related to holding of board meetings.

Question 3:

Mr. P and Mr. Q who are the directors of C-Tech Limited informed the company about their inability to attend the Board meeting because the notice thereof was not served on them. Discuss whether there is any default on the part of C-Tech Limited and the consequences thereof.

[ICAI-Module]

Answer:

Relevant provision:

Under section 173(3) of the Companies Act, 2013 a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Section 173(4) further provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of Rs. 25,000.

Given case:

In the given case, as no notice was served on Mr. P and Mr. Q who are the directors of C- Tech Limited, every officer responsible for such default in serving notice shall be punishable with fine of Rs. 25,000 as required by Section 173 (4).

Neither the Companies Act, 2013 nor the Companies (Meetings of the Board and its Powers) Rules, 2014 lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors. The Supreme Court, in case of Parmeshwari Prasad vs. Union of India (1974) has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing.

Conclusion:

Hence, even though the directors concerned knew about the Board meeting, the meeting shall not be valid, and resolutions passed thereat also shall not be valid.

Question 4:

A director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place under Section 161(2). During the period of absence of the original director, a board meeting was called. In this connection, with reference to the provisions of the Companies Act, 2013, advise who should be given the notice of Board meeting i.e., the "original director" or the "alternate director"?

[ICAI-Module]

Answer:

Relevant provision:

According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company may, if so, authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company or holding directorship in the same company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to Section 173(3), a meeting of the Board may be called by giving at least 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

There is no legal precedence whether the notice of the meeting is to be sent to the original director or the alternate director. But as a matter of prudence such notice may be served to both the alternate director as well as the original director who is for the time being outside India.

Question 5:

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

(i) An interested Director;

(ii) A Director who has expressed his inability to attend a particular Board Meeting;

(iii) A Director who has gone abroad (for less than 3 months).

[ICAI-Module]

Answer:

Notice of Board meeting

i. Interested director: Section 173(3) of the Companies Act, 2013 makes it mandatory that every director needs to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an interested director, notice must be given to him even though in terms of Section 184 (2) he is precluded from participation i.e., engaging himself in discussion or voting at the meeting on the business in which he is interested.

ii. A Director who has expressed his inability to attend a particular Board Meeting: In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting, notice must be given to that director also.

iii. A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also i.e., through e-mail. This factor carries weight because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio-visual means also, in addition to physical presence.

Question 6:

Moonlight Limited, held its Board meeting through video conferencing. Due to technical problems, the video recording, which was done, could not be retrieved. The Company seeks your advice for the preparation and recording of the minutes of the Board meeting in the above situation, under the provisions of the Companies Act, 2013 and Rules made thereunder.

[May 2018 - Old]

Answer:

Relevant provision:

According to Sub- Rule 11 of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, at the end of discussion on each agenda item, the Chairperson of the meeting shall announce the summary of the decision taken on such item along with names of the directors, if any, who dissented from the decision taken by majority and the draft minutes so recorded shall be preserved by the company till the confirmation of the draft minutes in accordance with sub-rule (12).

According to Sub- Rule 12 of Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014,

i. The draft minutes of the meeting shall be circulated among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board.
ii. Every director who attended the meeting, whether personally or through video conferencing or other audio visual means, shall confirm or give his comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the draft minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes failing which, his approval shall be presumed.

Given case and Analysis:

As per the facts of the question, due to technical problems, the video recordings of a Board meeting of Moonlight Limited, could not be retrieved.

However, the secretary of Moonlight Limited in consultation with the Chairman of the meeting can use the draft minutes that would have been recorded during the meeting to prepare the minutes. Further, when the same minutes will be circulated to the directors, they can give comments in writing, about the accuracy of recording of the proceedings of that particular meeting in the minutes, within seven days or some reasonable time as decided by the Board, after receipt of the draft minutes.

Moonlight Limited may, thus follow the above procedure.

Question 7:

M/s OBC Limited at its forthcoming Board meeting decided that it will not provide the directors with the facility of participation in the said meeting through electronic mode; can the directors insist on attending the meeting through such mode? Decide as per the provisions of the Companies Act, 2013. Will your answer differ, if a director participates in a Board Meeting through electronic mode from his end, even if the company does not provide such facility?

[Nov-18 (old)]

Answer:

Relevant provision:

According to section 173(2) of the Companies Act, 2013, the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

According to Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014, if the director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect sufficiently in advance so that company is able to make suitable arrangements in this behalf.

The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.

The above rule is to be complied with only if a company provides the facility of participation through electronic mode, but it is not his right. This option may be exercised by the director only when this facility is provided by the company to its directors. If the company has not offered to provide facility of participation through electronic mode and the director insists to attend the meeting through electronic mode, the company may decide whether to provide the same or not. Thus, it is not mandatory for companies to provide their directors with the facility of participation in meetings through electronic mode and therefore, the director cannot insist.

In the absence of any intimation from the director referred above, it shall be assumed that he will attend the meeting in person. So, if the company does not provide the facility of participation through electronic mode and a director participates in a Board Meeting through electronic mode from his end, it is not valid.

Author's opinion on the answer:
As per the judgement in case of "Achintya Kumar Barua v. Ranjit Barthkur (2018)", the appellate tribunal had held that the use of word "may" in the provision of Section 173(3) is directory in nature and gives the director options to participate in a board meeting either in person or through video conferencing or other audio-visual means as may be prescribed.

The provision doesn't give the company an option to deny the right given to directors to participate via video conferencing or other audio visual means.

Moreover, the appellate tribunal also stated that inclusion of the facility to attend the board meetings through video conferencing and other audio visual means is a progressive step by the legislature and it would not be appropriate to shut out the provisions on mere apprehension.

Considering the above judgement, the answer of ICAI seems to be incorrect.

The correct answer should be:
It is mandatory for M/S OBC Limited to provide the facility to its directors to attend the board meeting through video conferencing or other audio visual means. If the company refused to provide so, directors may seek legal action against the company.

However, a director is not permitted to make their own arrangements to attend the meeting through VC or other AV means. The arrangements are required to be made by the company itself ensuring adequate security and safeguards.

Question 8:
The Chairman of Evergreen Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.

[May 17 (old)]

Answer

Relevant provision:

According to section 173 (3) of the Companies Act, 2013, a meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Given case:

According to the question, two of the independent directors on the Board has objected on the grounds that no proper agenda for the meeting was circulated.

Analysis and conclusion:

The Companies Act, 2013 does not specifically provide for sending agenda along with the notice of the meeting. However, generally as a good secretarial practice, the notice is accompanied with the agenda of the meeting. Thus, the contention of the independent directors objecting on the grounds that no agenda for the meeting was circulated, does not hold good.

Further, the Chairman of Evergreen Limited has convened the Board meeting by serving a two weeks' notice (i.e., more than 7 days). Hence, the meeting shall be valid.

Question 9:

Sunshine Limited proposes to hold its board meeting at a shorter notice through video conferencing.

[May 17 - Old]

Answer:

According to section 173 of the Companies Act, 2013, the directors can participate in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognizing the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.

A meeting of the Board shall be called by giving not less than 7 days' notice in writing to every director at his address registered with the company.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Conclusion:

Hence, Sunshine Limited can hold a board meeting at a shorter notice through video conferencing, for transacting urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, if the independent directors are absent from the meeting of the Board, decision taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Question 10:
Woodworth Realtors Ltd. is a foreign collaborator in JaiShri Realtors Limited. M/s. Jai Shri Realtors Ltd. was incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of Jai Shri Realtors Limited are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e- mail. State in this connection whether such a provision in the Articles of Association of a foreign collaborated company is valid within the purview of the provisions of the Companies Act, 2013?

[Nov 18 - RTP(Old)]

Answer:
In terms of the proviso to section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. No exception is made for any class or classes of companies.

Further, under section 173(3) a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his addressed registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

If we examine the above provision, it is clear that the notice shall be sent by hand delivery or by post or by electronic means. Hence, the sending of notice by e-mail is an ordinary mode of sending notice of board meeting under the Companies Act, 2013.

Therefore, in the given case the shorter notice is legally permitted with the only condition being the presence of the quorum and at least one independent director. The provision of the Articles in this regard is not relevant as the position is amply clear in the Act itself.

Question 11:
Urja Pvt Limited, a recently emerged company for conducting business of providing solar panels, held 3 board meetings till 31st October, 2017 during the year 2017. The next board meeting was due to be held on 27th December, 2017 but for want of quorum the meeting could not be held. A group of shareholders complained that the Company has violated the provisions of section 173 of the Companies Act, 2013 in not holding the required number of board meetings, and section 137 for default in filing of its financial statement. Company contended that they fall under the purview of section 173(5) of the Companies Act, 2013. State as to the validity of the contention of Urja Pvt Limited in the given above situations.

[MTP March 2018 - Old]

Answer:
In terms of section 173(1) of the Companies Act, 2013, a company must hold a minimum number of four meetings of its Board of directors in such a manner that not more than 120 days shall intervene between two consecutive meetings of the Board.

Further, the proviso to this sub-section provides that the Central Government may by notification, direct that these provisions will not apply in relation to any class or description of companies or may apply subject to such exceptions, modifications or conditions as may be specified in the notification.

As per Section 173(5), One Person Company, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one

meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days.

Accordingly, here Urja, Pvt Limited in the given case is Private startup company, so will fall within the ambit of section 173(5) if the Act and shall be considered to have complied with the provision of this section by conduct of more than two board meetings in each half of a calendar year i.e., in 2017 and the gap between the two meetings is assumed to be more than ninety days.

However, in failure of compliance of section 137 of the Companies Act, 2013 by the Urja, Pvt. Limited, made it ineligible to fall under this exception. So Urja Pvt. limited has contravened the section 173, so the contention of the Urja Pvt. limited as to the valid holding of meeting is incorrect.

Author's Note:
Please note that in the given answer, ICAI has not considered the fact that as per section 174(4) where the meeting could not be held for the want of quorum, such meeting shall be automatically adjourned and the adjourned meeting is a mere continuation of the original meeting. So, if the adjourned meeting is validly held, then it will be deemed to have been held on 27th Dec and there would be no non-compliance of this provision.

Student may consider incorporating this point in their answer.

Question 12:

Wonderland Ltd. convened a meeting of the Board of Directors on 1st September, 2019 to approve the financial statements of the Company as on 31st March, 2019. The Board has strength of 5 directors and the quorum as per Articles of Association is 3 directors physically present. While 3 directors participated in the meeting physically, the fourth and the fifth directors participated through video conferencing. Examine the validity of the approval of financial statements in the above said Board meeting.

[Nov 2019 (Old)]

Answer:

Relevant provision:

As per the provision of Section 174 of the Companies Act, 2013:

i. The quorum for a Board Meeting shall be 1/3rd of its total strength or 2 directors, whichever is higher.
ii. While calculating the quorum, any fraction of a number shall be rounded off as one.

However, the Articles of a Company may specify a higher quorum than prescribed by Section 174 (1).

According to Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014, the approval of the annual financial statements shall not be dealt with in a meeting through video conferencing and other audio-visual means.

However, according to second proviso to Section 173(2) of the Companies Act, 2013, where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means.

Given case:

In the present case, the quorum required is 2 directors (i.e. . 1/3 of 5 Directors or 2 directors whichever is higher)

However, the quorum as per Articles of Association is 3 directors physically present in the case of Wonderland Ltd. Hence, the required quorum for the Board Meeting shall be 3 directors physically present.

Analysis and conclusion:
The approval of annual financial statement in a Board Meeting physically attended by 3 directors and participated by 2 directors through video conferencing, shall be valid because required quorum i.e., 3 directors have physically attended the said meeting.

Amendment w.e.f June 15, 2021 [Applicable for May'22 and onwards student]
MCA vide Notification dated June 15, 2021, notified the amendment in Companies (Meetings of Board and its Powers) Rules, 2014.

The said amendment has been notified to delete the provision related to restriction of conducting Board Meeting through Video Conferencing/Other Audio-Visual Means for selected agenda items like approval of the annual financial statements, Board's report, approval of the prospectus etc.

This means - The restriction on agenda is not applicable anymore and therefore every item can now be discussed via VC.

Question 13:
The Articles of Association of Amriz Limited provides for a maximum of 15 directors. But the company has only 10 directors and for two of them representing Foreign Collaborators, alternate directors have been appointed. Board meeting held on 1st August, 2018 was attended by four directors including two alternate directors. Examine with reference to the relevant provisions of the Companies Act, 2013 whether quorum was present at the Board Meeting held on 1st August, 2018. Will your answer be different, if the articles provide for a quorum of six directors?

[May 18 - Old]

Answer:
Relevant provision:
According to section 174 of the Companies Act, 2013, the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength or two directors, whichever is higher.

For the purposes of this section,—
(i) any fraction of a number shall be rounded off as one;
(ii) "Total strength" shall not include directors whose places are vacant.

Given case:
In the instant case, out of 10 directors, 4 directors including 2 alternate directors attended the Board Meeting held on 1st August, 2018. Required quorum: 1/3rd of 10 i.e., 3.33 rounded off to 4.

Alternate directors shall be counted in the quorum as they are holding the office of original director.

Conclusion:
Thus, presence of 4 directors (including 2 alternate directors) in the board meeting held on 1st August, 2018 shall be counted as quorum. Thus, quorum was present at the meeting in the given case.

If Articles provide different quorum: The Act specifically mentions in section 174(1) of the Companies Act, 2013 that the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength or two directors, whichever is higher.

However, the Act does not provide cap on the higher number of quorum and similar views have been expressed in Secretarial Standards 1 (Para 3.4.1) in terms of Section 118 (10) of the Companies Act, 2013 and various judicial rulings.

Hence, if the Articles provide 6 directors as quorum, the meeting held on 1st August, 2018 is not valid as it was attended only by 4 directors and answer will change in the given case study.

Question 14:

There are 7 directors in BUI Limited. A resolution (relating to opening of a branch office of the company in a place outside the state where the registered office is situated) in draft together with necessary papers were circulated among the directors seeking their approval by circulation. Four directors from among total seven directors approved the proposal. Three directors, who did not approve the proposal, opposed the validity of the proposal on the following grounds:

i. That the resolution was circulated by-mail and not by hand delivery or post or courier as per the provisions of sub-section (1) of Section 175 of the Companies Act, 2013; and
ii. Secondly, that more than 1/3rd of the number of directors now require that the resolution must be decided at a meeting of the Board of Directors and not by circulation.

Referring to and analyzing the relevant provisions of the Companies Act, 2013 and Rules made there under, decide, whether the contention of the three directors is tenable.

[Jan-21 (New)

Answer:

Relevant provision:

As per section 175 of the Companies Act, 2013, no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless:

- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,
- at their addresses registered with the company in India
- by hand delivery or by post or by courier, or through such electronic means as may be prescribed and
- has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014, provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

Provided that, not less than 1/3rd of the total number of directors of the company for the time being require, that any resolution under circulation must be decided at a meeting of the Board.

Given case and analysis:

In light of the stated provision, following are Answer to the proposals on the basis of given ground:

i. Contention of three directors with respect to opposing of resolution passed by email, is not valid in terms of stated Rule 5. Email is an accepted mode for passing resolution by circulation.
ii. Contention of three directors with respect to that resolution must be decided at a meeting of Board of Directors and not by circulation is not valid as per proviso to section 175(1). The claim to decide the matter in the board meeting after it has been approved is not valid. The proviso stated above requires that they should have insisted before the resolution has been passed that the resolution should be decided at a meeting of the board.

Question 15:

17th Board meeting of Jai Entertainment Ltd. was held at its registered office situated at B-17, Industrial Area, and Suncity. While discussing the matter of appointment of Mr. Kaabil as Managing Director of the company, certain defamatory remarks were made by Mr. X, one of the directors. The draft minutes submitted by the Company Secretary also incorporated the indecent remarks of Mr. X. The chairman wants to remove those undesirable remarks from the minutes. Can he do so?

[May 2017]

Answer:

Relevant provision:

The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting.

Section 118 of the Companies Act, 2013, deals with minutes of proceedings of General Meeting, Meetings of Board of Directors and Other Meetings and Resolutions Passed by Postal Ballot.

The section provides certain exemptions to matters from inclusion in the minutes.

There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting-

(a) is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceedings; or

(C) is detrimental to the interests of the company.

Absolute discretion of chairman: The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds as specified above.

Given case and conclusion

Hence, the Chairman can exercise his discretion of not including the undesirable remarks from the minute of the 17th Board meeting of Jai Entertainment Ltd.

Question 16:

i. What is the procedure to be followed, when a board meeting is adjourned for want of quorum?

ii. How is a resolution by circulation passed by the Board or its Committee?

[ICAI Module]

Answer:

a) Section 174(4) of the Companies Act, 2013 provides that, if a Board meeting could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned to the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a national holiday, at the same time and place.

b) The Companies Act, 2013 permits a decision of the Board of Directors to be taken by means of a resolution by circulation. Board's approvals can be taken in two ways - one, by a resolution passed at a Board Meeting and the other, by means of a resolution passed by circulation.

In terms of Section 175(1) of the Companies Act, 2013 no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the following provisions have been complied with:

1. the resolution has been circulated in draft, together with the necessary papers, if any,
2. the draft resolution has been circulated to all the directors, or members of the committee, as the case may be;
3. the draft resolution has been sent at their addresses registered with the company in India;
4. such delivery has been made by hand or by post or by courier, or through prescribed electronic means;

   Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.

5. such resolution has been approved by a majority of the directors or members, who are entitled to vote on the resolution;

However, if at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the Chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

A resolution that has been passed by circulation shall have to be necessarily noted in the next meeting of Board or the Committee, as the case may be, and made part of the minutes of such meeting.

Question 17:

An Audit Committee of a listed company constituted under Section 177 of the Companies Act, 2013, submitted its report containing the recommendations in respect of certain matters to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyze whether:

(a) The Board is empowered not to accept the recommendations of the Audit Committee.

(b) If so, what alternative course of action, would the Board resort to?

[ICAI-Module]

Answer:

a. According to Section 177(8) of the Companies Act, 2013, the Board's Report shall, under the provisions of Section 134 (3) which is laid before the general meeting where the financial statements of the company are placed before the members, disclose the composition of the Audit Committee and where the Board has not accepted any recommendations of the Audit Committee, the same shall also be disclosed along with the reasons therefor. Hence, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and supported by legitimate reasons for non-acceptance.

b. If the Board does not accept the recommendations of the Audit Committee, it shall disclose the same in its report under section 134 (3) which is placed before the general meeting of the company.

Question 18:

MNC Ltd., a company, who's paid up capital was Rs. 8 crore has issued right shares in the ratio of 1:1. The said company is listed with Mumbai Stock Exchange. Whether the company is required to appoint any Audit Committee and if yes, draft a suitable Board Resolution to appoint an Audit committee covering the aspects as provided in the Companies Act, 2013.

[ICAI-Module/Nov 2016]

Answer:

Relevant provision and analysis:

Under section 177(1) of the Companies Act, 2013 the Board of Directors of every listed public company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee.

Therefore, MNC Ltd being a listed company will be bound to constitute an audit committee under the Act.

Further under section 177(2) the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

Further, majority of the members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement.

Draft resolution:

The draft Board Resolution for the constitution of an Audit Committee may be as follows:

"Resolved that pursuant to the provision contained in section 177 of the Companies Act 2013 and the applicable clause of Listing Agreement with the Mumbai Stock Exchange, an Audit Committee of the Company be and is hereby constituted with effect from the conclusion of this meeting, with members as under:

Mr. A -- An Independent Director.
Mr. B -- An Independent Director
Mr. C -- An Independent Director
Mr. D -- An Independent Director
Mr. FE -- Financial Executive
Mr. MD -- Managing Director

Further resolved that the Chairman of the Committee, who shall be an Independent Director, be elected by the committee members from amongst themselves.

Further resolved that the quorum for a meeting of the Audit Committee shall be the chairman of the Audit Committee and 2 other members (other than the Managing Director).

Further resolved that the terms of reference of the Audit Committee shall be in accordance with the provisions of section 177(4) of the Companies Act, 2013.

Further resolved that the Audit committee shall conduct discussions with the auditors periodically about internal control system, the scope of audit including the observations of the auditors.

Further resolved that the Audit Committee shall review the quarterly and annual financial statements and submit the same to the Board with its recommendations, if any.

Further resolved that the recommendations made by the Audit Committee on any matter relating to financial management including the audit report shall be binding on the Board. However, where such recommendations are not accepted by the Board, the reasons for the same shall be recorded in the minutes of the Board meeting and communicated to the shareholders.

Further resolved that the Company Secretary of the Company shall be the Secretary to the Audit Committee.

Further resolved that the Chairman of the Audit Committee shall attend the annual general meeting of the Company to provide any clarifications on matters relating to audit as may be required by the members of the company.

Further resolved that the Board's Report/Annual Report to the members of the Company shall include the particulars of the constitution of the Audit Committee and the details of the non- acceptance of any recommendations of the Audit Committee with reasons therefor."

Question 19:

XYZ Limited, a listed company has constituted an audit committee consisting of five members out of whom two are independent directors. Subsequently, the company increased the composition of audit committee to six members with three independent directors.

[Nov 16 -Old]

Answer:

As per Section 177(2) of the Companies Act, 2013, the audit committee shall consist of a minimum of three directors with independent directors forming a majority.

In the given instance, XYZ Ltd. a listed company constituted an Audit committee consisting of 5 members out of which 2 are independent directors.

Subsequently company increased the composition of audit committee to 6 members with three independent directors.

Thus, according to the above provision the compliance with respect to the composition of audit committee with an independent directors forming a majority is not valid.

Question 20:

Out of the powers exercisable by the Board under Section 179 of the Companies Act, 2013, the Board of MN Limited wants to delegate the power to borrow monies otherwise than on debentures to the Managing Director. Advise whether such a delegation is possible? Would your answer be different, if the delegation is made to the manager or any other principal officer including a branch officer of the company?

[ICAI-Module]

Answer:

Relevant provision

Under section 179(3) of the Companies Act, 2013, the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board:

a) To make calls on shareholders in respect of money unpaid on their shares;
b) To authorise buy-back of securities under section 68;
c) To issue securities, including debentures, whether in or outside India;
d) To borrow monies;
e) To invest the funds of the company;
f) To grant loans or give guarantee or provide security in respect of loans;
g) To approve financial statement and the Board's report;
h) To diversify the business of the company;
i) To approve amalgamation, merger or reconstruction;
j) To take over a company or acquire a controlling or substantial stake in another company;
k) Any other matter which may be prescribed.

Provided that the Board may, by a resolution passed at a meeting, delegate to any Committee of Directors, the Managing Director, the manager or any other principal officer of the company or in the case of a branch office

of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify.

In respect of a company covered under Section 8 of the Companies Act, 2013, which has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar, the matters referred to in clauses (d), (e), and (f) of Section 179 (3) may be decided by the Board by circulation instead of at a meeting.

From the foregoing provisions, it is clear that the Board of MN Limited shall be perfectly in order if it delegates the power to borrow monies under clause (d) of Section 173 (3) to the Managing Director or to the manager or any other principal officer of the company. However, the Board is not allowed to delegate the power to any officer (other than the principal officer) of the branch office.

Question 21:

Advise the Board of Director of Spectra Papers Ltd. regarding validity and extent of its powers, under the provisions of the Companies Act, 2013 in relation to the following matters:

i. Buy-back, for the first time, the shares of the Company up to 10% of the paid-up equity share capital without passing a special resolution.
ii. Delegation of power to the Managing Director so that he can invest surplus funds of the company in the shares of some other companies.

[ICAI-Module]

Answer:

1) According to clause (b) of Section 179(3), The Board of Directors of a company shall exercise the power to authorize buy-back of securities under section 68, on behalf of the company by means of resolutions passed at meetings of the Board.

According to Sec 68(2), no company shall purchase its own shares or other specified securities, unless:

a. the buy-back is authorised by its articles;
b. a special resolution has been passed at a general meeting of the company authorizing the buy-back

However, nothing contained in this clause shall apply to a case where:

a. the buy-back is, 10% or less of the total paid-up equity capital & free reserves of the co.; and
b. such buy-back has been authorised by the Board by means of a resolution passed at its meeting,

From the foregoing provisions, it is clear that in case a company, for the first time, resorts to buy-back of its own shares, when the buy-back is limited to 10% of its paid-up share capital, a special resolution will not be required if such buy-back has been authorized by the Board by means of a resolution passed at its meeting.

Thus, the Board of Director of Spectra Papers Ltd. is empowered to buy-back the shares because the buy-back is limited to 10% of the paid-up share capital, by means of a resolution passed at the Board meeting.

2) According to Section 179(3)(e), the Board of Directors of a company shall exercise the power to invest the funds of the company, on behalf of the company by means of resolutions passed at the meetings of the Board.

The Board may, under the Proviso to Section 179(3), delegate the power to invest the funds of the company through a board resolution passed at a duly convened Board Meeting.

However, the investment in shares of other companies will also be governed by a specific provision contained in Section 186(5), according to which no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

Thus, a unanimous resolution of the Board is required. Further, Section 186 does not provide for delegation. Hence, the proposed delegation of power to the Managing Director to invest surplus funds of the company in the shares of some other companies, is not in order.

Question 22:

The Balance Sheets of last three years of PTL Ltd., contain the following information and figures:

	As at 31.03.2017 (Amount in Rs.)	As at 31.03.2018 (Amount in Rs.)	As at 31.03.2019 (Amount in Rs.)
Paid up capital	50,00,000	50,00,000	75,00,000
General Reserve	40,00,000	42,50,000	50,00,000
Credit Balance in Profit & Loss A/C	5,00,000	7,50,000	10,00,000
Debenture Redemption Reserve	15,00,000	20,00,000	25,00,000
Securities Premium	2,00,000	2,00,000	2,00,000
Secured Loans	10,00,000	15,00,000	30,00,000

While going through other records of the Company, the following is also determined:

Net Profit for the year (as per provisions of Companies Act,2013)	12,50,000	19,00,000	34,50,000

In the ensuing Board Meeting scheduled to be held on 5th September, 2019, among other items of agenda, following items are also appearing:

i. To decide about borrowing from financial institutions on long-term basis.
ii. To decide about contributions to be made to charitable funds.

Based on above information, you are required to find out as per the provisions of the Companies Act, 2013, the amount upto which the Board can borrow from financial institution and the amount upto which the Board of Directors can contribute to Charitable funds during the financial year 2019-20 without seeking the approval in general meeting.

[ICAI-Module]

Answer:

i. Relevant provision:

As per Section 180(1) (c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow money including moneys already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company, free reserves and securities premium.

Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Given case and analysis:
Since the decision to borrow is to be taken in a meeting to be held on 5thSeptember, 2019, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2019.

According to the above provisions, the Board of Directors of PTL Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Particulars	Amount in Rs.
Paid up Capital	75,00,000
General Reserve (being free reserve)	50,00,000
Credit Balance in Profit & Loss Account (to be treated as free reserve)	10,00,000
Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption)	----
Securities Premium	2,00,000
Aggregate of paid-up capital, free reserves and securities premium	**137,00,000**
Total borrowing power of the Board of Directors of the company, i.e., 100% of the aggregate of paid-up capital, free reserves and securities premium	137,00,000
Less: Amount already borrowed as secured loans	30,00,000
Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting.	**107,00,000**

ii. As per Section 181 of the Companies Act, 2013, the Board of Directors of a company without obtaining the approval of shareholders in a general meeting, can make contributions to genuine charitable and other funds upto an amount which, in a financial year, does not exceed 5% of its average net profits during the three financial years immediately preceding, the financial year.

According to the above provisions, the Board of Directors of the PTL Ltd. can make contributions to charitable funds, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Net Profit for the year (as calculated in accordance with the provisions of the Companies Act, 2013):

Particulars	Amount in Rs.
For the financial year ended 31.3.2017	12,50,000
For the financial year ended 31.3.2018	19,00,000
For the financial year ended 31.3.2019	34,50,000
Total	**66,00,000**
Average of net profits during three preceding financial years	22,00,000
Five per cent thereof	1,10,000

Hence, the maximum amount that can be donated by the Board of Directors of PTL Ltd to a genuine charitable fund during the financial year 2019 -20 will be limited to Rs. 1,10,000; and the said donation shall not require seeking of approval from the shareholders at a general meeting.

Question 23:

One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company's Articles also conferred upon the director's power to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members whereupon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members') decisions.

Examining the provisions of the Companies Act, 2013, answer the following:

i. Whether the contention of members against the non-compliance of members' decision by the directors is tenable?
ii. Whether it is possible for the members to usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?

[ICAI-Module]

Answer:

Relevant provision:

In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do.

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made thereunder including regulations made by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180 (1) of the Companies Act, 2013, specifies the powers which the Board of Directors of a company shall exercise only with the consent of the company by a special resolution. Clause (a) of Section 180 (1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded by passing a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution.

Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

Given case:
In the given case, the procedure followed is completely incorrect and violated of the provisions of the Companies Act, 2013. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independent of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then let the members to approve it by a special resolution.

Conclusion:
Accordingly, the contention of the members that they were the principals and the directors as their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even for all the members. The members, therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers.

However, in case if the shareholders intend, they have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

Question 24:
M/s. Multiplex Builders Limited is contemplating to enter into a joint venture agreement with another construction company for the development of lended properties located at Delhi. Since it is not possible to convene the Board Meeting immediately as the directors are at different place in connection with various works, the Managing Director seeks your advice on the following matters;

i. Whether the resolution pertaining to the joint venture agreement is required to be passed at the Board Meeting convened for this purpose or whether it can be passed by means of a circular resolution?
ii. What are the resolutions that are required to be passed only at the meetings of the Board of Directors?
iii. The steps that are required to be taken to pass the Board resolution by circulation.

Advise the managing Director in the light of the provisions of the Companies Act, 2013.

[RTP-Nov 2018 (old)]

Answer:
Relevant provision:
The directors of the company act together as a body and generally at the meeting of the Board duly convened, unless special powers are delegated to an individual director or the managing director. Where it is not possible to hold board meetings because the directors are busy elsewhere or the time for convening such a meeting is short, it is possible that the required resolution can be passed by way of circular resolution as provided in section 175 of the Companies Act, 2013.

However, under section 179 of the Companies Act, 2013, certain powers can be exercised by the Board of directors only by means of a resolution passed at meeting convened for this purpose.
They are:

i. to make calls on shareholders in respect of money unpaid on their shares
ii. to authorize buy back of securities under section 68
iii. to issue securities, including debentures, whether in or outside India
iv. to borrow monies
v. to invest the funds of the company and
vi. to grant loans or give guarantee or provide security in respect of loans
vii. to approve financial statements and the Board's report
viii. to diversify the business of the company
ix. to approve amalgamation, merger or reconstruction
x. To take over a company or acquire a controlling or substantial stake in another company.
xi. Any other matter as prescribed in Rule 8 of the Companies (Meetings of the Board and its Powers) Rules, 2014.

Given case and Analysis:

In view of the above, the Managing Director can go ahead and complete the joint venture agreement after obtaining the approval of the board by passing a circular resolution.

For this purpose, the proposed resolution has to be circulated in draft along with the other necessary papers, if any, to all the directors in India at their usual residential addresses.

The resolution will become valid if the same is approved by majority of the directors and who are entitled to vote on the resolution. There after the resolution as passed by way of circulation will be enterprises in the minute's book of the Board of Directors and is enough compliance of the provisions of Companies Act, 2013 in this regard.

Question 25:

M/s Dreamworks Limited (an unlisted company) without any public deposits as per the audited financial statements of the company as at March, 31st 2018 gives you the following information:

Paid up Share Capital	Rs. 20 crores
Gross Turnover	Rs. 500 crores
Bank Borrowings	Rs. 40 crores (from a National Bank)
Other Borrowings	Rs. 40 crores (from a Public Financial Institution)

Mr. Gupta, a Chartered Accountant employed in the finance and audit department of the company wants to form a Vigil Mechanism for directors and employees of the company.

Advise whether it is mandatory for M/s Dreamworks Limited to formulate a Vigil Mechanism under the provisions of the Companies Act, 2013 and rules framed there under. (2) Are there any penalties that could be imposed on the company for not formulating the Vigil Mechanism?

[May 2018,Old]

Answer:

Relevant provision:

According to Section 177(9) of the Companies Act, 2013, a Vigil mechanism shall be formed in:

a) Every listed company, and
b) Such other prescribed classes of companies.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following class or classes of companies that shall constitute Vigil mechanism:

a) the Companies which accept deposits from the public;
b) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.

Given case and analysis:

In the instant case, Dreamworks Limited does not have any public deposits. They have borrowings from banks and public financial institutions of Rs. 80 crores which is in excess of Rs. 50 crores. Since, the Company had borrowed from banks and Public Financial Institutions in excess of Rs. 50 crores as prescribed in Rule 7(2), the company is mandatorily required to form a Vigil Mechanism for directors and employees of the company.

Penalty: According to Section 178(8), in case of contravention of provisions of Section 177, the company shall be punishable with fine of Rs. 5 lakh rupees, and, every officer of the company who is in default shall be punishable with fine of Rs. 1 lakh rupees.

Question 26:

Following is data relating to Prince Company Limited:

Authorised Capital (Equity Shares)	- Rs. 100 crores
Paid - up Share Capital	- Rs. 40 crores
General Reserves	- Rs. 20 crores
Debenture Redemption Reserve	- Rs. 10 crores
Provision for Taxation	- Rs. 5 crores
Loan (Long Term)	- Rs. 10 crores
Short Term Creditors	- Rs. 3 crores

Board of Directors of the company by a resolution passed at its meeting decided to borrow an additional sum of Rs. 90 crores from the company's Bankers. You, being the company's financial advisor, advise the Board of Directors the procedure to be followed as required under the Companies Act, 2013.

[Nov 2014 - Old/ICAI-Module]

Answer:

Relevant provision:

As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed up to an amount which does not exceed the aggregate of paid-up capital of the company and its free reserves.

Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business.

Free reserves do not include the reserves set apart for specific purpose.

Given case:

According to the above provisions, the Board of Directors of Prince Company Limited can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Particulars	Amount in Rs.
Paid up Share Capital	40 Crores
General Reserve (being free reserve)	20 Crore
Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption)	----
Aggregate of paid up capital and free reserve.	60 Crore
Total borrowing power of the Board of Directors of the company, i.e., 100% of the aggregate of paid up capital and free reserves	60 Crore
Less: Amount already borrowed as long term loan	10 Crore
Amount upto which BoD can further borrow without the approval of SHs in a GM.	50 Crore

Analysis:
In the present case, the directors of Prince Company Limited by a resolution passed at its meeting decide to borrow an additional sum of Rs. 90 Crore from the company bankers. Thus, the borrowing will be beyond the powers of the Board of directors.

Conclusion:
Thus, the management of Prince Company Limited., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1) (c) of the Companies Act, 2013. Then, the borrowing will be valid and binding on the company and its members.

Question 27:
The following information is provided in respect of M/s Fortune Limited under three different case scenarios on the borrowing powers of the Board of Directors of the company. Mr. Murli, the CFO seeks your advice with explanations as to the nature of resolution which needs to be passed under each of the case scenarios as per the provisions of section 180(1) (c) of the Companies Act, 2013. Detailed workings should form part of your answer.

Particulars	Case 1 (in cr)	Case 2 (in cr)	Case 3 (in cr)
Equity Share Capital (Paid- up)	150	150	150
Preference Share Capital (Paid-up)	50	50	50
Securities Premium Account	50	50	50
Free Reserves	20	20	20
Total:	**270**	**270**	**270**
Working Capital Loan (repayable on demand-Existing) from Sigma Capital Limited	50	50	50
Cash Credit Limit from a scheduled bank (repayable on demand-Existing)	120	120	120
6 months loan for purchase of Plant & Machinery from scheduled bank (proposed)	30	40	130
24 months loan for purchase of Plant & Machinery from scheduled bank (proposed)	10	20	150
Total	210	230	450

[May 2019 - New]

Answer:
Relevant provision:
According to section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely: (c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business:

Explanation—For the purposes of this clause, the expression "temporary loans" means loans repayable on demand or within six months from the date of the loan such as short- term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character but does not include loans raised for the purpose of financial expenditure of a capital nature.

Particulars	Case 1 (in cr)	Case 2 (in cr)	Case 3 (in cr)
Total amount of Paid up share capital, free reserves and securities premium	270	270	270
Hence, Total amount that the company can borrow without passing Special Resolution - Amount (A)	270	270	270
Existing Working Capital Loan (Repayable on demand) from Sigma Capital Limited since it is not the company's banker	50	50	50
Total amount of Loan that Company needs is:			
6 months loan for purchase of Plant & Machinery	30	40	130
24 months loan for purchase if Plant & Machinery	10	20	150
Amount (B)	**90**	**110**	**330**
Is Amount (A)> Amount (B), then SR need not be passed	SR not to be passed	SR not to be passed	SR to be passed

Working Notes:

1. Paid up share capital includes both equity share capital and Preference share capital
2. Cash credit limit from scheduled bank' are temporary loans as they are repayable on demand.
3. 6 months loan for purchase of Plant & Machinery' is not treated as a temporary loan as temporary loans does not include loans raised for the purpose of financial expenditure of a capital nature.

Question 28:

Srajan Ltd., a company incorporated in July 2015. The Board of Directors of Srajan Ltd., proposed to donate Rs. 2, 00,000 to a school established exclusively for the benefit of the employees of the company. Besides, also proposed to donate Rs.1 lac to a political party during the financial year ending March 31, 2018. The net profit during the financial year 2017 -2018, was Rs.35,00,000.

Evaluate the given below situations in the light of the stated facts under the relevant provisions of the Companies Act, 2013-

(i) Whether the proposed political donation made by the Srajan Ltd., are within the powers of the Board of Directors of the company

(ii) Whether the contribution by Srajan Ltd. to school established for the benefit of an employee is charitable contribution.

[MTP Oct 2018 - New]

Answer:

(i) Political Contribution:

As per section 182, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party

Provided that no such contribution shall be made by a company unless a resolution authorizing the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.

Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates.

Given case and analysis:

In the given case BoD of Srajan Ltd. proposed political contribution of 1 Lac for the financial year 2017-2018. As per the above provision, any amount can be contributed by Srajan Ltd. through the resolution passed at a meeting of the Board of Directors authorizing the making of such contribution.

Such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it. So, the political contribution proposed is well within the powers of the Board. Such a proposal shall be passed at a meeting through the resolution authorizing such contribution and full disclosure of the name of political party and amount contributed shall be made in the profit and loss account.

Author's Note:

The answer to this question seems to be filled with assumptions. While it is correct that the co. completes its 3 FY at the end of 31st March 2018, it is unclear whether the political contribution is being paid out in FY 17-18 or 18-19. The assumption here is that political contribution pertaining to FY 2017-18 is being made in FY 18-19 and therefore Srajan Ltd. is allowed to make such contribution.

(ii) Charitable Contribution:

As per the facts, the Board of Directors of Srajan Ltd., proposed to donate Rs. 2, 00,000 to a school established exclusively for the benefit of the employees of the company. As per section 181 of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds.

A contribution by a company is said to be charitable contribution if it is made without any object of availing any benefit for the company or for its employees and such contribution does not have any direct relation with the business of the company.

Since, here the contribution proposed is for the school which is exclusively for the benefit of the employees' children. Therefore, it cannot be considered as charitable within the meaning of section 181.

Question 29:

M/s Jai Industries Limited earned net profit for the last three years as under:

Financial Year	Net Profit (Rs. in Crores)
2013-14	30
2014-15	40
2015-16	50

During the financial year 2016-17, the Board of Directors of the company contributed to a Charitable Fund Rs. 1.25 crores in July, 2016. Again, in January 2017, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1 crore.

Decide the validity of the decision of the Board of Directors regarding the contribution on both the occasions with reference to the provisions of the Companies Act, 2013.

[Nov-2017- Old]

Answer:

Relevant provision:

According to Section 181 of the Companies Act, 2013, the Board of Directors of a company may contribute to bona fide charitable and other funds.

Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceeds five per cent of its average net profits for the three immediately preceding financial years.

Given case:

In the instant case, the average Net Profit of M/s Jai Industries Limited in the three immediately preceding financial years (2013-14, 2014-15 and 2015-16) is 40 Crores [30+40+50/3].

Analysis and conclusion:

Thus, if M/s Jai Industries Limited wants to contribute more than Rs. 2 crores [Rs. 40 crores * 5%] in Charitable fund, it has to take the prior permission of the company in general meeting.

In July 2016, the Board of Directors of M/s Jai Industries Limited contributed to a Charitable Fund Rs. 1.25 crores. This contribution is within the limit of Rs. 2 crore, thus no prior permission of the company in general meeting shall be required.

In January 2017, the Board of Directors passed resolution to contribute to another Charitable Fund Rs. 1.00 crore. For this contribution, prior permission of the company in general meeting shall be required as the aggregate contribution in Charitable Fund in the year 2017 is Rs. 2.25 crores which is exceeding Rs. 2 crore. [Rs. 1.25 crores + Rs. 1 Crore].

Question 30:

State with reference to the provisions of the Companies Act, 2013 whether the following companies can make donations to political parties and if so the conditions to be complied with in this regard.

1. ABCD Ltd., a Government company registered in 1991, wants to donate a sum of Rs 10 lakhs.
2. EFG Ltd., a public company registered in 2013, wishes to contribute a sum of Rs. 5 lakhs.
3. RST Ltd., a company incorporated in the year 2014, decides to contribute a sum of Rs. 3 lakhs.
4. Rama Ltd., wants to make political contribution of Rs. 2,000 in cash.

[Nov-2018, Old]

Answer:

According to section 182(1) of the Companies Act, 2013, a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

Thus,

1. ABCD Ltd. being a government company cannot contribute to political parties.
2. EFG Ltd., being in existence for more than 3 years (2013 to 2018), may contribute Rs. 5 Lakhs to any political party.
3. RST Ltd. being in existence for more than 3 years (2014 to 2018), may contribute Rs. 3 Lakhs to any political party.
4. According to section 182(3A), the contribution under section 182 shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account. Thus, Rama Ltd. cannot make political contribution of Rs. 2,000 in cash.

Question 31:

The Articles of Association of M/s. DEF Limited (Non-Government Company) restricts the Company to contribute to National Defence Fund in any financial year for a sum not exceeding Rs. 5 lakhs. The Articles is silent about contribution to bonafide Charitable Fund and to a Political Party. The Company earned net profit during the last five financial years as under:

Financial Year	Net Profit (Rs. in Lakhs)
2018-19	45
2017-18	25
2016-17	20
2015-16	15
2014-15	10

The Board of Directors proposes to contribute in July 2019 for the first time during the financial year 2019-20:

i. Rs. 7 Lakhs to National Defence Fund
ii. Rs. 3 Lakhs to a bonafide Charitable Fund
iii. Rs. 5 Lakh to a Political Party

The Company Seeks your advice on the following matters in respect of each of the above proposals under the provisions of the Companies Act, 2013.

i. The appropriate approving authority:
ii. The quantum of contribution that can be made;
iii. The mode of payment of such contribution

[Nov 2019 - New]

Answer:

i. Appropriate approving authority

a. In case of National Defence Fund: As per section 183(1), the Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

b. In case of Bonafide Charitable Fund: As per section 181(1), the Board of Directors of a company may contribute to bona fide charitable and other funds. However, prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

c. In case of Political Party: As per section 182(1), a company may contribute any amount directly or indirectly to any political party. However, no such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall, subject to the other provisions of this section, be deemed to be justification in law for the making of the contribution authorised by it.

ii. Quantum of contribution

a. In case of National Defence Fund: As per section 183, the Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

Hence, the company can contribute Rs. 7 Lakhs to National Defence Fund in spite of restriction by the company to contribute in any financial year for a sum not exceeding Rs. 5 lakhs as the Section 183 prevails over Articles of the company and there is no limit on such contribution.

b. Bonafide Charitable Fund: According to section 181, the Board of Directors of a company may contribute to bona fide charitable and other funds. However, prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

Average Net profit: Rs. 30 Lakhs [(45+25+20)/3] 5% of average net profit: Rs. 1.5 Lakhs

Since, the amount of contribution exceeds five per cent of its average net profits for the three immediately preceding financial years, hence it requires prior permission of the company in general meeting for contributing Rs. 3 Lakhs to a bonafide Charitable Fund.

c. Political party: Section 182 specifies that a company other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

Hence, the company can contribute Rs. 5 Lakhs to a political party.

iii. Mode of payment of such contribution:

a. National Defence fund: No mode of payment is provided under section 183.

b. Bonafide Charitable Fund: No mode of payment is provided under section 181.

c. Political Party: According to Section 182(3A), notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account.

However, a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.

Question 32:

Apex Ltd. is an unlisted Public Company and having 10 Directors on its Board. At a duly convened meeting of the Board of Directors of the Company held on 14th August, 2020, it was proposed to approve entering into contracts or arrangements with 'E Limited' and 'Q and Associates', a partnership firm. Mr. Y and his spouse hold 2 and 1 shareholding respectively in E Limited. Mrs. Z, spouse of Mr. Z is a partner in Q and Associates. Mr. Y and Mr. Z are the Directors of Apex Limited. The board meeting was attended by five directors including Mr. Y and Mr. Z. All the directors participated in the discussions and voted in favor of the resolution except Mr. Y. The contracts were approved. However, Mr. Y and Mr. Z disclosed their respective interests in the contracts. The earlier Board Meeting was held on 25th May, 2020. In the light of the provisions of the Companies Act, 2013 (the Act), examine the following:

i. Whether the Board Meeting that was held and the transactions therewith are within the provisions of the Act?

ii. Under what circumstances any arrangement entered into by the Company in violation of Section 192 of the Companies Act, 2013 dealing with non-cash transactions involving directors shall not be held voidable? [Jan-21 (New)]

Answer:

i. According to section 173 of the Companies Act, 2013, every company shall hold minimum of 4 meetings every year but the gap between two consecutive board meetings shall not be more than 120 days.

In the given question earlier Board Meeting was held on 25th May, 2020. The next board meeting was held on 14th August, 2020. Thus, this provision has been complied as the gap between two meetings is less than 120 days.

As per section 174 of the Companies Act, 2013, the quorum for a Board Meeting shall be 1/3rd of its total strength or two directors whichever is higher. Where at any time, the number of interested director exceeds or is equal to 2/3 of the total strength, the quorum shall be the number of directors who are present and not interested directors.

According to section 184 of the Companies Act, 2013, every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in the manner prescribed in Rule 9 of the Companies (Meetings of Board and its Powers) Rules, 2014.

The section further provides that, a director of a company shall make a specific disclosure of interest whenever he, in any way, whether directly or indirectly, is concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:

(a) with a body corporate in which such director or such director in association with any other director holds more than 2% shareholding of that body corporate; or

(b) with a body corporate in which such director is a Promoter, Manager, Chief Executive Officer; or

(c) with a firm or other entity in which, such director is a partner, owner or member.

According to Section 184 (5) (b), the provisions of Section 184 regarding disclosure by interested director shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the either company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

As in the given case, Mr. Y holds 2% shareholding (his wife shareholding shall not be included) in E Limited. Since, his shareholding is not more than 2%, therefore, provisions of disclosure of interest shall not apply to him.

Similarly, the provisions related to disclosure of interest are not applicable on Mr. Z (as his wife is a partner in Q and Associates and he disclosed his indirect interest).

As per the question five directors including Mr. Y and Mr. Z (all uninterested) attended the board meeting which is more than 1/3rd of the strength. Thus, this provision has been complied.

Therefore, the meeting convened on 14-08-2020 is valid.

The provisions of section 184 of the Companies Act, 2013 are also complied with, and so the transactions of the meeting held on 14th August, 2020 are in order.

However, in terms of section 188 of the Companies Act, 2013, no contract or arrangement, in case of a company having paid up share capital of not less than such amount or transactions not exceeding such sums, as may be prescribed shall be entered into except with the prior approval of the company by a resolution.

ii. Where any arrangement entered into by the company in violation of the section 192(3) of the Companies Act, 2013 dealing with non-cash transactions involving directors, shall not be voidable:
   a. If the restitution of any money or other consideration which is subject matter of the arrangement is no longer possible and the company has indemnified by any other person for any loss or damage caused to it or
   b. If any rights are acquired bonafide for value and without notice of the contravention of the provisions of this section by any other person.

Question 33:

ASP Limited, a listed company secured residential accommodation for the use of its Managing Director by entering into a lease arrangement with the landlord. As per the terms of the agreement, ASP Limited deposited a sum of Rs. 10,00,000 as rental advance with landlord. Referring to the provisions of the Companies Act, 2013, decide whether the said deposit amount be considered as a loan given to the Managing Director.

[Nov 2019 - Old]

Answer:

Relevant provision:

According to Section 185 (1) of the Companies Act, 2013, no Company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by-

a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
b) Any firm in which any such director or relative is a partner.

Given case and analysis:

In the given situation, ASP Limited has secured a residential accommodation (for which the company has deposited Rs. 10, 00,000 as rental advance) for use of its Managing Director. The company in any way has not advanced any amount to the Managing director (MD), directly or indirectly. Further, it is the Company and not the MD who has entered into the lease agreement. Thus, the disposal of the said accommodation is at the hands of the company.

Conclusion:

Hence, in the light of the facts of the question and the provision of law, the said deposit amount cannot be considered as a loan given to the Managing Director.

[Case Law -Dr Fredie Ardesher Mehta vs Union of India (1991) J 70 Company case 210 (Bom)].

Question 34:

Can a holding company advance any loan to its wholly owned subsidiary company? What are the relevant provisions of the Companies Act, 2013 with regard to granting of loans by holding company to its wholly owned subsidiary company? Mention the penalties for the contravention of the provisions of the Company Act, 2013.

[Nov 2016 - Old]

Answer:

According to section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

However, the above restriction does not apply where any loan made by a holding company to its wholly owned subsidiary company, or any guarantee given, or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company.

Provided that the loans made by the holding company to its wholly owned subsidiary, should be utilized by the subsidiary company for its principal business activities.

Thus, a holding company can grant loan to its wholly owned subsidiary company in accordance with the provisions of section 185 of the Companies Act, 2013.

Penalty for contravention: If any loan is advanced or a guarantee is given or provided in contravention of the provisions of section 185, the following penalties shall be leviable-

i. On Company: Minimum- 5 lakhs and maximum- 25 lakhs
ii. On defaulting director and the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person:
Imprisonment- Maximum 6 months, or fine- minimum- 5 lakhs and maximum- 25 lakhs, or Both

Question 35:

Queen Construction Company Ltd. acquired 60 % of the equity paid up share capital of ABC Ltd. Queen Construction Ltd. has planned to expand its operation for which additional fund is required. The Board of Directors decided to avail additional exposure of Rs. 10 crores from the Bank.

The following data is furnished as on 30th June 2017.

Particulars	Rs In crores
Authorised Equity Share Capital	25
Issued and Subscribed Equity Share Capital	22
Paid up Equity Share Capital	20
Capital Reserve	2
Revaluation Reserve	1
General Reserve	3
Open cash credit Limit (for working Capital requirement) with the Bank repayable in 3 months	5
Loan obtained under the Hire Purchase agreement for acquiring vehicles.	1
Long-term Borrowing from Banks and other parties	15

ABC Ltd. approached Queen Construction Ltd. to grant a loan of Rs. 25 Lakhs and stand as guarantor for repayment of loan Rs 10 Lakhs to be sanctioned by a Bank.

The two loans (25 Lakhs plus 10 Lakhs) will be utilized by ABC Ltd. for its principal business activities.

You, being the Financial Advisor of the company, advise the Board of Directors about the procedure to be followed to avail additional exposure of Rs. 10 Crore from the Bank. Also evaluate whether the loan guarantee given by Queen construction Ltd. to ABC Ltd. Is valid according to Section 185 of the Companies Act, 2013.

[May-2018, New]

Answer:

Borrowings by the Board as per provision of Sec 180:

As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a Company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid-up capital of the company and its free reserves. Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business.

According to the above provisions, the Board of Directors of Queen Construction Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

Particulars	Rs. in cr.
Paid up Equity Share Capital (A)	20
General Reserve (being free reserve) (B)	3
Capital Reserve (Not a free reserve)	-
Revaluation Reserve (Not a free reserve)	-
Aggregate of paid up capital and free reserve (A)+(B)	23
Total borrowing power of the Board of Directors of the company, i.e.., 100% of the aggregate of paid up capital and free reserves (C)	23
Less: Amount already borrowed as long term loan (incl. hire purchase) (D)	16
Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. (C) - (D)	7

In the present case, the Directors of Queen Construction Limited by a resolution passed at its meeting decide to borrow an additional sum of Rs. 10 Crores from the bank. Hence, the borrowing will be beyond the powers of the Board of directors.

Thus, the Management of Queen Construction Limited., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1) (c) of the Companies Act, 2013. Then, the borrowing will be valid and binding on the company and its members.

According to Section 185 of the Companies Act, 2013, no Company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

However, the above sub-section shall not apply to any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary Company. [Section 185(1)(c)].

It is also provided that the loans made under this clause are utilized by the subsidiary company for its principal business activities.

In the instant case, Queen Construction Ltd. acquired 60% of the equity paid up share capital of ABC Ltd. Hence, ABC Ltd. is a subsidiary company of Queen Construction Ltd. [as per Section 2(87)]

Hence, as per Section 185(1)(c), granting of loan of Rs. 25 Lakhs by Queen Construction Ltd to ABC Ltd is not valid but providing of guarantee for repayment of loan of Rs. 10 lakhs to be sanctioned by bank is valid.

Question 36:

Mrs. Anjana is a director of Unique Ltd., a professionally managed, profit making, dividend paying Company. The said company is having sufficient liquid funds and are remaining idle as of now. With a view to deploy the idle funds, the Company proposes to provide either loans or invest in the shares of other companies or both. Considering this the Board of Directors delegated the powers to the Managing Director to invest up to 15% of the paid-up capital without passing a special resolution.

In the light of Companies Act, 2013 analyze whether the action of board is correct?

[Jan-21 - New]

Answer:

As per section 186(2) of the Companies Act, 2013, no company shall directly or indirectly—

a) give any loan to any person or other body corporate;
b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account whichever is more.

According to section 186(5) of the Companies Act, 2013, no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where term loan is subsisting, is obtained.

Thus, a unanimous resolution of the board is required. The section 186 does not provide for delegation.

Hence, the proposed delegation of power to the managing director to invest surplus funds of the company in the shares of some other companies is not correct.

Note:
Although Section 179 provides the Board with the power to delegate work such as - Borrow money, loan or invest money but Section 186(5) requires loan or investment to be approved by Board in the meeting.
Section 179 does not override Sec 186 and hence, the conclusion is power to give loan or make investment cannot be delegated.

Question 37:

Star Limited proposes to acquire 15% equity shares of Gain Investments (P) Limited for 45 lakhs which has a face value of Rs. 35 lakhs. Star Limited has an outstanding loan of Rs. 15 lakhs to a public financial institution and had not defaulted in the repayment of loan instalments stipulated in the loan agreements. Based on the following financial data. Advise Star Limited about the legal position regarding the allowability of the proposed investment under the provisions of the Companies Act, 2013.

	(Rs. In Crores)	
	Star Ltd.	Gain Investment (P) Ltd.
Authorized Capital	1.00	3.00
Paid up Share Capital	0.50	2.00
Free Reserves	0.20	1.50

As on the date of proposition, Star Ltd. does not hold any shares of any company

[Nov-17, Old]

Answer:

Relevant provision:

According to Section 186(2), no company shall directly or indirectly acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more. Where the giving of any loan or guarantee or providing any security or the acquisition exceeds the limits specified in Section 186(2), prior approval by means of a special resolution passed at a general meeting shall be necessary.

According to Section, 186(5), no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

However, prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in sub-section (2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

Analysis and conclusion:

In the given question, Star Limited has proposed to acquire 15% equity shares of Gain Investments (P) Limited for Rs. 45 lakhs.

Star Limited can make a maximum investment of Rs. 42 lakhs [(0.5+.2)*60% or (.2)*100%, whichever is more]. Since, the investment proposed by Star Limited in Gain Investment (P) Limited is 45 lakhs, prior approval by means of a special resolution passed at a general meeting shall be necessary.

Further, though Star Limited has not defaulted in the repayment of loan instalments of the loan taken from public financial institutions, but the amount of investment proposed exceeds the limit calculated in accordance with the provision specified in section 186(2), it will have to take prior approval of the public financial institution also.

Question 38:

Soft and Secure Lenders Limited, has convened a Board Meeting on 25th October 2016. One of the items of the agenda is to approve the grant of loan of Rs. 20 crores to Easy Going Industries Limited, for expansion of its business activities. At the Board Meeting, out of the total of six Directors of the lending company, five directors were present and except one director, the remaining four directors approved the grant of loan of Rs. 20 crores to Easy Going Industries Limited. The borrowing company has taken loans from a public financial institution and also deposits from public. Examine the loan proposal with reference to the provisions of the Companies Act.

[Nov 2016]

Answer:

Loan by company: The given problem is based on the Section 186 of the Companies Act, 2013. According to section 186 (2) of the Companies Act, 2013, no company shall directly or indirectly —

i. give any loan to any person or other body corporate;
ii. give any guarantee or provide security in connection with a loan to any other body corporate or person; and
iii. acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding 60% of its paid-up share capital, free reserves, and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Further, Section 186 (5) of the Companies Act, 2013 provides of unanimous resolution that is required for grant of loan to the borrowing company. Any investment shall be made or loan or guarantee or security given by the company only after when the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting.

Facts in the given problem states that Soft and Secure Lenders Limited convened a board meeting and was to approve grant of loan of Rs. 20 Crore. Considering the aforementioned provisions, since the approval for the grant of loan has not been sanctioned by passing of resolution at a meeting of the Board with the consent of all the directors present at the meeting, so loan proposal is not in compliance with the Companies Act, 2013.

Question 39:

ASK Housing Finance Company Limited are prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited subject to the condition that the loans are guaranteed by M/s. NEWS Pharmacy Limited. M/s NEWS Pharmacy Limited is not a listed company and the company will be exceeding the limits prescribed under the Companies Act, 2013 by providing the guarantees. Advise the company about this legal requirement under the Companies Act, 2013 to give effect to the above proposal. What would be your advice if the company was required to provide security instead of guarantee?

[May 2018 - Old]

Answer:

As per Section 186(2) of the Companies Act, 2013, no company shall directly or indirectly

a) give any loan to any person or other body corporate;

b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,

exceeding sixty per cent of its paid-up share capital, free reserves and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more, except with the prior approval by means of a special resolution passed at a general meeting.

However, explanation provided in Section 186(2) of the Companies Act, 2013 states that for the purposes of this sub-Section, the word "person" does not include any individual who is in the employment of the Company.

As per the given facts, ASK Housing Finance Company Limited was prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited on the condition that such loans are guaranteed by the M/s NEWS Pharmacy Limited exceeding the limits prescribed in the Companies Act, 2013.

Here, the loans are to be guaranteed by M/s. News Pharmacy Limited for its employees which falls within the purview of the explanations which includes guarantees given for the employees. So, Section 186(2) shall not be applicable to it. Hence, it can give the guarantee without any condition on the limits imposed in the Section 186(2). Hence, there are no legal requirements to be fulfilled under the Companies Act, 2013 to give effect to the above proposal.

Answer will remain the same, even if the company provides security instead of guarantee as the provisions of the Section 186(2) are applicable for providing security also.

Question 40:

Vogue Limited has an Authorised Capital of 250 lakhs and paid-up capital of 200 lakhs. The free reserves are there to the tune of 150 Lakhs. The company has advanced a loan of Rs 160 Lakhs to other companies as on 30th November 2018. Now the company proposes to advance an interest free loan of Rs. 60 Lakhs to its wholly owned subsidiary Fashion Limited.

Discuss the validity of the proposed transaction with reference to the restrictions imposed by the applicable provisions of the Companies Act, 2013 and relevant Rules made thereunder.

[May 2019, Old]

Answer:

According to Section 186(2) of the Companies Act, 2013, no Company shall directly or indirectly give any loan, guarantee, or provide security to other body corporate, exceeding 60% of its paid-up share capital, free reserves, and securities premium account or one hundred per cent of its free reserves and securities premium account, whichever is more

Section 186(3) provides that where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (2), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting:

However, where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply.

Further, sub- section (7) provides that no loan shall be given under Section 186 at a rate of interest lower than the prevailing yield of one year, three-year, five year or ten-year Government Security closest to the tenor of the loan.

In the given question, Vogue Limited has to provide interest free loan to its wholly owned subsidiary Fashion Limited. The maximum amount of loan that Vogue Limited can provide to other body corporate is Rs. 210 lakhs [Higher of {60% of (200+150)} or {100% of 150}]. But Vogue Limited has already provided loans of Rs. 160 lakhs to other companies. Thus, if Vogue Limited proposes to provide loan beyond of Rs. 50 lakhs (210-160 lakhs) it requires shareholders' approval.

However, since Fashion Limited is a wholly owned subsidiary of Vogue Limited, it can give loan to Fashion Limited without approval of shareholders.

However, the Companies Act, 2013, prohibits giving interest free loan, Vogue Limited cannot provide an interest free loan even to its wholly owned subsidiary.

Question 41:

Y Ltd. entered into a contract with Z Ltd. which has a PUC of Rs. 50 lakhs. One of the directors of Y Ltd. is holding equity shares of the nominal value of Rs. 50,000 in Z Ltd. but he did not disclose hos interest at the appropriate Board meeting. Is the concerned director liable for punishment for such non-disclosure?

[ICAI - Module]

Answer:

As per section 184 (2) of the Companies Act, 2013, the disclosure of interest by directors is not required in any contract or arrangement between two companies where any of the directors of one company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

In the present case, the holding of the director of Y Ltd. in Z Ltd. is only 1% [i.e. (50,000/50,00,000*100 = 1%] which is less than 2%.

Therefore, he is not liable for any punishment if he does not disclose his interest regarding holding of equity shares in Z Ltd.

Question 42:

Mr. Rajat, a Managing Director of XYZ Ltd. a listed company, authorised by Mr. Giri, the director in the Board of the Company, to enter into contact with Mr. Kushal, a brother in law of Mr. Giri for supply of furniture's during the setup of new branch in the city. Mr. Rajat enquires with Mr. Giri for seeking approval of the Board. Mr. Giri said that there is no need for such approval however we may get it ratified by the Board in the meeting.

Examine the given situations in the light of the relevant provisions of the Companies Act, 2013 and answer the following:

i. Validity of the said contract entered by the Mr. Rajat with Mr. Kushal for supply of furniture's for setup of new office.
ii. Consequences in case of non -compliance for seeking of approval by the Board.

[MTP May 21 (New)]

Answer:

Relevant provision:

As per section 188 (3) of the Companies Act, 2013, where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into, such contract or arrangement shall be voidable at the option of the Board or, as the case may be, of the shareholders and if the contract or arrangement is with a related party to any director, or is authorized by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

Given case:

As per the facts, Mr. Rajat, a Managing director, was authorized by Mr. Giri, the director in the Board of the XYZ Ltd., to enter into contract with Mr. Kushal, a brother in law of Mr. Giri for supply of furniture's during the setup of new branch in the city. Mr. Rajat enquires with Mr. Giri for seeking approval of the Board as per the requirement of the law and Mr. Giri stated that there is no need for such approval however we may get it ratified by the Board in the meeting.

Analysis and conclusion:

As per the requirement of the provision in the given case, contract entered into by a Mr. Rajat, on being authorised by Mr. Giri with Mr. Kushal, who is his relative without obtaining the consent of the Board and is required to be ratified by the Board within the three months from the date on which such contract was entered into.

i. Therefore, the said contract entered by the Mr. Rajat with Mr. Kushal for supply of furniture's for setup of new office can be said to valid if same has been ratified by the Board within the 3 months from the date on which such contract made.

ii. In case of non-compliance of the above requirement, such a contract shall be voidable at the option of the Board and if the contract is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

It shall be open to the company to proceed against a director concerned (i.e., against Mr. Giri and Mr. Rajat) who had entered into such contract in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract.

Such concerned directors of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall be liable to a penalty of twenty- five lakh rupees as XYZ Ltd, is a listed company.

Author's Note:
The answer of ICAI seems to be incorrect because in the given case, Mr. Kushal is out of purview of the definition of Relative (brother in law is not included in Sec 2(77)) and hence, the transactions altogether is outside purview of Sec 188. However, assuming that this an error on the part of the question maker, for practice, we will assume that Mr. Kushal is a brother and not brother in law and hence relative and then answer accordingly.

Question 43:

The Board of Directors of M/s ABC Motors Ltd. made the following appointments at its meeting held on 1st January 2018:

i. Mr. X, a director of its subsidiary company, namely, M/s ABC Forgings Ltd., was appointed as Purchase Manager on a consolidated salary of Rs. 1,00,000 per month with effect from 1st January 2018.

ii. Mr. Y was appointed as the Sales Manager on a consolidated salary of Rs. 1, 50,000 per month with effect from 1st January 2018.

Answer the following, explaining the relevant provisions of the Companies Act:

1. Does the appointment of Mr. X require the approval of the members in a general meeting of the company?
2. Mr. P, a relative of Mr. Y was appointed as a Director of M/s ABC Motors Ltd. On 1st August 2018. Does it affect the continuation of Mr. Y as the Sales Manager?

[Nov 2018, Old]

Answer:

Relevant provision:

Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT) with related party.
As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes, any company which is holding, subsidiary or an associate company of such company.

According to this section 188, except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as prescribed under Rule 15(1) of the Companies (Meetings of Board and its Powers) Rules, 2014, no company shall enter into any contract or arrangement with a related party with respect to the such transaction where there is a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company.

1. In the given case, Mr. X, a director of M/s ABC Forgings which is a subsidiary of M/s ABC Motors Ltd. was appointed as purchase manager on salary of 1,00,000 per month.

Accordingly, related party's appointment (i.e., of Mr. X) to an office or place of profit in M/s ABC Motors Ltd. will not require the approval of the members in a general meeting of the company as the monthly remuneration is not exceeding Rs. 2.5 lakh. Such transactions as to a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company shall require consent of the Board of Directors given by a resolution at a meeting of the Board.

2. As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes, a director or his relative. So, Mr. P, appointed as a director of M/s ABC Motors Ltd. on 1st of August, 2018, was a relative of Mr. Y who was appointed as sales manager in the M/s ABC Motors Ltd. This falls within the purview of Section 188 of the Companies Act, 2013 which relates with the related party transactions (RPT) with related party. Yes, the continuation of Mr. Y as a sales manager will lead to interest of conflict and will affect the continuation unless ratified by the board [Section 188 (3)].

Question 44:

M/s Tristar Ltd. (an unlisted public limited company) with the annual turnover of Rs. 700 crores entered into a contract of purchasing of raw material from M/s. PTC Pvt. Ltd. during the year 2018. M/s Tristar Ltd. appointed Mr. Sudhir, a Director of the Company, to act in this deal of transaction on behalf of the company. Mr. Sudhir is also one of the members of M/s PTC Pvt. Ltd. Mr. Sudhir settled the said transaction of purchase for Rs. 85 crores and entered into the contract. After a few transactions executed under the contract, the Board of M/s Tristar Ltd. finds degradation in the quality of the raw material supplied. Further, in a board meeting this contract was challenged considering it as a related party transaction and in contravention to section 188 (1) of the Companies Act, 2013 read with rules framed thereunder. During the period Mr. Sudhir was appointed as director in a newly incorporated company M/s Raaga Limited.

In the light of the given facts, examine the following situations as per the Companies Act, 2013.

1. What is the legal position of the contract entered between M/s Tristar Ltd. through its director Mr. Sudhir, and M/s. PTC Pvt. Ltd.?
2. Is there any contravention of section 188 (1)? If yes, then state the liability of the wrongdoer.
3. Comment upon the appointment of Mr. Sudhir as a Director in M/s Raaga Limited.

[May 2019 - New]

OR

XYZ, Ltd. with the turnover of Rs. 500 crores entered into a contract of purchasing of raw material from a private company. XYZ Ltd. appointed Mr. Khurana, a director of the company, to act in this deal of transaction. Mr. Khurana is also a member of that private company. He settled the said transaction into 60 crore and entered into the contract. After few transactions made under the contract, XYZ Ltd. finds degradation in the quality of the product supplied. In the Board Meeting, this contract was challenged considering it as a related party transaction and in contravention to section 188(1). During this period, Mr. Khurana was appointed as a director in newly setup, PQR Ltd.

In the light of the given facts, examine the following situations as per the Companies Act, 2013.

i. What is the legal position of the contract entered between XYZ Ltd through Mr. Khurana, and the private company?
ii. Is there any contravention of section 188 (1)? If yes, then the liability of the wrong doer.
iii. Comment upon the appointment of Mr. Khurana as a director in PQR Ltd.

[MTP - Oct 2018 - New]

Answer:

Given case:

As per the given facts, Mr. Sudhir, a director of M/s Tristar Ltd., was also a member of M/s PTC private Ltd. with which he entered into contract for the purchase of the raw material. In terms of section 2(76) of the Companies Act, 2013, M/s Tristar Ltd. is a related party to M/s PTC private Ltd.

Also, as per section 188(1) of the Act, no company shall enter into any contract or arrangement with a related party with respect to the transaction related to the sale, purchase or supply of any goods or materials or made through an appointment of any agent for purchase or sale of goods, materials, services or property, except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as given in rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014.

However, no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as prescribed in Rule 15(3) of the Companies (Meetings of Board and its Powers) Rules, 2014, shall be entered into except with the prior approval of the company by a resolution. [First proviso to section 188(1)]

A company shall not enter into transactions related to sale, purchase or supply of any goods or materials, directly or through appointment of agent, where the transaction or transactions to be entered into is amounting to 10% or more of the turnover of the company except with the prior approval of the company by a resolution.

Since in the given case, M/s Tristar Ltd. has turnover of Rs. 700 crores. The transaction of purchase settled by Mr. Sudhir, is Rs. 85 crore which is more than 10% of the turnover (i.e., 700 crores x10/100= 70 crore). Neither M/s Tristar Ltd. had taken prior approval of the company by a resolution, nor it was ratified by the shareholders at a meeting within three months from the date on which such contract or arrangement was entered into. [Section 188(3)]

i. So, in terms of the above provision, this contract is of voidable nature at the option of the shareholders according to section 188(3) of the Companies Act, 2013.
ii. Contravention of Section 188(1): Yes, as per the answer given under Part (i), there is a contravention of section 188(1).

Following is the liability of the Sudhir, Director of M/s Tristar Ltd:

Section 188(3) specifies, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it. Therefore, M/s Tristar Ltd, may proceed to recover loss.

Section 188 (4) provides that it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

Penalty: Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall be punishable with fine of Rs. 5 lakhs (As M/S Tristar Ltd. is not a listed co.)

iii. Appointment of Director in M/s Raaga Ltd.:

As per section 164(1)(g) of the Companies Act,2013, a person shall not be eligible for appointment as a director of a company, where he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years;

In the given instance, Mr. Sudhir was not convicted rather only the contract was challenged in the board meeting considering it as a related party transaction which is in contravention to section 188(1) and may attract penalty in terms of Section 188(5) against the offence dealt with related party transaction hence Mr. Sudhir remains eligible to be appointed as a director of M/s Raaga Ltd.

Question 45:

The register of contracts or arrangement under Section 189 of the Companies Act, 2013 is maintained at the Registered office of Fortune Ltd. under the custody of the Company Secretary. The AGM was held in different place but in the same town where the registered office is situated. Mr. Semar, a shareholder of the company and Mr. Raj, proxy of a shareholder insisted on producing the said register at the commencement of the AGM for inspection. The Company Secretary refused to produce the register stating that being the statutory register it has to be maintained at the registered office only. Examine whether Mr. Semar and Mr. Raj will succeed in their attempt under the provisions of the Companies Act, 2013?

Also identify the particulars to be disclosed to the members of a company to pass a resolution approving any payment by way of compensation for loss of office of a director as per the provisions of Section 191 of the Companies Act, 2013 read with Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014.

[May 2018, New]

Answer:

a) Place of maintenance of Register of Contracts or Arrangements:

As per Section 189 of the Companies Act, 2013, every Company shall keep one or more registers giving separately the particulars of all contracts or arrangements related to disclosure of interest by director as per Section 184(2) or related party transactions given under Section 188.

The register shall be kept at the registered office of the Company, and it shall be-

- open for inspection at such office during business hours and extracts may be taken therefrom, and
- copies thereof as may be required by any member of the company shall be furnished by the company

The register to be kept under this Section shall also be produced at the commencement of every annual general meeting of the Company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting.

As per law, register shall be produced at the commencement of every annual general meeting of the Company and shall remain open and accessible during the meeting to any person having the right to attend the meeting.

Hence, Mr. Semar and Mr. Raj, being a shareholder and proxy of a shareholder, have a right to inspect the register of contract and arrangements during the meeting.

b) Payment by way of compensation for loss of office to Director

As per the Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014, no director of a company shall receive any payment by way of compensation in connection with any event mentioned in 191(1) unless the

following particulars are disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount:

(a) name of the director;
(b) amount proposed to be paid;
(c) event due to which compensation become payable;
(d) date of Board meeting recommending such payment;
(e) basis for the amount determined;
(f) reason or justification for the payment;
(g) manner of payment - whether payable in cash or otherwise and how;
(h) sources of payment; and
(i) Any other relevant particulars as the Board may think fit.

Question 46:

Mr. K is making an arrangement to acquire some stock-in-trade from BL Limited for consideration of some furniture lying with him. He is a Director of JS Limited, which is the holding company of BL Limited. Advise him on the basis of provisions of Companies Act, 2013. What will be the position of the arrangement if there is a contravention of the applicable provisions of the Companies Act, 2013?

[Nov 2016]

Answer:

Section 192 of the Companies Act, 2013 provides for restriction on non-cash transactions involving directors. According to this section:

i. No company shall enter into an arrangement by which—
   a. a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or
   b. the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected,

   unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

ii. The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

   Hence, Mr. K (director of JS Limited, holding company of BL Limited) can follow the above procedure for making an arrangement to acquire some stock-in-trade from BL Limited for consideration of some furniture lying with him.

iii. Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless-
   a. the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or
   b. Any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

Question 47:

The Board of Directors of Blackstone Ltd. (BL) made the following appointments at its meeting held on 1st January, 2021:

i. Mr. Amir, a Director of its subsidiary Company, namely, Black Ruby Ltd., was appointed as General Manager on a consolidated salary of Rs. 1,75,000 per month with effect from 1st January, 2021.

ii. Mr. Kumar was appointed as the Production Manager on a consolidated salary of Rs. 1, 50,000 per month with effect from 1st January, 2021.

iii. Mr. Pratap, a relative of Mr. Kumar was appointed as a Director of BL on 1st April 2021.

In the light of the provisions of the Companies Act, 2013, critically examine the following:

i. Whether the appointment of Mr. Amir requires the approval of the shareholders of BL at a general meeting?

ii. Does the appointment of Mr. Pratap as a Director of BL affect the continuation of Mr. Kumar as the Production Manager?

[May 21 – New]

Answer:

Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT). Here, as per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes any company which is holding, subsidiary or an associate company of such company. According to this section 188, except with consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as prescribed under rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014, no company shall enter into any contract or arrangement with a related party with respect to the such transaction where there is a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company.

i. In the given case, Mr. Amir, a director of Black Ruby Ltd., which is a subsidiary of Blackstone Ltd., was appointed as General Manager on salary of Rs. 1, 75,000 per month.

   Accordingly, related party's appointment (i.e., of Mr. Amir) to an office or place of profit in Blackstone Ltd. will not require the approval of the members in a general meeting of the company as the monthly remuneration is not exceeding Rs. 2,50,000. Such transactions as to a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company shall require consent of the Board of Directors given by a resolution at a meeting of the Board.

ii. As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes a director or his relative. So, Mr. Pratap appointed as a director of Blackstone Ltd. on 1st April, 2021 was a relative of Mr. Kumar who was appointed as Production Manager in the Blackstone Ltd. This falls within the purview of section 188 of the Companies Act, 2013 which relates with the related party transactions with related party. Yes, the continuation of Mr. Kumar as a Production Manager will lead to conflict of interest and will affect the continuation unless ratified by the Board under section 188(3) of the Companies Act, 2013.

Question 48:

The composition of the Board of Directors of XYZ Limited, an unlisted public company, consists of 8 directors. Mr. Amir, one of the non-executive directors of the company, is a resident of Singapore and therefore, has registered his address in Singapore with the Company for communication and record purposes. The Articles of Association of the Company confers approval of the Board of Directors for promoting eligible person to the

coveted position of General Manager in any stream of the organization. Accordingly, a draft Board resolution for promoting Mr. Amrish as General -Manager (Finance) with effect from the date of approval by the Board has been initiated on 1st March, 2021 and except Mr. Amir, it was circulated to 3 directors by hand delivery through a special messenger, 2 directors by courier, 2 directors by email. The draft resolution was approved by four directors on March 5, 2021, two directors on March 7, 2021 and finally by the Chairman of the Board on March 10, 2021. In the light of the provisions of the Companies Act, 2013 (the Act) examine and decide the following:

(i) What shall be the date of approval of the Board for giving effect to the promotion order of Mr. Amrish?

(ii) Is there any violation of the provisions of the Act in not circulating the draft resolution to Mr. Amrish?

[May 21 – New]

Answer:

Requirements to pass resolution by circulation [Section 175 (1)]: A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation in case:

- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,
- at their addresses registered with the company in India,
- by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and
- has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Provided that, where not less than one-third of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting of the Board.

Rule 5 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

Further, para 6.3.2 of the Secretarial Standard 1 which is mandatory in terms of section 118(10) of the Companies Act, 2013 provides that 'The Resolution, if passed, shall be deemed to have been passed on the last date specified for signifying assent or dissent by the Directors or the date on which assent from more than two-third of the Directors has been received, whichever is earlier, and shall be effective from that date, if no other effective date is specified in such Resolution.

In the instant case, the draft board resolution for promoting Mr. Amrish as General Manager was circulated to 7 directors at their addresses registered with the company in India.

i. Out of 7 directors, 4 directors approved the resolution on 5th March, 2021 and two directors on 7th March, 2021 which meets the requirement of two-third of the directors mentioned in SS1. Hence, the appointment of Mr. Amrish as General Manager deemed to be effective from 7th March, 2021. His appointment was subject to noting in the next Board meeting.

ii. There is no violation of the provisions of the Act in not circulating the draft resolution to Mr. Amir as he has registered his address in Singapore with the company for communication and record purposes and Section 175 clearly talks about circulating the resolution to the directors who have registered their address with the company in India.

Alternate Answer

Requirements to pass resolution by circulation [Section 175 (1)]: A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation in case:

- the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,

- at their addresses registered with the company in India,
- by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and
- has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Rule 5 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax.

In the instant case, the draft board resolution for promoting Mr. Amrish as General Manager was circulated to 7 directors at their addresses registered with the company in India.

i. Out of 7 directors, 4 directors approved the resolution on 5th March, 2021. Hence, the appointment of Mr. Amrish as General Manager deemed to be effective from 5th March, 2021 as the resolution for his appointment was approved by majority on 5th March, 2021 (4 directors out of 7). His appointment was subject to noting in the next Board meeting.

ii. There is no violation of the provisions of the Act in not circulating the draft resolution to Mr. Amir as he has registered his address in Singapore with the company for communication and record purposes and Section 175 clearly talks about circulating the resolution to the directors who have registered their address with the company in India.

Question 49:

PQR Limited, incorporated on 1st April, 2016, an unlisted Public Company has provided the following data from its audited financial statements.

(Rs. in crore)

Financial Year	Paid up share capital as on 31st March	Turnover for the year ended	Aggregate of outstanding loans, debentures and deposits as on 31st March
2016-17	5	100	60
2017-18	5	110	55
2018-19	7	·95	50
2019-20	7	90	45
2020-21	7	75	40

During the FY 2020-21, the liquidity of the Company was highly affected due to closure of the business on account of Covid-19 pandemic. The aggregate outstanding loans, debentures and deposits increased from ` 45 crore as on 31st March 2020 to Rs. 60 crore as on 30th September 2020 and dropped down to Rs. 40 crore as on 31st March 2021. There was no such increase in the aggregate of outstanding loans, debentures and· deposits during the earlier financial years. PQR Limited, which was obligated to constitute an Audit Committee in the Financial Year 2017-18 decided to dismantle it in the FY 2021-22. Now, taking into account the above inputs and in the light of the· provisions of the Companies Act, 2013 (the Act) examine:

i. Whether the company has complied with the provisions of the Act and the rules made thereunder in dismantling the Audit Committee?

ii. What will be your answer in case PQR Limited is a subsidiary of RST Limited, a listed entity?

[May 21 – New]

Answer:

Companies required to constitute an Audit Committee [Section 177 (1) and Rule 6]:

Following companies are required to constitute an Audit Committee:

a. every listed public company;
b. public companies having paid up share capital of 10 crore rupees or more;
c. public companies having turnover of 100 crore rupees or more;
d. public companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

Clarification: Explanation to Rule 4 (1) clarifies that the paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

i. In the instant case, PQR Limited was obligated to constitute the Audit Committee in the Financial year 2017-18 as it was having turnover of Rs. 100 crore and aggregate of outstanding loans, debentures and deposits of Rs. 60 crore on 31 st March, 2016.

   Now, the company has ceased to fulfill the three conditions related to paid up share capital, turnover and aggregate of outstanding loans, debentures and deposits for three consecutive years (as on 31st March, 2018, 31st March 2019 and 31st March 2020). Hence, the company is not required to constitute Audit committee in the financial year 2021-22.

   Hence, the company has complied with the provisions of the Act and rules made thereunder in dismantling the Audit Committee.

ii. <u>If PQR Limited is a subsidiary of RST Limited, a listed entity:</u>
   PQR Limited is a subsidiary of RST limited, a listed entity, is not to be considered as listed company unless registered in the recognized Stock exchange. Also since PQR Limited is a subsidiary and not a wholly -owned subsidiary, no exemption is given to PQR limited under the prescribed class of companies under Rule 4 for constitution of Audit committee. Therefore, PQR Limited has to comply with the provisions of the Act and rules made thereunder for constitution of the Audit Committee.
   However, the answer will remain same in this case also.

Question 50:

Dharma Ltd. in the light of prospective developments in the infrastructure of company decided to have borrowing on long term basis from financial Institutions. In the Board Meeting held on 15th September, 2020, following proposal of borrowing 2, 00, 00,000 from Financial institutions on long-term basis was also presented for consideration. As per the given information, in the light of relevant provisions of the Companies Act, 2013, examine the eligibility of the amount up to which the Board can borrow from Financial institution and the state on the validity of the said proposal.

Following were the Balance Sheets of last three years of Dharma Ltd., containing following facts and figure of financial information :

Particulars	As at 31.03.2018 Rs.	As at 31.03.2019 Rs.	As at 31.03.2020 Rs.
Paid up capital	60,00,000	60,00,000	85,00,000
General Reserve	50,00,000	52,50,000	60,00,000
Credit Balance in Profit & Loss Account	6,00,000	8,50,000	20,00,000
Securities Premium	3,00,000	3,00,000	3,00,000
Secured Loans	20,00,000	25,00,000	40,00,000

[RTP MAY 21]

Answer:

Borrowing from Financial Institutions: As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow money including moneys already borrowed up to an amount which does not exceed the aggregate of paid up capital of the company, free reserves and securities premium. Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Since the decision to borrow is taken in a meeting held on 15th September, 2020, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2020. According to the above provisions, the eligibility of Board of Directors of Dharma Ltd.to borrow up to an amount is calculated as follows:

Particulars	Rs.
Paid up Capital	85,00,000
General Reserve (being free reserve)	60,00,000
Credit Balance in Profit & Loss Account (to be treated as free reserve)	20,00,000
Securities Premium	3,00,000
Aggregate of paid-up capital, free reserves and securities premium	1,68,00,000
Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid-up capital, free reserves and securities premium	1,68,00,000
Less: Amount already borrowed as secured loans	40,00,000
Amount up to which the Board of Directors can further borrow	1,28,00,000

Dharma Ltd. is entitled to borrow Rs.1, 28, 00,000 through board of directors. As in the given case proposal of borrowing was Rs, 2, 00, 00, 000 which is more than eligibility to borrow, therefore, Dharma Ltd, have to seek approval of shareholders in general meeting. As the proposal of borrowing Rs. 2,00,00,000 from Financial institutions on long-term basis was presented for consideration in Board Meeting without approval of shareholders in general meeting, therefore said proposal is invalid.

Question 51:

Atlantic Garments Ltd., is a company engaged in the business of manufacturing of garments for all seasons. The company have in all 14 directors. The first meeting of the Board was held on 15th February, 2020. Thereafter, the subsequent meetings of the Board were held on 29th February, 2020, 25th March, 2020, 30th August, 2020 and 25th December, 2020. In these meetings, the full strength of the Board was present except in the meeting of 25th March, 2020. In this meeting only 4 persons were present.

Decide whether the Board meeting held on 25th March 2020 is valid in compliance with the legal requirements under the Companies Act, 2013. What shall be date of the meeting in case where if meeting could not be held because of quorum.

[MTP and RTP Nov Dec 21]

Answer:

As per given section 174(1) of the Companies Act, 2013 the quorum for a meeting of the Board of Directors of a company shall be one third of its total strength or two directors, whichever is higher, and the participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

Section 174(4) provides that where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

Further explanation to section 174(4) provides that for the purposes of this section, (i) any fraction of a number shall be rounded off as one; (ii) "total strength" shall not include directors whose places are vacant.

Total Strength of directors =14 One-third of 14 = 4.67 Rounded off to = 5 (Five)

As in the meeting scheduled on 25th March 2020, only 4 persons were present, hence due to want of required minimum quorum, the meeting shall have to be adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

The meeting of the Board was not valid as the required quorum was not present in the meeting. In this case, the adjourned meeting was to be held on 1st April, 2020.

Author's Note:

In this question, the meeting held on 20th August is in compliance with Sec 173 (because the gap between 25th March and 20th Aug although exceeds 120 days is less than 180 days. In view of COVID, the max. gap allowed was extended to 180 days. Students - Feel free to mention this point at the end of your answer.

Question 52:

ABC Pvt Ltd. is chemical manufacturing company. Few directors and employees expressed some serious genuine concerns regarding their health issue due to emission of chemical wastes. Though ABC Pvt Ltd. has a vigil Mechanism in place, they are of the opinion that it shall not be mentioned in their website in order to avoid unnecessary cases. The company has borrowed Rupees 60 crore from a bank

(A) How should they address the issue? What are the requirements for companies having an audit committee and a company not having an audit committee with regard to Vigil Mechanism?

(B) Is the company's stand regarding the non-mentioning of the vigil mechanism on website, correct?

[MTP - Dec 2021]

Answer:

According to Section 177(9) of the Companies Act, 2013, a vigil mechanism shall be formed by-

a) Every listed Company and
b) Prescribed classes of companies as per Rule 7 of the Companies(Meetings of Board and its Power)Rules 2014, which are:
    a. The companies which accepts deposits from public
    b. The companies which borrowed money from banks and public financial institutions in excess of Rs. 50 cr.

The main purpose of formation of a vigil mechanism is for directors & employees to address their genuine concerns.

1. In the given case, ABC Pvt Ltd. has borrowed money from bank in excess of the prescribed limit of Rupees 50 crores (60 crores). Hence, they shall have a vigil mechanism in place as per Section 177(9). The directors & employees shall get their concerns regarding their health issues from chemical waste emissions addressed to the vigil mechanism in place. They shall ensure safeguards against victimization of persons who use such mechanism and make provision for direct access to the chairperson of the audit committee appropriately
   In case of Companies with audit committee, the audit committee shall oversee the vigil mechanism through the audit committee and if any of the members have conflict of interest in a given case, they should rescue themselves and other members would deal the matter on hand.
   In the case of companies without Audit committee, the Board of Directors shall nominate a director to play the role of audit committee for the purpose of Vigil Mechanism. Other directors & employees may report their concerns to such nominated director.
2. Section 177 (10) of the Companies Act, 2013, states that it is imperative to disclose the details of establishment of Vigil Mechanism on the website of the company and in Board's report.

In the given case, ABC Pvt Ltd. doesn't to want to include this information on its website fearing they might have to handle more cases.

This is not correct. If it fails to comply with the above provision, it shall be liable for punishment as per section 178(8) prescribing a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of one lakh rupees.

Question 53:

Rich Fragrance Ltd. produces fragrance related products, which are very much popular among the young generation. Anwesha, is the Managing Director of the company. She is drawing a monthly salary of Rs. 5 lakh. Anwesha booked a flat in Mumbai and paid Rs. 5 lakh as booking amount. The cost of the flat is Rs. 85 lakhs. Anwesha have its savings of Rs. 50 lakh and want to avail a loan of Rs. 30 lakhs only from the company.
The company do not have any policy of giving loans and advance to staff. Further, at the time of appointment of Anwesha, as Managing Director, the grant of loan was not part of the terms and conditions of her appointment. Anwesha thought that if the company give her 6 months' salary as an advance, she can use it in purchasing the flat.
Based on the captioned facts, answer the following questions in the light of the Companies Act, 2013:

a. Whether a company may grant loan to Anwesha?
b. If giving of loan is not permissible to the managing director, whether she can be given 6 months advance salary (6 month * Rs. 5 lakh salary per month = Rs. 30 lakh)?
c. What would have been your answer, if the status of the company is of Private Limited?

d. If in the appointment letter to Anwesha, as managing director, there would have been a clause that the candidate may avail house loan facility up to Rs 50 lakh and its notional interest would be considered as an allowance and part of the salary.

Answer:

a. Section 185(3) of the Companies Act, 2013 provides that nothing in sub-section (1) and (2) shall apply to the giving of any loan to a managing director or whole-time director-
   (i) As a part of the conditions of service extended by the company to all its employees; or
   (ii) Pursuant to any scheme approved by the members by a special resolution

   In the given case, at the time of appointment of Anwesha, as Managing Director, providing of loan was not part of the conditions of service. Further, the company is also not having policy of providing loan to its employee. Hence, Anwesha cannot be granted loan.

b. Section 185(1) of the Companies Act, 2013 provides that no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—
   (i) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
   (ii) any firm in which any such director or relative is a partner.

   In the given case, the 6 months advance salary is also part of the loans / advance (indirectly), hence, in terms of Section 185(1)(a), it can't be given.

c. The answer would have been the same. Since section 185(1) starts with the words, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by:
   (i) any director of company, or of a company which is its holding company or any partner or relative of any such director; or
   (ii) any firm in which any such director or relative is a partner.

   Therefore, whether it be a public company of private company or even One Person Company, the provisions of section 185(1) do not permit to grant loans and advances to any director.

   However, section 185(3) provides that sub-section (1) shall not apply, if providing of loans / advances was part of the service conditions of the appointment of the manging director.

d. Yes, in that case Anwesha could have availed the loan up to ` 50 lakhs in terms of section 185(3) of the Companies Act, 2013.

   Section 185 (3)(a)(i) provides that, nothing contained in sub-sections (1) and (2) shall apply to the giving of any loan to a managing or whole-time director as a part of the conditions of service extended by the company to all its employees.

Question 54:

Clause 36 of the Articles of Association of Swasth Medical Pharmacy Limited (SMPL) states the dates on which the Board Meetings shall be held every year and therefore, if Board Meetings are held as scheduled, there is no need to send notice of such meeting to every director. The notice of the meeting shall be sent to every director only if a particular Board Meeting is held on a date which is otherwise than that mentioned in Clause 36. Raghav, one of the directors of the company, feels that it is mandatory to send notice of every Board Meeting to all the directors otherwise it shall be violative of the relevant provisions of the Companies Act,

2013. Analyse the contention of Raghav with reference to the applicable provisions of the Companies Act, 2013.

[MTP - Dec'21]

Answer

The contention of Raghav that the notice of every Board Meeting is to be mandatorily sent to all the directors of the company is to be analysed with reference to Section 173 of the Companies Act, 2013 which deals with 'Meetings of Board'.

According to Section 173 (3) of the said Act, a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Section 173 (4) prescribes that every officer of the company whose duty is to give notice und er Section 173 and who fails to do so shall be liable to a penalty of twenty-five thousand rupees.

It is worth noting that Section 173 (3) makes it mandatory to send written notice of a Board Meeting to every director. It states that a meeting of the Board shall be called by giving not less than seven days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

In view of the above provisions, the contention of Raghav that the notice of every Board Meeting is to be mandatorily sent to all the directors of the company is valid. If the Board Meeting is held on a date prescribed by Clause 36 of the Articles of Association of Swasth Medical Pharmacy Limited and no notice is sent to the directors of the company, it shall be violative of Section 173 (3) of the Companies Act, 2013.

Even Sub-section (4) of Section 173 imposes a penalty of Rs. 25,000 on every officer of the company whose duty is to give notice under Section 173 and who fails to do so.

Thus, notice of the Board Meeting must be sent as per the provisions of Section 173(3) irrespective of what is contained in the Articles otherwise, the officer who is required to send notice but fails to fulfill his duty i.e., does not send notice, shall be liable to a penalty of Rs. twenty-five thousand.

Chapter 3 - Appointment and Remuneration of Managerial Personnel

Question 1:

There are four directors in Two Squares Ltd. Mr. Rao, being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc. Whether as per provisions of the Companies Act, 2013, he will be treated as managing director of the company? Also narrate the procedure of appointment of a managing director in a company.

[May 2017 - Old]

Answer:

Relevant provision

As per Section 2(54) of the Companies Act, 2013, a "Managing Director" is a director who is entrusted with substantial powers of management of the affairs of the company by virtue of:

(i) articles of a company or
(ii) an agreement with the company or
(iii) a resolution passed in its general meeting, or by its Board of Directors, and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

(i) the power to affix the **common seal** of the company to any document or
(ii) to draw and endorse any **cheque** on the account of the company in any bank or
(iii) to draw and endorse any **negotiable instrument** or
(iv) to sign any **certificate** of share or
(v) To direct registration of **transfer** of any share.

Given case

In the instant case, Mr. Rao, a director in Two Squares Ltd. has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc.

Analysis and Conclusion

Hence, according to explanation to section 2(54), Mr. Rao will not be treated as managing director of the company as he is authorized to do administrative acts of a routine nature.

Procedure of appointment of a managing director [Section 196(4)]

1. Subject to the provisions of section 197 and Schedule V, a managing director shall be appointed, and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting.
2. The terms and conditions and remuneration approved by Board of Directors as above shall be subject to the approval of shareholders by a resolution at the next general meeting of the company.

Question 2:

'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2021. The articles also empowered 'X' to appoint a successor. 'X' appointed by will 'G' to succeed him after his death. Examine in this connection

a) Can 'G' succeed 'X' as Managing Director after the death of 'X'?
b) Is it possible for the company in general meeting to remove 'X' from his office of directorship during his lifetime?

[ICAI Practice Manual]

Answer:

Relevant Provision

As per Section 196(2), no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding 5 years at a time. This condition applies to all companies, whether public or private.

As per Section 196(4), the terms and condition s of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be-

a. approved by the Board of directors at a meeting:
b. approved at a general meeting held immediately after the approval by the Board; and
c. approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

However, the provisions of Section 196(4) shall not apply to private company if it has not committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92

Given case and Analysis:

Mr. X was appointed as the managing director for life in accordance with the articles of a private company. This appointment is in contravention of Section 196(2).

Also, if the private company which has appointed Mr. X as the managing director has committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92, there would be contravention of Section 196(2) as well as Section 196(4).

The appointment of Mr. X as the managing director for life is not valid. Since the appointment of Mr. X as the managing director is not valid, he is not entitled to name Mr. G as his successor for the position of managing director.

Conclusion

a) Mr. G cannot succeed Mr. X as the managing director, after the death of Mr. X.

b) Had Mr. X been validly appointed as the managing director, it would have been possible for the company to remove him before the expiry of his term, in accordance with the provisions of Section 169.

   Section 169 empowers a company (whether public or private) to remove any director (including a managing director) by passing an ordinary resolution and after giving a reasonable opportunity heard to the director concerned. A special notice (in accordance with the provisions of Section 115 has to be given to the company for such removal.

Question 3:

ABC Ltd. wants to appoint a Managing Director for the company. Out of the following persons, who can be appointed as a Managing Director in the company as per the provisions of the Companies Act, 2013?

i. Mr. M, a director of the company having the age of 71 years.
ii. Mr. S who been sentenced for a period of 2 months for the conviction of an offence under the Income-tax Act. 1961.
iii. Mr. R who is an undischarged insolvent.

[ICAI MTP]

Answer:

Relevant Provision:

As per Section 196(3), no company shall appoint or continue the employment of any of the following persons as its managing director, whole-time director or manager:

a. A person who is below the age of 21 years or has attained the age of 70 years.
   However, a person who has attained the age of 70 years may be appointed as managing director, whole-time director or manager, if-
   i. Such appointment is made by passing a **special resolution; and**
   ii. The explanatory statement annexed to the notice shall indicate the **justification** for appointing such person.

   Further, even if no such special resolution is passed, the appointment of a person who has attained the age of 70 years may be made, if -
   i. the votes cast in favor of the motion exceed the votes, if any, cast against the motion; and
   ii. The Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company.

b. A person who is an undischarged insolvent or has at any time been adjudged as an insolvent.
c. A person who has at any time suspended payment to his creditors or makes or has at any time made a composition with them.
d. A person who has at any time been convicted by a court (whether in India or outside India) of any offence and sentenced for a period of more than 6 months.

As per Part I of Schedule V, a person shall not be eligible to be appointed as a managing director, whole Time director or manager, without obtaining the approval of the Central Government if:

1. he has been sentenced to imprisonment for any period, or to a fine exceeding Rs. 1,000, for the conviction of an offence under any of the 19 Acts specified .
2. has not completed age of 21 or has attained the age of 70 years.

As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be-

a. approved by the Board of directors at a meeting:
b. approved at a general meeting held immediately after the approval by the Board; and
c. approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

Given case, analysis and conclusion

i. Mr. M has attained the age of 71 years. Therefore, he can be appointed as a managing director only if 196(4) as above is followed

   Further, if Mr. M does not fulfil one or more conditions contained in Part I of Schedule V, his appointment as the managing director shall require the approval of the Central Government.

   However, if Mr. M fulfils all the conditions contained in Part I of Schedule V, no approval of the Central Government shall be required.

   Whether or not Mr. M fulfils the conditions contained in Part I of Schedule V., his appointment as the managing director shall require -
   a. approval of the Board of directors at a meeting of the Board; and

b. Approval of the members at a general meeting held immediately after obtaining the approval of the Board.

ii. Mr. S has been sentenced for a period of 2 months for the conviction of an offence under the Income-tax Act, 1961.

Income-tax Act, 1961 is one of the 19 Acts specified in Part I of Schedule V, and so Mr. S cannot be appointed as a managing director in accordance with Part I of Schedule V. However, Mr. S shall not be disqualified for appointment as a managing director as per Section 196(3), since he has been sentenced to imprisonment for 2 months only, and not for more than 6 months.

Since Mr. S does not fulfil the conditions specified in Part I of Schedule V, he may be appointed as the managing director with the approval of the Central Government. Before making an application to the Central Government, his appointment shall have to be -

a. approved by the Board of directors at a meeting of the Board; and
b. approved by the members at a general meeting held immediately after obtaining the approval of the board.

iii. Mr. R is an undischarged insolvent. So, he is disqualified for appointment as a managing as per Section 196(3). Accordingly, he cannot be appointed as a managing director.

Question 4:

You are a leading Chartered Accountant advising corporates covering various aspects inter alia on Corporate and Economic Laws, Corporate Tax and related matters with excellent articulation skills and is a much sought after professional on the Board of many reputed Companies. Recently, you have been approached by Dash Board Ltd., a loss making company seeking your advice on the validity of the appointment of Mr. 'X', a turnaround specialist, as the Whole Time Director of the Company w.e.f. 01.01.2020 on which date he would be above 70 years of age. You were further informed that at the extra-ordinary general meeting of the Company held on 15.03.2020, the shareholders have not passed a special resolution with regard to the appointment of Mr. 'X' but the votes cast in favour of the motion exceeded the votes cast against the motion. The Company has provided you the following inputs extracted from the latest audited Balance Sheet as at 31st March, 2020.

S. No.		Amount (Rs. In Crores)
1.	Authorized Equity Share Capital	1,560
2.	Paid Up Equity Share Capital	860
3.	Share Application Money Account (Company is in process of Issue (FPO)) Follow on Public	60
4.	Reserves and Surplus (including General Reserve - 600 & Revaluation Reserve - 80)	680
5.	Long Term Borrowings	800
6.	Investments	160
7.	Accumulated Losses	40

On the basis of the above facts and figures, Dash Board Ltd. seeks your advice in respect of the following under the provisions of the Companies Act, 2013.

i. Validity of the appointment of Mr. 'X' as Whole Time Director.
ii. Compute the effective capital for payment of managerial remuneration.

iii. As the Company is running in losses, state the maximum amount of remuneration that can be paid on yearly basis to each Managerial person other than a managerial personnel functioning in a professional capacity.

iv. How is the remuneration payable to a Whole Time Director determined?

[Jan 2021 - New]

Answer:

i. As per section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as Managing Director, Whole-Time Director or Manager who is below the age of 21 years or has attained the age of 70 years.

However, where a person has attained the age of seventy years, he may still be appointed to such office if a special resolution is passed in this respect. In such a case, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

Further, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

In the given question, the appointment of Mr. X is not valid as special resolution was not passed. However, it could have been regularized (since the votes cast in favour exceeded votes cast against the motion of appointment of Mr. X as Whole Time Director) by seeking approval of the Central Government, which, if satisfied, can accord such approval.

ii. As per Explanation 1 to Section II of Part II of Schedule V "Effective Capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

The effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Calculation of Effective Capital:

Particulars	**Amount (Rs. in crores)**
Paid up Capital (excluding share application money)	860
Add: Reserves and surplus excluding revaluation reserve	600
Add: Long term borrowings	800
Less: Investments	160
Less: Accumulated Losses	40
Effective Capital	**2,060**

iii. Section II of Part II of Schedule V states that where the effective capital is Rs. 250 crore and above, the remuneration payable shall not exceed Rs. 120 lakh plus 0.01% of the effective capital in excess of Rs. 250 crore (i.e., 1.20 cr. + 0.181 cr. = 1.381 crore).

Accordingly, the **total managerial remuneration** payable by Dash Limited to **each** Managerial person other than a managerial personnel functioning in a professional capacity shall be Rs. 1.381 crore.

Provided that the remuneration in excess of the above limits may be paid if the resolution passed by the shareholders, is a special resolution. Further, it has been clarified by an explanation that if the managerial personnel are employed for a period less than one year, the remuneration payable to him shall be pro-rated.

iv. In terms of section 197(4) of the Companies Act, 2013, the remuneration payable to the directors of a company including any Managing or Whole Time Director or Manager, shall be determined in accordance of this section, either:
   a. By the articles of the company
   b. By a resolution or
   c. If the articles so require by special resolution, passed by the company in general meeting.

Question 5:

Mr. X, a Director of MJV Ltd., was appointed as Managing Director on 1st April 2015. One of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31st March 2017, the company suffered heavy losses. The company was not in a position to pay any remuneration, but he was paid 50 lakhs for the year. The effective capital of the company is 150 crores. Referring to the provisions of Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X.

[ICAI Module]

Answer:

Relevant provision:

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to managerial personnel and other directors is linked to the effective capital of the company.

Schedule V states that where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding 120 Lakhs in the year in case the effective capital of the company is between 100 crores and 250 crores.

However, the remuneration in excess of 120 Lakh may be paid if the resolution passed by the shareholders, is a special resolution.

Given case and Analysis:

From the foregoing provisions as contained in Schedule V, the payment of Rs. 50 lakh in the year of loss as remuneration to Mr. X is less than 120 lakhs which is otherwise permissible when the effective capital of the company is between 100 crores and 250 crores.

Conclusion:

Thus, payment of Rs. 50 lakhs being made to Mr. X is within the prescribed limit and can be validly made to him.

Question 6:

Advise Super Specialties Ltd. in respect of the following proposals under consideration of its Board of Directors:

(i) Payment of commission of 4% of the net profits per annum to the directors of the company;

(ii) Payment of remuneration of rupees 40,000 per month to the whole-time director of the company which is running in loss and having an effective capital of rupees 95.00 lacs.

[ICAI Module/CA Final - Old]

Answer:

Under section 197 (1) the limit of total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent of the net profits of that company for that financial year computed in the manner laid down in section 198.

Further, the third proviso to section 197 (1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed one per cent of the net profits of the company, if there is a managing or whole-time director or manager. Whereas in any other case, the remuneration payable to directors shall not exceed three per cent of the net profits.

Therefore, in the given case, the commission of 4% is beyond the limit specified, and the same should be approved by the members by passing a special resolution.

(i) If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including managing or whole time director or manager, any remuneration exclusive of any fees payable to directors except in accordance with the provisions of Schedule V.

Section II of Part II of schedule V provides that where in any financial year during the currency of tenure of a managerial person or other directors, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding 60 lakhs for the year if the effective capital of the company is negative or upto 5 crores.

In the given situation, the proposed remuneration of 40,000 rupees per month (i.e., 4, 80,000 rupees per annum) can be paid to the whole-time director of the company which is running in loss because the remuneration is within the permissible limit of 60 lakhs.

Question 7:

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

1. Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.
2. The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.
3. The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

[ICAI Module/May 2016]

Answers:

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

1. Commission at the rate of 5% of the net profits to its Managing Director, Mr. Kamal:
   Part (i) of the second proviso to section 197(1), provides that except with the approval of the company in general meeting, the remuneration payable to any one managing director; or whole time director or manager

shall not exceed 5% of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the International Technologies Limited is being managed by a Managing Director, the commission at the rate of 5% of the net profit to Mr. Kamal, the Managing Director is allowed and no approval of company in general meeting is required.

2. The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of 1 % of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed 2% of the net profits of the company.

Part (ii) of the second proviso to section 197(1) provides that except with the approval of the company in general meeting, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-
(A) 1% of the net profits of the company, if there is a managing or whole time director or manager;
(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed for directors other than managing or whole time director is 1% of the net profits of the company because the company is having a managing director also. Hence, if the company wants to fix their remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by passing a Special Resolution.

3. The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.

According to section 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either
   i. by the articles of the company, or
   ii. by a resolution or,
   iii. if the articles so require, by a special resolution, passed by the company in general meeting, and

The remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity. Any remuneration for services rendered by any such director in other capacity shall not be so included if:
   a. the services rendered are of a professional nature; and
   b. in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bhatt, a director for professional services rendered as software engineer will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

Also, the International Technologies Limited (a listed company) shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed under the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.

Question 8:

The articles of association of a listed company provides for fixed payment of sitting fee for each meeting of directors subject to maximum of Rs. 30,000. In view of the increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to Rs.45.000 per meeting. Advise the company about the requirement under the companies Act, 2013 to give effect to the Proposal.

[Nov-18-New]

Answer:

Relevant provision:

As per first proviso to Section 197(5) sitting fees payable to a director shall not exceed such sum as may be prescribed.

As per Rule 4 of the companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the sum prescribed is Rs. 1 lakh for every meeting of the Board or any committee of the Board. The said Rule 4 further states that the amount of sitting fees shall be such as may be decided by the Board of directors of the company.

Analysis and Conclusion:

In the present case, it is proposed to increase the sitting fees payable to directors from Rs. 30,000 to Rs. 45,000 per meeting. Since, the amount proposed (i.e., Rs. 45,000 per meeting) is within the ceiling limit prescribed by the Central Government (i.e., Rs. 1 lakh per meeting), such increase is permitted. Such increase in sitting fees shall require:

a. a resolution of the Board; and
b. amendment of articles (to provide that sitting fees upto Rs. 45,000 can be paid by the company) by passing a special resolution.

Question 9:

You are provided with the relevant extract of the financials of Tribhuke Company Limited for the financial year ended as on 31st March 2020 as below:

Particulars	Amount
Authorised Share Capital	10,00,00,000
Issued and Paid up Share Capital	5,00,00,000
Share Premium Account	25,00,000
Reserves and Surplus (Amount of Rs. 25,00,000 is included as Revaluation Reserve)	35,00,000
Term loan repayable after 1 year	12,00,000
Current Borrowings (Cash Credit Loan from Banks)	20,00,000
Non-Current Investments	10,00,000
Accumulated Losses	5,00,000
Preliminary expenses not written off	3,00,000

The company has three managerial persons in its board of directors - Mr. A - Managing Director, Mr. B - Whole Time Director and Mr. C - Director. According to their terms of appointment, in case the company has no or inadequate profits, the managerial remuneration payable to them shall be in accordance with Schedule V. You are required to compute the total managerial remuneration payable considering the provisions of Schedule V.

[ICAI Module]

Answer:

Relevant provision:

Section II of Part II of Schedule V states the provisions applicable for the payment of managerial remuneration in case where the company has no profits, or its profits are inadequate. In such a case, managerial remuneration is payable on the basis of the effective capital as on the last date of the financial year for which the remuneration is payable.

Explanation 1 to Section II of Part II of Schedule V states effective capital means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

Given case and conclusion:

Accordingly, to compute the total managerial remuneration payable, we should first calculate the effective capital.

Particulars	**Amount**
Issued and Paid up Capital	5,00,00,000
Add: Reserves and surplus excluding revaluation reserve	10,00,000
Add: Term Loan repayable after 1 year (excluding working capital loans)	12,00,000
Less: Non-Current Investments	10,00,000
Less: Accumulated Losses	5,00,000
Less: Preliminary Expenses	3,00,000
Effective Capital	**5,04,00,000**

Section II of Part II of Schedule V states that where the effective capital is 5 crores and above but less than 100 crores, the remuneration payable shall not exceed Rs. 84 lakhs. Accordingly, the total managerial remuneration payable by the Companies to three managerial personnel for the year ended 31st March, 2020 shall not exceed Rs. 252 lakhs (Rs. 84 lakhs x 3 managerial personnel).

Note: As nothing is specified about Mr. C, whether he is part-time or non-executive or Independent director. He may be considered as director in whole time employment (i.e., Managerial Personnel).

Question 10:

Mr. Smart, a technocrat aged 71 years and reputed to be a specialist in reviewing sick companies is being considered to be appointed as Managing Director of Downhill Industries Limited. The company has been incurring losses for the past several years and its "effective capital" is Rs. 500 crores. Referring to the provisions of the Companies Act, 2013, discuss:

i. Can Mr. Smart be appointed as Managing Director of the company despite being over 70 years of age? If so, what is the process to be followed to enable this?

ii. What is "effective capital" as per Schedule V of the Act?
What is the maximum permissible remuneration under the Companies Act, 2013?

[Nov 2016 - Old]

Answers:

1. According to section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who is below the age of 21 years or has attained the age of 70 years.

   Provided that, where a person who has attained the age of seventy years may be appointed to such office by passing of a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

   Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

   Hence, Downhill Industries Limited can appoint Mr. Smart aged 71 years as Managing Director of Downhill Industries Limited either by passing Special resolution and justifying his appointment in the explanatory statement annexed to the notice for such motion or in case if the votes casted in favour of the motion is in excess of votes cast against the motion, an application may be made to Central Government for approving such appointment.

2. "Effective Capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long- term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

   Maximum permissible remuneration: According to Section II of Part II of Schedule V, where in any financial year during the currency of tenure of a managerial person or other directors, a company has no profits or its profits are inadequate, it may, without Central Government approval pay remuneration to the managerial person not exceeding 120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores in case where the effective capital is 250 crores and above.

   Hence, the maximum permissible remuneration shall be 120 lakhs plus 0.01% of 250 crore [500 crore - 250 crore]: Rs. 120 Lakhs + 2.5 lakhs is Rs. 122.5 Lakhs.

Question 11:

M/s Star Health Specialties Limited owns a multi-specialty Hospital in Chennai. Dr. Hamilton, a practicing Heart Surgeon, has been appointed by the company as its non- executive ordinary director and it wants to pay him fee, on case to case basis, for surgery performed on the patents at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013.

Advise the company, which seeks to ensure that the same does not contravene any provision of the Companies Act, 2013

[ICAI Module]

Answer:

Relevant provision:

As per Section 197(4), the remuneration paid to a director for rendering services in any other capacity shall also be covered in 'remuneration payable to the directors' under the provisions of Section 197(1).

However, remuneration paid to a director for rendering services in any other capacity shall not be so included, if:

i. the services rendered are of a professional nature; and
ii. in the opinion of the Nomination and Remuneration Committee if the company is required to constitute Nomination and Remuneration Committee under Section 178) or the Board of directors (in any other case), the director concerned possesses requisite professional qualifications.

Given case:

In the given case, M/s Star Health Specialties Limited intends to pay fees for surgery performed by Dr. Hamilton, its non- executive director, on case to case basis.

Analysis and conclusion:

It means that the services rendered by Dr. Hamilton are of a professional nature. Such payment of fees shall not be included in the limits of managerial remuneration specified under Section 197(1), if the Nomination and Remuneration Committee (or in its absence, the Board of directors) passes a resolution to the effect that Dr. Hamilton possesses requisite professional qualifications.

Question 12: Intentionally left blank for future additions

Question 13:

Mr. X, a Director of Sunrise Limited., was appointed on 1st April, 2014, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. The company suffered heavy losses during the financial year ended 31st March, 2018. The company was not in a position to pay any remuneration, but he was paid Rs. 50 lakhs for the year, as paid to other directors. The effective capital of the company is Rs. 150 crores. Referring to provisions of the Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X.

[Nov 2018,Old]

Answers:

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel or other director in case of no profit or inadequate profit is linked to the effective capital of the company.

According to section 197(3) of the Companies Act, 2013 read with Schedule V, where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding Rs. 120 Lakhs in the year in case the effective capital of the company is between Rs.100 crores to Rs. 250 crores.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 50 Lacs in the year as remuneration to Mr. X is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V.

Question 14:

CTC Limited is an unlisted public company having a paid up capital of Rs. 100 crores as on 31st March, 2017. The company made a turnover of Rs. 300 crores for the financial year ended 31st March, 2017. The Articles of Association of the company provides for payment of sitting fee to Directors for each Board Meeting/Committee thereof subject to a maximum of Rs. 40,000 per meeting. The Board of Directors is comprised of Independent Directors and Women Directors also. The Company is having 7 directors in its Audit Committee. Shri PKV, working as Financial Advisor of the company, was designated as Chief Financial Officer from 1st April, 2015.

He retired from service on superannuation on 31st March, 2016. He is in receipt of monthly pension of Rs. 80,000 from the company. It is proposed to appoint Shri PKV as Independent Director of the Company. The Board of Directors proposes to fix sitting fee of Rs. 50,000 per meeting to Independent Director and Rs. 30,000 per meeting to Woman Director, taking into consideration their experience and qualification.

In the light of the provisions of the Companies Act, 2013, advise the Board of Directors in the following matters:

(1) Appointment of Mr. PKV as Independent Director.

(2) Fixing sitting fee of Rs. 50,000 to Independent Director and Rs. 30,000 to Woman Director.

(3) Minimum number of Independent Directors.

(4) Maximum sitting fee to a director.

Assuming CTC Ltd. is a Government Company, what will be your advice in the matter of appointment of Mr. PKV as Independent Director.

[May 18 - Old]

Answers

Relevant provision:

1. Appointment of Mr. PKV as an Independent Director

   According to Section 149(6)(e)(i) of the Companies Act, 2013, an Independent Director shall be a person who, neither himself nor any of his relatives holds or has held the position of a Key Managerial Personnel (KMP) or is or has been an employee of the Company or its Holding, Subsidiary or Associate Company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed.

   In the instant case, the Company, CTC Limited is proposing to appoint Mr. PKV as an Independent Director who was working as Financial Advisor in the Company and then was designated as Chief Financial Officer for the financial year 2015 -2016. Since, he was an employee and also a Key Managerial Personnel in one of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed, Mr. PKV shall not be appointed as an Independent Director in CTC Limited.

2. Fixing sitting fee to Independent Director and Women Director

   As per Section 197(5) of the Companies Act, 2013 along with the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014 a Company may pay a sitting fee to a Director for attending meetings of the Board or Committees thereof, such sum as may be decided by the Board of Directors thereof which shall not exceed one lakh rupees per meeting of the Board or Committee thereof.

   However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

   In the instant case, the Articles of Association of the Company provides for payment of sitting fee to Directors of Rs 40,000.

   Hence, the sitting fee of Rs. 50,000 can be paid to the Independent Director but the sitting fee payable to Woman Director shall not be less than Rs. 40,000. So, the amount of Sitting fee payable to Woman Director has to be increased from Rs. 30,000 (as proposed) to minimum Rs 40,000.

3. Minimum number of Independent Directors

According to the Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class or classes of Companies shall have at least 2 directors as Independent Directors:

1. The Public Companies having paid up share capital of 10 crore rupees or more; or
2. the Public Companies having turnover of 100 crore rupees or more; or
3. the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

However, in case a Company covered as under the above Rule is required to appoint a higher number of Independent Directors due to composition of its Audit Committee, such higher number of Independent Directors shall be applicable to it.

As per Section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with Independent Directors forming a majority.

In the instant case, CTC Limited shall appoint at least 2 directors as Independent Directors as it is covered under Rule 4 of the above Rules since the Company is having a paid up capital of Rs. 100 crores and a turnover of Rs. 300 crores for the financial year ended 31st March, 2017. But since the Company is having an Audit Committee having 7 directors, therefore 4 directors out of 7 must be independent directors (4 is forming majority).

4. Maximum sitting fee to a director:

As per Section 197(5) of the Companies Act, 2013 along with the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014, a Company may pay a sitting fee to a Director for attending meetings of the Board or Committees thereof, such sum as may be decided by the Board of Directors thereof which shall not exceed one lakh rupees per meeting of the Board or Committee thereof. Accordingly, the maximum sitting fee payable to a Director shall not exceed one lakh rupees.

Appointment of Mr. PKV if CTC Ltd is a government company

If CTC Ltd. is a Government Company, then also Mr. PKV shall not be appointed as an Independent Director in CTC Limited because, he was an employee and also a Key Managerial Personnel in one of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed and there are no such exceptions for Government company.

Author's Note:

Please note that Mr. PKV can also be considered to be having pecuniary relationship with the company at present as it is receiving pension of Rs. 80,000 per month from the company. However, it is on the students to take an assumption whether they consider such amount of pension to be less than 10% of total income of Mr. PKV or not. ICAI has assumed that the amount of pension is lower than 10% of total income and hence not considered as pecuniary relation.

Question 15:

Excel limited is a listed company with a turnover of Rs. 60 crores in the FY 2016-2017. The company appoints Ms. R as the woman director on 1st March, 2017. Ms. R is already a director in twelve companies including ten public companies. Also, Ms. R is a chartered accountant in practice.

Further, Ms. R, is a director in Supreme Ltd. where she is acting in a professional capacity. Since lots of proposals for the holding of directorship in various Companies are lined up before Ms. R, so in order to retain her, Nomination and Remuneration Committee proposed to enhance the remuneration of Ms. R from Rs. 4 Lac per month to Rs. 6 Lac per month. However, Supreme Limited was running in losses for last 2 years.

Evaluate, in the light of the given facts, the following situations with reference to the provisions of the Companies Act, 2013.

1) The validity of appointment of Ms. R in Excel Limited.
2) Analysis the proposition of enhancement of the remuneration of Ms. R in Supreme Ltd.

[RTP May 18]

Answer:

1. Number of directorships:

As per section 165(1) of the Companies Act, 2013, no person shall hold office as director, including any alternate directorship, in more than 20 companies at the same time.

Out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

Private companies, that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

In the instant case, Ms. R was appointed as a women director on 1st March, 2017 in Excel Limited. She was already holding directorship in twelve companies including ten public companies.

As Ms. R was already a director in ten public companies, her appointment in Excel Limited is not valid as it will lead to her directorship in 11 public companies.

In this case, either she can choose between the companies in which she wishes to continue to hold the office of director or resign her office as director in the other remaining companies to maintain the limit of holding of directorship.

Moreover, if Ms. R accepts an appointment as a director in violation of this section, she shall be liable to a penalty of two thousand rupees for each day after the first during which such violation continues, subject to a maximum of two lakh rupees

2. Remuneration :

Section II of Part II of Schedule V empowers a company to pay remuneration to its whole- time director, managing director or manager or other directors, even in case of inadequacy of profits or in case of a loss. As per Section II of Part II of Schedule V, the remuneration to a whole-time director depends upon the effective capital of the company. In case of a company having an effective capital of less than Rs. 5 crore, the remuneration payable to whole time director shall not exceed Rs. 60 lakh per year.

In the given case. Supreme Ltd. has suffered losses during the last 2 years. Assuming that Supreme Ltd. has also incurred loss during the financial year for which remuneration is to be paid to Ms. R, and further assuming that Ms. R is a whole time director, managing director or manager in Supreme Ltd., the company (i.e., Supreme Ltd.) can pay remuneration to Ms. R in accordance with Section II of Part I of Schedule V.

The effective capital of Supreme Ltd. has not been given.
Given that the company is in loss since the past few year, it would be fair to assume that the effective capital of Supreme Ltd. is less than Rs. 5 crore, and hence, as per Section II of Part II of Schedule V, Supreme Ltd. can pay a maximum of Rs. 60 lakh per year to Ms. R. However, remuneration in excess of Rs. 60 lakh per year may be paid if the resolution passed by the shareholders approving the remuneration, is a special resolution.

Thus, remuneration of Ms. R can be increased from Rs. 4 lakh per month to Rs. 6 lakh per month only if the resolution passed by the shareholders approving the remuneration is a special resolution.

However, if it is assumed that the effective capital of Supreme Ltd. is Rs. 5 crore or more, then, as per Section II of Part I of Schedule V, Supreme Ltd. can increase the remuneration of Ms. R from Rs. 4 lakh per month to Rs. 6 lakh per month, and the approval of increase in such remuneration from the shareholders shall require an ordinary resolution.

Question 16:

The effective capital of Goldsmith Ornaments Limited at the end of the financial year ending 31st March, 2019 is Rs. 4.5 Crores and it has been increased to Rs. 5.5 Crores on 30th June, 2019 by way of rights issue of equity shares. The company proposes to appoint Mr. Edward and Mr. Robinson as whole time directors for a period of three years with effect from 1st November, 2019. The company proposes to pay a consolidated salary of Rs. 2,00,000 per month to each of them.

Advise the company explaining the relevant provisions, whether it can pay the proposed salary and also on the steps to be taken to comply with the requirements of Section 197 read with Schedule V of the Companies Act, 2013 with regard to the proposed appointment of Mr. Edward and Mr. Robinson as whole time directors.

[Nov 2019 - Old]

Answer:

Relevant provision:

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to managerial personnel is linked to the "effective capital" of the Company.

Schedule V states that where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding Rs. 60 Lakhs in the year in case the effective capital of the company is "Negative" or less than Rs. 5 Crores.

According to explanation II to Schedule V, the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Given case and Analysis:

In the instant case, appointment of Mr. Edward and Mr. Robinson as whole time directors for a period of three years is to be done from 1st November, 2019. Hence, effective capital of Rs. 4.5 Crores as on 31st March, 2019 shall be considered.

From the foregoing provisions as contained in Schedule V, the payment of Rs. 24,00,000 [2,00,000*12] lacs as remuneration to Mr. Edward and Mr. Robinson each as Whole Time Directors is less than Rs. 60 lacs which is permissible and therefore the Company can pay the proposed salary.

Steps for appointment of Mr. Edward and Mr. Robinson as Whole Time Directors

i. No Company shall appoint or re-appoint any person as its Managing Director, Whole-Time Director or Manager for a term exceeding five years at a time.

ii. Subject to the provisions of Section 197 and Schedule V, a Managing Director, Whole-time Director or Manager shall be appointed and the terms and conditions of such appointment and remuneration payable be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next general meeting of the Company and by the Central Government in case such appointment is at variance to the conditions specified in Part I of that Schedule

iii. A notice convening Board or General Meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.
iv. A return in the prescribed form shall be filed within sixty days of such appointment with the Registrar.
v. Subject to the provisions of this Act, where an appointment of a Managing Director, Whole-Time Director or Manager is not approved by the Company at a general meeting, any act done by him before such approval shall not be deemed to be invalid.

Assumption: Nothing is specified in the question that whether the Company is having profits or losses. Calculation of remuneration of managerial personnel according to effective capital is made when there are no profits or in case of inadequacy of profits. As question contains information regarding effective capital, so inference has been drawn that company is having no profits or inadequacy of profits and hence Section II of Part II of Schedule V to the Companies Act, 2013 becomes applicable.]

Question 17:

Mr. Weldon was appointed as a director of Esquire Engineering Ltd. with effect from 1st April, 2018. Since the company, namely Esquire Engineering Ltd. wanted to take full advantage of the wisdom and expertise of Mr. Weldon, it offered him remuneration payable on monthly basis. Esquire Engineering Ltd. started paying such remuneration from the date of appointment and continued to do so till 31st March. 2019.
On scrutiny of the accounts, it was established that the company, till 31st March, 2019, has paid to Mr. Weldon a total sum of Rs. 1.20 lakhs in excess of the remuneration permissible under Section 197. You are required to state with reference to the provisions of Companies Act, 2013 in respect of recovery and waiver of recovery of the excess remuneration so paid, whether Mr. Weldon can keep the excess remuneration so received and under what conditions.

[Nov – Old]

Answer:

Relevant Provisions

As per Section 197(9), if any director draws or receives, directly or indirectly, by way of remuneration any sum in excess of the limit prescribed under Section 197 or without the approval required under Section 197, he shall refund the excess remuneration drawn by him to the company, within 2 years or such lesser period as may be allowed by company. Until such sum is refunded, he shall hold the excess remuneration in trust for the company.

As per Section 197(10), the company shall not waive the recovery of any excess remuneration drawn or received by a director, unless approved by the company by passing a special resolution within 2 years from the date the sum becomes refundable.

But, if the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining approval of such waiver by passing a special resolution.

Given case, Analysis and Conclusion:

1. Rs. 1.20 lakh is the amount of excess remuneration paid to Mr. Weldon by Esquire Engineering Ltd. for the financial year 2018-2019. Mr. Weldon is required to refund to the company this amount of Rs. 1.20 lakh within 2 years or such lesser period as may be allowed by the company. Until such sum is refunded, he shall hold it in trust for the company.
2. Esquire Engineering Ltd. cannot waive the recovery of such excess remuneration unless such waiver is approved by passing a special resolution within 2 years from the date the sum becomes refundable.
3. But, if Esquire Engineering Ltd has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public

financial institution concerned or the non- convertible debenture holders or other secured creditor, as the case may be, shall be obtained by if before obtaining approval of such waiver by passing a special resolution.

Question 18:

The following particulars are extracted from the statement of profit and loss of Surya Cement Limited for the year ended 31st March 2020:

Particulars	Amount
Gross Profit	60,00,000
Profit on sale of building (Cost Rs. 10,00,000 and written down value Rs 6,00,000)	5,00,000
Salaries & wages	2,50,000
Sundry Repairs to Fixed Assets	1,00,000
Subsidy from the government	3,00,000
Compensation for breach of contract	1,00,000
Depreciation	1,40,000
Loss on sale of investments	2,00,000
Interest on unsecured loans	50,000
Interest on debentures issued by the company	1,00,000
Repair Expenses to fixed assets (Capital in nature)	2,00,000
Net Profit	**13,00,000**

You are required to calculate the overall managerial remuneration payable under section 197 of the Companies Act, 2013 subject to the provisions under Schedule V.

[ICAI Module]

Answer:

The managerial remuneration shall be computed in accordance with the provisions laid down in section 198 of the Companies Act 2013.

Particulars	Amount
Net profit	13,00,000
Less: Capital profits on sale of building (Note 1)	1,00,000
Salaries & Wages (Note 2)	-
Sundry repairs to fixed Assets (Note 2)	-
Subsidy from the government (Note 3)	-
Compensation from breach of contract (Note 2)	-
Depreciation (Note 2)	-
Loss on Sale of Investments (Note 4)	-
Interest on unsecured loans (Note 2)	-
Interest on debentures (Note 2)	-
Add: Repair expenses to fixed assets (Capital in Nature) (Note 5)	2,00,000
Net profits as per section 198	14,00,000

Therefore, the overall maximum managerial remuneration shall be 11% of the Net profits computed in accordance with section 198 i.e., 11% x 14, 00,000 = Rs. 1, 54,000. It is assumed that the net profit given in the question is arrived after giving effect to all the line items given therein.

Notes:

1. As per section 198(3), credit shall **not** be given for profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets; provided that where the amount for which any fixed asset is sold exceeds the written- down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written - down value.

   Accordingly, the calculation of capital profit is computed as under:
   Profit = Selling Price – Written down value
   5, 00,000 = Selling Price – 6, 00,000.
   Therefore, Selling Price = 11, 00,000.
   Capital profit = 11,00,000 – 10,00,000 (original cost) = 1,00,000

2. According to section 198 (4), the following sums shall be deducted:
   a. All the usual working charges – salaries and wages are considered as usual working charges
   b. expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature
   c. any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract
   d. interest on debentures issued by the company
   e. interest on unsecured loans and advances
   f. depreciation to the extent specified in section 123

   Since all of the above charges are already deducted while arriving at net profit, no effect will be given.

3. According to section 198 (1), credit shall be given for bounties and subsidies received from any government, or any public authority constituted or authorised in this behalf, by any government, unless and except in so far as the Central Government otherwise directs.

4. According to section 198(5), Loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or any part thereof shall not be deducted. In the given question, in the absence of the specific information about the nature of investments, the said investments are considered as current investments and revenue in nature and accordingly no effect is given as it is already deducted while arriving at net profit.

5. According to section 198(4), expenses on repairs, whether to immovable or to movable property is deducted only for repairs which are not capital in nature. Accordingly, we have added back to the net profit.

Question 19:

Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2016 on a salary of 12 lakhs per annum with other perquisites. The Board of Directors of the company came to know about certain questionable transactions entered into by Mr. Doubtful and therefore, terminated his services as Managing Director from 1.3.2019. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of Rs.5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:

i. The company is bound to pay compensation to Mr. Doubtful and, if so, how much.
ii. The company can recover the amount of 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guided by corrupt practices.

[ICAI Module]

Answer:

Relevant provision:

According to Section 202 of the Companies Act, 2013, a company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

The amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired term of his office or for 3 years whichever is shorter.

However, no compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

Given case:

In light of the above provisions of law, the company is not liable to pay any compensation to Mr. Doubtful, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company.

But it is not proper on the part of the company to withhold the payment of compensation on the basis of mere allegations. The compensation payable by the company to Mr. Doubtful would be 25 Lakhs calculated at the rate of 12 Lakhs per annum for unexpired term of 25 months.

Regarding ad-hoc payment of 5 Lakhs, it will not be possible for the company to recover the amount from Mr. Doubtful in view of the decision in case of *"Bell vs. Lever Bros"* where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him. In that case the Managing Director was initially removed by paying him compensation and later on it was discovered that he had been guilty of breaches of duty and corrupt practices and that he could have been removed without compensation.

Question 20:

Mr. Gopi is the Managing Director of LGB Limited. The Company wants to vacate the post of Managing Director on March 31, 2018 and appoint Mr. Lakshmikant in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr. Gopi is upto 30th June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the Company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:

Financial Year	Remuneration(Rs. in Lakhs)
2013-14	30
2014-15	35
2015-16	40
2016-17	45
2017-18	50

Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited, as per the provisions of the Companies Act, 2013. Advice.

What will be your answer if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the Company?

[Nov 2018, New]

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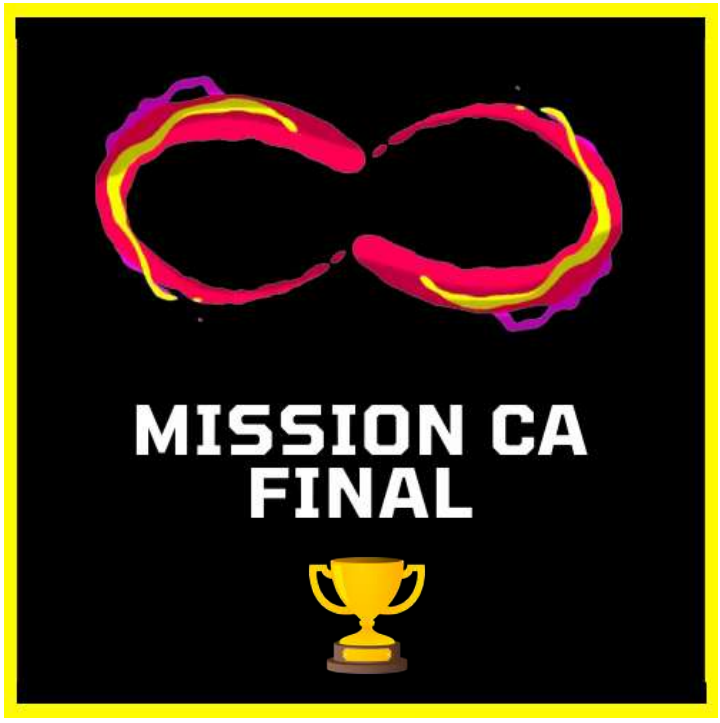

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Answer:

Relevant provision:

Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

i. A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.
ii. The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, calculated on the basis of the average remuneration earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

Given case and Analysis:

In the light of the provisions as stated above, the following will be taken into consideration while calculating the amount of compensation to be paid to Mr. Gopi:

1. Average remuneration earned by Mr. Gopi during a period of 3 years (i.e. 2015-16, 2016-17 and 2017-18) immediately preceding the date on which he ceased to hold office: [(40+45+50)/3] = Rs. 45 Lakhs.
2. Remainder time period left to be served in office has Mr. Gopi not been removed, 1st April, 2018 to 30th June, 2022, 4 years.
   Thus, Mr. Gopi will be paid compensation for Maximum 3 years.

Amount of Compensation: The maximum amount of compensation that Mr. Gopi will be eligible to get from LGB Limited is Rs.45 lakhs for 3 years = Rs. 135 lakhs.

In case of an ordinary director: Further, if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the company, he shall not be eligible to get compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

Question 21:

Mr. Raman is a Managing Director of X company. He resigns from his office as a result of amalgamation of the X company with the other body corporate. Further he is appointed as the Managing director of the body corporate resulting from the amalgamation. State in the light of the Companies Act, 2013 whether in this situation, is company liable towards Managing Director to compensate for the loss of office after his resignation?

[Nov 2018 – New/ RTP May 2016 - Old]

Answer:

Relevant provision:

Compensation can be paid to a managing director or whole-time director or manager. However, no compensation can be paid to a managing director or whole-time director or manager where such person resigns because of the reconstruction or amalgamation of the company and is appointed as managing director, manager or other officer of the reconstructed or amalgamated company.

Given case, Analysis and conclusion

1. Mr. Raman, the managing director of X Company, resigned from his office as a result of amalgamation of X Company with a body corporate. Mr. Raman is appointed as the managing director of the body corporate resulting from the amalgamation.
2. The provisions contained in Section 202 prohibiting the payment of compensation are attracted in this case. Therefore, the company is neither bound nor entitled to make payment of any compensation to Mr. Raman.

Question 22:

Primus group of companies has three companies, viz., Primus Rolling Mills Ltd., Primus Steel Pipe Manufacturers Ltd. and Primus Marketing Company Ltd. All the three companies want to appoint Mr. Prem as their managing director.

You are required to state with reference to the provisions of the Companies Act, 2013 whether such appointments are permissible.

[CA Final - Old]

Answer:

Relevant Provisions:

As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the following conditions:

a. Such person is the managing director or manager of one, and of not more than one, other company;
b. Such appointment or employment is approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting; and
c. Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

Given Case and Analysis

1. It is proposed to appoint Mr. Prem as the managing director of 3 companies.
2. Section 203 permits a person to be a managing director of maximum 2 companies, subject to the fulfilment of certain conditions as above
3. However, in no case, it is permissible for any person to be a managing director of more than 2 companies.

Conclusion

It is not permissible for the three companies to appoint Mr. Prem as their managing director. He can be appointed as a managing director in maximum 2 companies.

Question 23:

ABC Limited, an unlisted company having a paid up share capital of Ten crores of Rupees during the preceding financial year has appointed Shri X, a Fellow member of the Institute of Chartered Accountant of India as Chief Financial Officer of the company who is appointed as Key Managerial Personnel under section 203 of the Companies Act, 2013. Shri X is also a Fellow member of the Institute of Company Secretaries of India. The Company Secretary post has become vacant. In order to reduce the administrative expenses, the Company proposes to appoint Shri X as Company Secretary in addition to Chief Financial Officer post. Whether the proposal is legally valid under the provisions of the Companies Act, 2013?

[May 2018 - Old]

Answers:

Relevant provision:

According to Section 203(1) of the Companies Act, 2013, every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel:

a. Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-time Director;
b. Company Secretary; and
c. Chief Financial Officer.

According to Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 every listed company and every other public company having a paid-up share capital of Rs. 10 crore or more shall have whole-time key managerial personnel.

Given case and Analysis:
In the instant case, ABC Limited is having paid up share capital of Rs. 10 crore, so it is covered under the above Rule, and it is mandatory for it to appoint a whole time KMP. As the term used is 'whole time', therefore, three different individuals are required to hold these three key positions.

In view of the above, the company cannot appoint Mr. X as the Company Secretary of the company in addition to his CFO post. Further, Section 203 of the Act specifically prescribes the word "and" between Company Secretary and CFO. Thus, both the positions are to be held by separate persons.

Conclusion:
Hence, the proposal of the company to appoint Mr. X as the Company Secretary is not valid.

Question 24:
Mr. Amit is the Managing Director of ANJ Limited, which is a non-government public company. The directors of CHH Limited decided to appoint Mr. Amit as the Managing Director of the company, even though Mr. Amit decided not to vacate his place of office of Managing Director of ANJ Limited. A notice for a Board meeting specifying a resolution containing the proposal of appointment of Mr. Amit was served to all the eligible directors of CHH Limited. Out of eight directors of the company, six directors attended the meeting and out of them four directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of Directors seek your opinion whether Mr. Amit can be appointed as the Managing Director, of the company in this situation. Referring to the applicable provisions of the Companies Act, 2013, advise them.

[May 2018 (Old)]

Answer:
As per Section 203(3) of the Companies Act, 2013, a whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

However, the above sub-Section (3), shall not disentitle a key managerial personnel from being a director of any company with the permission of the Board.

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.
In the given case, unanimous consensus of all the directors present at the meeting was lacking. Hence, Mr. Amit cannot be appointed as a Managing Director of CHH Limited.

Question 25:
Mr. Mania is the Managing Director of S Limited (and nowhere else), which is a subsidiary of H Limited. Seeing the success of S Limited, the directors of H Limited (which is a listed company) decided and approached Mr. Mania to act as the Managing Director of H Limited. Mr. Mania agreed with the directors of H Limited subject to a condition that he will continue to act as the Managing Director of S Limited also. In this direction, the directors of H Limited propose to appoint him by means of a resolution (containing the terms and conditions of appointment excluding remuneration) by circulation. Referring to and analyzing the relevant provisions of the Companies Act, 2013, decide whether the decision of appointing and the proposed mode of appointment of Mr. Mania as the Managing Director of H Limited is valid.

Will your answer differ in case S Limited is not a subsidiary of H Limited?

[May 2019 - Old]

Answer:

Relevant provision:

As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the fulfilment of the following conditions:

(a) Such person is the managing director or manager of one, and of not more than one, other company,
(b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board With the consent of all the directors present at the meeting; and
(c) Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

As per Section 196(4), the terms and conditions of the appointment of a managing director and the remuneration payable to him shall be:

1. approved by the Board of directors at a meeting;
2. approved at a general meeting held immediately after the approval by the Board: and
3. approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

Given Case and Analysis:

The Board of directors of H Limited intends to appoint Mr. Mania as the managing director of the company. Mr. Mania is already the managing director of S Limited. Since, Mr. Mania is the managing director of only one other company, the requirement of Section 203, that the person should not be managing director of more than one other company, has been fulfilled.

For the purpose of appointing Mr. Mania as the managing director, a resolution by circulation is proposed to be passed by the Board of directors of H Limited. Further, it is proposed that such resolution shall not contain the provisions with respect to remuneration of Mr. Mania but shall contain other terms and conditions of appointment of Mr. Mania.

If the proposed mode of appointment is adopted, the provisions of Section 196(4) and Section 203 shall be contravened, since:

1. it shall be made by passing a resolution by Circulation, but such appointment can be made only by passing a resolution at a Board meeting as per Section 196 and 203,
2. It requires a unanimous resolution of the Board as per Section 203, but in the proposed mode of appointment, unanimous resolution shall not be passed;
3. Specific notice of the Board meeting and resolution proposed for appointing Mr. Mania as the managing director is required to be given to all the directors as per Section 203, but no such notice shall be given as per the proposed mode of appointment: and
4. The Board shall not approve the remuneration payable to Mr. Mania as per the proposed mode of appointment, but Section 196(4) requires approval of remuneration by the Board

Conclusion:

If Mr. Mania is appointed as the managing director as per the proposed mode of appointment, it would result in contravention of the provisions of Section 196(4) and 203. Accordingly, the proposed mode / manner of appointment of Mr. Mania as the managing director of H Limited, is not valid.

Even if S Limited were not a subsidiary of H Limited, the answer would have remained same, since the provisions of Section 196(4) and Section 203 would still be applicable to the appointment of Mr. Mania.

Question 26:

Mr. Ram and Mr. Mohan were appointed as the Whole-Time Director and Managing Director respectively in Gopi Industries Limited (GIL). Raja Limited, a holding company of GIL, was willing to appoint Mr. Ram as its Whole-Time Director and Mr. Mohan as Managing Director. Enumerate the legal provision as regards the holding of office by KMPs and decide on the eligibility of Mr. Ram and Mr. Mohan in Raja Limited as its managerial personnel in terms of the Companies Act, 2013. What if the office of Mr. Ram is vacated due to his sudden resignation given on 1st September 2020 in GIL?

[MTP Mar 2021, New/Old]

Answer:

Relevant provision:

As per Section 203(3) of the Companies Act, 2013, a Whole-Time Key Managerial Personnel shall not hold office in more than one company except in its subsidiary company at the same time.

Provided that nothing contained in this sub-section shall disentitle a Key Managerial Personnel from being a director of any company with the permission of the Board.

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India.

Given case and Analysis:

In the above question, Mr. Ram cannot be appointed as Whole-Time Director in Raja Ltd because Raja Ltd. is not the subsidiary company of GIL. Mr. Mohan can be appointed as Managing Director in Raja Ltd. if all the conditions specified in section 203(3) are complied with.

Conclusion:

Therefore, Mr. Ram cannot be appointed as Whole-time Director in Raja Ltd. whereas Mr. Mohan can be appointed as Managing Director in Raja Ltd. with the unanimous resolution being passed at the Board Meeting.

Where, if the office of Mr. Ram is vacated on 1st September 2020, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy i.e., latest by 31st March, 2021.

Author's Note:

ICAI's calculation of 6 months seems to be incorrect. Technically it ends on 28th February, 2021. In case if the question comes in exam, feel free to calculate exact 6 months and write the correct date.

Question 27:

M/s. Asian Ltd., a public limited company has a paid-up share capital of Rs. 55 crore. Answer the following:

1) Whether it is obligatory for the company to get the secretarial audit conducted?
2) Will it make any difference if the paid-up share capital of M/s Asian Ltd. is Rs. 35 crore.
3) State as to whether M/s Asian Ltd. is required to appoint whole time key managerial personnel.

[ICAI RTP]

Answer:

Relevant provisions:

As per Section 204 read with Rule 9, secretarial audit is mandatory if a company satisfies any of the following 3 conditions:

a. It is a listed company. Or

b. It is a public company having a paid-up share capital of Rs. 50 crore or more.
c. It is a public company having a turnover of Rs. 250 crore or more.
d. It is a public company having outstanding loans or borrowings from banks or public financial institutions of Rs. 100 crores or more

As per Section 203, every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel:
a. Managing director, or Chief Executive Officer or manager and in their absence, a whole- time director:
b. Company Secretary; and
c. Chief Financial Officer.

As per Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following classes of companies shall have the whole-time key managerial personnel:
(a) Every listed company
(b) Every other public company having a paid-up share capital of Rs. 10 crore or more.

Analysis and Conclusion

i. M/s Asian Ltd. has a paid-up share capital of Rs. 50 crore or more and therefore, is required to get the secretarial audit conducted.

ii. If the paid-up share capital of M/s Asian Ltd. is Rs. 35 crore, it would not be required to get the secretarial conducted unless it is a listed company or it satisfies the condition of turnover or outstanding loans or borrowings.

iii. M/s Asian Ltd. is a public company having a paid-up share capital of Rs. 10 crore or more and therefore, required to appoint following whole-time key managerial personnel:

a. Managing director, or Chief Executive Officer or manager and in their absence, a whole- time director:
b. Company Secretary: and
c. Chief Financial Officer.

Question 28:

Explaining the provisions of the Companies Act, 2013, examine whether the following companies are required to get the Secretarial Audit conducted:

i. ABC Company Limited is a company listed at Bombay Stock Exchange and has a paid-up share capital of Rs. 40 crore.
ii. DEF Company Limited is a company which has a paid-up equity share capital of Rs. 100 crore but has a turnover of Rs. 100 crore during the financial year 2014-15. The company is not listed on any of the Stock Exchanges.

[ICAI RTP]

Answers:

Relevant Provisions

Secretarial audit is mandatory if a company satisfies any of the following 3 conditions:
1. It is a listed company, or
2. It is a public company having a paid-up share capital of Rs. 50 crore or more.
3. It is a public company having a turnover of Rs. 250 crore or more.
4. It is a public company having outstanding loans or borrowings from banks or public financial institutions of Rs. 100 crores or more

Analysis and Conclusion

i. ABC Company Ltd. is a listed company. Since secretarial audit is mandatory for every listed company irrespective of its paid-up share capital, ABC Company Ltd. is required to get the secretarial audit conducted.

ii. DEF Company Ltd. is not a listed company. Also, its turnover is less than Rs. 250 crore. However, it satisfies the condition of having a paid-up share capital of Rs. 50 crore or more and therefore, DEF Company Ltd. is required to get the secretarial audit conducted.

Question 29:

Innovative Intelligence Limited, a listed Company proposes to pay the following managerial remuneration:

(a) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Sharma.

(b) The directors other than the Managing Director are proposed to be paid a monthly remuneration of Rs. 2,50,000 and also commission at the rate of one percent of the net profits of the Company subject to the condition that overall remuneration payable to ordinary· directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the Company. The commission i s to be distributed equally among all the directors.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

[May 2021 – New]

Answer:

Innovative Intelligence Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) Commission at the rate of 5% of the net profits to its Managing Director, Mr. Sharma:

Clause (i) of the Second Proviso to Section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director or whole time director or manager shall not exceed 5% of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the Innovative Intelligence Limited is being managed by a Managing Director, the commission proposed to be paid at the rate of 5% of the net profit to Mr. Sharma, the Managing Director, is permissible and no approval of company in general meeting is required. Therefore, said proposal is valid.

(ii) The Clause (ii) of the Second Proviso to Section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

(A) 1% of the net profits of the company, if there is a managing or whole-time director or manager;

(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed to directors other than managing or whole-time director is 1% of the net profits of the company because the company is managed by a managing director. Hence, if the company wants to fix directors' remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by passing a special resolution.

Therefore, the said proposal is not valid and can be said to be valid, only if made in compliance with the said requirement.

Question 30:

Earth Developers Private Limited, a Bengaluru based company is regular in filing its annual return as well as financial statements, is having four directors but so far, no Managing Director has been appointed. Due to the manifold increase in the construction work undertaken by the company in the last two years, it is urgently felt that a Managing Director needs to be appointed. Accordingly, Mr. Pranav is appointed as MD by the Board of Directors at its meeting specifying the terms and conditions including monthly remuneration payable to him. Enumerate on the requirement and validity of an appointment of Mr. Pranav in the given scenario in the context of relevant law?

[MTP March 2021]

Answer:

The given problem deals with the Companies Act, 2013 to be read in light of notification No. 464 (E), dated 05-06-2015 w.r.t. section 196(4), whereby a private company is exempted from the application of said section.

Section 196 (4) requires that the terms and conditions of appointment of a Managing Director and the remuneration payable to him shall be approved by the Board of Directors at a meeting which shall be subject to approval by a resolution at the next General Meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in Part I of the Schedule V.

Therefore, there is no requirement regarding the approval of appointment of Mr. Pranav as MD in the Earth Developers Private Limited, at the immediate next General Meeting of the shareholders. Therefore, his appointment as MD in Earth Developers Private Ltd., is valid.

Question 31:

Rainbow Industries Ltd. is a listed entity. It has one Managing Director (MD) and one Whole Time Director (WTD) in the Board. There are 15 directors in the Board including the MD and WTD.

(Rs. in crores)

S. No.	Particulars	31.03.2020	31.03.2021
1.	Net Profit	50	10
2.	Share capital	75	75

The remuneration of the directors from the respective financial year, has not been deducted from the gross profits.

The Company wants to give maximum remuneration to the MD, WTD and other directors as prescribed under the Companies, Act, 2013.

Based on the above facts:

(i) Determine the remuneration payable to MD for the financial year ended on 31.03.2020 and 31.03.2021.

(ii) Is it permissible if the company wants to pay remuneration over and above the maximum ceiling prescribed under the Company Act, 2013?

[MTP - Dec'21]

Answer:

(i) Section 197(1) provides that the total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent. of the net profits of that company for that financial year computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits:

Provided that the company in general meeting may, authorise the payment of remuneration exceeding eleven per cent. of the net profits of the company, subject to the provisions of Schedule V:

Provided further that, except with the approval of the company in general meeting, by a special resolution,—

(a) the remuneration payable to any one managing director; or whole-time director or manager shall not exceed five per cent. of the net profits of the company and if there is more than one such director

remuneration shall not exceed ten per cent. of the net profits to all such directors and manager taken together;

(b) the remuneration payable to directors who are neither managing directors nor whole- time directors shall not exceed,—

(A) one per cent. of the net profits of the company, if there is a managing or whole-time director or manager;

(B) three per cent. of the net profits in any other case.

For the FY ended on 31.03.2020	
Remuneration to all the directors in terms of section 197(1): 11% of the Net Profit of Rs. 50 cores	5.50
Remuneration to MD in terms of second proviso i.e. 5% of Rs 50 crores	2.50
Remuneration to WTD in terms of second proviso i.e. 5% of Rs. 50 crores	2.50
Remuneration to other directors in terms of second proviso i.e. 1% of Rs 50 crores	0.50

(ii) The first proviso to section 197(1) provides that the company in general meeting may, authorise the payment of remuneration exceeding eleven per cent. of the net profits of the company, subject to the provisions of Schedule V.

Chapter 4 – Inspection, Inquiry and Investigation

Question 1:

A notice was sent to Mr. Left by the registrar to furnish the information related to a business transacted during his tenure in the X company. Mr. Left ignored the notice considering that he is no more an employee of X company. Registrar issued the summon against Mr. Left. Explain in the light of the Companies Act, 2013 about the liability of the Mr. Left in the given case.

[May 2016 – Old]

OR

Mr. Shariff who was a Key Managerial Personnel (Manager) of XYZ Ltd, retired on 12th May 2020. On examination of the final accounts of the company for the year ended on 31st March 2020, the Registrar of Companies found some serious irregularities in writing off of the huge amounts of bad debts and no satisfactory explanation was provided for the same from the company. In such a situation the Registrar of Companies wants some explanation from the company and Mr. Shariff. In the light of the Companies Act, 2013, examine the situation and advice on the act of Registrar seeking explanation from Mr. Shariff.

[May 2021 – New]

Answer:

Relevant provision:

According to section 206(1) of the Companies Act, 2013, where on a scrutiny of any document filed by a company or on any information received by him, the Registrar is of the opinion that any further information or explanation or any further documents relating to the company is necessary, he may by a written notice require the company:

(a) to furnish in writing such information or explanation; or

(b) to produce such documents,

within such reasonable time, as may be specified in the notice.

Further, proviso to sub-section (2) of section 206 provides that where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

In the given instance, Mr. Left is a past member of the company. Registrar by serving notice asked Mr. Left to furnish the information related to the business transaction made during his tenure. So as per the above provision, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on him, he has a duty to give such information / Explanation to the best of his knowledge. Mr. Left is liable to provide such information.

Question 2:

A group of shareholders of M/s. FMG Limited made a complaint to the concerned Registrar of Companies (RoC) that the business of the Company is being carried on for unlawful and fraudulent purposes and filed an application to inquire into the affairs of the Company. Referring to and analyzing the provisions of the Companies Act, 2013, decide:

i. Whether the RoC has the power to order for an inquiry into the affairs of the Company?
ii. If yes, state the procedure to be followed by the RoC.
iii. Whether the inquiry should be pursued by the RoC in case the complaint is withdrawn by the same group of shareholders subsequent to the Order for inquiry?
iv. Whether the Central Government has the power to direct the RoC to carry out the inquiry?

[Nov 2019 - New/ICAI Module]

Answer:

(i) Yes, the RoC has the power to order for an inquiry into the affairs of the company, as he deems fit, after providing the company a reasonable opportunity of being heard if he is satisfied on a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act. [Section 206(4) of the Companies Act, 2013]

(ii) Procedure followed by RoC:
The Registrar may, after informing the company of the allegations made against it by a written order, call on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard.

(iii) The inquiry can be pursued by the ROC in case the complaint is withdrawn by same group of shareholders subsequent to the order for inquiry in terms of section 206(4).

(iv) Yes, the Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar for the purpose to carry out the inquiry under section 206(4).

Question 3:

A group of creditors of Mac Trading Limited makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 10 A.M. on 1st July 2015 and the ROC entered the premises at 10.30 A.M. for the search. Examine the powers of the Registrar to seize the books of the company.

[May 2016 - Old]

OR

A group of creditors of XYZ Limited makes a complaint to the Registrar of Companies, Gujarat alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 11 A.M. on 06th June, 2018 and the registrar has attempted to enter the premise of company but has been denied by the company, due to not having order from special court. Is the contention of company being valid in terms of Companies Act, 2013?

OR

The Registrar of Companies, West Bengal has received a complaint from a group of creditors of a company. The complaint alleges that the directors of the company, in order to prevent the unearthing of their embezzlement of company's funds, are engaged in falsification and destruction of original accounting books and records. The complaints urged the Registrar to seize the accounting books and records of the company so that the directors may not be able to tamper the same. You are required to state the powers, if any, of the Registrar in this respect.

[ICAI Module]

Answer:

Section 209, of the Companies Act, 2013 states that, if the Registrar has reasonable ground to believe that the books and papers of

- the company or
- relating to the key managerial personnel or any director or
- auditor or
- company secretary in practice if the company has not appointed a company secretary

are likely to be destroyed, mutilated, altered, falsified or secreted he may, after obtaining an order from the special court for the seizure of such books and papers:

a. enter with such assistance as may be required and search the place where such books or papers are kept;
b. Seize such books and papers as he considers necessary after allowing the company to take copies or extracts therefrom.

According to the above provisions the registrar may enter, search and seize the books only after obtaining an order from the Special Court.

In the given scenario, the registrar has failed to obtain permission from the special court so, he is not authorized to enter the premises of the company and seize the books of accounts of XYZ Limited.

Hence, the contention of the XYZ Limited is valid in law.

Question 4:

On suspicion of manipulation of accounts of RRP Private Limited for the year 2019 -20 to ease bank finance, the Registrar seized the books of accounts and other papers and retained it for 180 days and thereafter extended the retention for next 180 days for further scrutiny. Advise the Company whether it shall be lawful for the Registrar to seize the books for more than 180 days? What is the remedy available to the Registrar to make further scrutiny after the expiry of 180 days of retention of books if so required by him? Your advice should be given in consultation with the provisions of Companies Act, 2013.

[Jan 2021 – Old]

Answers:

According to Section 209 of the Companies Act, 2013, Registrar or Inspector on reasonable grounds to believe that books and papers relating to the affairs of the Company may be destroyed, mutilated, altered, falsified or secreted, on an order of the Special Court, seize such necessary documents.

The Registrar or Inspector shall return the books and papers seized as soon as may be, and in any case not later than 180th day after such seizure, to the Company from whose custody or power such books or papers were seized.

The books and papers may be called for by the Registrar or inspector for a further period of 180 days by an order in writing if they are needed again.

In the given case, the Registrar extended the seizure beyond 180 days which is not valid as per the provisions of law. The Registrar should have returned the books at the end of 180th and should have, by way of notice in writing, called for the books for further period of 180 days.

Question 5:

Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture. Whether the shareholders' application will be accepted?

[ICAI Module / Nov 2015 - Old]

Answer:

The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors.

Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation, but it is not sufficient as the company has not passed the special resolution.

Question 6:

Greater DINA Investors Association made a complaint by an informal letter to the Central Government that Management of Secret Limited has been indulging in fraudulent activities causing loss to the shareholders and that an investigation should be carried out to find out the whole truth. On receipt of the letter, the Central Government directed the Association to approach them formally after complying with the provisions of the Companies Act, 2013. Advise the Association.

[Nov 2016 - Old]

OR

Shareholders of Akash Ltd., not satisfied with the performance of the company, inferred that some activities conducted by the company are against the interest of the members of the company. Group of shareholders of the company filed an application to the Central Government to appoint an inspector to carry out investigation to look into the matter. With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application is tenable? Elaborate.

[RTP May 2017]

Answer:

Relevant provision:

Section 210 of the Companies Act, 2013 provides for investigation into affairs of company. According to sub-section (1), where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company:

(a) on the receipt of a report of the Registrar or inspector under section 208;
(b) on intimation of a special resolution passed by a company that affairs of company ought to be investigated;
(c) in public interest,

it may order an investigation into the affairs of the company.

According to section 214,

(i) The Central Government may before appointing an inspector under Section 210, require the applicant to give a security not exceeding 25,000 rupees for payment of the costs and expenses of investigation as per the criteria given in the Companies (Inspection, investigation and inquiry) Rules, 2014.
(ii) Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

Given case:

In the given case, Greater DINA Investors Association made a complaint by an informal letter to the Central Government that Management of Secret Limited has been indulging in fraudulent activities causing loss to the shareholders and that an investigation should be carried out to find out the whole truth. On receipt of the letter, the Central Government directed the Association to approach them formally after complying with the provisions of the Companies Act, 2013

Analysis and conclusion:

In view of the above provision, Central Government directing the association to approach them formally after complying with the provision of the Companies Act, 2013 is not required because Central Government can act in public interest.

Question 7:

The Registrar, after inspection of the book of accounts of the PQR Ltd., submitted its report with further recommendation of investigation into the affairs of the company. Explain the law as to the recommendation for further investigation by the registrar.

[MTP Oct 2018 - New]

Answer:

As per section 208 of the Companies Act, 2013, the Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government along with such documents, if any, and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

Therefore, the registrar is authorised to submit in its report after the conduct of inspection of the book of accounts, the recommendation for further investigation into the affairs of the company.

Question 8:

i. The shareholders of Kumar Ltd. passed a special resolution that the affairs of the Company ought to be investigated. The Company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act, 2013, whether the power of the Central Government to order an investigation is mandatory or discretionary?

ii. Enumerate the procedures to be followed by the Serious Fraud Investigation Office to arrest a person who has been found guilty of an offence committed under Section 447 of the Companies Act, 2013

[Nov 2018 -New]

Answer:

i. As per Section 210(1) of the Companies Act, 2013, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company:
   (a) on the receipt of a report of the Registrar or inspector under section 208;
   (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
   (c) in public interest,

   it may order an investigation into the affairs of the company. The use of word "may" clearly show that the power of the Central Government to order an investigation is discretionary.

ii. As per section 212(6) of the Companies Act, 2013, offences covered under section 447 of this Act shall be cognizable as well as non-bailable. So, the person found guilty for commission of an offence under the said section, shall be liable to be arrested, by SFIO.

   If any officer not below the rank of Assistant Director of SFIO authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

Immediately after arrest, the officer shall forward a copy of the order, along with the material in his possession, to the SFIO in a sealed envelope, in such manner as may be prescribed and the SFIO shall keep such order and material for such period as may be prescribed. [Sub section (9)] and present the person so arrested before a Special Court or Judicial Magistrate or a Metropolitan Magistrate having jurisdiction within 24 hours. The period twenty four hours shall exclude the time necessary for the journey from the place of arrest to the Special Court/Magistrate. [Sub section (10)].

An Interim report is submitted, if so directed, to the Central Government, till the completion of the investigation. On Completion of investigation, the SFIO shall submit the investigation report to the Central Government [Sub section (11) & (12)].

Question 9:

The business of Weak Fabrication Limited is conducted fraudulently and the management activities are not in the interests of the Company. The paid up capital of the company is Rs. 1 crore. A group of shareholders numbering 110 members representing 1/9 of total voting power decided to approach Tribunal (NCL T) to carryout investigation into the Company's affairs under the provisions of the Companies Act, 2013. They seek your advice in the following matters, stating the relevant provisions of the Companies Act, 2013.

(1) Whether the group can make valid application?
(2) Other than member, can any other person make application?
(3) Are the applicants required to furnish security for payment of cost and expenses of Investigation?

[May 2018 – New]

Answer:

a) Whether the Group can make a valid application?

According to Section 213(a) (i) of the Companies Act, 2013, the Tribunal may, on an application made by not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a Company having a share capital, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government.

In the instant case, the application by 110 members representing 1/9 of total voting power of Weak Fabrication Limited to carryout investigation into the company's affairs is valid.

b) Other than member, can any other member make an application?

According to Section 213(b)(i) of the Companies Act, 2013, the Tribunal may, on filling of an application by other person (not being a member of Company), if satisfied, that there are circumstances suggesting that:

a. the business of the Company is being conducted with intent to defraud its creditors, members or any other person or
b. otherwise for a fraudulent or unlawful purpose,
c. or in a manner oppressive to any of its members or that
d. the Company was formed for any fraudulent or unlawful purpose,

may order after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the Company ought to be investigated by an Inspector or Inspectors appointed by the Central Government and where such an Order is passed, the Central Government shall appoint one or more competent persons as Inspectors to investigate into the affairs of the Company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

Thus, any other person (other than a member) can also make an application.

c) Section 214 of the Companies Act, 2013 provides for security for payment of costs and expenses of investigation:
Where an investigation is ordered by the Central Government in pursuance of an order made by the Tribunal under Section 213, the Central Government may before appointing an Inspector under clause (b) of Section 213, require the applicant to give such security not exceeding 25,000 rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation.

Such security shall be refunded to the applicant if the investigation results in prosecution.

Question 10:

A majority of the Board of directors of M/s High Value InfoTech Ltd. have realized that some of the business activities carried out in the name of the company are not in the interest of either the company or its members. They want that the company should make an application to the Central Government to appoint an inspector to carry out an investigation so as to find out the whole truth. Explain the steps that should be taken to achieve the purpose.

OR

A majority of the Board of Directors of M/s Bulk Drugs Ltd. have reasons to believe that some of the business activities carried on in the name of the company are prima facie against the interests of the company and its members. They want the matter to be referred to Central Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil the truth. In this connection you are required to state the steps required to be taken with reference to the provisions of the Companies Act, 2013.

[CA Final - Old]

Answer:

Relevant provision:

As per Section 210, the Central Government may order an investigation into the affairs of the company if it is of the opinion that it is necessary to investigate into the affairs of a company,

(a) on the receipt of a report of the Registrar or inspector under Section 208;
(b) on intimation of a special resolution passed by a Company that the affairs of the company ought to be investigated, Or
(c) in public interest.

As per Section 213, the Central Government shall order an investigation of the affairs of a company if the Tribunal makes an order that an investigation into the affairs of the company is required. The Tribunal may make an order that an investigation into the affairs of the company is required where an application is made to the Tribunal by eligible members that the members have a good reason for seeking an order of investigation into the affairs of the company. The application needs to be supported by such evidence as may be necessary to show that an investigation into the affairs of the company is necessary. The members eligible to make an application to the Tribunal are as follows:

a. In case of a company having a share capital, members eligible to make an application to the Tribunal are -
   i. 100 members; or
   ii. One or more members holding 10% of total voting power. Whichever is lower.
b. In case of a company having no share capital, 1/5th of the total number of members are eligible to make an application to the Tribunal.

Further, as per Section 213, the Tribunal may make an order that an investigation into the affairs of the company where an application is made to the Tribunal by any person or otherwise (viz. suo motu) the Tribunal is satisfied that any of the following circumstances exist:

a) That the business of the company is being conducted –
    a. with intent to defraud its creditors, members or any other persons; or
    b. for a fraudulent or unlawful purpose, or
    c. in a manner oppressive of any of its members.
b) That the company was formed for any fraudulent or unlawful purpose.
c) That the persons concerned in the formation or management of the company have been guilty of fraud, misfeasance or other misconduct.
d) That the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to the managing or other director or the manager of the company.

The Tribunal may make such an order only after giving a reasonable opportunity of being heard to all the parties concerned.

Given case and analysis:

In the present case, following options are open to the Board of directors of M/s High Value Infotech Ltd:

a) The Board of directors may get a special resolution passed in a general meeting of the company, and then an application may be made to the Central Government for seeking an order of investigation into the affairs of the company. On receipt of such application, the Central Government may order an investigation of the affairs of the company (Section 210).

b) If the directors of M/s High Value Infotech Ltd. satisfy the eligibility criterion contained in Section 213, then, they may, in the capacity of members, make an application to the Tribunal under Section 213. If the Tribunal makes an order that an investigation into the affairs of the company is required, the Central Government shall order an investigation of the affairs of a company.

c) Even the directors of M/S High Value Infotech Ltd, do not satisfy the eligibility criterion contained in Section 213, they may make an application to the Tribunal seeking an order of investigation on any of the four grounds mentioned in Section 213, as discussed above. If the Tribunal makes an order that an investigation into the affairs of the company is required, the Central Government shall order an investigation of the affairs of a company.

Question 11:

Some creditors of NTY Limited approached you to guide them to apply to the Tribunal for seeking an order for conducting an investigation into the affairs of the company due to the fact that the business of the company is being conducted with intention to defraud its creditors. Referring to the provisions of the Companies Act, 2013, guide them regarding the circumstances under which and how a person, not being a member of the company can apply to the Tribunal to seek an order for conducting an investigation into the affairs of a company.

[May 2018 - Old]

Answer:

Relevant provision:

According to Section 213(b)(i) of the Companies Act, 2013, the Tribunal may, on filling of an application by any other person (not being a member of company) or otherwise, if the Tribunal is satisfied that there are circumstances suggesting that the business of the company is being conducted with intent to defraud its creditors,

members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose, may order after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

The creditors of NTY Ltd should be guided in terms of the provisions stated above to make an application to Tribunal.

Question 12:

Mrs. Preeti, a lady aged about 32 years and Managing Director of M/s Growmore plantations Ltd., has been arrested for an offence covered under section 447 of the Companies Act, 2013 on a complaint made by the Director, Serious Fraud Investigation Officer. Mrs. Preeti seeks your legal advice as to the conditions under which she can be released on bail and the role of Special Court in this regard.

[Nov 2017 - Old]

Answer:

Relevant provision:

According to Section 212(6) of the Companies Act, 2013, notwithstanding anything contained in the Code of Criminal Procedure, 1973, offence covered under section 447 shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless:

i. the Public Prosecutor has been given an opportunity to oppose the application for such release; and
ii. Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

A person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

The Special Court shall not take cognizance of any offence referred to this sub- section except upon a complaint in writing made by—

(i) the Director, Serious Fraud Investigation Office; or
(ii) Any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

Given case and conclusion:

In the instant case, Mrs. Preeti has been arrested for an offence covered under section 447 of the Act on a complaint made by the Director, SFIO. As Mrs. Preeti is a woman, she may be released on bail if the Special Court so directs.

Question 13:

Doomed Limited wanted to reduce the rank of Mr. happy (the Chief Operations Officer of the company) during the pendency of investigation being conducted on the company on the order of the Tribunal as per the provisions of the Act. Doomed Ltd. made an application to Tribunal regarding the reduction of the rank of the Mr. happy on 2nd May, 2020 and received objection of the Tribunal on 29th May, 2020. What course of action/ remedy is available to Doomed Ltd. and to Mr. happy as per the provisions of the Companies Act, 2013?

[MTP March 2021 - New]

OR

Damage Ltd, the Company wanted to suspend Mr. Z, the CFO of the Company during the pendency of an investigation being conducted under the provisions of the Companies Act, 2013 on the order of Tribunal. The Company approached the Tribunal on 3rd January, 2017 for the proposed action. The Company on 15th February, 2017 passed an order of suspension without waiting for the orders from Tribunal. Comment upon the action taken by the Company with reference to the relevant provisions of the Act.

[May 2017 - Old]

Answers:

Relevant provision:

As per Section 218 of the Companies Act, 2013, if:

a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or
b) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI,

such company, other body corporate or person proposes—

a) to discharge or suspend any employee; or
b) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
c) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

If the company, other body corporate or person concerned does not receive within 30 days of making of application, the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

Given case and Analysis:

In the above question, since the Doomed Ltd. have received the objection of the Tribunal within 30 days from the date of making application, so the Doomed Ltd. can prefer an appeal against the order of the Tribunal to the Appellate Tribunal within 30 days. No further appeal can be preferred against the order of the Appellate Tribunal by the company or the employee concerned.

Conclusion:

Therefore, Doomed Limited can prefer an appeal against the order of objection of Tribunal within 30 days to the Appellate Tribunal and if the decision of the Appellate Tribunal is against Mr. happy, then he cannot appeal further against the order of the Appellate Tribunal.

Question 14:

Pursuant to Section 210 of the Companies Act, 2013 an Inspector was appointed to investigate the affairs of Sterling Trading Limited. Mr. Ahmed the General Manager (Operations) who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company if he discloses the misdeeds during the course of examination by the Inspector. Advise him explaining the relevant provisions of the Companies Act, 2013.

[Nov 2017 - Old]

OR

An inspector was appointed to investigate the affairs of a public company. Mr. WM, the works manager of the company, who is aware of certain misdeeds of the management, desires to know whether he is entitled to any protection against dismissal by the company, if he discloses the misdeeds during the course of examination by the inspector. Advise him explaining the relevant provisions of the Companies Act, 2013.

Answer:

According to Section 218 of the Companies Act, 2013, if during the course of any investigation of the affairs and other matters of or relating to a company under section 210, or during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

i. to discharge or suspend any employee; or
ii. to punish him, whether by dismissal, removal, reduction in rank or otherwise; or
iii. to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub- section (1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

In the instant case, the above mentioned protection is available to Mr. Ahmed, the General Manager of Sterling Trading Limited.

Question 15:

Mr. Rahul is an employee of the company ABC Limited and investigation is going on him under the provisions of Companies Act, 2013. The company wants to terminate the employee on the ground of investigation is going against him. They have filed the application to tribunal for approval of termination. Company has not received any reply from the tribunal within 30 days of filling an application. The company consider it as a deemed approval and terminated Mr. Rahul.

(a) Is the contention of company being valid in law?
(b) What is remedy available to Mr. Rahul?
(c) What is remedy available to Mr. Rahul, if reply of Tribunal has been received within 30 days of application?

[ICAI Questions for Practice]

Answer:

Relevant provision:

The provision of Section 218 states that, the company shall require to take approval of the tribunal before taking action against the employee if there is any pendency of any proceedings against any person concerned in the conduct and management of the affairs of the company.

The company shall require approval in the following circumstances:

- discharge or suspension of an employee; or
- punishment to an employee by dismissal, removal, reduction in rank or otherwise; or
- change in the terms of employment to the disadvantage of employee(s); The Tribunal shall notify its objection to the action proposed in writing.

In case, the company, other body corporate or person concerned does not receive the approval of the Tribunal within 30 days of making the application, it may proceed to take the action proposed against the employee. That means it can be consider as a deemed approval by the tribunal.

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of 30 days of the receipt of the notice of the objection, refer an appeal to the Appellate Tribunal in such manner and on payment of fees as may be prescribed.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

Conclusion:

a. Yes, the termination of Mr. Rahul made by the company is totally valid in law and company can do so by considering deemed approval of tribunal.

b. In this scenario, Mr. Rahul has not any remedy available under the Companies Act, 2013. As per the provision of the law appeal to the appellate tribunal can be made only if the person is dissatisfied with the objection raised by the tribunal. Hence, in this case the tribunal has not replied Mr. Rahul cannot refer an appeal to Appellate Tribunal.

c. In this case, Mr. Rahul can refer and appeal to appellate tribunal within 30 days of the receiving letter of objection raised by the tribunal and with payment of prescribed fees.

Author's Note:

Question and answer to part (c) is vague and based on certain assumptions. The assumption here is that:

(a) When Tribunal replies within 30 days, Tribunal raises objection to such termination (and not granting approval to such termination)

(b) Even if the Tribunal raises any objection, Mr. Rahul can prefer an appeal to NCLAT u/s 421 of Companies Act and not u/s 218 of the Companies Act. [As per Sec 421, any person aggrieved by order of NCLT may prefer an appeal with NCLAT within 45 days (+45 days)]

Question 16:

During investigations conducted on the affairs of a company in the public interest, the inspector observed that the Directors of the company had been acting on the instructions of the holding company and he proceeded to investigate the holding company. Is Inspector permitted to do under the provisions of the Companies Act, 2013?

[May 2017 - Old]

Answer:

Relevant provision:

Section 219 of the Companies Act, 2013, provides for power of Inspector to conduct investigation into the affairs of related companies etc., if an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of:

(a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;

(b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;

(c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(d) any person who is or has at any relevant time been the company's managing director or manager of employee,

he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Therefore, the inspector shall subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the Managing Director or Manager, in so for as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed. In view of above, the Inspector is permitted to investigate the holding company.

Question 17:

Members of Sarat Solutions Ltd. are concerned about the performance of the company as they suspect gross negligence and mismanagement of the affairs of the company that may be detrimental to the interests of the company and therefore filed an application to the Central Government to appoint an inspector to carry on the investigation. Mr. X, who was appointed as inspector, is of the view that to find out the true picture it is necessary to investigate into the affairs of M/s. Hemant Softech Solutions Ltd., which is a subsidiary of Sarat Solutions Ltd. Referring to and analyzing the provisions of the Companies Act, 2013 decide, whether the inspector has powers to investigate into the affairs of M/s Hemant Softech Solutions Ltd.

[May 2019 - Old]

Answer:

According to Section 219 of the Companies Act, 2013, if an Inspector appointed under Section 210 or Section 212 or Section 213 of the Companies Act, 2013 to investigate into the affairs of a Company and considers it necessary for the purposes of the investigation, to investigate also the affairs of any other body corporate which is, or has at any relevant time been the Company's Subsidiary Company or Holding Company, or a Subsidiary Company of its Holding Company; the Inspector, shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the Company for which he is appointed.

Hence, as per the above provision, after obtaining prior approval of Central Government, Inspector has power to investigate into the affairs of M/S Hemant Softech Solutions Ltd. which is a subsidiary of Sarat Solutions Ltd.

Question 18:

Investigation proceeding under the provisions of the Companies Act, 2013 is being carried out against Fishy Ltd. During the investigation, the Tribunal has a reasonable ground to believe that a removal, transfer or disposal of funds, assets or properties of the Company is likely to take place in a manner that would be prejudicial to the interests of the Company. In this connection, the Tribunal requested the Company's legal advisers and the Bankers respectively to disclose and furnish a copy of the communication made by them to the Company. But they refused to disclose any information. Under the circumstances, the Tribunal wishes to pass an order to:

(i) Freeze the assets of the Company.

(ii) Punish the Company for the contravention, if any of the order of Tribunal.

(iii) Compel the legal advisers and the bankers to provide the required information.

In the light of the provisions of the Companies Act, 2013 analyses whether the Tribunal has the power to do so in respect of the above situations.

[Jan 2021- New]

Answers:

(i) As per Section 221 of the Companies Act, 2013, where it appears to National Company Law Tribunal on reasonable ground to believe that removal or transfer or disposal of funds, assets or properties of company is likely to take place in manner prejudicial to interests of company or its shareholders or creditors or in public interest, the Tribunal may by order direct that such transfer, removal or disposal shall not take place till 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.

Hence, the Tribunal may pass an order to freeze the assets of the company.

(ii) In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal as specified above 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.

(iii) In requirement with Section 227 of the Companies Act, 2013 even during an investigation, the legal adviser cannot be compelled to provide information of any privileged communication made to him in that capacity, except as respects the name and address of his client, or by the bankers of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person, to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government.

Hence, the legal advisers and bankers of Fishy Ltd. cannot be compelled to provide required information.

Author's Note:
As per plain reading of Sec 227, it appears that the disclosure may be compelled upon the banker w.r.t information pertaining to the company/BC/Person being investigated and no one else. So, in this case, it would be worthwhile to mention that bankers may be compelled to disclose such info.

Question 19:

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 its 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

[MTP March 2018, New]

Answers:

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 20:

Remedial Pharma Limited, over the years, enjoys a high reputation in the market and its general reserves are ten times more than the paid up capital of the company. There is a serious apprehension of cornering the share of the company by a group of unscrupulous persons likely to result in change in the Board of directors which may be prejudicial to the public interest. The company seeks your advice as to how it can block the transfer of shares of the company under the provisions of the Companies Act, 2013.

[Nov 2017 - Old]

OR

ABC Limited, over years, enjoys high reputation and its general reserve is many times more than the paid-up capital of the company. There is apprehension of cornering the shares of the company by some persons likely to result in change in the Board of directors which may be prejudicial to the public interest. Advise, as to how Can ABC Limited block the transfer of shares of the company under the provisions of the Companies Act, 2013.

OR

Big Ball Ltd., a reputed public company, over the years, has performed excellently and its general reserve is many times more than the paid up capital of the company. The chairman of the company came to know that a group of unscrupulous persons is cornering the shares of the company and may lodge them for transfer in their names. It is apprehended that such transfer may lead to change in the composition of Board of directors which may be prejudicial to the public interest. You are required to state with reference to the provisions of the Companies Act, 2013 as to how Big Ball Ltd. can block the above stated transfer of shares.

Answer:

Relevant provision:

As per Section 222 of the Companies Act, 2013, where it appears to the Tribunal, in connection with any investigation under Section 216 of the Companies Act, 2013 or on a complaint made by any person in this behalf that there is good reason to find out the relevant facts any securities issued or to be issued by the company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions as it may deem fit are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding 3 years as be specified in the order.

Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub section (1), the company shall be punishable with fine which shall not less than one lakh rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than twenty five thousand rupees but which may extend to 5 lakh rupees or with both. [Section 222(2)]

Analysis and Conclusion:

The facts given in the question squarely fall within the provision of Section 222 of the Companies Act, 2013. The management of Remedial Pharma Limited may make a complaint to the NCLT and convince that the transfer of shares in favor of the group of unscrupulous persons would change the composition of the Board of directors of the company which shall be prejudicial to the public interest and if the NCLT is convinced with the pleas of the company, it may pass an order as stated above which would block the transfer of shares as stated in the question.

Question 21:

An investigation was ordered by the Central Government under Section 216 of the Companies Act, 2016, against PKR Limited for determining the true membership of the Company. In connection with this investigation, it appears to the Tribunal that there is good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by the Company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose cannot be solved. Accordingly, the Tribunal, by an Order dated 15.08.2018, directed the Company that the further issue of RCPS shall be subject to restrictions for a period of four years. Despite the Order of the Tribunal as above, PKR Limited proceeded with further issue of RCPS on 20.08.2018 in order to fund the working capital requirements for its expansion project.

Referring to the provisions of the Companies Act, 2013, examine the following:

1. Can the Tribunal restrict further issue of RCPS? If yes, then to what period?
2. What are the penal provisions in case of contravention to the above Order?

[Nov 2018 - New]

OR

The Central Government ordered an investigation under Section 216 of the Companies Act, 2013 against M/s Green Wood Limited for determining the true membership of the company. In connection with this investigation a reference was made to the Tribunal. It appears to the Tribunal that there is a good reason to find out the relevant facts about the equity shares with Differential Voting Rights (DVRs) issued by the company and the Tribunal is of the opinion that unless restrictions are imposed on further issue of such equity shares for two years, the purpose cannot be solved.

Referring to the provisions of the Companies Act, 2013 and Rules framed in this regard, answer:

(i) Can the Tribunal put such a restriction on further issue of shares?

(ii) Period for which such a restriction can be imposed by the Tribunal?

[Nov 2018 - Old]

Answer:

Imposition of Restrictions upon Securities (Section 222 of the Companies Act, 2013)

i. Tribunal may by order put restrictions upon securities [sub-section (1)]:

Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

In the instant case, the Tribunal can restrict the further issue of RCPS for such period not exceeding three years.

ii. Punishment in case of contravention to an order:

Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

Question 22:

The report submitted by the inspector appointed under Section 210/ 213 of the Companies Act, 2013 to investigate the affairs of a Company revealed that substantial funds of the Company have been misappropriated by the Managing Director of the Company. The Central Government is of the opinion that effective action may not be taken the company for recovery of the funds misappropriated by the Managing Director. Examine with reference to the provisions of the Companies Act, 2013 the action that can be taken by the Central Government for recovery of damages or funds misappropriated by the Managing Director.

[CA Final - Old]

Answer:

Relevant Provision:

As per Section 224, the Central Government may take any of the following actions:

1. If any person appears to be guilty of an offence for which he is criminally liable, the Central Government may prosecute such person.

2. The Central Government may cause to be presented to the Tribunal, a petition for the winding up of the company.
3. The Central Government may cause to be presented to the Tribunal, an application under Section 241 (viz. an application for claiming relief from oppression or mismanagement).
4. If it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated-
   a. for the recovery of damages in respect of any fraud, misfeasance or other misconduct in Connection with the promotion or formation, or the management of the affairs, of such co. or body corporate or
   b. for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained the Central Government may itself bring proceedings for that purpose in the name of such company or body corporate.

   The Central Government shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with any proceedings for recovery of damages or recovery of any property.

5. Where the report made by the inspector states that any fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement, and also for holding such person personally liable without any limitation of liability.

Given case and Analysis:
From the inspector's report, it appears that managing director of the company has misappropriated substantial funds. However, it is likely that no effective action may be taken against the managing director for recovery of such funds.

Since it is unlikely that any action would be taken by the company against the managing director for recovery of funds, and it is in the public interest that the proceedings for recovery of funds should be brought against the managing director, so, the Central Government should itself bring proceedings for the recovery of damages in the name of such company. The Central Government shall be indemnified by the company against any costs or expenses incurred by it in connection with any such proceedings.

Further, the Central Government may file an application before the Tribunal seeking an order of disgorgement, i.e., an order that the managing director shall be personally liable for taking any undue advantage or benefit.

Conclusion:
The Central Government may itself bring proceedings in the name of the company for recovery of damages and file an application before the Tribunal seeking an order of disgorgement.

Question 23:
M/s Genesis Paper Ltd. has been incurring business losses for past couple of years. The company, therefore, passed a special resolution for voluntary winding up. Meanwhile, complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public. In this situation advise whether investigation may be initiated against the company under the provisions of the Companies Act, 2013.

[Nov 2017 - Old]

Answer:

According to section 226 of the Companies Act, 2013, an investigation may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that:

(a) an application has been made under section 241;

(b) The company has passed a special resolution for voluntary winding up; or

(c) any other proceeding for the winding up of the company is pending before the Tribunal.

In the instant case, M/s Genesis Paper Ltd. has been incurring business losses for past couple of years. The company passed a special resolution for voluntary winding up. Meanwhile complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public.

As, the company has passed a special resolution for voluntary winding up of the company, then also the investigation may be initiated against the company under section 226 of the Companies Act, 2013.

Question 24:

Mr. Sharma is a legal advisor of M/s ABC Ltd. and in that capacity, he has rendered legal advice by way of a written communication to the company. The registrar of companies, Mumbai, issues and order to Mr. Sharma to disclose and furnish a copy of the communication made by him. Examine the power of the registrar to call for the said document from Mr. Sharma.

[CA Final - Old]

Answer:

As per Section 227, a legal adviser shall not be bound to disclose to the Tribunal, Central Government, Registrar or inspector, any privileged communication made to him except the name and address of his client.

Section 227 constitutes professional communication incorporated in the Indian Evidence Act, 1872, according to which no advocate or legal advisor shall be compelled to disclose as to what communication was made to him by the client. The rule of professional communication is based on public policy and protects the interest of the client.

As per Section 206, the Registrar is empowered to issue a written notice and demand information or explanation and require production of documents from:

a. The company
b. any officer or employee of the company
c. any past officer or employee of the company.

As is evident from a study of Section 206, the Registrar has no power to demand any information or explanation or require production of books from the legal adviser of the company.

In the given case, Mr. Sharma is a legal adviser of M/s ABC Ltd., and the Registrar issued an order to Mr. Sharma requiring him to disclose the Communication made by him to ABC Ltd. The Registrar has also demanded a copy of the communication made by Mr. Sharma to M/s ABC Ltd.

Section 227 expressly restricts the Registrar from issuing any order to any legal adviser of the company, requiring him to disclose any communication between him and the company. The Registrar is not empowered to call for the said document from Mr. Sharma.

Question 25:

Mr. M, a member of XYZ Ltd. filed an application before the Tribunal complaining of oppression and mismanagement w.r.t. an agreement entered by XYZ Ltd. effecting the interest of the company. Vide order passed by the Tribunal under section 242 of the Companies Act, 2013, terminated the said agreement. The agreement was entered by Mr. H and Mr. G who was managing director and the executive director of the XYZ Ltd. Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement. Also state the legal position of Mr. H and Mr. G holding their place of office in the said situation. Examine the given facts and address the issues in terms of the relevant provisions of Companies Act, 2013.

[RTP May 21]

Answer:

As per section 243 of the Companies Act, 2013 , where an order made under section 242 terminates, sets aside or modifies an agreement which was entered by the company, were in a manner prejudicial to the interests of the company:

a. such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;
b. no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company.

Accordingly, Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement, is not viable. Further, Mr. H and Mr. G, managing director and the executive director of the XYZ Ltd. who entered agreement with Mr. Rasik which was ordered to be terminated by the Tribunal, shall not act as the managing director or other director or manager of the company, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal.

Chapter 5 – Compromise, Arrangements & Amalgamations

Question 1:

Examine the following situation in the light of the provisions of the Companies Act, 2013:

Total number of secured creditors are 10 and the aggregate amount of outstanding loan is Rs.10.00 crore as at 31.03.2020 as per audited financial statement. NCLT sanctioned the scheme as approved by the meeting of the creditors by requisite majority. 4 creditors having a debt of Rs. 50 Lakhs together intend to object to the scheme. Are they entitled for the same?

[Jan 2021 – Old – 2 marks]

Answer:

As per proviso to Section 230(4) of the Companies Act, 2013, any objection to the compromise or arrangement shall be made only by persons holding not less than ten percent of the shareholding or having outstanding debt amounting to not less than five percent of the total outstanding debt as per the latest audited financial statement.

In the present case, 4 creditors are holding 5% debt and therefore, they are entitled to object to the scheme of compromise or arrangement.

Author's Note - Although not covered by ICAI, but it would fetch brownie points to mention that the objections can only be raised prior to sanction of scheme by Tribunal. In this case, they can raise the objection as soon as they receive notice and not after sanction of scheme.

Question 2:

Surya Ltd. wants to reorganize the company' share capital by the consolidation of shares of different classes and passed a resolution to this effect in the Board meeting and thereafter made an application to the Tribunal. The Tribunal ordered that a meeting of the members be called. The company sent notices to all the members.

In the meeting, some of the members made objections to such arrangements. However, the majority of the members were interested in the resolution proposed by the company. Tribunal after scrutinizing the minutes of the meeting, sanctioned the proposed arrangement.

Examine in the light of the given facts, that in order to give effect to the arrangement which prescribes the reorganization of company' share capital by the consolidation of shares of different classes, mention the requirements on the execution of the said arrangement under the Companies Act, 2013.

[RTP for Nov 2021 – New/Old]

Answer:

The requirements for execution of the said arrangement is as below:

Section 230(1) of the Companies Act, 2013 provides that where a compromise or arrangement is proposed:

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them,

the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Here the term, arrangement includes a reorganization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

Any compromise or arrangement needs the order of sanction by the Tribunal and the Tribunal may on an application made by the company, order the company to call the meeting of the shareholders, pass such resolution in the meetings and then forward the minutes to the Tribunal for its order.

The order of the Tribunal shall be filed with the Registrar by the company within a period of 30 days of the receipt of the order.

The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least 90% value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement

Question 3:

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.

[ICAI Module]

OR

A meeting of members of ABC Limited was convened as per the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent to 1000 members holding in aggregate 500000 equity shares. The meeting was attended by 800 members holding 350000 shares. 450 members holding 240000 shares voted in favor of the scheme; 200 members holding 60000 shares voted against the scheme. The remaining 150 members abstained from voting. Explain with reference to the provisions of the Companies Act, 2013, whether the scheme is approved by the requisite majority.

[May 2019 - New]

OR

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?

[Nov 2017 - New/ICAI Module]

Answer:

Relevant provision

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.

Given case and Analysis:
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 members) 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.

Conclusion:
As both the requirements are fulfilled, the scheme is approved by the requisite majority.

Question 4:
At the meeting of the members of M/s QRS Limited, a scheme of compromise and arrangement was approved by requisite majority. The National Company Law Tribunal (NCLT) after complying the provisions, issued an Order, approving the scheme of compromise and arrangement.
List out the matters to be provided in the Order issued by NCLT under Section 230(7) of the Companies Act, 2013. When shall the Order be filed with ROC?

[ICAI Module]

Answer:
According to section 230(7) of the Companies Act, 2013, an order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely:

a. where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
b. the protection of any class of creditors;
c. if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;
d. if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
e. such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order. [Section 230(8)]

Question 5:
At the time of filing of the petition for amalgamation, the object clause of both the transferor and transferee companies does not contain power to amalgamate. With reference to the provisions of the Companies Act, 2013, examine the validity of the scheme of amalgamation.

[May 2004]

OR

Explaining the relevant provisions of the Companies Act, 2013, answer whether the companies seeking sanction of the Tribunal for a scheme of amalgamation must have specific power to amalgamate in the object clause of their Memorandum of Association?

[Nov. 2009]

Answer:

The memorandum of association lays out the scope of operations of a company beyond which the company cannot go. Anything done by the company outside the objects clause of memorandum is ultra-vires the company.

However, to amalgamate with another company is a power of the company, and not an object of the company.

Therefore, no power to amalgamate is required in the memorandum of a company before making an application to the Tribunal for effecting amalgamation. Also, the power to amalgamate has been given by the statute under Section 232. Since there is a statutory provision dealing with amalgamation of companies, no special power in the objects clause of the memorandum is necessary for its amalgamation with another company.

Section 232 is a complete code which gives full jurisdiction to the Tribunal to sanction amalgamation of companies, even though there may be no power in the objects clause of memorandum. *(United Bank of India v United India Credit & Development Co. Ltd. (1977)).*

Question 6:

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?

[ICAI Module]

Answers:

Relevant provision:

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 7:

M/s. Unicorn Rubber Sheets Limited was incorporated and registered in the United Kingdom. M/s Artha Rubber Sheets Manufacturing and Trading Limited is an Indian Company incorporated and registered under the provisions of the Companies Act, 2013. A scheme of compromise between the above two companies provided for an amalgamation of the English Company with the Indian company. The CFO of the Indian Company is of the opinion that the companies being amalgamated must be companies registered in India and therefore an amalgamation with a company registered outside India is not possible. Explaining the relevant provisions of the Companies Act, 2013, examine the correctness or otherwise of the following with reference to a scheme of amalgamation of Companies:

i. Whether the contention of the CFO is correct that the companies being amalgamated must be Companies registered in India?

ii. What is the majority required for approving the scheme of amalgamation in a meeting of members of a company called as per the directions of the Tribunal? Is the scheme required to be approved by the preference shareholders?

[May 2019 - Old]

OR

A scheme provides for amalgamation of PQL International Limited, a foreign company, with DHP Limited, an Indian company registered under the Companies Act, 2013. Referring to the provisions of the above Act, decide whether the scheme providing amalgamation of a foreign company as a transferor company can be sanctioned by the Tribunal.

[May 2015]

OR

With reference to the provisions of the Companies Act, 2013, state whether companies being amalgamated must be companies registered in India.

(CA (Final) May 2000 (Modified)

OR

Examine with reference to the provisions of the Companies Act, 2013 the validity of a scheme providing for amalgamation of a 'foreign company' with a company registered under the Companies Act, 2013.

[May 2004]

OR

Explaining the relevant provisions of the Companies Act, 2013, answer whether the companies being amalgamated must be companies registered under the Companies Act, 2013?

[Nov. 2009]

Answer:

i. As per Section 234(3) of the Companies Act, 2013, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a Company registered under this Act or vice versa as per the scheme to be drawn up for the purpose.

Therefore, the contention of CFO of the M/s Artha Rubber Sheets Manufacturing and Trading Ltd. (Indian Company) is incorrect.

ii. According to Section 230(3) of the Companies Act, 2013, where a meeting is proposed to be called in pursuance of an order of the Tribunal, a notice of such meeting shall be sent to all the creditors / class of creditors and to all the members / class of members and the debenture-holders of the company.

Where, at a meeting, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an Order, the same shall be binding on the Company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a Company being wound up, on the liquidator, and the contributories of the Company.

As the expression used is 'members', not only holders of equity shares but also preference shareholders will have to be taken into account or, if the meeting of holders of preference shares and equity shares are ordered by the tribunal to be held separately, the three-fourths majority of each class will have to be ascertained separately. Where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable.

Question 8:

ABC Company Limited was amalgamated with and merged in XYZ Company Limited. Some workers of ABC Company Limited refuse to join as workers of XYZ Company Limited and claim compensation for premature termination of service. XYZ Company Limited resists the claim on the ground that their services are transferred to XYZ Company Limited by the order of amalgamation and merger and, therefore, the workers must join service of XYZ Company Limited and cannot claim any compensation. According to the provisions of the Companies Act, 2013, examine whether the workers' contention is correct.

[MTP Oct -2018 - New]

Answer:

An order under section 232 of the Companies Act, 2013 transferring the property, rights and liabilities of one company to another does not automatically transfer contracts of personal service, which are in their nature, incapable of being transferred and no contract of service is thereby created between an employee of the transferor company on the one hand and the transferee company on the other.

In compliance with section 232(1) and (2), the tribunal may by order make a provision for the transfer of the employees of the transferor company and the transferee company. And provisions shall also be made for any persons who dissent from the compromise or arrangement scheme.

According to the above provisions, the workers/employees and their services cannot be transferred without their consent. Tribunal may by order safeguard the interest of the employees/ workers. Therefore, the workers of ABC Ltd. (Transferor) will succeed against XYZ Ltd.

Question 9:

In the context of judicial rulings in the matter of merger, answer the following:

i. Whether exchange ratio approved by shareholders of merging companies can be questioned by a small group of dissenting shareholders?
ii. Whether Transferor Company is justified in excluding assets held on lease and license arrangement, from those transferred to the transferee company?

[Nov 2018 - Old]

Answer:

As per the legal provision of Section 232 of the Companies Act, 2013:

(i) Where the exchange ratio was questioned by small group of dissenting shareholders:
In this case, since the valuation is confirmed by majority of shareholders of merging companies, the objection raised by some shareholders of a small group cannot be sustained.
(Hindustan Lever Employees Union vs. Hindustan Lever Ltd.)

(ii) Excluding assets held on lease and license arrangement:
As per the decided case law *Hindustan Lever Employees Union Vs. Hindustan Lever Ltd.*, the court said that assets held on lease and license arrangement were neither transferable nor heritable. They are in the nature of a personal privilege and therefore Transferor Company is justified.

Question 10:

Pioneer Textiles Limited desired to amalgamate its enterprise with Latex Textiles Limited. A scheme of amalgamation for this purpose was approved by an overwhelming majority of shareholders and all creditors of both companies at meetings held under the provisions of Section 232 of the Companies Act, 2013. Thereupon it was presented to the Company Law Tribunal for its sanction. While the scheme was pending in the Tribunal, some of the

dissentient shareholders of Pioneer Textiles Limited requisitioned an extraordinary general meeting to negotiate with Latex Textiles Limited as according to the requisitionists the exchange ratio was not fair and reasonable. Examine whether the directors may refuse to call the extraordinary general meeting. Also discuss the powers of the Tribunal in this respect.

[May 2018 - New]

Answer:

Relevant Provisions:

According to Section 235 of the Companies Act, 2013,

1. Where a scheme or contract involving the transfer of shares or any class of shares in a Company (the "Transferor Company") to another company (the "Transferee Company") has, within four months after making of an offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved, other than shares already held at the date of the offer by, or by a nominee of the transferee company or its subsidiary Companies, the transferee Company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

2. Where a notice under sub-section (1) is given, the transferee Company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee Company.

According to Section 232(3) of the Companies Act, 2013, the Tribunal, after satisfying itself that the procedure specified in 232(1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement.

In the light of the above stated provisions,

i. Once the scheme of amalgamation has been approved by an overwhelming majority, transferee Company gets the right to give notice to any dissenting shareholder that it desires to acquire his shares. Further, as per the facts of the question, the dissenting shareholders has not applied to the Tribunal against the scheme of amalgamation.

   Hence, it is not mandatory for the directors to call the extraordinary general meeting.

ii. According to Section 232(3) of the Companies Act, 2013, the Tribunal may make provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement.

   [Note: It is assumed that overwhelming majority as specified in the question signifies approval by the holders of not less than nine-tenths in value of the shares (which is a pre- requisite to apply the provisions of section 235 of the Companies Act, 2013)].

Question 11:

A Ltd. (transferee) decides to acquire B Ltd. (transferor) by acquiring its shares via a process of takeover u/s 235 of the Companies Act, 2013. A Ltd. prepared a scheme by which an offer was made to the shareholders of B Ltd. The offer was made on 1st August, 2019. The offer remained open for 4 months. Such offer was approved by

shareholders having 92% value of the shares. Subsequently A Ltd. gave a notice to the remaining shareholders that it desires to acquire their shares. Such notice was given on 5th January, 2020. Certain dissenting shareholders made an application to the tribunal that acquisition of their shares should not be permitted. Such application was dismissed by the tribunal. Hence A Ltd. acquired shares of 5% of the dissenting shareholders (out of balance 8%). The shareholding of balance 3% shareholders continued to remain with them. Comment on the validity of such a takeover by A Ltd.

[ICAI Module]

Answer:

The basic requirements as to acquisition of shares mentioned in Sec 235 of the Companies Act, 2013 are as follows:

1. The scheme or contract involving the transfer of shares in a company (transferor company) to another company (transferee company) has been approved by the holders of not less than 9/10th (90%) in value of the shares whose transfer is involved.
2. The approval of 9/10th shareholders in value shall be received within 4 months after making of an offer in that behalf by the transferee company.
3. The transferee company shall express his desire to acquire the remaining shares of dissenting shareholder in 2 months after the expiry of the said 4 months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall be entitled as well as bound to acquire the shares of the dissenting shareholders where no application is made by any dissenting shareholders to the tribunal in 1 month of receipt of notice of acquisition of shares or where an application is made by any dissenting shareholder but such application is dismissed by the tribunal.

In the given case, since application made by dissenting shareholders has been dismissed by the tribunal, hence A Limited is entitled and bound to acquire all the shares of dissenting shareholders i.e., entire 8% shareholding.

Since A Limited acquired only 5%, this is a contravention of section 235 and hence the takeover is not valid

Question 12:

In a scheme of reconstruction by a multinational company listed in India, the company wanted the minority shareholders to get out of the company by selling their shares back to the promoters at a price determined by the promoters. The minority shareholders were not given a choice whether they wanted to tender their shares or not. In the meeting, there were six non-promoter shareholders who voted against the scheme, but Chairman declared that the motion was carried with an overwhelming majority of more than 90% shareholding. However, minority shareholders contended that they had a right to reject the offer. Will they succeed?

[Nov 2019 - Old]

Answer:

In the scheme of reconstruction by a Multinational Company listed in India, the company wanted to acquire the minority shareholders by selling their shares to the promoters at a price determined by the promoters.

Relevant provision:

As per Section 236(1) of the Companies Act, 2013 (the Act), in the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of 90% or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming 90% Majority or holding 90% of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any

other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.

According to Section 236(2) of the Act, the acquirer, person or group of persons, shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a determined price on the basis of valuation by a Registered Valuer.

The minority shareholders of the Company may offer to the majority shareholders to purchase the minority equity shareholding of the Company at the determined price as above.

Given case:
In the given case, the minority shareholders were not given a choice whether they wanted to tender their shares or not. Also, 6 minority shareholder were dissenting from the scheme. Chairman declared that such scheme was passed by majority of more than 90% shareholding. Further the price of the shares was determined by the Promoters and not by a Registered Valuer.

Analysis and Conclusion:
In the given instance, the said procedure of acquisition of shares of minority shareholders is not in compliance with the procedure given in Section 236 of the Act.

Further, as per the Section 236(9) of the Act, when a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders.

Therefore, as per the above provisions of the Act, minority shareholders will succeed in rejecting the said offer of purchasing of minority shareholding in the Company.

Question 13:
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.

[May 2018]

Answer:
Relevant provision:
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.

Given case and Analysis:
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 14:

The Central Government in the public interest ordered for the amalgamation of ABC Limited and DEF Limited into a single company named KPN Limited through a notification in the official gazette. In this connection the prescribed authority ordered that the equity shareholders of ABC Limited were to be provided with a cash compensation of Rs. 2,000/- and two equity shares in KPN Limited for every single equity share held in ABC Limited. Mr. Ganesh, an equity shareholder of ABC Limited was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority. Advise him whether he can challenge the above amalgamation order of the Central Government. Also advise him within how many days and before which authority he can prefer an appeal against the order of the prescribed authority. Advise him referring to the provisions of the Companies Act, 2013 in this regard

[Nov 2016]

Answers:

As per Section 237, the Central Government is empowered to make an order of amalgamation of 2 or more companies if it is satisfied that such amalgamation is in public interest. The provisions are as under

a. Every member and creditor of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interests and rights against the transferee company as he had in the transferor company.
b. In case the interests or rights of any member or creditor against the transferee company are less than his interests or rights against the transferor company, he shall be entitled to receive compensation from the transferee company.
c. The compensation shall be assessed by such authority as may be prescribed.
d. Every assessment of compensation shall be published in the Official Gazette.
e. Any person aggrieved by any assessment of compensation made by the prescribed authority may, within a period of 30 days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

Section 237 entitles any member of the transferor company to prefer an appeal to the Tribunal against the assessment of compensation by the prescribed authority. Thus, Mr. Ganesh is entitled to prefer an appeal to the Tribunal against the assessment of compensation by the prescribed authority. Such appeal may be preferred within 30 days from the date of publication of such assessment of compensation in the Office Gazette.

However, Section 237 does not entitle any person to prefer any appeal against the order of amalgamation passed by the Central Government. Thus, Mr. Ganesh cannot prefer any appeal before any authority against the order of amalgamation passed by the Central Government. In other words, Mr. Ganesh cannot seek any order from any Court or Tribunal cancelling or nullifying the order of amalgamation passed by the Central Government. His only remedy is to prefer an appeal against the assessment of compensation, as discussed above.

Question 15:

The shareholders and creditors of XYZ Limited, in a meeting convened for approval of a scheme of reconstruction of the Company, passed the necessary 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 of the balance amount. A few shareholders and creditors raised objections against the said arrangements.

Advise the directors about the steps to be taken by the Company to give effect to the scheme of reconstruction under the Companies Act, 2013.

[May 21 - New]

Answer:

Scheme of compromise or arrangement: As per section 230 of the Companies Act, 2013, the proposed scheme of reconstruction involves scheme of compromise or arrangement with members and creditors. The scheme of reconstruction provided for sale of plant and machineries and appropriation of proceeds for payment of outstanding wages, tax dues and repayment of loan. And also the unsecured creditors are to forego 60% of their claims against company and receive debentures of the balance amount. Besides, a few shareholders and creditors raised objections against the said arrangements.

Following is the procedure to give effect to the said Scheme of Compromise/arrangement:

1. Filing of an application: While the company or any creditor or member or liquidator (in case of voluntary liquidation) can make application to the Tribunal under section 230. On such application, the Tribunal may order that a meeting of creditors and/or members, be called and held and conducted as per directions of the Tribunal.
2. Disclosure by applicant: All the relevant disclosures as regards material facts related to financial aspects, reduction of share capital, scheme of corporate debt restructuring consented by not less than 75% of the secured creditors, and the valuation report, shall be made to the Tribunal by affidavit.
3. Serving of Notice: Company must arrange to send notice of meeting to every creditor/member/ debenture holders/sectoral regulators at the registered address. Notice shall be containing a statement setting forth the terms of compromise or arrangement explaining its effect.
4. Such notice and other documents shall be hosted on website and published in newspaper and also advertised.
5. Tribunal may dispense with the calling of meeting where such creditors/ class of creditors having at least 90% value, agree and confirm to the scheme.
6. Person to whom notice is sent may vote in the meeting to the adoption of the compromise or arrangement within 1 month from the date of receipt of such notice.
7. Any objection to the scheme shall be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5% of the total outstanding debt as per the latest audited financial statement.
8. At the meetings convened as per directions of the Tribunal, majority in number representing $\frac{3}{4}$th in value of creditors/members present and voting (either in person or by proxy or by postal ballot if allowed) must agree to the scheme of compromise or arrangement.
9. Such scheme of the compromise or arrangement is sanctioned by the Tribunal by an order.
10. Such an order shall be binding on the company, all the creditors, members or on liquidator, and the contributories of the Company.
11. Copy of order must be filed with the Registrar of Companies.

In the light of above the order shall be binding on the company, all creditors, members or on liquidator and contributories of the company and the objections raised by a few shareholders and creditors will not sustain.

Question 16:

A group of members of XYZ Ltd. made a complaint to the Registrar of Companies alleging that the management of the Company is indulging in destruction and falsification of the records of the Company. Decide the liability of the person for commission of the following acts during the course of inspection, inquiry or investigation under the Companies Act, 2013:

i. Mr. B who is required to make a statement during the course of investigation pending against its Company, is a party to the manipulation of documents related to the transfer of securities and name of shareholders in the Register of Members of the Company.

ii. Mr. N, an employee of the Company posted in social media that the Company was making profits so as to influence probable investors, when on the contrary, the Company was incurring losses.

[May 21 - New]

Answer:

As per section 229 of the Companies Act, 2013, where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation, shall be punishable for fraud in the manner as provided in section 447, if he:

a. destroys, mutilates or falsifies, or conceals or tampers or unauthorizedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorized removal of, documents relating to the property, assets or affairs of the company or the body corporate;

b. makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

c. provides an explanation which is false or which he knows to be false. Accordingly, following are the answers:

    i. In this part, Mr. B, is a party to the manipulation of documents related to the transfer of securities and name of shareholders in the Register of Members of the company. Thus he is party in making of a false entry in register of members of the XYZ Ltd. Thus, liable for fraud as provided in section 447 of the Companies Act, 2013.

Here Mr. N, an employee of XYZ Ltd. posted false explanation in social media that company was making profits so as to influence probable investors, in fact the company was incurring losses. Therefore, Mr. N is liable for the fraud as provided in section 447 of the Companies Act, 2013.

Question 17:

PQR Limited is a listed company engaged in hospitality business (a five star hotel). Due to the current pandemic situation and frequent lockdowns, business was in a bad shape. They are on the verge of liquidation due to drastic fall in the number of customers, non-happening of banquet events, lesser room occupancy etc. The management proposed one last arrangement between the vendors and the company wherein the Annual maintenance Contract (AMC) vendors (only creditors for the company) need to let go 50% of the rate mentioned in the contract. This led to protest among some of the vendors who were not in favour of this arrangement. Total value of AMC vendors amounts to Rupees 15 crores. Value of protesting vendors amounts to Rupees 80 Lakhs. Discuss whether the company can proceed with the arrangement irrespective of protest from few vendors.

[MTP - Dec 2021]

Answer:

The proposed scheme involves a compromise or arrangement with the creditors(vendors) and it attracts Section 230 - Where a compromise or arrangement is proposed between a company and its creditors, the tribunal may, on the application of the company or creditor, call a meeting in such manner as it may think fit.

The company shall make an application to the tribunal all material facts relating to the company like the latest financial position of the company, latest auditor's report.

If the Tribunal decides to hold a meeting, notice of the same shall be send to the company & its creditors individually at the address registered with the company.

Advertisement of the notice shall be put up in the website of the company and since PQR Ltd is a listed company, notice & other documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the company are listed. It shall also be published in the newspaper.

The recipient of notice shall cast their vote either by themselves or through proxies or postal ballots to the adoption of the compromise or arrangement within one month from the date of receipt of such notice
Any objection can be raised only by persons not holding less than 10% of the shareholding or having outstanding debts amounting to not less than 5% of the total outstanding debts as mentioned in the latest audited Financial Statement. Here total outstanding of vendors is Rs. 15 crores. 5% is Rupees 75 Lakhs. In the case of PQR Ltd, it is Rupees 80 Lakhs.

Where a meeting is held, majority of persons representing 3/4th in value of the creditors, (here 3/4th of Rupees 15 crore = Rupees 11 crore 25 Lakhs) agree to the compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company & the creditors.

Hence to conclude, PQR Ltd. can go forward with the arrangement of 50 % payment to vendors irrespective of protest from few vendors.

Chapter 6 – Prevention of Oppression and Mismanagement

Question 1:
Legal heir of a deceased member of a company alleged oppression and mismanagement. He made a complaint to the Tribunal for relief. The management of the company is of the opinion that the petitioner has no locus standi since he is not a member. The register still shows the name of the deceased as member. Will the representation be entertained by the Tribunal?

[ICAI Module]

Answer:
The legal heir of a deceased member is entitled to file a petition under Section 241 of the Act for relief against oppression and mismanagement, even though the name of the deceased member is still recorded in the register of members. *Worldwide Agencies Pvt. Ltd. and another vs. Margaret T. Desor and others.*

It would be wrong to insist that the name of the legal representative be first put on the register before he can move an application under Section 241. Therefore, the Tribunal may entertain the complaint in the given case.

Question 2:
Fifteen members of KUN Limited holding 15% paid-up share capital (who have paid all calls and other sums due on their shares) of the company applied to the Tribunal under Section 241 of the Companies Act, 2013 for relief from oppression on the ground that the affairs of the company are being conducted in a manner prejudicial to their interest. The Tribunal admitted the application and upon enquiry found the allegation to be genuine. Thereupon, the Tribunal on 1st October, 2020, ordered for termination of Mr. BAP, the Managing Director of the company, with immediate effect. Mr. BAP was appointed as the Managing Director of the company for a period of five years with effect from 1st April, 2017 having a clause in his letter of appointment that he would be entitled for compensation for the remaining period; in case his services are terminated by the company before expiry of his stipulated term of service. Mr. BAP claimed compensation for the remaining term of one and half year. KUN Limited denied to pay the compensation but offered him to re-assume his office again after lapse of a period of three years from 1st October, 2020. Referring to and analyzing the relevant provisions of the Companies Act, 2013, decide, whether the claim of Mr. BAP is tenable and proposal of KUN Limited is valid.

[Jan 2021 -New]

Answer:
As per the provisions of section 243(1) of the Companies Act, 2013, where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub section (2) of that section:

a. Such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;
b. No managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as managing director or other director or manager of the company.

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

In terms of the provisions stated above, the contention of Mr. BAP is not tenable since he will not be eligible to get any compensation.

KUN Limited's proposal offering Mr. BAP to resume his office before the expiry of a period of three years is also not valid since there is a restriction of a period of five years from the date of termination of his service.

But, with the leave of the Tribunal, Mr. BAP can be appointed, or act, as the Managing Director of the company, provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

Question 3:

A group of shareholders consisting of 30 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s. Aravalli Manufacturing Company Limited having a paid up Share Capital of Rs. 1 crore. The company has a total of 500 members and the group of 30 members holds one-tenth of the total paid-up share capital accounting for one- fifteenth of the issued share capital. The grievance of the group is that due to the mismanagement by the Board of Directors, the company is incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies. Act, 2013, please advise the group of shareholders regarding the admission of the petition and the relief thereof.

[May 2019 - New]

OR

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.

[ICAI Module]

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:

1. 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.
2. In the case of company not having share capital, not less than one-fifth of the total number of its members.

As per the facts, a group of 30 members decided to file a petition. Total number of members are 500 & one tenth of 500 will be 50 and lower of above is 50. Thus, the group of shareholders who decides to file the petition are less than 50. However, the group of 30 members holds one-fifteenth of the issued share capital which is less than the required one tenth of the issued share capital.

In view of this, the group is not having requisite number of shares and shareholding for being eligible to approach the Tribunal for order.

Also, the shareholders may not succeed in getting any relief from the tribunal as continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).

Similarly, the failure to declare dividend or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. Vs. Kuttanad Rubber Co. Ltd.).

Question 4:

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.

[ICAI Module]

OR

There are eight shareholders in M/s. Supra Private Ltd. Mr. Shyam who is holding less than one-tenth of the share capital of the company seeks your advice whether he can apply to the Tribunal for relief against oppression and mismanagement. Advice.

(CA (Final) Nov. 2002 (Modified)

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 than one-tenth of the company's share capital.

Question 5:

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 the above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

[ICAI Module]

OR

The issued and paid up capital of Crown Jewels Limited is Rs. 5 crore 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 the above petition, if subsequently 40 members, who had signed the petition, withdrew their consent.

[RTP May 2018]

Answer:

Relevant provision

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:

a. 100 members; or
b. 1/10th of the total number of members; or
c. 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:

a. 100 members; or
b. 50 members (being 1/10th of 500); or
c. 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.].

Question 6:

MNC Private Ltd. is a Company in which there are six shareholders. Mr. Srinath, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital the Company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013 whether the petition made by Mr. Srinath valid and maintainable?

[Nov 2018 -New]

Answer:

1. According to 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.

2. Legal heir of the deceased shareholder with minority status is entitled to file the petition.

In the given case, there are six shareholders. As per the condition (a) above, 10% of 6 i.e., 1 (round off 0.6) satisfies the condition.

Therefore, in the light of the provisions of the Act, a single member (even the legal representative of a deceased shareholder) can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.

Thus, the petition made by Mr. Srinath is valid and maintainable.

Question 7:

M/s DJ Limited, a listed company, as per the audited financial statements as at March 31, 2018 is having issued and paid-up equity share capital comprising of 10 Lakhs shares of Rs. 10 each and issued and paid-up preference share capital of 5 Lakhs shares of Rs. 10 each respectively. The members of the company after complying with the provisions of Section 169 of the Companies Act, 2013 removed one Mr. Satish from the directorship of the company on 1st August 2018 before the completion of his term of office. Mr. Satish is also one of the members of the company holding 1,10,000 fully paid- up equity shares. Mr. Satish has alleged oppression on his removal and has moved the jurisdictional Honorable National Company Law Tribunal (NCLT) under Section 241 read with Section 244 of the Companies Act, 2013. The Board of Directors of the company is of the opinion that the application is not maintainable as per the provisions of Section 244 of the Companies Act, 2013. Decide.

[Nov 2018 -Old]

Answer:

According to section 244(1)(a) of the Companies Act, 2013, the following members of a company shall have the right to apply under section 241, namely:

- in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

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

In the instant case, the equity share capital of the company is Rs. 1 crore (10 lakh shares of Rs. 10 each) and preference share capital is Rs. 50 Lakh (5 lakh shares of Rs. 10 each). The total issued and paid up share capital is Rs. 1.50 crore comprising of 15 lakh shares.

Mr. Satish is holding 1,10,000 fully paid up equity shares. His holding is less than one- tenth of the issued share capital of the company [1/10th of 15 Lakhs i.e. 150000 shares].

Hence, his application is not maintainable as per provisions of section 244 of the Companies Act, 2013 and therefore the opinion of Board of directors is correct.

However, as per proviso to section 244(1), Mr. Satish may make an application to the Tribunal in this behalf for the waiver of the above condition so that he may apply under section 241.

Question 8:

A group of members of XYZ Limited has filed a petition before the Tribunal alleging various acts of oppression and mismanagement by the majority shareholders of the company. The Petitioner group holds 12% of the issued share capital of the company. During the pendency of the petition, some of the petitioner group holding about 5% of the issued share capital of the company wish to disassociate themselves from the petition and they along with the other

majority shareholders have submitted before the Tribunal that the petition may be dismissed on the ground of non- maintainability. Examine their contention having regard to the provisions of the Companies Act, 2013.

[ICAI Module]

Answer:

The argument of the majority shareholders that the petition may be dismissed on the ground of non-mainability is not correct. The proceedings shall continue irrespective of withdrawal of consent by some petitioners. It has been held by the Supreme Court in Rajmundhry Electric Corporation vs. V. Nageswar Rao, 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 the 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 9:

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

i. Various acts of illegal, invalid and irregular transactions entered into the name of the company.
ii. Losses incurred due to mismanagement by the board of directors.
iii. Non-declaration of dividend despite having sufficient profits in the past years.

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

[May 2017]

OR

Discuss the powers of the Tribunal to pass the following orders on applications seeking relief from oppression and mismanagement: (i) Termination or modification of any agreement between the company on the one hand, and the managing director or director or any other person. (ii) Alteration in the memorandum or articles of the company.

(CA (Final) Nov. 1997)

OR

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. Examine the merits of the petition in the light of judicial pronouncements made in this regard.

(CA (Final) Nov. 2013 (Modified)

OR

A group of shareholders holding more than 15% of the issued capital of M/s Defraud Ltd. have filed a petition before the Tribunal alleging various acts of illegal, invalid and irregular transactions entered into in the name of the company. Examine the merits of the petition in the light of the judicial pronouncements made in this regard.

(CA (Final) Nov. 2009, Nov. 2001 (Modified)

Answers:

According to Sections 244 of the Companies Act, 2013, a group of shareholders of DEF Limited must hold at least 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 10:

M/s City Hospital Private Ltd. has two groups of directors. A dispute arose between the two groups out of which one group controlled the majority of shares. A very serious situation arose in the administration of the company's affairs when the minority group ousted the lawful Board of Directors from the possession and control of the management of the company's factory and workshop. Books of account and statutory records were held by the minority group and consequently the annual accounts could not be prepared for two years. The majority group applied to the Tribunal under Section 241 of the Companies Act, 2013. You are required to decide with reference to the provisions of the said Act, the following issues:

i. Can majority of shareholders apply to the Tribunal for relief against the oppression by the minority shareholders?
ii. Whether Tribunal can grant relief in such circumstances.

(CA (Final) Nov. 2007)

Answer:

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

(a) 100 members; or
(b) 1/10th of the total number of members; or
(c) Members holding not less than 1/10th of the issued share capital of the company.

However, in case of a company not having a share capital, the application shall be valid only if it is made by at least 1/5th of total number of members.

Section 244 specifies the minimum number of members who are eligible to make an application. Section 244 does not stipulate that an application shall be maintainable only if it is made by the minority.

Where the application is made by a majority of members, relief may be granted if the Tribunal is satisfied that the majority is oppressed and has been rendered completely ineffective by the wrongful acts of a minority group.

There may be oppression where a minority by physical force or other wrongful act oust the majority, so as to prevent the lawful exercise of their rights as shareholders.

i. Application to the Tribunal by majority of shareholders is valid since the right to apply to the Tribunal is not confined to minority shareholders alone; majority may also apply. Since, in the given case, the majority is oppressed, the majority of shareholders may apply to the Tribunal for relief against the oppression by minority shareholders.

ii. Whether the application made by the majority shareholders would succeed or not would depend upon the satisfaction of the Tribunal with respect to fulfilment of conditions laid down under Section 241 read with Section 242, viz. -
   1. the affairs of the company have been or are being conducted in a manner-
      a. prejudicial to public interest:
      b. prejudicial or oppressive to the member(s) making such application/any other member, or
      c. prejudicial to the interests of the company: and
   2. to wind up the company would unfairly prejudice such member or members, but that otherwise the 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.

The Tribunal may grant such relief as it may deem fit in the light of facts and circumstances of the case, in accordance with the provisions of Section 242 and 243, if the Tribunal is of the opinion that the conditions laid down under Section 241 and 242 are satisfied.

Question 11:

Mr. B. Dutt is the Managing Director of Food Plaza Restaurants Private Limited (FPRPL). 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.

During the course, 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 pressurized 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?

[MTP Aug 2018 - New]

Answer:

Relevant Provisions

As per the given instance, the act of JIPL to remove Mr. B Dutt, a Managing director from FPRPL and pressurizing him to sell his shares much below the fair market price is an act of oppression and violations of Section 241and 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 may, 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 utilization 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.

Under Section 242(2) of the Companies Act, 2013, the 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.

Mr. B. Dutt can be reappointed by Tribunal as the Managing director of the company 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).

Question 12:

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 Honorable Tribunal? Discuss with reference to the provisions of the Companies Act, 2013?

[May 2018 - Old]

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 practicing 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 5% of the total number of depositors, whichever is less.

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, as the requirement of minimum number of members (5% of 200 i.e., 10) filing the application under Section 245(3)(ii) is fulfilled.

Question 13:

B, S, and D hold 33%, 33% and 34% of equity shares of BSD Private Limited respectively. S and D are directors and D is looking after the whole of the management and administration of the company without being formally appointed as a Managing Director. Since from last three years the company is incurring heavy losses and could not declare a dividend. Being aggrieved, B filed a complaint before the Tribunal on the grounds of oppression and mismanagement of the company such as running of a company continuously in losses, non-declaration of dividend and managing the affairs of the company by a director who has not been formally appointed as a managing director. The complaint is thereby made soliciting the directors for payment of compensation by way of salary to him as like other directors and such other direction as may be deemed suitable by the Tribunal to remove oppression and mismanagement of the Company. Examine the maintainability of his complaint in law in the light of the provisions of the Companies Act, 2013.

[MTP March 21]

Answer:

Mr. B has filed a complaint before the Tribunal on the grounds of oppression and mismanagement of the BSD Private Limited on the following issues:

i. <u>Running of Company continuously in losses:</u>
   As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).
ii. <u>Non declaration of dividend:</u>
   Failure to declare dividends or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd).
iii. <u>Managing the affairs of the Company by a director who has not been formally appointed as a Managing Director:</u>

Where a person without being so appointed, was acting as a Managing Director and was discharging his functions as such, whether with or without the knowledge of the members, a member cannot claim that it was an act of oppression, by filing an application with the Tribunal.

iv. Payment of Compensation by way of Salary

Mr. B has filed a complaint soliciting the direction for payment of compensation by way of salary to him as like other directors and such other directions as may be deemed suitable by the Tribunal to remove oppression and mismanagement of the Company. But as per decided case laws, shareholders can share the dividend of the Company, if it is declared but cannot seek directions to be compensated. The payment of salary is a question that concerns the Board of Directors and not the Tribunal.

Hence, Mr. B neither may succeed in getting any relief from Tribunal nor getting any compensation by way of salary.

Chapter 7 – Winding Up

Question 1:

A Ltd is getting wound up by the tribunal u/s 271 of the Companies Act, 2013. Mr. P (liquidator) has a sum of Rs. 45,00,000 which was deposited in Company Liquidation Dividend and Undistributed Assets Account. Mr. P was given a receipt of the same. Mr. X applied to the registrar on 1st October, 2019 claiming Rs. 12, 00,000 of such amount. After verifying the correctness of the claim, the same was settled on 12th November, 2019. Balance amount remained unclaimed for a period of 15 years and hence was transferred to the general revenue account of the Central Government. It was noted that a sum of Rs. 6,00,000 was retained by Mr. P which should have been deposited by him into Company Liquidation Dividend and Undistributed Assets Account. Hence interest @ 15% p.a. was levied on Mr. P. State on the correctness of the process of compliance in the given situation in the light of the section 352.

[ICAI Module]

Answer:

In the given case, Mr. X has made an application to the registrar for claiming Rs. 12, 00,000 which is in accordance with the law. There is no need to submit any application to the tribunal. The claims have been settled on 12th November, 2019 which is within 60 days from the date of receipt of the application (i.e. 1st October, 2019).The unclaimed amount has been transferred to the general reserve account of the Central Government after the amount has remained unclaimed for a period of 15 years which is also in accordance with the law.

Interest levied @ 15% p.a. is in contravention of Sec 352. Here interest @ 12% p.a. should be levied on Mr. P for his failure to deposit Rs. 6, 00,000 into the Company Liquidation Dividend and Undistributed Assets Account.

Question 2:

Clarks Limited, has made default in filing financial statements and annual returns for a continuous period of 4 financial years ending on 31st March, 2019. 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 as per 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?

[ICAI Module]

OR

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?

[May 2018- Old]

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 Clarks Limited 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, 2019.

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 3:

Due to an unprecedented flood, all the fixed assets of a Company were damaged extensively beyond renovation or repair. The costs of replacement of assets were huge and the sum insured on the fixed assets did not cover all the assets. Therefore, the operations of the Company were permanently discontinued. Meanwhile, based on a winding-up petition filed by the secured creditors, the High Court passed a winding-up order. The workers of the Company opposed to the winding-up petition and also filed an appeal against the winding-up order. The workers are not sure whether their appeal would be heard in the winding-up proceedings. Examine, under the provisions of the Companies Act, 2013, whether the appeal filed by the workers would succeed and their dues / interest will be protected in priority?

[ICAI Module]

Answer:

According to section 279 of the Companies Act, 2013, when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose.

It is further provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

However, the above provision shall not apply to any proceeding pending in appeal before the Supreme Court or a High Court.

According to section 325/326/327 of the Companies Act, 2013, in the winding up of a company under this Act, the workmen's dues shall be paid in priority to all other debts ranking pari passu with secured creditors.

As per the facts of the question, the High Court has already passed a winding up order of the company. Hence, the workmen can appeal against the winding up order but only with the leave of the Tribunal and subject to such terms as the Tribunal may impose. Further, the dues/ interest of the workmen will be protected in priority as workmen's dues shall be paid in priority to all other debts ranking pari passu with secured creditors.

Question 4:

Some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares allotted to them and thereby become shareholders of the company. The company went into liquidation.

i. What shall be the fate of the applicants who had consented to become shareholders on certain conditions?
ii. What shall be the amount to be borne by the secured creditors out of the expenses incurred by the liquidator if:
    a. The value of the security of secured creditors of a company is Rs. 1.00 lac.

b. Total amount of workmen's due is Rs. 1.00 lac and
c. Debts due from the company to its secured creditors is Rs. 3.00 lacs.
d. The liquidators incurred Rs. 10,000 for the preservations of the security before it is realized by the secured creditors.

[May - 2017]

Answer:

Some applicants consented to become shareholders of a company on the condition that their suggestions should be included in the memorandum and articles of association. Their suggestions, however, were not carried out by the promoters but the applicants signed usual applications for shares allotted to them and thereby become shareholders of the company. The company went into liquidation.

In East Bengal Sugar Mills Ltd., it was held that it was not open to shareholders to object subsequently to their being shareholders of the company on the ground that the condition had not been fulfilled.

Section 326 prescribes the debts which shall be paid in priority to all other debts, i.e. overriding preferential payments. Accordingly, the following debts shall be paid in priority to all other debts:

(a) Workmen's dues.

(b) Debts due to secured creditors to the extent such debts rank pari passu with workmen's dues.

The debts listed under Section 326 shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Value of the security: Rs. 1 lakh.
Amount due towards workmen's dues: Rs. 1 lakh.
Amount due to secured creditors: Rs. 3 lakh.
Overriding preferential payments (workmen's dues and secured creditors): Rs. 4 lakh.

Since the amount realised is not sufficient to pay the overriding preferential payments in full, the workmen's dues and dues payable to secured creditors shall abate in equal proportions, i.e., payments to workmen and secured creditors shall be made in the proportion of amount owed by the company to them (i.e., in the ratio of 1:3).

Accordingly, the amount payable towards workmen's dues would have been Rs. 25,000 and the amount payable to secured creditors would have been Rs. 75,000, had the liquidator not incurred any expense towards preservation of security.

Since the liquidator has incurred Rs. 10,000 towards preservation of the security, this amount of Rs. 10,000 shall have to be borne by the 'workmen dues' and secured creditors in the proportion of 1:3. Accordingly, the workmen shall have to bear Rs.2, 500 and the secured creditor shall bear Rs. 7,500.

Question 5:

M/s, IJK Limited was wound up with effect from 15th March 2018 by an order of the Court. Mr. A, who ceased to be a member of the company from 1st June 2017, has received a notice from the liquidator that he should deposit a sum of Rs. 5,000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called as a contributory, whether he can be made liable and whether there is any limitation on his liability..

[May 2018 - Old]

OR

M/s. XYZ Limited was wound up with effect from 15.3.2000 by an order of the Tribunal. Mr. A, who ceased to be a member of the company from1.6.1999, has received a notice from the liquidator that he should deposit a sum of Rs. 5,000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called a contributory and whether he can be made liable and whether there is any limitation on his liability.

[May 2000]

OR

By an order of the Tribunal M/s ABC Limited was wound up with effect from 15.3.2002. Mr. Gupta, who ceased to be a member of the company from 1.6.2001 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.

[Nov. 2002]

Answer:

Contributory: According to section 285 of the Companies Act, 2013, as soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories.

While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

Liability of the contributory: A person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up.

In the given case, M/s, IJK Ltd. was wound up on 15th March 2018. Whereas Mr. A ceased to be a member of the company from 1stJune, 2017. So, according to the above provision, Mr. A will be a contributory and be liable to contribute as the time period of one year from the commencement of winding up has not elapsed. So, Mr. A is liable to deposit Rs. 5000 (if any unpaid on the shares in respect of which he is liable as member [Section 285 (3) (d)] as his contribution towards the liability on the shares previously held by him.

Question 6:

Info-tech Overtrading Ltd. was ordered to be compulsory wound up by an order dated 10th March, 2019 by the Tribunal. The official liquidator who has taken control of the assets and other records of the company has noticed that :

i. One of the contributory whose calls are pending to be paid is about to leave India for evading payment of calls and;
ii. A person having books of accounts of the company his possession may abscond to avoid examination of books of accounts in respect of the affairs of the company.

Apprehending such possibilities, Tribunal detained such contributory for next 6 month disallowing him to leave India as well as arrest & seized books of accounts from the person which may possibly abscond to avoid examination of the affairs of the company.

Referring to the provisions of Companies Act, 2013, answer the following in current scenario :

i. What is the validity of Tribunal's order for detention of contributory disallowing him to leave India?
ii. Is it correct from Tribunal's part to arrest and seize books of accounts from the person planning to abscond to avoid examination of books of accounts in respect of the affairs of the company?

[ICAI Module/ May 2019 - New]

Answer:

According to section 301 of the Companies Act, 2013, at any time either before or after passing a winding up order, if the Tribunal is satisfied that

- a contributory or
- a person having property, accounts or papers of the company in his possession

is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company,

the Tribunal may cause—

a. the contributory to be detained until such time as the Tribunal may order; and
b. His books and papers and movable property to be seized and safely kept until such time as the Tribunal may order.

In the instant case, by taking into account the above provisions:

i. The Tribunal's order for detention of contributory for next 6 months disallowing him to leave India, is valid.
ii. It is correct from Tribunal's part to arrest and seize books of accounts from the person planning to abscond to avoid examination of books of accounts in respect of the affairs of the company.

Question 7:

Best Plastics Limited is being would up by the Tribunal. The 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.

[Nov. 2015]

Answer:

Section 326 prescribes the debts which shall be paid in priority to all other debts, i.e. overriding preferential payments.

Accordingly, the following debts shall be paid in priority to all other debts;

(a) Workmen's dues.
(b) Debts due to secured creditors to the extent such debts rank pari-passu with workmen's dues.

The debts listed under Section 326 shall be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

The order of payment of liabilities adopted by the liquidator shall be as under:

1. Overriding preferential payments under Section 326 (1.e. workers' dues and debts due to secured creditors)
2. Costs and expenses of winding up.
3. Preferential payments under Section 327.
4. Creditors secured by a floating charge.
5. Unsecured creditors.

In the present case, only Rs. 28 Lakhs are available whereas the overriding preferential payments (workers' dues and secured creditors) amount to Rs. 35 lakhs. Therefore, the workers dues and dues payable to secured creditors shall abate in equal proportions, i.e., payments to workers and secured creditors shall be made in the proportion of amount owed by the company to them (i.e., in the ratio of 20:15) Accordingly the workers shall be paid Rs. 12 lakhs and the secured creditors shall be paid Rs. 16 lakhs No payment shall be made to the Government authorities for tax dues or to unsecured creditors.

Question 8:

A company was in financial distress. They pledged certain immovable properties with a nationalized bank in the belief that their loan limits would be increased. However, within 3 months, some creditors filed a petition for winding up. The management was accused of fraudulent preference.

(i) In the above context discuss fraudulent preference.

(ii) Would your answer be different if the charge was created in favor of an NBFC?

[May 2016]

OR

Modern Textiles Limited incurred huge losses during the last three financial years and its financial position was bad. The Company created a legal mortgage on some of its immovable properties in favor 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 15th 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, 1956:

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

ii. Whether the creation of legal mortgage by the Company in favor of the bank would amount to fraudulent preference?

[Nov 2013]

Answer:

As per Section 328, a transaction shall be deemed to be a fraudulent preference and consequently invalid if all the following conditions are satisfied:

a) The transaction relates to transfer of property, delivery of goods, payment of money or other act relating to the property of the company.

b) It took place within 6 months before the commencement of the winding up of the company.

c) It was an entirely voluntary act and not made under any pressure.

d) The dominant motive was to give a creditor a preference over other creditors.

As per Section 357, in case of a winding up by the Tribunal, the winding up shall be deemed to have commenced at the time of presentation of the petition for the winding up. Thus, where a petition is made to the Tribunal and the Tribunal orders the winding up, the order relates back to the date of the presentation of the petition.

In the given case, the petition for winding up was presented to the Tribunal within 3 months of pledge of immovable property by the company. Thus, the transaction of pledge has taken place within 6 months before the commencement of winding up of the company.

A transaction shall amount to fraudulent preference only it there is an element of dishonesty, i.e., there is a malafide intention to give preference to a creditor over others.

There is no fraudulent preference when a debtor's dominant intention is to benefit himself rather than to confer an advantage on his creditor. Thus, where a company created a legal mortgage in favor of a bank in the hope that by keeping good faith with the bank if could get further advance from the bank which could be utilized to revive the company, the mortgage was held not to be a fraudulent preference even though the mortgage was created after it was fairly clear that the company had become insolvent [Re, F.L.E. Holdings Ltd. (1967) 3 All ER 553].

In the given case, the immovable property was pledged by the company under a belief that the loan limit would be increased. Thus, the dominant motive was not to give to the bank any preference over other creditors, and so pledge of immovable property by the company does not amount to fraudulent preference. Therefore, the Tribunal shall not declare the pledge of immovable property as void.

Even where the charge was created in favor of NBFC, and not in favor of a bank, the answer would have remained same, since in determining as to whether a transaction is a fraudulent preference or not, if is immaterial that the creditor is a bank or NBFC or any other person.

Question 9:

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/-.

[ICAI Module]

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 favour of the workman to the extent of their portion.

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

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

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

$$\text{Workman's Share to Secured Assets} = 80,00,000$$

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 10:

Insincere Limited on 22nd May, 2020 mortgaged one of the freehold land of the company in the favor of the bank, from which Mr. Daman, a director of the company had taken housing loan for his residential purpose. Since Insincere Ltd. had been running in losses and was unable to honor the liabilities due towards the other creditors.

As, the Board of Directors of the company was aware of the financial crisis faced by the Insincere Ltd. and of creation of a mortgage in order to give preference to Mr. Daman over other creditors. On 23rd September, 2020 some creditors of the company filed a petition for the winding up before Tribunal. It passed an order for the winding up of the company on 5th November, 2020. Discuss on the nature of the transaction of mortgage created with bank in the given circumstances in the light of the Companies Act, 2013.

[MTP March 2021 - New]

Answer:

As per Section 328 of the Companies Act, 2013,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.

If the Tribunal is satisfied that there is a preference transfer of property, movable or immovable, or any delivery of goods, payment, and 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.

In the question, the company had created a legal mortgage on 22nd May, 2020 and the creditors made a petition for winding up of the company on 23rd September, 2020, so the above transaction of creation of legal mortgage on the freehold land of the company falls within the ambit of section 328 of the Act.

Therefore, creation of mortgage of the freehold land of the company is the transaction covered under the fraudulent preference since the mortgage is created 6 months preceding the date of making of winding up petition and therefore, the Tribunal may order as it may think fit and may declare such transaction on creation of mortgage as invalid and restore the position.

Question 11:

Info-tech Overtrading Ltd. was ordered to be wound up compulsory by an order dated 10th March, 2019 by the Tribunal. The official liquidator who has taken control for the assets and other records of the company has noticed the following:

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 INR 50 lakhs. The sale took place on 15th October, 2018.

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

[ICAI Module]

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 15th October, 2018 and the company went into liquidation on 10th March, 2019 i.e., within 6 months before the winding up of the company and since the sale has resulted in a loss of INR 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. 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.

Question 12:
PQR Limited has purchased machinery from the vendor under hire purchase agreement. Subsequently, before payment of last installment due on 01.08.2020 the Company went into liquidation in the month of July 2020 under the order of the Tribunal. Due to Liquidity problem PQR Limited defaulted the payment of the last installment due under hire purchase agreement for the machinery and consequently the Vendor seized the machinery from the custody of PQR Limited on the next day of the default and sold it to the new buyer without leave of the Tribunal. Examine the effect of the transaction of seizing and transferring the machinery by the vendor to the new buyer in the light of the provisions of section 334 and 335 of the Companies Act, 2013 dealing with the winding up of the Company.

[Jan 2021 - Old]

Answer:
According to Section 334 of the Companies Act, 2013, in the case of a winding up by the Tribunal, any disposition of the property including actionable claims, of the Company and any transfer of shares in the Company or alteration in the status of its members, made after the commencement of the winding up shall, unless the Tribunal otherwise orders, be void.

Section 335 provides that, where any Company is being wound up by the Tribunal,—
a. any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the company, after the commencement of the winding up; or
b. any sale held, without leave of the Tribunal of any of the properties or effects of the company, after such commencement,

-shall be void.

In the light of the stated provisions, the transaction of seizing and transferring the machinery by the vendor to the new buyer is void.

Question 13:
M/s. Sagar Retail Mega Mart Ltd. applied for winding up on 1st April, 2018 before the Honorable 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 Honorable 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 does 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?

[May 2018 -Old]

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 14:

OTP Limited was ordered to be wound up by the Tribunal. A provisional liquidator for the purpose was appointed. Despite the same, some parties want to pursue certain legal proceedings against the Company. The Company contends that on winding up order being passed, all suits and other legal proceedings come to an end. Advise the parties as per the relevant provisions relating to winding up as contained in the Companies, Act, 2013.

[May 21 – New]

Answer:

According to section 279 of the Companies Act, 2013, when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:

Provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

In the given question, some parties of OTP Limited (which was ordered to be wound up by the Tribunal) want to pursue certain legal proceedings against the company.

In the light of the facts of the question and provisions of law, the parties which want to pursue certain legal proceedings against the company can do so only with the leave of the Tribunal and subject to such terms as the Tribunal may impose

Question 15:

XYZ Ltd is being wound up by the Tribunal. The Company's dues to the different categories of people are as below:

Particulars	Amount
Security of a secured creditor	10,00,000
Workmen's due less than 2 years	3,60,000
Workmen's dues more than 2 years	2,40,000
Secured creditors	10,00,000

How should the amount realised be utilised for making payments?

[MTP - Dec'21]

Answer:

Section 326 provides that following debts shall be paid in priority to all other debts, in case of winding up of a company:

(i) workmen's dues

(ii) where a secured creditor has realized a secured asset, so much of the debts due to such secured creditor as could not be realized by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues.

Following sums due from a company to its workmen which are payable for a period of 2 years preceding the winding up order or such other period as may be prescribed shall be paid in priority to all other debts (i) all wages or salary of any workman in respect of services rendered to the company (ii) all accrued holiday remuneration becoming payable to any workman, within a period of thirty days of sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

The debts payable above shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that sub section shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Based on the above provisions, computation of amount utilised & balance outstanding is as below:

Particulars	Workmen's dues	Secured creditors	Balance available
Securities realised			10,00,000
Balance Outstanding	6,00,000	10,00,000	
1st priority payment	3,60,000	-	3,60,000
Balance Outstanding	2,40,000	10,00,000	6,40,000
6,40,000 to be distributed in proportion of outstanding balances of 240000 & 1000000			
2nd priority payment	1,23,871	5,16,129	6,40,000
Net Balance outstanding	**1,16,129**	**4,83,871**	-

1,23,871 = 2,40,000/(2,40,000+10,00,000)*6,40,000

5,16,129 = 10,00,000/(2,40,000+10,00,000)*6,40,000

Chapter 9 - Companies Incorporated Outside India

Question 1:

Z Limited, a Foreign Company, incorporated in Japan has a branch office in Hyderabad in India. Mr. Bhartiya, the Indian Citizen holds preference shares of Z Limited which comprises 10% of the paid-up share capital of the company. Deshi Limited, a company incorporated in India holds equity shares of Z Limited which comprises 45% of the paid-up share capital of the company. During the financial year 2019-20, there has been alteration in the particulars of the documents mentioned under section 380 of the Act and the company has failed to submit the alterations to the Registrar within 30 days. Analyze in the light of the applicable laws the consequences of failure on the validity of any contracts entered into by the foreign company?

[MTP April 2021 - New]

Answer:

Relevant provision:

As per Section 379 of the Companies Act, 2013 where not less than fifty per cent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

As per section 393 of the Act, any failure by a company to comply with the provisions of Chapter XXII 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 this Act applicable to it.

Given case, Analysis and Conclusion:

In the above question, the provisions of the Companies Act, 2013 are applicable on Z Limited because an aggregate of 55% of the paid-up share capital of the company are held by an Indian citizen and Indian company.
Therefore, Provisions of the Companies Act, 2013 apply on the company.

However, there has been violation of section 380 of the Act, so as per section 393 of the Act, the validity of any contract entered into by the foreign company shall not be affected, the company may be sued in respect of such contract but shall not be entitled to bring any suit in respect of such contract until it has complied with the relevant provisions related to the companies incorporated outside India under the Companies Act, 2013.

Question 2:

i. 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.
ii. 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.

[ICAI Module]

Answer:

i. The Companies Act, 2013 vide section 380 state that 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 (Registration 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.

ii. The Companies Act, 2013 lays down the governing provisions for foreign companies in Chapter XXII which is comprised of sections 379 to 393A. 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 foreign company contravenes the provisions of this Chapter, the foreign company shall be punishable with a fine which shall not be less than 1,00,000 but which may extend to 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to 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 fine which shall not be less than 25,000 but which may extend to 5,00,000.

Question 3:

DEJY is a Company Limited incorporated in Singapore desires to establish a branch office at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as a liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013,answer the following:

i. Whether branch office will be considered as a company incorporated outside India.
ii. If yes, state the documents you are required to furnish on behalf of the company, on the establishment of a branch office at Mumbai.

[ICAI Module]

OR

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

[MTP March 2021]

OR

Transtar Limited, a company incorporated in Thailand, has a place of business through an agent in Bangalore. The agent transacts the business on behalf of the company through electronic mode. As regards Transtar Limited, answer the following:

i. Whether Transtar Limited shall be called a foreign company within the meaning of the Companies Act, 2013?
ii. What are the regulatory requirements under the Companies Act, 2013 to be complied with by a company which has established its place of business in India with respect to delivery of documents etc. to Registrar??

[Nov 2019 - Old]

Answer:

(i) 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.

Further, branch offices are generally considered as reflection of the Parent Company' office. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.

(ii) Under section 380(1) of the Companies Act, 2013 every foreign company shall, within 30 days of the establishment of place of business in India, deliver to the Registrar for registration the following documents:

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;
d. the name and address or the names and address 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;
e. the full address of the office of the company in India which is deemed to be its principal place of business in India;
f. particulars of opening and closing of a place of business in India on earlier occasion or occasions;
g. declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
h. any other information as may be prescribed.

According to the Companies (Registration 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.

Question 4:

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

[ICAI Module]

Answer:

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 in Form FC-3.

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 5:

Abroad Ltd., a foreign company without establishing a place of business in India, proposes to issue prospectus for subscription of securities in India. Being a consultant of the company, advice on the procedure of such an issue of prospectus by Abroad Ltd.

[ICAI Module]

Answer:

As per 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:

a. 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
b. the prospectus states on the face of it that a copy has been so delivered, and
c. there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and
d. such documents as may be prescribed under Rule 11 of the Companies (Incorporated outside India) Rules,2014.

Accordingly, the Abroad Ltd. a foreign company shall proceed with the issue of prospectus in compliance with the above stated provisions of section 379 of the Act.

Question 6: *[Controversial Question]*

In the light of the provisions of the Companies Act, 2013 explain whether the following Companies can be considered as a 'Foreign Company':

i. A Company which has no place of business established in India yet is doing online business through telemarketing in India.

ii. A Company which is incorporated outside India employs agents in India but has no place of business in India.

iii. A Company incorporated outside India having shareholders who are all Indian citizens.

[Nov. 2018- New]

OR

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.

[May - 2015]

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 -

i. business to business and business to consumer transactions, data interchange and other digital supply transactions;

ii. offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;

iii. financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management;

iv. online services such as telemarketing, telecommuting, telemedicine, education and information research; and

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

In the light of the said provisions of the Companies Act, 2013, as enumerated above:

i. A company which has no place of business in India but is doing online business through telemarketing in India, will be considered as a 'Foreign Company'.

ii. A company incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode, will be considered as foreign company.

Thus, a company incorporated outside India which does not have a place of business in India, will not be considered a 'Foreign Company'

Author's Note:

The answer of ICAI seems to be based on some literal interpretation which sounds illogical to the Author. Student may also consider that - Employing an agent in India would technically establish Place of Business of India and hence this company will become a Foreign Company as per Sec 2(42).

iii. A company incorporated outside India having shareholders who are all Indian citizens shall be a 'Foreign Company'
(*It is presumed that the company in question is incorporated outside India, so that provisions of section 2(42) of the Companies Act, 2013 can be applied on it)

Author's Note:
Yet again a controversial answer. The definition of Foreign company in no way depends on the citizenship except to the extent provided u/s 379. In this case, the co. having shareholders as Indian Citizen will not make it a Foreign Company. The answer of ICAI is incorrect.

Question 7:

In the light of the provisions of the Companies Act, 2013, examine whether the following Companies can be considered as a 'Foreign Company':

i. M/s Red Stone Limited is a Company registered in Singapore. The Board of Directors meets and executes business decisions at their Board Meeting held in India.
ii. M/s Blue Star Public Company Limited registered in Thailand has authorized Mr. 'Y' in India to find customers and to enter contracts with them on behalf of the Company.
iii. M/s Xex Limited Liability Company registered in Dubai has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India.

[Nov 2019 - New]

Answer:

Relevant provision:

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, database 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.

Given Case and Analysis:

1. In the given situation, M/s Red Stone Limited is registered in Singapore. However, it does not have a place of business in India whether by itself or through an agent, physically or through electronic mode; and does not conduct any business activity in India in any other manner. Mere holding of board meetings and executing business decisions in India cannot be termed as conducting business activity in India. Hence, M/s Red Stone Limited is not a foreign company as per the Companies Act, 2013.

2. In the given situation, M/s Blue Star is registered in Thailand. It has authorised Mr. Y in India to find customers and enter into contract on behalf of the company. Thus, it can be said that M/s Blue Star Limited has both place of business in India through an agent, physically or through electronic mode; and is conducting business activity in India. Hence, M/s Blue Star Limited is a foreign company as per the Companies Act, 2013.

3. In the given situation, M/s Xex Limited Liability Company is registered in Dubai and has installed its main server in Dubai for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that M/s Xex Limited Liability Company has a place of business in India through electronic mode and is conducting business activity in India. Hence, M/s Xex Limited Liability Company is a foreign company as per the Companies Act, 2013.

Question 8:

Trans Asia Limited is registered as a public company u/s 4(7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Trans Asia Limited carries on business in India describing itself as a foreign company. Can it do so? State the actions that can be taken against the company for improper use or description as foreign company under the provisions of the Companies Act, 2013.?

[Nov 2018-Old]

Answer:

Foreign Company [Section 2(42)]: "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.

In the instant case, Trans Asia Limited is registered as a public company u/s 4(7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Though Trans Asia Limited is a subsidiary of a foreign company but since it is registered in India, it is not a foreign company. Hence, it cannot describe itself as a foreign company.

Action against the improper use/description as foreign co:

As per Rule 12 of the Companies (Registration of Foreign Co.) Rules, 2014, if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person.

Question 9:

Mr. Ziyan an Indian citizen holds 25% of the paid up capital of Laurel Steven Limited, a company which was incorporated in Singapore with a paid up capital of 10 million Singapore Dollars. Swaraj Limited a company registered in India holds 30% of the paid up capital of Laurel Steven Limited. Laurel Steven Limited has recently established a share transfer office at New Delhi. The Company seeks your advice as to what formalities it should observe as a foreign company under the Companies Act, 2013.

[Nov 2017]

Answer:

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

i. has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
ii. Conducts any business activity in India in any other manner.

According to Section 386 of the Companies Act, 2013, "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, in respect of its Indian Business, comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed as if it were a company incorporated in India.

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

a. Laurel Steven Ltd. was incorporated in Singapore and has a place of business (share transfer office) in New Delhi, hence, it is a foreign company.

b. Its shareholding comprises of 25% held by Mr. Ziyan who is a citizen of India and 30% by Swaraj Limited which is a company registered in India. Together the two Indian shareholders hold 55% of the share capital of Laurel Steven Ltd.

   Therefore, although Laurel Steven 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 Laurel Steven Ltd. will be only in respect of business carried by it in India and not in relation to its business anywhere outside India.

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:

i. a certified copy of the instrument constituting or defining the constitution of the company.
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 prescribed under Companies (Registration of Foreign Companies) Rules, 2014;
iv. the name and address or the names and address of one or more persons resident in India who is authorized for correspondence on behalf of 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 authorized 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.

Question 10:

Tokushia Motors Ltd. was incorporated in Japan. Its share capital is held by the following persons:

(a) Citizens of India - 10%;

(b) Indian Companies- 40%

The company has opened its representative office in Mumbai on 15th January, 2021, in order to receive orders from the Indian Market and make available the delivery of Japanese luxury cars to the Indian purchasers.

The company was not aware of the Indian Company Law, hence could not file the required documents to the Registrar. The company could file all the required documents only on 28th February, 2021.

Based on the above facts, answer the following questions:

(i) Whether the provisions of Chapter XXII of the Companies Act, 2013 are applicable on Tokushia Motors Ltd?

(ii) What documents are required to be filed by Tokushia Motors Ltd to the Registrar of Companies?

(iii) By what time all the requisite documents shall be filed?

[RTP Nov 2021 -New]

Answer:

(i) Section 379(2) of the Companies Act, 2013, provides that where not less than fifty per cent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

In the given case, although the company was incorporated in Japan, however its share capital of not less than 50% is held by the Indian citizens and Indian companies, hence in terms of section 379(2) all the provisions pertaining to Chapter XXII of the Companies Act, 2013, shall be applicable on it.

(ii) In terms of section 380(1) every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration:

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 and, if the instrument is 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;
d. the name and address or the names and address 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;
e. the full address of the office of the company in India which is deemed to be its principal place of business in India;
f. particulars of opening and closing of a place of business in India on earlier occasion or occasions;
g. declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
h. any other information as may be prescribed.

Further its sub-section (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under this section, the foreign company shall, within thirty days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form.

(iii) In the given, case the company had established its representative office in India on 15.01.2021, it was required to file the documents latest by 14.02.2021 with the Registrar.

Question 11: *[Extra-ordinary question]*

Qinghai Huading Industrial Company Ltd., incorporated in China established a place of business at Mumbai. The Charter / Documents constituting the Company is in Mandarian Chinese (Chinese local language). It is required inter alia to file a certified translation of above documents with the Registrar of Companies in India. Who can authenticate the translated charter/documents as per the provisions of the Companies Act, 2013 and Rules made there under governing foreign companies in case such translation is made at Mumbai?

[May 2018]

Answer:

According to Rule 10 of the Companies (Registration of Foreign Companies) Rules, 2014,

i. All the documents required to be filed with the Registrar by the foreign companies shall be in English language and where any such document is not in English language, there shall be attached a translation thereof in English language duly certified to be correct in the manner given in these rules.

ii. Where such translation is made within India, it shall be authenticated by-
   a. an advocate, attorney or pleader entitled to appear before any High Court; or
   b. an affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

In the instant case, Qinghai Huading Industrial company Ltd. can translate the related documents within India, and they shall be authenticated by the persons mentioned under the above Rules.

Question 12:

Analyze under the provisions of the Companies Act, 2013, whether the following Companies can be considered as a Foreign Company:

i. A Company incorporated outside India and registered in Moscow; Russia has installed its main server in Moscow for maintaining office automation software by cloud computing for its client in India.
ii. A Company which is incorporated outside India employs agents in India but has no place of business in India.
iii. A Company incorporated outside India and registered in Australia has authorized Mr. X in India to source customers and subsequently to enter into contracts with them on behalf of the Company.
iv. A Company incorporated outside India and is registered in Mauritius. All the business models, financial strategy, important decisions are carried and taken out at the Board Meetings held only in India.

[Jan 2021 -New]

Answer:

i. As per the facts, a company is registered in Moscow, Russia and has installed its main server in Moscow for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that this company has a place of business in India through electronic mode and is conducting business activity in India. Hence, the above company is a foreign company by taking into account the provisions of Section 2(42) of the Companies Act, 2013 read with the Companies (Registration of Foreign Companies) Rules, 2014.
ii. In this case, a company is incorporated outside India and employs agents in India but does not have a place of business in India. As per section 2(42) of the Companies Act, 2013, foreign company means any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode. Since, the company though employed agent in India but have no place of business in India, so it cannot be termed as foreign company.
iii. In the given situation, a company is registered in Australia. It has authorised Mr. X in India to source customers and enter into contract on behalf of the company. Thus, it can be said that this company has both place of business in India through an agent, physically or through electronic mode; and is conducting business activity in India. Hence, this company is a foreign company as per the Companies Act, 2013.
iv. In the given situation, a company is registered in Mauritius. However, it does not have a place of business in India whether by itself or through an agent, physically or through electronic mode; and does not conduct any

business activity in India in any other manner. Mere holding of board meetings and executing business models, financial strategies and important decisions in India cannot be termed as conducting business activity in India. Hence, the above company is not a foreign company as per the Companies Act, 2013.

Question 13:

Phil Heath Systems Incorporated (PHSI), is a foreign Company registered in Australia and has established a place of business in India. The financial statements pertaining to the Indian business operations for the year ended 31st March, 2020 were prepared by the Company. Referring to the provisions of the Companies Act, 2013, advise the Company on the following matters:

i. Whether the accounts of the Company pertaining to Indian business operations shall be audited? If yes, by whom?
ii. What is the due date for filing the audited financial statements with the Registrar of Companies (RoC)?
iii. What is the effect of the contracts entered by an Indian Company with PHSI in case PHSI has not filed financial statements with the RoC?
iv. In which e-form and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies?

[Jan 21 - New]

Answer:

Phil Health Systems Incorporated (PHSI), a foreign company, is registered outside India and has a place of business in India. As it has prepared financial statements pertaining to the Indian business operations, it reflects conducts of business activity in India. Therefore, provisions related to companies incorporated outside India shall be applicable to it.

Following are the answer in line with said nature of the company:

i. According to the Companies (Registration of Foreign Companies) Rules, 2014, PHSI shall get its accounts, pertaining to the Indian business operations, audited by a practicing Chartered Accountant in India or a Firm or Limited Liability Partnership of practicing Chartered Accountants.

ii. The audited financial statements of Indian business operations of PHSI shall be delivered to the Registrar within a period of six months of the close of the financial year of the foreign company to which the documents relate i.e., latest by 30th September 2020.

Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months i.e., latest by 31st December 2020.

iii. According to Section 393 of the Companies Act, 2013, any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013 (chapter XXII deals with 'Companies incorporated Outside India'), 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.

In the instant case, non-filing of financial statements by PHSI shall not invalidate the contracts entered by Indian companies with PHSI.

However, PHSI shall not be entitled to bring in any suit, claim any set off, make any counter claim or institute any legal proceeding in respect of any such contract until the company has filed the financial statements.

iv. According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year i.e., by 30th May 2020, to the Registrar containing the particulars as they stood on the close of the financial year.

Question 14:

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 GST Officer having jurisdiction, intends to serve show cause notice on the Foreign Company. As Standing Counsel for the department, advise the GST Officer on valid service of notice.

[Nov 2014]

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 GST Officer may serve the show cause notice by following the above provisions.

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

Question 15:

MNO Ltd., a foreign Joint Venture Company having its established place of business in India and following International Financial Reporting Standards (IFRS) and its financial statement being prepared in German language desires to know the following with regard to submission of its financial statements to the Registrar of Companies in India. Its area office is located at Mumbai:

(i) Submission of financial statements in German Language;
(ii) Format of financial statements as per IFRS;
(iii) How authentication of its financial statements is to be done?
(iv) Whether the documents can be submitted at the Registrar's office at Mumbai?

[May 21 - New]

Answer:

In the light of the given facts, following are the answers:

i. All the documents required to be filed with the Registrar by the foreign companies shall be in English language. If the financial statements are in German language and not in the English language, a certified translation thereof in the English language shall be annexed and submitted to Registrar [Section 381 (2)]

ii. Format of Financial statement as per IFRS:
Rule 6 of the Companies (Accounts) Rules, 2014 provides for the consolidation of accounts of companies in the following manner:
Manner of consolidation of Accounts: The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards.

iii. Authentication of translated financial statements [Rule 10 of the Companies (Registration of Foreign Companies) Rules, 2014]:
   1. All the documents required to be filed with the Registrar by the foreign companies shall be in English language and where any such document is not in English language, there shall be attached a translation thereof in English language duly certified to be correct in the manner given in these rules.
   2. Where any such translation is made outside India, it shall be authenticated by the signature and the seal, if any, of—
      (a) the official having custody of the original; or
      (b) a Notary (Public) of the country (or part of the country) where the company is incorporated:

Provided that where the company is incorporated in a country outside the Commonwealth, the signature or seal of the person so certifying shall be authenticated by a diplomatic or consular officer empowered under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948, or, where there is no such officer, by any of the officials mentioned in section 6, of the Commissioners of Oaths Act, 1889, or in any relevant Act for the said purpose.

3. Where such translation is made within India, it shall be authenticated by—
   (a) an advocate, attorney or pleader entitled to appear before any High Court; or
   (b) an affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.

iv. According to the Companies (Registration 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. Hence, the documents of MNO Ltd. cannot be submitted at the Registrar's office at Mumbai.

Question 16:

Identify which among the following companies can be categorised as foreign companies:

Case	Incorporated	Registered	Additional Condition
1	Malaysia	Malaysia	Developed patient's database for a hospital in India. Server in Malayasia
2	Dubai	Dubai	No Place of business in India but employs agents in India
3	California	California	Board meetings held in India
4	Australia	Australia	59% of the shareholding held by an India company
5	Washington	Washington	Offers & invites deposits from citizens of India but has no place of business In India
6	Germany	Germany	49% of the shareholding held by an Indian Company

[MTP - Dec 21]

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

For the purposes of clause (42) of section 2 of the Act, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to:

i. business to business and business to consumer transactions, data interchange and other digital supply transactions;
ii. offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
iii. financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;
iv. online services such as telemarketing, telecommuting, telemedicine, education and information research; and
v. all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise;

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

Based on the above provisions, analysing each case as below:

Case	Incorporated	Registered	Additional Condition	Reasons
1	Malaysia	Malaysia	Developed patient's database for a hospital in India, Server in Malaysia	Though incorporated outside India, it is involved in transacting business in India and having place of Business through electronic mode. Hence it is a foreign company.
2	Dubai	Dubai	No Place of business in India but employs agents in India	Since the company, though employed agent in India, but have no place of business in India. Hence not a foreign company.
3	California	California	Board meetings held in India	Mere holding of meetings in India cannot be termed as conducting business activity in India. Hence not a foreign company.
4	Australia	Australia	59% of the shareholding held by an Indian company	As per the provisions, if not less than 50% of shareholding of a foreign company is held by Indian citizens. It is treated as an Indian Company. Hence this is not a foreign company.
5	Washington	Washington	Offers & invite deposits from citizens of India but has no place of business India	This is one of the ways of transacting business through electronic modes. However, this company doesn't have a place of business in India. Hence it is cannot be called as a Foreign Company
6	Germany	Germany	49% of the shareholding held by an Indian Company	As per the provisions, if not less than 50% of shareholding of a foreign company is held by Indian citizens, it is treated as an Indian Company. Here only 49% is held by Indian company. Hence this is a foreign company.

Author's Note:

In case 4 and 6 - Where ICAI says - "It is treated as an Indian Company. Hence this is not a foreign company". In this case, the Author believes that the intention of ICAI is to say that - By virtue of Sec 379, the provisions applicable to Indian companies will become applicable to these companies but whether or not it is a foreign company depends on whether it complies both the conditions mentioned u/s 2(42).

Chapter 10 - Miscellaneous Chapters

Registered Valuer

Question 1:

The Board of Directors of M/s APCO Limited a listed company, for carrying out the valuation of the immovable properties standing in the name of the company as required under the provisions of the Companies Act, 2013 proposes to appoint Mr. Mehta, an individual as the valuer. Referring to the provisions of the Companies Act, 2013 read with the Companies (Registered Valuers and Valuation) Rules, 2017, the Audit Committee is of the opinion that the Board of Directors does not have the right to appoint the valuer. Decide.

[Nov 2018 - Old]

Answer:

Valuation by Registered Valuers (Section 247): According to the provisions of the section 247 of the Companies Act, 2013 read with the Companies (Registered Valuers and Valuation) Rules, 2017, where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed and appointed by the audit committee or in its absence by the Board of Directors of that company.

Hence, in the given instance, proposal for appointment of Mr. Mehta as the valuer by the Board of directors of M/s APCL Ltd. is against the said provision. In fact, valuer shall be appointed by the audit committee or in its absence by the Board of Directors of that company.

In view of above, the opinion of the Audit Committee is correct.

Question 2:

M/s KIL Limited, a listed company, proposed to acquire a plant for consideration other than cash from Mr. KK, a director. The Managing Director of the Company identified Mr. JK a registered valuer under the provisions of the Companies Act, 2013 for the purpose of valuation of the plant. Mr. KK acquired the plant 48 months back from a partnership firm in which the spouse of Mr. JK is a partner. The Managing Director of the Company issued an order appointing Mr. JK as a registered valuer. Examine and decide whether the decision of appointment and the mode of appointment is valid under the provisions of the Companies Act, 2013?

[May 2019 - New]

Answer:

1. Restriction on acquiring assets for consideration other than cash: According to Section 192 (1) of the Companies Act, 2013, no company shall enter into an arrangement by which-
    a. a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or
    b. the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected.

2. Relaxation of restriction: The above restriction shall be relaxed i.e. the company may enter into an arrangement involving non-cash transactions, if prior approval for such arrangement is accorded by a resolution of the company in general meeting.

3. Contents of notice issued for approval of resolution: The notice for approval of the resolution in general meeting issued by the company shall include the particulars of the arrangement. It shall also include the value of the assets involved in such arrangement duly calculated by a registered valuer.
4. As per section 247(2) of the Companies Act, 2013, the valuer shall not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time during a period of 3 years prior to his appointment as valuer or 3 years after the valuation of assets was conducted by him.

Question 3:

The Senior Ltd. has acquired 92% shareholding in the Junior Ltd. Both the companies are un- listed entities. Now, the Senior Ltd. wants to acquire the rest of 8% shareholding and accordingly informed the Junior Ltd. to buy the remaining shareholding. The Senior Ltd. wants to determine the price to be paid to the remaining equity shareholders. The price to be arrived shall be on the basis of the valuation for which the Senior Ltd. has appointed Mr. Sameer, a famous Chartered Accountant, who is also in the panel with the Income Tax Dept., to make out the valuation and determine the price to be paid to the remaining shareholders of the Junior Ltd.
The Senior Ltd. also deposited an amount equal to the value of shares to be acquired by it in a separate bank account, operated by the Junior Ltd. However, all the remaining shareholders of the Junior Ltd. did not turned up to accept the price / offer.
Based on the above facts, answer the following questions:

(i) Evaluate on the validity of the valuation of the shares of the Junior Ltd. done by the Chartered Accountant. In the given circumstances, who is authorised to do valuation?

(ii) A person who is already in the panel with the Income tax Dept, can do the valuation as required under the Companies Act, 2013?

[MTP - Dec'21]

Answer:

Part (i):

A Chartered Accountant is not authorised to do valuation until he is a registered as a valuers in accordance with the section 247.
Section 236(2) provides that the acquirer, person or group of persons under sub-section (1) shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.

Who can be a registered valuer

Rule 3 of the Companies (Registered Valuers and Valuation) Rules, 2017 provides that eligibility, qualifications and registration of valuers. Rule 3(1) provides that -
A person shall be eligible to be a registered valuer if he-

a. Is a valuer member of a registered valuers organisation;
b. Is recommended by registered valuer's organisation of which he is a valuer member for registration as valuer;
c. Has passed the valuation examination under rule 5 within three years preceding the date of making an application for registration under rule 6;
d. Possesses the qualifications and experience as specified in rule 4;
e. Is not a minor;
f. Has not been declared to be of unsound mind;
g. Is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt;
h. Is a person resident in India;

i. Has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence of five years has not elapsed from the date of expiry of the sentence:
j. Has not been levied a penalty under section 271J of Income-tax Act, 1961 (43 of 1961) and time limit for filing appeal before Commissioner Appellate Tribunal, as the case may be has expired, or such penalty has been confirmed by Income-tax Appellate Tribunal, and five years have and
k. Is a fit and proper person.

Since in the given case, the valuation has been done by a non-registered valuer, hence, the valuation done by the CA is not valid as per the provisions of the Companies Act, 2013. Since the valuation is not valid, the whole of the exercise / procedures as described in section 236 is of no value / legal sanctity under the Companies Act, 2013.

Part (ii):
Section 247 of the Companies Act, 2013 and the Rules framed thereunder provides the detailed guidelines relating to the valuation to be done only by the registered valuer. A registered valuers is, who possess the requisite qualifications, passed the valuation examination and is registered by the IBBI to act as valuer. Person already in the panel of Income tax Department is not eligible to carry out the valuation as per the above specified requirement under the Companies Act, 2013.

Removal of Name of Companies from the Register of Companies

Question 4:
Kojol 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, analyze 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 III case of violation of restrictions?

[May 2018- Old]

Answer:
According to Section 248 (1) of the Companies Act, 2013, where the Registrar has reasonable cause to believe that—
a. a Company has failed to commence its business within one year of its incorporation, or;
b. 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.

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 5:

After discontinuing business operations for two financial years, the directors and other persons in charge of the management of CDR Limited with the intention of evading some liabilities of the company, made an application to the Registrar for removal of its name. The Registrar scrutinised the documents and allowed the name of the company to be removed from the Registrar of Companies. A group of persons, who had supplied goods to the company and were not paid off, incurred loss as a result of removal of the name of the company and were aggrieved of the above action. They approached you for your advice whether they will succeed to claim their dues from anybody and whether the persons in charge of the management of the company shall be considered as guilty by any means. Referring to the provisions of the Companies Act, 2013, advise them.

[Jan 2021]

Answer:

Section 251 of the Companies Act, 2013 deals with the fraudulent application for Removal of Name. Where it is found that an application by a company under sub-section (2) of section 248 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.

Here, in the given case, directors and other persons in charge of the management of the CDR Limited, made an application to the Registrar for removal of its name from Register of Companies on basis of not carrying on any business or operation for a period of two immediately preceding financial years. According to section 248(2), 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 to the registrar.

From the given facts, CDR Limited without extinguishing its liabilities against a group of creditors, who were not paid off and incurred loss, applied for removal of name.

In light of stated provision, it can be concluded that CDR Limited filed an application for removal of names with the object of evading the liabilities of the company and with the intention to deceive the creditors.

Accordingly, creditors will succeed to claim their dues from the directors and other persons who are in charge of the management of the CDR Limited.

Question 6:

Prathmikhta Life Insurance Limited incorporated on 01.04.2020 could not commence its business till 01.04.02021. The Company filed an application to the Registrar of Companies with a special resolution to remove its name from the register of the companies maintained by the Registrar and give effect to the dissolution of the Company. Rejecting the application on the ground that the application has not been supported by approval of the regulatory authority, the Registrar asked the Company to re-submit it after marking necessary compliances. Examine the validity of rejection of the application of Prathmikhta Life Insurance Limited by explaining the procedure to be followed for removal of the name of the Company and get it dissolved under the provisions of the Companies Act 2013 (the Act) without taking a recourse to the regular winding-up procedure provided under chapter XX of the Act.

[MTP Mar 21]

Answer:

<u>Approval of the Regulatory Body in case a Company is regulated under a Special Act:</u>

Prathmikhta Life Insurance Ltd. is a company regulated under a Special Act, the Insurance Act, 1938. It shall obtain approval of the regulatory body, "Insurance Regulatory and Development Authority" (IRDA) constituted or established under that Act and such approval shall be enclosed with the application.

Here in the given case, no approval of the regulatory body i.e., IRDA was obtained, and therefore, the rejection of application of Prathmikhta Life Insurance Limited, is valid.

Procedure for removal of name of the company

As per Section 248(2) of the Companies Act, 2013, a Company (Prathmikhta Life Insurance Ltd.) may, after extinguishing all its liabilities, by a special resolution, or consent of seventy-five per cent of members in terms of paid-up share capital, file an application to the Registrar for removing the name of the Company from the Register of Companies on the ground that the said Company has failed to commence its business within one year of its incorporation (i.e. from 1/4/2020 till 1/4/2021) and the Registrar shall, on receipt of such application, cause a public notice to be issued.

A notice issued shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

At the expiry of the time mentioned in the notice, the Registrar may, unless contrary is shown by the Company, strike off its name from the Register of Companies, and shall publish notice thereof in the Official Gazette, and on the publication in the Official Gazette of this notice, the Company shall stand dissolved.

Prathmikhta Life Insurance Limited with approval of the IRDA, shall re-submit the application in compliance with stated procedure and can get its name struck off from Register of Companies and get it dissolved without taking recourse to the regular winding up procedure under the Companies Act, 2013.

Government Company

Question 7:

Discuss the provisions relating to annual reports of Government Companies-

(i) Where in addition to the Central Government, any State Government is a member of the company.

(ii) Where the Central Government is not a member of the Government Company.

[Nov-2016]

Answer:

Relevant provision:

According to section 394 (1) of the Companies Act, 2013, where the Central Government is a member of a Government company, the Central Government shall cause an annual report on the working and affairs of that company to be prepared and laid before Parliament with the copy of audit report and comments made by the Comptroller and Auditor-General of India.

According to section 394 (2) of the Companies Act, 2013 where in addition to the Central Government, any State Government is also a member of a Government company, that State Government shall cause a copy of the annual report prepared under section 394 (1) to be laid before the House or both Houses of the State Legislature together with a copy of the audit report and the comments upon or supplement to the audit report referred above.

According to section 395 of the Companies Act, 2013, where the Central Government is not a member of a Government company, every State Government which is a member of that company, or where only one State Government is a member of the company, that State Government shall cause an annual report on the working and affairs of the company to be—

a. Prepared within the time specified in sub-section (1) of section 394; and
b. as soon as may be after such preparation, laid before the House or both Houses of the State Legislature together with a copy of the audit report and comments upon or supplement to the audit report referred to in sub-section (1) of that section.

Question 8:

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.?

[May 2016]

Answers:

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). Hence, merely being a subsidiary and not wholly owned subsidiary should be adequate to be called a Government company.

Miscellaneous Provisions of the Companies Act, 2013

Question 9:

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. Advice.

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 company.

[May 2018-Old]

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;
b. there has been no default in repayment of matured deposits and interest; and
c. 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 10:

Akri Nidhi Limited proposes:

i. To reappoint Mr. X, a Director who has completed a term of 10 consecutive year as a Director of the Nidhi.

ii. To pay dividend at the rate of 45%.

Examine and analyze the validity of the above proposals with reference to Nidhi Rules 2014 formulated under Companies Act, 2013.

Answer:

- According to Rule – 17 of the Nidhi Rules, 2014, the Director of a Nidhi shall hold office for a term up to ten consecutive years on the Board of Nidhi and he shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director.

Hence, in the instant case, Akri Nidhi Limited cannot reappoint Mr. X as a director for a period of two years after completion of 10 consecutive years.

- 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;
  b. there has been no default in repayment of matured deposits and interest; and
  c. it has complied with all the rules as applicable to Nidhis.

In the instant case, if the Company wants to pay dividend at the rate of 45%, it has to follow the procedure mentioned under Rule 18.

Question 11:

Ariana Credit and Thrift (Nidhi) Ltd., was incorporated in December 2018 and want it to operate as a Nidhi Company. The company has established its registered office in Jaipur, Rajasthan. The company started its operations from the April 2019. The company's main function was to collect deposits from its members on monthly basis and to lend the members in case of need. The company pays interest @10% p.a. on quarterly basis on the deposits and charge interest @12%. p.a. on monthly basis. The loan to its members is granted for the working capital of the business only and for which the member borrower has to give guarantee of two members, against whom no loan is outstanding. For the financial year ended on 31st March 2020, the company's paid-up equity share capital was Rs. 15 lakh and for the year ended on 31st March 2021, the capital remained as Rs. 15 lakh and reserves were Rs. 5 lakh.

Based on the captioned facts, answer the following questions:

(i) What are the criteria for declaration of any company as Nidhi Company by the Central Government?

(ii) For the year ended on 31st March 2021, company's capital was Rs. 15 lakh and reserves were Rs. 5 lakhs. How much deposit the company can accept from its member in the FY 2021-22?

[MTP – Dec'21]

Answer:

(i) In terms of Nidhi Rules, 2014 the following is the criteria for declaration of a company as Nidhi Company:

Rule 4: Incorporation and incidental matters

1. A Nidhi shall be a public company and shall have a minimum paid up equity share capital of five lakh rupees.
2. On and after the commencement of the Act, no Nidhi shall issue preference shares.
3. If preference shares had been issued by a Nidhi before the commencement of this Act, such preference shares shall be redeemed in accordance with the terms of issue of such shares.
4. Except as provided under the proviso to sub-rule (e) to rule 6, no Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.
5. Every "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

Rule 5: Requirements for Minimum Number of Members, Net Owned Fund etc.

1. Every Nidhi shall, within a period of one year from the date of its incorporation, ensure that it has-
   a. not less than two hundred members;
   b. Net Owned Funds of ten lakh rupees or more;
   c. Unencumbered term deposits of not less than ten per cent. of the outstanding deposits as specified in rule 14; and
   d. ratio of Net Owned Funds to deposits of not more than 1:20.

2. Within ninety days from the close of the first financial year after its incorporation and where applicable, the second financial year, Nidhi shall file a return of statutory compliances in Form NDH-1 along with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 with the Registrar duly certified by a company secretary in practice or a chartered accountant in practice or a cost accountant in practice.
3. If a Nidhi is not complying with clauses (a) or (d) of sub-rule (1) above, it shall within thirty days from the close of the first financial year, apply to the Regional Director in Form NDH-2 along with fee specified in Companies (Registration Offices and Fees) Rules, 2014 for extension of time and the Regional Director may consider the application and pass orders within thirty days of receipt of the application. Provided that the Regional Director may extend the period upto one year from the date of receipt of application.

   Explanation.- For the purpose of this rule "Regional Director" means the person appointed by the Central Government in the Ministry of Corporate Affairs as a Regional Director;
4. If the failure to comply with sub-rule (1) of this rule extends beyond the second financial year, Nidhi shall not accept any further deposits from the commencement of the second financial year till it complies with the provisions contained in sub-rule (1) and gets itself declared under sub-section (1) of section 406, besides being liable for penal consequences as provided in the Act.

(ii) Rule 11 of the Nidhi Rules, 2014 deals with the acceptance of deposits by Nidhi's. Its sub - rule (1) provides that a Nidhi shall not accept deposits exceeding twenty times of its Net Owned Funds (NOF) as per its last audited financial statements.

The total NOF of the company is Rs. 20 lakhs only (15+5). The company can accept deposits from its members not exceeding 20 times of the NOF i.e., up to Rs 400 lakh only.

Question 12:

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.

[ICAI Module/May 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 13:
What is the object of Constituting Panel for Mediation and Conciliation under the Companies Act, 2013? Who can file application for mediation and conciliation?

[ICAI Module]

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 14:
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.

[ICAI Module]

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
(c) A member of the company, or
(d) 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 cognizance of the alleged offence.

Here, the Court shall take cognizance of the offence relating to nonpayment of dividend as the shareholder 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 similar offences.

Question 15:

Excel Ltd. committed an offence under the Companies Act, 2013. The offences falls within the jurisdiction of a special court of Bundi district in which the registered office of Excel Ltd was situated. However, in that Bundi district, there were two special courts one in X place and other in Y place. Identify the jurisdiction of special court for trial of an offences committed by Excel Ltd.

[ICAI Module]

Answer:

All offences which are punishable in this Act with imprisonment of 2 years or more, shall be triable only by the special court established for the area in which the registered office of the company in relation to which the offence is committed. According to section 436 where there are more special courts than one for such area, by such one of them as may be specified in this behalf by the High court concerned.

Accordingly, in the given case, there are more than one special court in Bundi district where registered office of Excel Ltd. is situated. The jurisdiction for trial in special court will be specified by H.C of the State (i.e. Rajasthan).

Question 16:

Before imposing penalty, the adjudicating authority issued a show cause notice to the company and its officers on 15th July, 2020 to represent before the adjudicating authority. The notice was served on them on 31st July 2020. State the time period within which the company and its officers who were called upon may be present before the Adjudicating authority.

[ICAI Module]

Answer:

Issue of written notice by an adjudicating officer: Rule 3 of the Companies (Adjudication of Penalties) Rules, 2014 read with section 454 of the Companies Act, 2013, states that before adjudging penalty, the adjudicating officer shall issue a written notice in the specified manner-

(A) to the company and
(B) to officer of the company who is in default or
(C) any other person, as the case may be

to show cause, within such period as may be specified in the notice (not being less than fifteen days and more than thirty days from the date of service thereon), why the penalty should not be imposed on it or him.

Accordingly, the company and its officers shall be presented before the Adjudicating Authority on or before 30th August 2020 (being not more than 30 days from the date of service of notice thereon).

Question 17:

All offences under the Companies Act, 2013 are non-cognizable except offences of fraud covered under Section 447 of the Act. Explain the validity of the statement.

[May 2018]

Answer:

As per Section 439, every offence under this Act except the offences referred to in sub- Section (6) of Section 212 shall be deemed to be non-cognizable.

As per Section 212(6), the offences covered under Section 447 of this Act shall be cognizable. Section 212(6) shall apply notwithstanding anything contained in the Code of Criminal Procedure, 1973.

To conclude, all the offences covered under the Companies Act, 2013 shall be non- cognizable. However, there is one exception to this, viz. the offences relating to fraud which are covered under Section 447 shall be cognizable.

Thus, the given statement is correct.

Question 18:

The Directors of a public company received a show cause notice from the Registrar of Companies for violation of Section 185 of the Companies Act, 2013. State whether the said offence is compoundable under the said Act. Is it possible for a person to apply for compounding of offence even after prosecution has been launched? Whether penalty paid in respect of compounding of an offence will be treated as a disqualification under Part I of Schedule V to the Companies Act, 2013 for the appointment of such person as a Managing Director of a public company?

[Nov. 2012]

Answer:

The offence relates to contravention of Section 185. The punishment for contravention of Section 185 is as under:

a. The company shall be punishable with fine which shall not be less than Rs. 5 lakh but which may extend to Rs. 25 lakh.
b. The specified person (to whom the loan has been given, or for whom the guarantee has been given or security has been provided, in contravention of Section 185) shall be punishable with imprisonment up to 6 months or with fine which shall not be less than Rs. 5 lakh but which may extend to Rs. 25 lakh, or with both.

The company or the specified person may make an application for compounding the offence, and the offence may be compounded. The application for compounding shall be made to the Registrar, who shall forward the same to the compounding authority (viz. the Regional Director or the officer authorised by the Central Government, as the case may be, since the maximum fine for the offence does not exceed Rs. 25 lakh.

The application for compounding may be made either before or after the institution of any prosecution. Thus, application for compounding may be made even after prosecution has been launched. If the offence is compounded, the Court shall discharge the company or its officers, as the case may be.

When an offence is compounded under Section 441, the applicant has to pay the sum specified by the Compounding Authority. Such 'sum specified' does not amount to fine for the purpose of ascertaining eligibility for appointment of managerial person under Part I of Schedule V.

Question 19:

Amar is a branch manager in Kismat Bank Ltd. During the course of recovery drive initiated by the Bank, Amar collected around 50 lakh rupees from the defaulters / non-performing accounts. He did not credited the amount so recovered, in the respective borrower's loan account, but kept with himself. Later he absconded along with amount so collected. A FIR was lodged by the Bank and the police, after making intensive search, caught and arrested him. Charge sheet was issued and case was submitted in the court.

Give the following answers in reference to the Companies Act, 2013:

i. In which category, cognizance or non-cognizance, the embezzlement of cash by Amar shall be treated?
ii. Non-cognizable offences are less serious than that of the cognizable offences. Do you agree? Substantiate your plea by differentiating between these two.
iii. Which offences, Special Court cannot deal with? Whether the said case can be dealt by the Special court.

[RTP Nov 2021]

Answer:

i. Embezzlement of the cash and absconding is a cognizable offence which means a police officer can arrest such person without the warrant of the magistrate.

ii. Cognizable Offence:

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

Non- Cognizable Offence:

"Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant.

Cognizable offences are heinous crimes, whereas non-cognizable offences are not so serious. Cognizable offences encompasses murder, rape, theft, kidnapping, counterfeiting, etc. whereas the, non-cognizable offences include offences like forgery, cheating, assault, defamation and so forth.

By having an overview of the definitions of cognizable and non-cognizable offences as stated above, it is clear that in the matter of cognizable offences, a police officer have authority to arrest any person without warrant, but in case of non-cognizable offences, policy office do not have such authority.

Therefore non-cognizable offences are less serious than that of the cognizable offences.

iii. Section 435 (1) provides that the Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, by notification, establish or designate as many Special Courts as may be necessary.

Section 452 of the Companies Act, 2013 provides that 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 one lakh rupees but which may extend to five lakh rupees.

Hence, as per the provisions of the Companies Act, 2013, the Special Court cannot deal with the matters on which section 452 applies. In the given case, since the branch manager, after collecting the money from the borrowers, absconded [as defined as per section 452(1)(a) & (b)], which comes under the purview of section 452, hence this matter shall not be dealt with by the Special Court.

Question 20:

Gulmohar Ltd. is a company registered in India for last 5 years. Since last 2 financial years, it has not been carrying on any business or operations and has not filed financial statements and annual returns saying that it has not made any significant accounting transaction during the last two financial years. Considering the current situation, Directors of the Company is contemplating to apply to Registrar of Companies to obtain status of dormant or inactive company. Advise them on :

i. Whether Gulmohar Ltd. is eligible to apply to Registrar of Companies to obtain dormant status for the company?

ii. Will your answer be different if Gulmohar Ltd is continuing payment of fees to Registrar of Companies and payment of rentals for its office and accounting records for last two financials years?

iii. Is special resolution in general meeting a pre-requisite to make an application to Registrar of Companies for obtaining the status of dormant company?

iv. What will be your answer if it is found after making an application of dormant company to Registrar of Companies that an investigation is pending against the company which was ordered 6 months ago?

Answer:

i. According to section 455 of the Companies Act, 2013, 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.
Here, "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.
Gulmohar Ltd., since from last two years is not carrying on business or operations and has not filed financial statements and annual returns saying it has not made any significant accounting transaction during the last two financial years. Thus, it falls within the definition of inactive company as stated above and hence is eligible to apply to Registrar of Companies to obtain the status of Dormant company.

ii. According to Explanation to sec 455, "significant accounting transaction" means any transaction other than—
   a. payment of fees by a company to the Registrar;
   b. payments made by it to fulfill the requirements of this Act or any other law;
   c. allotment of shares to fulfill the requirements of this Act; and
   d. payments for maintenance of its office and records.

   Thus, Gulmohar Ltd. is still eligible to apply to the Registrar of Companies to obtain the status of Dormant company even if it has continued 'payment of fees to Registrar of Companies and payment of rentals for its office and accounting records' for last two years, as these transactions have been kept outside the purview of significant accounting transactions.

iii. According to the Rule 3 of the Companies (Miscellaneous) Rules, 2014, a company may make an application in prescribed form to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of section 455 after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).

   Thus, special resolution is a pre- requisite to make an application to Registrar of Companies for obtaining the status of dormant company.

iv. According to the Rule 3 of the Companies (Miscellaneous) Rules, 2014, a company shall be eligible to apply under this rule only, if no inspection, inquiry or investigation has been ordered or taken up or carried out against co.

   According to section 455(6), 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 section 455.

   In the given case, Gulmohar Ltd. was not eligible to apply for the status of a dormant company as an investigation was pending against the company which was ordered 6 months ago. But since, it has already made an application and then it came to the light about the pending investigation against the company, the Registrar shall not register it as a dormant company and if already registered as a dormant company, strike off the name of a dormant company from the register of dormant companies as the company has contravened the necessary requirements.

Question 21:

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?

[May 2018]

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 Honorable 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 22:

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?

[May 2018 - Old]

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 recognize.

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

Question 23:

The e-forms are required to be authenticated by the authorized signatories using digital signature. "With reference to e-filing of documents with the Registrar of Companies, identify the users of digital signature who are required to obtain Digital Signature Certificate (DSC) and name the e-forms required to be filed for the following:

(i) Particulars for satisfaction of charge.

(ii) For filing Profit and Loss Account and other documents with the Registrar.

[May 2019 - Old]

Answer:

Only those persons who will be signing the e-Forms on behalf of the Company are required to register their Digital Signature Certificate (DSC) on the MCA portal. Directors, Manager and Secretary of the Company and practicing professionals i.e. CA, CS & CWA should register their DSC on MCA portal, as a business user for e-filing of the documents with the ROC.

E-Form (Companies Act, 2013)	Purpose of Form as per Companies Act, 2013
CHG-4	Particulars for satisfaction of charge
23ACA	Form for filing profit and loss account and other documents with the Registrar

Note: With coming into enforcement of the Companies Act, 2013, specific filing of e-form in the name of the profit and loss account has been discontinued. Presently, it goes combinedly with the e-form filled under the name "Form for filing financial statements and other documents with the Registrar" in the form AOC-4.

Question 24:

Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. State the penal provision under the Companies Act, 2013?

[May 2017]

Answer:

As per Section 448, a person shall be liable under Section 447 if

- he makes a statement in any return, report, certificate, financial statement, prospectus, statement or other document required by any of the provisions of this Act or Rules; and
- and such statement
    - is false in any material particulars, knowing it to be false; or
    - omits any material fact, knowing it to be material

As per Section 447, where any person is found guilty of fraud, he shall be punishable as follows:

a. If the fraud involves an amount of at least Rs. 10 lakh or 1% of the turnover of the company, whichever is lower, any person who is guilty of fraud shall be punishable as follows:
    i. If the fraud involves public interest, the period of imprisonment shall not be less than 3 years but which may extend to 10 years, and also with 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. If the fraud does not involve public interest, the period of imprisonment shall not be less than 6 months, but which may extend to 10 years, and also with 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.

b. If the fraud involves an amount less than Rs. 10 lakh or 1% of the turnover of the company, whichever is lower, and the fraud does not involve public interest, any person guilty of such fraud shall be punishable with
    (i) imprisonment up to 5 years; or
    (ii) fine up to Rs. 20 lakh; or
    (iii) both.

In the given case, Mr. Z has been found guilty of filing documents containing false and inaccurate particulars. Therefore, he is punishable with imprisonment and fine as contained in Section 447.

Question 25:

An officer of a company was allotted one room for two years in a guest house owned by the company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of Rs. 500 per day. The record shows that he had permitted the outsider for 45 days and collected Rs. 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act.

[May, 2017]

Answer:

As per Section 452 of the Companies Act, 2013, an officer or employee of a company shall be punishable with fine which shall not be less than Rs. 1 lakh but which may extend to Rs. 5 lakh in the following cases:

a. where he wrongfully obtains possession of any property of a company; or
b. where he was already in the possession of any property of the company, and he wrongfully withholds if or knowingly applies if to purposes other than those expressed or directed in the articles and authorised by this Act.

The Court may order him to deliver any such property within a time to be fixed by the Court. If the officer or the employee fails to comply with the order of the Court, the Court may order him to suffer imprisonment for a term which may extend to 2 years.

In the given case, an officer of the company has withheld the guest house of the company after the period of 2 years, for which he was allowed to stay in the guest house. Also, the officer of the company has knowingly applied the guest house of the company for the purpose of letting Out and earning rent. Because of the said acts, the officer of the company is punishable under Section 452. The Court may order that-

a. such officer shall be punishable with fine, which shall not be less than Rs. 1 lakh but which may extend to Rs. 5 lakh;
b. the office shall deliver the possession of the guest house to the company within a time to be fixed by the Court;
c. the officer shall be liable to imprisonment not exceeding 2 years, in case the officer fails to deliver the possession of the property to the company.

The complaint under Section 452 may be made by -

(a) the company: or
(b) any creditor of the company: or
(c) any contributory of the company; or
(d) any member of the company.

The right to take action against the officer is conferred by Section 452 of the Act, and therefore, no provision enabling the company to take any action against the officer is required in the letter of allotment.

Question 26:

In the capacity of an Adjudicating officer, the, Registrar passed an order against IDLE Limited, a listed company, for not following some provisions of the Companies Act, 2013. Being aggrieved of the order of the Adjudicating officer, IDLE Limited proceeded to the Tribunal. The Tribunal after giving both the parties an opportunity of being heard upheld the order of the Adjudicating authority in a modified manner. After lapse of a period of one year and five days, the Tribunal with a view to rectify a mistake apparent from the record, amended the order passed by him earlier, when the mistake was brought to his notice by the Adjudicating officer. IDLE Limited approached you and contended that the stipulated period of 3 months within which the order should be passed by the Tribunal is already over, even the delay period has exceeded the maximum allowed condonation period of 90 days and therefore the order passed by the Tribunal cannot be revised. Referring to and analyzing the relevant provisions of the Companies Act, 2013, advise IDLE Limited whether its contention is tenable. Will your answer differ if IDLE Limited has already preferred an appeal against the original order of the Tribunal before the amendment was made by the Tribunal ?

[Jan 21 - New]

Answer

As per the section 420 of the Companies Act, 2013, the Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

The Tribunal may, at any time within 2 years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties. Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

In the given case, though mistake was bought to the notice of the Tribunal by Registrar, but the time period for rectifying any mistake apparent from the record was within the prescribed period of 2 years from the date of order, so contention of IDLE Ltd. stating that the order passed by the Tribunal cannot be revised, is not correct.

Where if, IDLE Limited has already preferred an appeal against the original order of the Tribunal before the amendment was made by the Tribunal, no such amendment shall be made in respect of such order.

Question 27:

The Central Government is contemplating trial of a certain offence committed by TT Limited under the Companies Act, 2013. The said offence is punishable with an imprisonment of two years or more and a police report on the facts of the case has been prepared. Further, the said offence can be charged under the Code of Criminal Procedure, 1973. In the given scenario, outline a legal note as to how the trial of offences would proceed for prosecution and the Court jurisdiction in which the trial of offences would take place

[May 21 - New]

Answer

As per Section 435 of the Companies Act, 2013, the Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, established or designated Special Courts with a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more.

Further section 436 provides following legal provision that deals with trial of offences for prosecution and courts jurisdiction in which trial of offences would take place:

i. all offences specified under sub-section (1) of section 435 (except section 452) shall be triable only by the Special Court established or designated for the area in which the registered office of the company in relation to which the offence is committed , or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;

ii. where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate, such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:
Provided that where such Magistrate considers that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

iii. the Special Court may exercise, in relation to the person forwarded to it under clause (b), the to try a same power which a Magistrate having jurisdiction case, in relation to an accused person who has been forwarded to him under that section; and

iv. a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint, take cognizance of that offence without accused being committed to it for trial.
When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

Question 28:

Two groups of shareholders in a Company complained to the Registrar regarding the conduct and state of affairs of the company and accordingly, the proceedings of the case are before the Tribunal. Since the proceedings in the case is taking a long time, the shareholders approached you to advise alternative resolution of disputes outside the regulatory jurisdiction and also the time frame by which the proceedings can be completed. They also have a doubt that after hearing the final verdict, whether it will be binding on them and whether it can be referred to the next level of Court. You are requested to suitably advise as per the provisions of the Companies Act, 2013.

[May 21 – New]

Answer:

According to section 442(2) of the Companies Act, 2013, any of the parties to the proceedings may, at any time during the proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the Mediation and Conciliation Panel.

The Mediation and Conciliation Panel shall follow such procedure as may be in Rule 11 of the Special Courts (Companies Mediation and Conciliation) Rules, 2016, and 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.

Any party aggrieved 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.

Thus, the group of shareholders can apply to the Mediation and Conciliation Panel. Further, after the hearing of the final verdict, the group of shareholders may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

Question 29:

Draft a Board resolution for approval of investment in equity shares by Speed Cycles Limited in Brakes and Gears Limited.

[MTP – Dec'21]

Answer

Specimen of Board Resolution: Investment in Equity Shares

Resolution passed at the meeting of the Board of Directors of Speed Cycles Limited held at its registered office situated at _____ on _____ (day) at A.M.

"Resolved unanimously that pursuant to provisions of Section 186(2) of the Companies Act, 2013, the company be and is hereby authorized to invest in__ equity shares of Rs. _____ each of Brakes and Gears Limited, the investment in addition to other investments made to date in the aggregate being within the limits prescribed under the said section."

"Resolved further that Mr. ....., the Managing Director of the Company be and is hereby authorised on behalf of the Board to sign /execute the necessary documents in this connection."

Sd/-

Board of Directors Speed Cycles Limited

National Company Law Tribunal and Appellate Tribunal

Question 30:

JSK, a shareholder of CRI (Private) Ltd. filed an application before erstwhile Company Law Board, alleging various acts of oppression and mis-management in the affairs of the Company and sought certain relief measures. The petition was transferred to NCLT on its constitution. The NCLT passed an order on 5th October, 2017 without the consent of the parties. Aggrieved by the order, the shareholder decided to prefer an appeal. Nevertheless, the shareholder was suffering from low blood pressure. He was medically advised not to move, and he did not move. Therefore, he preferred the appeal with NCLAT on 5th December, 2017. Examine whether the appeal is admissible with reference to time limitation? Identify the provisions governing further appeal on the orders of NCLAT under Section 423 of the Companies Act, 2013.

[May 2018 -Old]

Answer:

Relevant provision:

As per Section 421 of the Companies Act, 2013, any person aggrieved by an Order of the Tribunal may prefer an appeal to the Appellate Tribunal.

However, no appeal shall lie to the Appellate Tribunal from an Order which was made by the Tribunal with consent of parties.

Every appeal in the above case, shall be filed within a period of forty-five days from the date on which a copy of the order of Tribunal is made available to the person aggrieved.

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

Given case:

In the given situation, NCLT passed an order on 5th October, 2017 without the consent of the parties on the acts of oppression and mis-management in the affairs of the company and for the obtaining certain relief measures.

Analysis and Conclusion:

JSK, a shareholder, aggrieved by an order of NCLT, can prefer an appeal in the NCLAT within 45 days from the date on which a copy of the order of Tribunal is made available to the person aggrieved. However, on reasonable ground this period may be further extended by 45 days i.e., within 90 days from the date on which a copy of the order of Tribunal is received by JSK.

Section 423 of the Companies Act, 2013 provides that any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order.

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

Assumption: In the question, date of order of the NCLT may be taken as the date on which a copy of the order of Tribunal is made available to the person aggrieved to answer the question within the provided information.

Question 31:

Aggrieved by an Order of NCLT dated 05.05.2018, passed without the consent of the parties, Madhruk Ltd. decided to file an appeal before NCLAT. Meanwhile, the employees and officers of the Company went on a strike from 10.05.2018 demanding higher pay and allowances and as a result of which, the operational and management activities were badly affected. The strike was called-off on 15.06.2018. Thereafter, the appeal was filed on 25.06.2018 before NCLAT with a prayer for condoning the delay in filing the appeal. A single judicial member of NCLT started the hearing. With reference to the provisions of the Companies Act, 2013, examine the following:

(i) Whether the appeal is admissible?

(ii) Maximum period allowed for condonation

(iii) Is the appeal transferable to a Bench consisting of two members?

[Nov 2018 -New]

OR

Aggrieved by an order of Hon'ble NCLT, dated 3rd April, 2018, passed without the consent of parties, Solan Minerals Limited decided to file an appeal before Hon'ble NCLAT. The order was received by the company on 4th April, 2018. The employees and officers went on a strike for a period of 10 days from 22nd May, 2018 demanding higher bonus and pay. In view of this, the management of the company was forced to a grinding halt during the strike period. Thereafter, the appeal was filed on 6th June, 2018 before the Hon'ble NCLAT and the company prayed for condonation of delay. Referring to and analyzing the applicable provisions of the Companies Act, 2013, decide the following:

(i) Whether the proposed appeal would be admitted by the Hon'ble NCLAT.

(ii) What is the maximum period allowed by the NCLAT for condonation of delay?

Answer:

Appeal from Orders of Tribunal [Section 421 of the Companies Act, 2013]

Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal (AT). No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

Every appeal under sub-section (1) (i.e. appeal to AT against order of Tribunal) shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding 45, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

In the instant case,

i. The appeal is admissible as the order of NCLT was passed without the consent of the parties.

ii. The maximum period allowed for condonation is 45 days if the AT is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. In the instant case, the appeal filed on 25.06.2018 before NCLAT is tenable.

iii. As per second proviso to section 419(3) if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

Question 32:

On an application filed before Tribunal from one of the shareholder of Company, Tribunal (NCLT) passed order on 20th December 2019 without the consent of parties. Mr. Rama, one of the party to the proceeding whose family condition was not good so didn't take much interest in order of tribunal but after few days due to aggrieved by the order, he filed an appeal before Appellate Tribunal (NCLAT) on 15th March 2020 showing sufficient cause of delay for not filling appeal up to 45 days from the date of order. The Appellate Tribunal has passed an order dated 30th April 2020, Mr. Rama was not satisfied and made application to Supreme Court on 30th September 2020 against the order of the Appellate Tribunal.

Considering the given situation, examine whether Appeal filed before the Supreme Court is admissible after showing cause of delay.

[ICAI Module]

Answer:

According to Section 423 of the Companies Act, 2013, any person aggrieved by an order of the Appellate Tribunal may prefer an appeal to the Supreme Court on any question of law arising out of Appellate Tribunal's order.

Every appeal shall be filed within a period of 60 days from the date on which a copy of the order of the Appellate Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.

Supreme Court may entertain an appeal even after the expiry of the said period of 60 days from the date aforesaid, but within a further period not exceeding 60 Days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within period.

In above case, since Mr. Rama even aggrieved by order of Appellate Tribunal filed application before Supreme Court on 30th September 2020. But as Supreme Court can entertain appeal only upto 60 days + 60 Days (extension if sufficient cause). Since this appeal was filed beyond 120 days by Mr. Rama, so, appeal filed before the Supreme Court is not admissible.

Chapter 1 – Securities and Exchange Board of India, 1992 and SEBI LODR, 2015

Question 1:
On completion of 60 years of age as on 31st March 2014, Mr. Jain retired as Professor from a university. From 1st April 2014, he was appointed as Chairman of the Securities and Exchange Board of India for a period of three years. Under the, provisions of the Securities and Exchange Board of India Act, 1992, decide whether he can be re-appointed on the same post after expiry of the original tenure? Also state whether it could be possible for him to relinquish the office before expiry of his tenure?

[Nov 2017 - Old]

Answer:

Appointment of Chairman:

As per Section 5 of the SEBI Act, 1992 and the rules prescribed under the SEBI Act, 1992, the Chairman may hold office for a period of 5 years subject to the maximum age limit of 65 years and can be re-appointed by the Central Government.

Also, as per Section 4(5) of the Act, the Chairman shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board.

In the instant case, Mr. Jain retired as professor from a university on completion of 60 years of age as on 31st March, 2014 appointed as Chairman of SEBI from 1st April, 2014 for a period of 3 years. This appointment is valid as on the date of appointment, he is of 60 years of age and he, as a retired professor, is a person of ability, integrity and standing and have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline.

If Mr. Jain is reappointed as a chairman after expiry of the original tenure of 3 years, he can be re-appointed but only upto 65 years of age i.e., upto 31st March, 2019 (i.e. only for two years).

Right to Relinquish the office: The Chairman shall equally have the right to relinquish office at any time before the expiry of their tenure by giving a notice of three months in writing to the Central Government.

Question 2:
Mr. Robert, aged 64 years as on 31.01.2016, was appointed 'Presiding Officer' of Securities Appellate Tribunal (SAT) on 01.02.2016 for a term of 5 Years. He served to the Central Government the notice of resignation from the office of 'Presiding Officer' on 01.10.2020. The Central Government issued an order appointing his successor which shall take effect on 01.12.2020. Explaining the provisions of the Securities and Exchange Board of India Act, 1992, (the SEBI Act) determine the date on which Mr. Robert shall vacate his office.

[Jan 2021 -Old]

Answer:

Provision relating to holding Office:

According to Section 15N of the Securities and Exchange Board of India Act, 1992, the Presiding Officer or every Judicial or Technical Member of the Securities Appellate 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 reappointment for another term of maximum five years

Provided that no Presiding Officer or the Judicial or Technical Member shall hold office after he has attained the age of seventy years.

According to Section 15Q, the Presiding Officer or any other Member of a Securities Appellate Tribunal may, by notice in writing under his hand addressed to the Central Government, resign his office.
Provided that the Presiding Officer or any other Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office-

- until the expiry of three months from the date of receipt of such notice or
- until a person duly appointed as his successor enters upon his office or
- until the expiry of his term of office,

whichever is earlier

Calculation of date of vacation of office:
In the given question, Mr. Robert was appointed as presiding officer of SAT on 1.2.2016 for 5 years (when he was 64 years of age). Thus, he can hold office till 31.01.2021. However, he resigns on 1.10.2020, i.e., before the expiry of his term. The Central Government issued an order appointing has successor which shall take effect on 1.12.2020. Hence, Mr. Robert has to continue in office earlier of the following:

(i) 31.12.2020 - expiry of three months from the date of receipt of such notice, or
(ii) 1.12.2020- until a person duly appointed as his successor enters upon his office, or
(iii) 31.01.2021- until the expiry of his term of office,

Thus, Mr. Robert shall vacate his office by 01.12.2020.

Question 3:
David is a Managing Director of Dynamic Power Limited, a listed public company. His wife consolidated her shareholding of Dynamic Power Limited within a very short span of time. David shared with her the information of unpublished adverse financial results of Quarter-4. Taking a call of this information she sold her shares in the market at a handsome price. The market prices of Dynamic Power Limited steeply fell after Q-4 results were published. Some investors made a complaint to SEBI alleging that David and Dynamic Power Limited are indulged in insider trading and manipulating the market prices with a request to issue cease and desist order for protection of investors' interest. Explain under the provisions of the Securities and Exchange Board of India Act, 1992, (the SEBI Act) the powers that can be exercised by SEBI to pass cease and desist order.

[Jan 2021 - Old]

Answers:
Legal Position:
According to Section 11 D of the SEBI Act, 1992, if the Securities and Exchange Board of India (the Board) finds after causing an inquiry to be made that any person has violated or is likely to violate any provisions of this Act or any Rules or Regulations made thereunder, it may pass an order requiring such person to cease and desist from committing or causing such violation

Provided that the Board shall not pass such order in respect of any listed Public Company or a Public Company (other than intermediaries specified under Section 12) which intends to get its securities listed on any recognized

stock exchange unless the Board has reasonable grounds to believe that such Company has indulged in insider trading or market manipulation.

In the present case, after causing inquiry, if SEBI has reasonable grounds to believe that Dynamic Power Limited and its Managing Director, David has indulged in insider trading or market manipulation, it may pass an order requiring such person to cease and desist from committing or causing such violation.

Question 4:

A group of complainants have alleged that Mr. Z, a Member of the Securities and Exchange Board of India (SEBI) has pecuniary interest in some of the cases that came up before the Board and that he misused his position and therefore, he should be removed from his office. The complainants seek your advice. Advice.

[ICAI Module]

OR

Mr. Zubin (Member of SEBI) was adjudged as an insolvent by the Adjudicating authority. As of that, a group of complainants have alleged that Mr. Zubin while rendering of his services in office may be biased in the performance of his duties. Working in such a state of position by him, may be detrimental to the public interest and so should be removed from his office. Advise in the given situation, the tenability of maintenance of complaint against Mr. Zubin.

[ICAI Module]

Answer:

Removal of Member of the SEBI (Section 6 of the Securities and Exchange Board of India Act, 1992)

According to section 6 of the Securities and Exchange Board of India Act, 1992, the Central Government shall have the power to remove a member appointed to the Board, if he:

(i) is, or at any time has been adjudicated as insolvent;
(ii) is of unsound mind and stands so declared by a competent court;
(iii) Has been convicted of an offence which, in the opinion of the Central Government, involves a moral turpitude.
(iv) Has, in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest.

Before removing a member, he will be given a reasonable opportunity of being heard in the matter.

In the present case, a group of complainants have alleged that Mr. Z, a member of the SEBI has pecuniary interest in some of the cases that came up before the Board and he misused his position and therefore, he should be removed from his office.

Here, above complainants may approach the Central Government for removal of Mr. Z, a member of the SEBI and if the Central Government is of the opinion that Mr. Z has so abused his position as to render his continuation in office detrimental to the public interest, the Central Government may remove Mr. Z from his office after giving him a reasonable opportunity of being heard in the matter.

Question 5:

SEBI received complaints from some investors alleging that ABC Ltd. and some brokers are indulging in price manipulation in the shares of ABC Ltd. Explain the powers that can be exercised by SEBI under the Securities and Exchange Board of India Act, 1992 in case the allegations are found to be correct.

[ICAI Module]

Answer:

Price manipulation in the shares of ABC Ltd. can be considered as fraudulent and unfair trade practices relating to securities market.

In this case SEBI may exercise the following powers under section 11(4) of securities and Exchange Board of India Act, 1992.

i. Suspend the trading of any security (in this case the securities of ABC Ltd.) in a recognized stock exchange.
ii. Restrain persons (in this case ABC Ltd.) from accessing the securities market. It can also prohibit any person associated with securities market (i.e. brokers who have indulged in price manipulation) to buy, sell or deal in securities market.

SEBI may issue the above orders for reasons to be recorded in writing. SEBI shall, either before or after passing such orders give an opportunity of hearing to company and brokers concerned (proviso 2 to Section 11(4)) SEBI may also appoint an adjudicating officer who may levy penalty under section 15 HA after holding an enquiry in the prescribed manner.

According to section 15HA if any person indulges in fraudulent and unfair trade practices relating to securities, he shall be leviable to a penalty which shall not be less than five lakh rupees, but which may extend to twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher.

Prohibition on manipulation and deceptive practices: Further according to section 12A, no person shall directly or indirectly indulge in following (i.e.) (a) using in manipulative or deceptive device in connection with purchase, sale or securities listed (b) Employ any scheme or device to defraud in connection with dealing in securities which are listed (c) engage in an act which would operate as fraud or deceit upon any person in connection with dealing in securities which are listed. SEBI may impose penalty which shall not be less than one lakh rupees but which may extend to one crore rupees. (Section 15HB)

Question 6:

Clever who is registered as an Intermediary fails to enter into an agreement with his client and hence penalized by SEBI under section 15B of the SEBI Act. Advise Mr. Clever as to what remedies are available to him against the order of SEBI.

[ICAI Module]

Answer:

Remedies against SEBI order: Section 15B of the Securities and Exchange Board of India Act, 1992 lays down that if any person, who is registered as an intermediary and is required under this Act or any rules or regulations made there under, to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Mr. Clever has been penalized under the above mentioned provision.

Two remedies are available to Mr. Clever in this matter:-

(i) Appeal to the Securities Appellate Tribunal: Section 15T of the SEBI Act, (1) any person aggrieved:
   (a) by an order of the Board made, on and after the commencement of the Securities Laws (Second Amendment) Act, 1999, under this Act, or the rules or regulations made there under; or
   (b) by an order made by an adjudicating officer under this Act; or
   (c) by an order of the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

Every appeal shall be filed within a period of forty-five days from the date on which a copy of the order made by the Board or the Adjudicating Officer or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be, is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Securities Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

On receipt of an appeal under sub-section (1), the Securities Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

The Securities Appellate Tribunal shall send a copy of every order made by it to the Board, or the Insurance Regulatory and Development Authority or the Pension Fund Regulatory and Development Authority, as the case may be the parties to the appeal and to the concerned Adjudicating Officer.
The appeal filed before the Securities Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

(ii) Appeal to the Supreme Court: Section 15Z of the SEBI Act, 1992 provides that any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order to him on any question of ~~fact or~~ law arising out of such order. The Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

Question 7:

A group of investors are upset with the functioning of two leading stock brokers of Calcutta Stock Exchange and want to make a complaint to SEBI for intervention and redressed of their grievances. Explain briefly the purpose of establishing SEBI and what type of defaults by the stockbrokers come within the purview of SEBI Act, 1992.

[ICAI Module]

OR

Mr. Raman, an investor is not satisfied with the dealings of his stock broker who is registered with Delhi Stock Exchange. Mr. Raman approaches you to guide him regarding the avenues available to him for making a complaint against the stock broker under Securities and Exchange Board of India Act, 1992 and also the grounds on which such complaint can be made. You are required to briefly explain the answer to his queries.

[ICAI Module]

Answer:

The Securities and Exchange Board of India (SEBI) was established primarily for the purpose of:

(a) to protect the interests of investors in securities
(b) to promote the development of securities market
(c) to regulate the securities market and
(d) for matters connected therewith and incidental thereto.

The following defaults by stock brokers come within the purview of SEBI Act:

a. Any failure on the part of the stock broker to issue contract notes in the form and in the manner specified by the Stock Exchange.
b. Any failure on the part of the broker to deliver any security or to make payment of the amount due to the investor in the manner or within the period specified in the regulations.
c. Any collection of charges by way of brokerage in excess of the brokerage as specified in the regulations. (Section 15 F, SEBI Act, 1992)

Question 8:

On the complaint of Mr. Kamlesh Gupta, after enquiry SEBI finds that Mr. P. Mehta, a Chief Executive Officer of the Company, on the basis of unpublished price sensitive information, has indulged in the trading of the securities of that company. Explain, on the basis of the said finding, what action SEBI can take against Mr. P. Mehta under the Securities and Exchange Board of India Act, 1992.

[ICAI Module]

Answer:

Section 15G of the Securities and Exchange Board of India (SEBI) Act, 1992 deals with penalty for Insider Trading. According to this, if any insider

(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate on any stock exchange on the basis of any unpublished price sensitive information; or

(ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary cause of business or under any law, or

(iii) counsels or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information,

Shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

As such SEBI can, after following the prescribed procedure, impose a penalty on Mr. P. Mehta. The maximum penalty that SEBI can impose is Rupees twenty-five crores or three times the amount of profits made out of insider trading, whichever is higher.

Question 9:

Securities and Exchange Board of India (SEBI) has undertaken inspection of books of accounts and records of LR Ltd., a listed public company. Specify the measures which may be taken by SEBI under the Securities and Exchange Board of India Act, 1992 to protect the interest of investors and securities market, on completion of such inquiry.

[ICAI Module]

Answer:

As per section 11 (4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:

1. suspend the trading of any security in a recognised stock exchange;
2. restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;
3. suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;
4. impound and retain the proceeds or securities in respect of any transaction which is under investigation;
5. attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

   Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under section 26A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of section 28A shall apply:

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.

6. Direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation.

The amount disgorged, pursuant to a direction issued, under the SEBI Act or the Securities Contracts (Regulation) Act, 1956 or the Depositories Act, 1996, as the case may be-

- shall be credited to the Investor Protection and Education Fund (IPEF) established by the Board, and
- such amount shall be utilised by the Board in accordance with the regulations made under this Act.".

Provided that the Board may take any of the measures specified in clause (d) or clause (e) or clause (f), in respect of any listed public company or a public company (not being intermediaries referred to in section 12) which intends to get its securities listed on any recognised stock exchange where the Board has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market.

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

Penalty: The Board may, by an order, for reasons to be recorded in writing, levy penalty under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB after holding an inquiry in the prescribed manner.

Question 10:

Mr. S, a member of MN Ltd., obtained an order from the Securities and Exchange Board of India (SEBI) against the company. But the company failed to redress the grievance of Mr. S within the time fixed. Consequently, SEBI imposed penalty on the company. The company, however, did not pay the penalty also. State how the penalty can be recovered from the company?

[ICAI Module]

Answer:

According to Section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed by the adjudicating officer or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement /certificate in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:

(a) attachment and sale of the person's movable property;
(b) attachment of the person's bank accounts;
(c) attachment and sale of the person's immovable property;
(d) arrest of the person and his detention in prison;
(e) Appointing a receiver for the management of the person's movable and immovable properties.

The expression 'Recovery Officer' means any officer of the Board who may be authorized by general or special order in writing, to exercise the powers of a Recovery Officer. The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers.

Question 11:

Mr. Ravi failed to pay the penalty imposed by the Adjudicating Officer for an offence committed under Securities and Exchange Board of India Act, 1992. After the penalty has become due, Mr. Ravi, otherwise than for adequate consideration, transferred his residential property to his sister and the fixed deposits with Banks in favor of his minor son. The minor son has become major and deposits continue to be held by his son.

With reference to the provisions of SEBI Act, 1992 discuss,

i. Whether the residential property and fixed deposits with Banks can be attached by the Recovery Officer for the purpose of recovering the penalty?

ii. Whether the Recovery Officer can seek assistance of local district administration for attaching the property?

[Nov 2018 - New]

Answer:

As per requirement of section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed by the adjudicating officer, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by modes specified in the said section.

As per the explanation, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.

Further, Section 28A states that the Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising his powers.

In the light of the provisions enumerated above and facts of the question,

i. The residential property shall not be attached by the Recovery Officer for the purpose of recovering the penalty, as it has been transferred by Mr. Ravi to his sister and said transfer has not been covered in the section.

   The Fixed deposits with Bank that have transferred by Mr. Ravi in favor his minor son can be attached by the Recovery Officer for the purpose of recovering the penalty. Further, these Fixed deposits can even after the date of attainment of majority by such minor son, continue to be included in Mr. Ravi's monies held in bank accounts for recovering any amount due from him under this Act.

ii. Yes, the Recovery Officer can seek assistance of local district administration for attaching the property.

Question 12:

Mr. Kapoor, a market intermediary was found alleged to have violated certain conditions under the provisions of the SEBI Act, 1992. The SEBI is contemplating action on the intermediary and asked for submission of certain details. Mr. Kapoor submitted the required details with a full and true disclosure in respect of the alleged violation and the Central Government wants to grant him immunity in the said circumstances. SEBI is however of the view that immunity cannot be granted and wants to prosecute Mr. Kapoor by carrying out an investigation. Examine as to how the matter will be resolved under the provisions of the SEBI Act, 1992?

[May 21 - New and MTP- Dec'21]

Answer:

Power to grant immunity [Section 24B of the SEBI Act, 1992]:

The Central Government may, on recommendation by the Board, if the Central Government is satisfied, that any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made thereunder, has made a full and true disclosure in respect of the alleged violation,

- grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made thereunder or also from the imposition of any penalty under this Act with respect to the alleged violation.

Exception: Provided that no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.

Provided further that recommendation of the Board under this sub-section shall not be binding upon the Central Government.

Hence, the instant case, in the light of the said provision, the Central Government cannot grant immunity to Mr. Kapoor, in the circumstances provided in the question. Recommendation of SEBI is required to grant immunity. However, such recommendation shall not be binding upon the Central Government.

Question 13:

SEBI had ordered investigation into the affairs of a stock broking company, Rivori Securities Ltd. for alleged unauthorized trading and during the investigation, it passed an attachment order of two out of five bank accounts of the company on 20th April, 2021, which were involved in the violation of provisions of the SEBI Act, 1992, after recording the reasons for the same.

After passing the attachment order, opportunity of being heard was given to the company and the confirmation order for such attachment was obtained from Special Court on 5th July, 2021. The investigation got completed on 10th August, 2021 and consequently the two bank accounts were released. Also, the Investigating Authority returned the books of the company after informing the Judge of a Designated Court.

In the context of aforesaid case-scenario, please answer to the following question:-

(iii) Whether it can be said that there was proper attachment of banks accounts of Rivori Securities Ltd. by the SEBI?

(iv) Due to what reason, the Investigating Authority would be required to have informed the Judge of the Designated Court while returning the books of Rivori Securities Ltd.?

[MTP - Dec 21]

Answer:

(i) As per section 11(4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, either pending investigation or inquiry or on completion of such investigation or inquiry, attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:

Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under section 26A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of section 28A shall apply:

Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.

Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.

Here, SEBI passed the attachment order on 20th April, 2021 after recording the reasons for the same. Also after passing such order, an opportunity of being heard was giving to the company. The confirmation order for such attachment was obtained from Special Court on 5th July, 2021 i.e. within 90 days from passing the attachment order.

Further, only such bank accounts were attached which were involved in the violation of provisions of the SEBI Act, 1992 and such attachment was continued till the conclusion of the investigation proceedings.

Thus, it can be said that there was proper attachment of banks accounts of Rivori Securities Ltd. by the SEBI as all the requirements with respect to such attachment appeared to be fulfilled.

(ii) The Investigating Authority would have made an application to the Judge of the Designated Court for seizing the books of Rivori Securities Ltd. as per section 11C of the Securities and Exchange Board of India Act, 1992, and further as per the said section, the books seized can be kept in the custody by the Investigating Authority till the conclusion of the investigation and thereafter it shall return the same to the company and inform the Judge of the Designated Court of such return.

Thus, due to the aforesaid reason, the Investigating Authority would be required to have informed the Judge of the Designated Court while returning the books of Rivori Securities Ltd.

Question 14:

The composition of Audit Committee of M/s MKBTC Limited, an unlisted Public Company, as on 31-3-2019 comprised of 7 Directors including 4 Independent Directors. The majority of the members of the Audit Committee has the ability to read and understand the financial statements but none of them has accounting or related financial management expertise. The Company listed its Securities in a recognized Stock Exchange in the month of August 2019. Referring to the regulations of Securities and Exchange Board of India [Listing Obligations and Disclosure Requirements] Regulations 2015, decide whether the existing Audit Committee can continue after listing of its Securities?

[Nov 2019 - New]

Answers:

Audit Committee:

According to Regulation 18 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, every listed entity shall constitute a qualified and independent audit committee which shall have:

(a) Minimum three directors as members.

(b) At least Two-thirds of the members of audit committee shall be independent directors.

(c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.

As per the facts of the question, M/s MKBTC Limited, listed its securities in a recognised stock exchange in the month of August, 2019. In order to comply with the requirements of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the company requires to do the following:

i. The audit committee of M/s MKBTC Limited already has 7 directors as members, which is in compliance.

ii. The audit committee has 4 directors as independent directors. However, once the company gets listed, at least 5 [7*(2/3)] directors shall be independent directors. Thus, they need to change the composition of audit committee once the company gets listed on stock exchange.

iii. In the existing audit committee though majority of the members have the ability to read and understand the financial statement but none of them has accounting or related financial management expertise. However, once the company gets listed it is required that all members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. Hence, it is required that the company should appoint at least one member in the audit committee who shall have accounting or related financial management expertise.

In view of above, the existing audit committee cannot continue after listing of its securities.

Question 15:

Grow Well Limited, a public company (not a Section 8 Company) has recently been listed. The promoters of the company are individuals only. It has 12 directors in its Board. The company approached you seeking your advice regarding the following as per the circumstances stated below.

i. What should be the optimum combination of executive and non-executive directors?

ii. What should be the minimum number of independent directors in case the chairperson of the board of directors is a non-executive director?

iii. What should be the minimum number of independent directors in case the company does not have a regular non-executive chairperson?

iv. What should be the minimum number of independent directors in case where the regular non-executive chairperson is a promoter of Grow Well Limited or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors?

Referring to the relevant regulation of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, advise the company on the above matters

[Jan 2021 -New]

Answer:

Regulation 17(1) of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015:

i. According to said Regulation, company should have optimum combination of executive and non-executive directors, with not less than 50% of directors comprising of non-executive directors. Hence, in Grow Well Limited, there should be not less than 6 non- executive directors.

ii. According to said Regulation, where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors of Grow Well Limited shall comprise of independent directors i.e., minimum 4.

iii. Where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors (i.e., 50%) shall comprise of independent directors i.e. minimum 6.

iv. Where the regular non-executive chairperson is a promoter of the listed entity or is related to any promoter or person occupying management positions at the level of board of director or at one level below the board of directors, at least half of the board of directors of the listed entity shall consist of independent directors i.e. minimum 6.

Question 16:

Perfect Tyres Ltd. was incorporated in January, 2019 and came out with its first IPO in the month of May 2020. The company's shares were listed on the BSE and NSE after successful completion of the IPO and allotment of equity shares made to the investors.

The Chairperson of the Board of Directors is a non-executive director. There are 13 directors, out of which one is woman director.

Based on the stated facts in the light of the relevant law, advise on the following issues:

i. Where if after listing of the shares, the total number of directors on the board are 13. Out of which, one is woman director. What shall be the required number of independent directors in the company?

ii. If the Board of directors do not have regular non-executive director, then what shall be the required number of independent directors in the Board in the said case?

[RTP Nov 2021 -New]

Answer:

(i) As per Regulation 17 of the SEBI(LODR) Regulations, 2015, the composition of board of directors of the listed entity shall be as follows:

a. Board of directors shall have an optimum combination of executive and nonexecutive directors with at least one woman director and not less than fifty per cent. of the board of directors shall comprise of non-executive directors;

b. Where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors.

Any fraction in number, shall be rounded off to the nearest number.

So, 1/3rd of 13 comes to 4.33, rounded off to 5. So at least 5 independent directors should be there.

(ii) In line with above clause (b) of part (i), where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors.

So one-half of 13 comes to 6.5, rounded off to 7. So at least 7 independent directors should be there.

Question 17:

Superb manufacturing Ltd. was incorporated in January, 2021. In the month of May 2021,it came out with its first IPO. The company's shares were listed on the two recognised stock exchange after successful completion of the IPO and allotment of equity shares made to the investors.

There are 14 directors in the BoD, out of which one is woman director, whereas the Chairperson is a non-executive director.

Based on the stated facts in the light of the relevant law, evaluate the given situations:

(i) After listing of the shares, the total number of directors on the Board are 14 including a woman director. What shall be the required number of independent directors in the company

(ii) If the Board of directors do not have regular non-executive director, then what shall be the required number of independent directors in the Board?

Answer:

(i) As per Regulation 17 of the SEBI(LODR) Regulations, 2015, the composition of board of directors of the listed entity shall be as follows:

(a) Board of Directors shall have an optimum combination of executive and nonexecutive directors with at least one woman director and not less than fifty per cent. of the board of directors shall comprise of non-executive directors;

(b) where the chairperson of the Board of Directors is a non-executive director, at least one-third of the Board of Directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors.

Any fraction in number, shall be rounded off to the nearest number.

So one-third of 14 comes to 4.66, rounded off to 5. So at least 5 independent directors should be there.

(ii) Regulation 17(1)(b) of SEBI (LODR) Regulations, 2015 states that where the chairperson of the board of directors is a non-executive director, at least one-third of the board of directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors.

Any fraction in number, shall be rounded off to the nearest number.

So one-half of 14 comes to 7. So at least 7 independent directors should be there.

Question 18:

Mr. Vasumadan Lal, one of the directors of Florence Shares (P) Ltd., was found to be guilty of contravention under the SEBI Act, 1992, under section 27 and was imposed a penalty of Rs. 70 lakhs vide order of SEBI dated 14th April, 2021. SEBI issued notice to Mr. Vasumadan for paying the penalty amount but he refrained from doing so and unfortunately, he passed away on 25th May, 2021 without paying the penalty amount.

His estate worth Rs. 60 lakhs was inherited by his son, Mr. Rajgopal Lal, which included a property worth Rs. 25 lakhs which was mortgaged by him for taking a bank loan. Recovery proceedings under section 28A were initiated against Mr. Rajgopal by the Recovery Officer for recovering the penalty amount payable by Mr. Vasumadan.

In the context of aforesaid case-scenario, please answer to the following questions:

1. Whether it was valid to initiate the recovery proceedings against Mr. Rajgopal?
2. What shall be the liability of Mr. Rajgopal in such recovery proceedings?

[MTP - Dec'21]

Answer:

i. As per section 28B of the Securities and Exchange Board of India Act, 1992, Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay, if he had not died, in the like manner and to the same extent as the deceased:

Provided that, in case of any penalty payable under this Act, a legal representative shall be liable only in case the penalty has been imposed before the death of the deceased person.

For the purposes of sub-section (1), any proceeding for disgorgement, refund or an action for recovery before the Recovery Officer under this Act, except a proceeding for levy of penalty, which could have been initiated against the deceased if he had survived, may be initiated against the legal representative and all the provisions of this Act shall apply accordingly.

Explanation.--For the purposes of this section ''Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased

and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

Here, penalty of Rs. 70 lakhs was imposed on Mr. Vasumadan Lal vide order of SEBI dated 14th April, 2021, and he passed away on 25th May, 2021. So, the penalty had been imposed before his death.

Further, he had refrained from paying the penalty for which recovery proceedings could have been initiated against him by the Recovery Officer but as he passed away because of which as per section 28B(2), as aforesaid, such recovery proceedings might be initiated against his legal representative and all the provisions of the SEBI Act, 1992, would apply accordingly.

Mr. Rajgopal Lal would be considered as the legal representative of Mr. Vasumadan as he inherited his estate. Thus, it was valid for the Recovery Officer to initiate the recovery proceedings against Mr. Rajgopal as per section 28B of the SEBI Act, 1992.

ii. As per section 28B of the Securities and Exchange Board of India Act, 1992, every legal representative shall be personally liable for any sum payable by him in his capacity as legal representative if, while his liability for such sum remains undischarged, he creates a charge on or disposes of or parts with any assets of the estate of the deceased, which are in, or may come into, his possession, but such liability shall be limited to the value of the asset so charged, disposed of or parted with.

The liability of a legal representative under this section shall be limited to the extent to which the estate of the deceased is capable of meeting the liability.

Though the penalty amount recoverable is Rs. 70 lakhs but the amount that would be recovered from Mr. Rajgopal shall be limited to the extent to which the estate of the deceased was capable of meeting the liability i.e., to the extent of Rs. 60 lakhs.

However, the said estate included a property of Rs. 25 lakhs which was mortgaged by Mr. Rajgopal for taking a bank loan. So for paying the sum of Rs. 25 lakhs, Mr. Rajgopal would be personally liable as he has created a charge in the property included in the estate and the remaining amount i.e., Rs. 35 lakhs (Rs. 60 lakhs - Rs. 25 lakhs) would be required to be paid by him from the charge free assets of the estate.

The Foreign Exchange Management Act, 1999

Question 1:

'Printex Computer' is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under the FEMA, 1999 of printer units in Pune and that of Dubai branch?

[ICAI Module]

OR

Pamtop is a London based company having several business units all over the world. It has a manufacturing unit called Laptop with headquarters in Bengaluru. It has a branch in Seoul, South Korea which is controlled by the headquarters in Bengaluru. What would be the residential status under FEMA 1999 of Laptop in Bengaluru and that of Seoul branch?

[Nov 2009]

OR

Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its headquarters in Mumbai and has a branch in Singapore. The Headquarters at Mumbai controls the Singapore branch of the robotic unit. What would be the residential status of the robotic unit in Mumbai and that of the Singapore branch?

[ICAI Module]

Answer:

Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)].

Section 2 (u) defines 'person' under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by "such person". The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly, Printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by the Printer unit in Pune which is a person resident in India. Hence, the Dubai Branch is a person resident in India.

Question 2:

Examine, with reference to the provisions of the Foreign Exchange Management Act, 1999, the residential status of the branches mentioned below:

i. MKP Limited, an Indian company having its Registered Office at Mumbai, India established a branch at New York U.S.A. on 1st April, 2004.
ii. WIP Ltd., a company incorporated and registered in London established a branch at Chandigarh in India on 1st April, 2004.
iii. WIP Ltd.'s Singapore branch which is controlled by its Chandigarh branch.

[May 2005]

OR

Examine with reference to the provisions of the Foreign Exchange Management Act, 1999, the residential status of the branches mentioned below:

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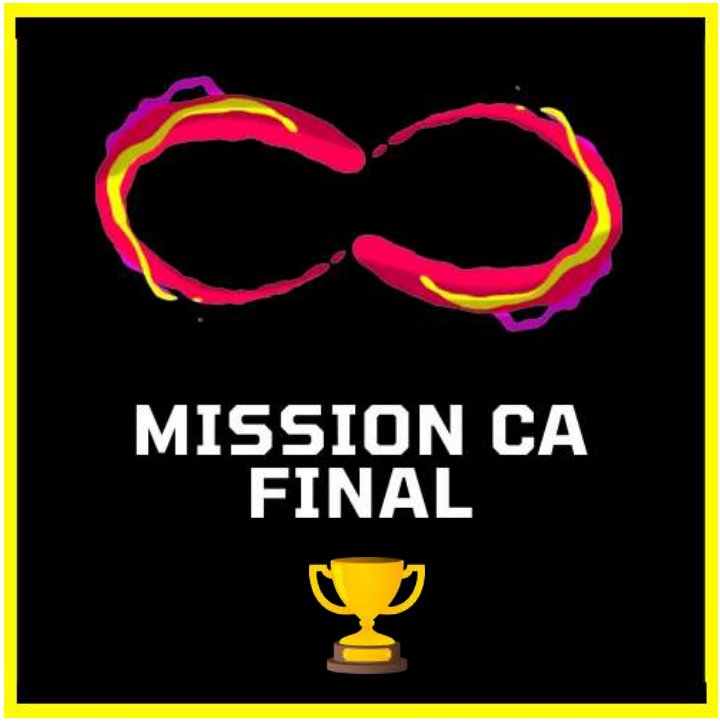

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(i) NNM Ltd. an Indian Company having its registered office at Mumbai, India established a branch at New York U.S.A. on 1st April 2005.
(ii) DDI Ltd. a company incorporated and registered in London established a branch at Kanpur in India on 1st April 2005.
(iii) DDI Ltd. has a branch office at Singapore which is controlled by its Kanpur branch

[CA Final - Old]

Answer:

Section 2(u) defines a 'person'. As per this definition, the following shall be covered in the definition of a 'person':

a) A company
b) Any agency, office or branch owned by a 'person'.

Section 2(v) defines a 'person resident in India'. As per this definition, the following shall be covered in the definition of a person resident in India:

a) Any person or body corporate registered or incorporated in India.
b) An office, branch or agency in India owned or controlled by a person resident outside India.
c) An office, branch or agency outside India owned or controlled by a person resident in India.

The answer to the given problem is as under:

i. MKP Limited as well as the New York branch of MKP Limited is a 'person'. Therefore, residential status under FEMA shall be determined for each of them separately.

   MKP Limited is incorporated in India. Therefore, it is a 'person resident in India'.

   MKP Limited (a 'person resident in India') has established a branch outside India. Therefore, the New York branch of MKP Limited falls under the clause 'an office, branch or agency outside India owned or controlled by a person residential India' and so the New York branch is a 'Person resident in India'.

ii. WIP Ltd. as well as Chandigarh branch of WIP Ltd. is a 'person'. WIP Ltd. (a foreign company) does not fall under any of the clauses of the definition of a 'person resident in India'. Therefore, WIP Ltd. is a person resident outside India. The Chandigarh branch of WIP Ltd. is a 'Person resident in India' since it falls under the clause an office, branch or agency in India owned or controlled by a person resident outside India'.

iii. The Singapore branch of WIP Ltd., though not owned, is controlled by the Chandigarh branch. The Singapore branch is a 'Person resident in India' since it falls under the clause 'an office, branch or agency outside India owned or controlled by a person resident in India'.

~~Question:~~ [This example of ICAI contradicts with their own chart. Ignore this unless ICAI revises their module]

~~Mr. X had resided in India during the financial year 2019-2020 for less than 182 days. He had come to India on April 1, 2020 for carrying on business. He intends to leave the business on April 30, 2021 and leave India on June 30, 2021. Determine his residential status for the financial years 2020-2021 and 2021-2022 up to the date of his departure?~~

~~[ICAI Module]~~

~~**Answer:**~~

~~Mr. X came to India for carrying on business. During FY 2019-20, he resided in India for less than 182 days. Since he has not fulfilled condition of staying in India for more than 182 days, he would normally be considered PROI but~~

~~as Mr X has come for carrying on business in India, he falls under the second limb and will be considered as PRI w.e.f. 1st April 2020.~~

~~Mr. X will be considered as a person resident in India' from 1st April 2020.~~

~~As regards, financial year 2021-2022, Mr. X would continue to be an Indian resident from 1st April 2021.~~

~~If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure.~~

~~It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any these purposes, he would be considered, 'person resident in India' during the financial year 2021-2022. Thus, it is the purpose of leaving India which will decide his status from 1st July 2021.~~

Question 3:

Mr. Z had resided in India during the financial year 2019-2020. He left India on 1st August, 2020 for United States for pursuing higher studies for three years. What would be his residential status during financial year 2020-2021 and during 2021-2022?

[ICAI Module]

Answer:

Mr. Z had resided in India during financial year 2019-2020 for more than 182 days. After that he has gone to USA for higher studies. He has not gone out of or stayed outside India for or on taking up employment, or for carrying a business or for any other purpose, in circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2020-2021.

RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2021-2022, he would not have been in India in the preceding financial year (2020-2021) for a period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2021-2022.

Question 4:

Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the Airline is headquartered. However, for security considerations, she was based at Mumbai. During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

[ICAI Module]

Answer:

Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v) (B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be a Person Resident in India.

If, however, she has been employed in Mumbai branch of British Airways, then she will be considered a Person Resident in India.

Question 5:

Mr. Mickey is a citizen of America. He came to India for the first time on October 5, 2000 for employment and stayed in India till 31.3.2002. What would be his residential status during the financial years 2000-01, 2001-02 and 2002-03? What would be the conditions in which he may be treated as a person resident outside India in the financial year 2002- 03?

Answer:

The given problem can be answered as under :

(a) Financial year 2000-01. Mr. Mickey came to India for the first time on October 5, 2000. It means he did not reside in India for anytime in the financial year 1999-2000. Therefore, for the financial year 2000-01 he is a 'Person resident outside India'.

(b) Financial year 2001-02. He resided in India for less than 183 days in the FY 2000-01. Therefore, for the financial year 2001-02 he is a 'Person resident outside India'.

(c) Financial year 2002-03. Since he resided in India for more than 182 days in the financial year 2001-02, he shall be a 'Person resident in India' for the financial year 2002-03.

He shall be regarded as a 'Person resident outside India' for the financial year 2002-03 if he goes out of India:

- for taking up **employment** outside India; or
- for carrying on outside India a **business** or **vocation** outside India; or
- for any other purpose, in such circumstances as would indicate his **intention** to stay outside India for an **uncertain period**.

Question 6:

Mr. Ram had resided in India during the financial year 1999-2000 for less than 183 days. He again came to India on 1st May, 2000 for higher studies and business and stayed up to 15th July, 2001. State whether-

a. Citizenship is relevant for determining the residential status under the Foreign Exchange Management Act, 1999?

b. Mr. Ram can be considered Person resident in India' during the financial year 2000- 2001.

[Nov 2002]

Answer:

a. A person residing for more than 182 days in India in preceding financial year is a 'person resident in India' as per FEMA. Therefore, citizenship is not relevant for determining the residential status of a person under FEMA.

b. The residential status of an individual for a particular financial year is determined with reference to his residence in India in the immediately preceding financial year. in the problem given, Mr. Ram resided in India for less than 183 days in the financial year 1999-2000. Therefore, for the financial year 2000-2001 he is a 'Person resident outside India' notwithstanding the purpose or duration of his stay in India during the financial year 2000-2001. Unless an individual resides in India for more than 182 days in the preceding financial year, he cannot be termed as a person resident in India.

Question 7:

Mr. Sekhar resided for a period of 150 days in India during the financial year 2003-2004 and thereafter went abroad. He came back to India on 1st April, 2004 as an employee of a business organization. What would be his residential status during the financial year 2004-2005?

[Nov 2004]

OR

Mr. Sekhar resided for a period of 150 days in India during the financial year 2006-2007 and thereafter went abroad. He came back to India on 1st April, 2007 as an employee of a business organization. What would be his residential status during the financial year 2007-2008?

[May 2007]

OR

Mr. Sekhar resided in India for a period of 150 days during the financial year 2007-2008 and thereafter went abroad. He came back to India on 1st April 2008 as an employee of a business organization. What would be his residential status under Foreign Exchange Management Act, 1999 during the financial year 2008-2009?

[June 2009]

Answer:

The residential status of an individual for a particular financial year is determined with reference to his residence in India in the immediately preceding financial year. in the problem given, Mr. Sekhar resided in India for less than 183 days in the financial year 2003-2004. Therefore, for the financial year 2004-05 he is a 'Person resident outside India' irrespective of the purpose or duration of his stay. Unless an individual resides in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India.

Question 8:

Mr. Ruchi resided for a period of 170 days in India during the financial year 2008-09 and thereafter went abroad. He came back to India on 1st April, 2009 as an employee of a business organization. What would be his residential status during financial year 2009-10 under Foreign Exchange Management Act, 1999?

[Nov 2008]

OR

During the financial year 2010-11, Mr. Bhattacharyya resided in India for a period of 180 days and thereafter went abroad. On 1st April, 2011 Mr. Bhattacharyya came back to India as an employee of a business organization. Decide the residential status of Mr. Bhattacharyya during the financial year 2010-11 under the provisions of the Foreign Exchange Management Act, 1999.

[CA Final May 2011]

Answer:

The residential status of an individual for a particular financial year is determined with reference to his residence in India in the immediately preceding financial year. in the problem given, Mr. Ruchi resided in India for less than 183 days in the financial year 2008-2009. Therefore, for the financial year 2009-10 he is a Person resident outside India' irrespective of the purpose or duration of his stay in India. If an individual does not reside in India for more than 182 days in the preceding financial year, he cannot be termed as a person resident in India.

Question 9:

During the financial year 2000-01, Mr. Aman visited India for the first time for a holiday. He stays in India for more than 182 days and goes back on 1st January 2001. He again comes to India on August 1, 2001 for the purpose of business. He intends to wind up his business and leave India on 31st December, 2002, and plans to take up employment outside India. What would be his residential status during the financial years 2000-01, 2001-02 and 2002-03?

OR

Mr. Kishore resided in India during the Financial Year 2009- 2010 for less than 182 days. He came to India on 1st April, 2010 for business. He closed down his business on 30th April, 2011 and left India on 30th June, 2011 for the purpose of employment outside India. Decide the residential status of Mr. Kishore during the Financial Years 2010-2011 and 2011-2012 under the provisions of the Foreign Exchange Management Act, 1999.

[CA Final May 2013]

Answer:

The given problem can be answered as follows:

(a) FY 2000-01 Mr. Aman came to India for the first time in the financial year 2000-01. It means he did not reside in India for anytime in the financial year 1999-2000. Therefore, for the financial year 2000-01 he is a Person resident outside India'.

(b) FY 2001-02 He resided in India for more than 182 days in the financial year 2000-01. Also, during the financial year 2001-02 he has been in India for the purpose of business. Therefore, for the financial year 2001-02 he is a Person resident in India".

(c) FY 2002-03 He resided in India for more than 182 days in the financial year 2001-02. However, he left India for the purpose of taking up employment outside India. Therefore, he shall be a 'Person resident outside India' for the financial year 2002-03.

Question 10:

Mr. Arjun is an Indian Citizen. He has been residing in India since his birth. He left India for employment in Australia on 25th February, 2001. The contact of employment is for 2 years. He comes back on 24th February, 2003. What is his residential status for the financial years 2000-01, 2001-02, 2002-03 and 2003-04?

Answer:

The given problem can be answered as under:

(a) Financial year 2000-01. Mr. Arjun resided in India for the whole year in the preceding financial year, i.e., 1999-2000. However, he leaves India for employment outside India in the current financial year, i.e. 2000-01. It is immaterial whether the period of employment is certain or not. Therefore, for the financial year 2000-01 he is a 'Person resident outside India'.

(b) Financial year 2001-02. Mr. Arjun resided for more than 182 days in the preceding financial year, i.e., 2000-01. However, he has left India for employment outside India. Therefore, he is a Person resident outside India'.

(c) Financial year 2002-03. Mr. Arjun did not reside at all in the preceding financial year, i.e., 2001-02. Therefore, he shall be a Person resident outside India' for the financial year 2002-03.

(d) Financial year 2003-04. Mr. Arjun resided for less than 183 days in the preceding financial year, i.e., 2002-03. Therefore, he shall be a 'Person resident outside India' for the financial year 2003-04.

Question 11:

The Reserve Bank of India receives a complaint that an authorized person has submitted incorrect statements and information to the Reserve Bank of India in respect of receipt and utilization of foreign exchange. Explain the powers of the Reserve Bank of India with regard to inspection of records of the above authorized person in respect of the above complaint. Referring to the provisions of Foreign Exchange Management Act, 1999, state the duties of the above authorized person.

[CA Final May 2010]

Answer:

Power of Reserve Bank to inspect authorized person (Section 12)

a. Inspection by Reserve Bank:

The Reserve Bank may, at any time, cause an inspection to be made, by any officer of the Reserve Bank specially authorized in writing by the Reserve Bank in this behalf, of the business of any authorized personas may appear to it to be necessary or expedient for the purpose of :

1. verifying the correctness of any statement, information or particulars furnished to Reserve Bank;
2. obtaining any information/particulars which such authorized person has failed to furnish on being called upon to-do so;
3. Securing compliance with the provisions of this Act or of any rules, regulations, directions or orders made hereunder.

b. Duty to produce books and furnish information:
It shall be the duty of every authorized person to produce before the officer authorized by Reserve Bank to make an inspection of the authorized person, such books, accounts and other documents in his custody or power and to furnish any statement or information as the said officer may require within such time and in such manner as the said officer may direct.

Question 12:
Suresh resided in India during the Financial Year 2013-14. He left India on 15th July, 2014 for Switzerland for pursuing higher studies in Biotechnology for 2 years. What would be his residential status under the Foreign Exchange Management Act, 1999 during the Financial Years 2014-15 and 2015-16?

Mr. Suresh requires every year USD 25,000 towards tuition fees and USD 30,000 for incidental and stay expenses for studying abroad. Is it possible for Mr. Suresh to get the required Foreign Exchange and, if so, under what conditions?

[ICAI Module]

Answer:
Residential Status: According to section 2(v) of the Foreign Exchange Management Act, 1999, 'Person resident in India' means a person residing in India for more than 182 days during the course of preceding financial year [Section 2(v)(i)].

However, it does not include a person who has gone out of India or who stays outside India for employment outside India or for any other purpose in such circumstances as would indicate his intention to stay outside India for an uncertain period.

Generally, a student goes out of India for a certain period. In this case, Mr. Suresh who resided in India during the financial year 2013-14 left on 15.7.2014 for Switzerland for pursuing higher studies in Biotechnology for 2 years, he will be resident as he has gone to stay outside India for a 'certain period' RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

Mr. Suresh will not be resident during the Financial Year 2015-2016 as he did not stay in India during the relevant previous financial year i.e., 2014-15.

Foreign Exchange for studies abroad: According to Para I of Schedule III to Foreign Exchange Management (Current Account Transactions), Amendment Rule, 2015 dated 26th May , 2015, individuals can avail of foreign exchange facility for the studies abroad within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit shall require prior approval of the RBI.

Further proviso to Para I of Schedule III states that individual may be allowed remittances (without seeking prior approval of the RBI) exceeding USD 2,50,000 based on the estimate received from the institution abroad. In this case the foreign exchange required is only USD 55,000 per academic year and hence approval of RBI is not required.

Question 13:
Explain the meaning of the term 'Current Account Transaction' and the right of a citizen to obtain Foreign Exchange under the Foreign Exchange Management Act, 1999.

[CA Final May 2001]

Answer:

Definition of current account transaction [Section 2(j)]

Current account transaction means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes-

i. payments due in connection with foreign trade, other current business, services, and short- term banking and credit facilities in the ordinary course of business;
ii. payments due as interest on loans and as net income from investments:
iii. remittances for living expenses of parents, spouse and children residing abroad: and
iv. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

No restriction on current account transactions unless prescribed (Section 5)

Foreign exchange is freely available for a current account transaction if the following two conditions are satisfied:

(a) The transaction is not prohibited by the Rules.
(b) The transaction is within the ceiling, if any, prescribed by the Rules, or the permission of the Reserve Bank of India or the Central Government, as the case may be, is obtained

Question 14:

Mr. G, an Indian National desires to obtain foreign exchange on current account transactions for the following purposes:

i. Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company.
ii. Remittance of hiring charges of transponder.

Advise G whether he can obtain the foreign exchange and, if so, under what conditions?

[Nov 2001]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

i. As per Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000, payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited
ii. As per Rule 4 read with Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, drawal of foreign exchange for remittance of hiring changes of transponder requires the prior approval of the Central Government.

Brownie Points - *However, no approval of the Central Government is required if the payment is made out of the funds held in Resident Foreign Currency Account.*

Question 15:

Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:

a) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.
b) US Dollar 100,000 for sending a cultural troupe on a tour of U.S.A.

Advise him whether he can get Foreign Exchange and if so, under what conditions?

[ICAI Module]

Answer:

Relevant provision

Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions.

As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

a) In respect of item No.(i), i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Sane cannot withdraw Foreign Exchange for this purpose.

b) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with section 10 of the Foreign Exchange Management Act, 1999.

Question 16:

Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw foreign exchange. Specify-

i. Can Mr. Ramesh draw any foreign exchange for his journey?

ii. What are the purposes for which foreign exchange drawal is not allowed for current account transactions?

[CA Final Nov 2002]

Answer:

i. Rule 3 of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits drawal of foreign exchange (by any person) for the purpose of travel to Nepal and/or Bhutan. Therefore, Mr. Ramesh cannot draw any foreign exchange for journey to Nepal.

ii. Rule 3 read with Schedule I prohibits drawal of foreign exchange (by any person) tor the following purposes:

- Remittance out of lottery winnings.
- Remittance of income from racing/riding, etc., or any other hobby.
- Remittance for purchase of lottery tickets, banned/prescribed magazines, football pools, sweepstakes. etc.
- Payment of commission on exports made towards equity investment in Joint Ventures/Wholly Owned Subsidiaries abroad of Indian companies.
- Remittance of dividend by any company to which the requirement of dividend balancing is applicable.
- Payment of commission on exports under Rupees State Credit Route, except payment of commission up to 10% of the invoice value of export of tea and tobacco.
- Payment related to 'Call Back Services' of telephones.
- Remittance of interest income on funds held in Non-resident Special Rupee Scheme Account.

Question 17:

GOGU Limited, a resident company in India, has achieved a turnover of Rs. 20,000 crore during the financial year 2019-20. The paid-up share capital and Free Reserves of the company as on 31st March, 2020 as per the audited financial statements was Rs. 1500 crore and Rs. 500 crore respectively. The company is planning to make an investment of INR 7800 crore in an Overseas Joint Venture in Singapore. The company approached you whether it can make the desired investment under the terms of automatic route for direct investment during the financial year 2020-21. The equivalent currency in US $ comes to around USD 1.05 billion. Referring to the Foreign Exchange Management (Transfer of Issue of Any Foreign Security) (Amendment) Regulations, 2004 and notifications issued by the Reserve Bank of India, decide whether there is any restriction in the above investment.

[Jan 2021 - New]

Answer:

Automatic route for direct investment or financial commitment outside India:

As per Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV) or Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Here, 'Indian Party' includes a company incorporated in India.

As per the facts of the question and provision of law, GOGU Limited (Indian party) will require prior approval of the Reserve Bank of India even though its total financial commitment is within the eligible limit under automatic route [i.e. {400% of (1500+500) = Rs. 8,000 crore}], because financial commitment is more than USD 1 billion

Question 18:

Mr. Rahul, an Indian National desires to obtain US Dollar 10,000 for payment for goods purchased from a party situated in Nepal. Advise him, he can get the Foreign Exchange and under what conditions.

[June 2009, May 2007, Nov 2004]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person.

However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5).

The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits drawal of foreign exchange in respect of any transaction with a person resident in Nepal or Bhutan. Therefore, Mr. Rahul cannot obtain foreign exchange of US Dollar 10,000 for payment of goods purchased from a party situated in Nepal.

Question 19:

Mr. F, an Indian National desires to obtain foreign exchange for the following purposes:

a) Payment of US $ 10,000 as commission on exports under Rupee State Credit Route.
b) US $ 30,000 for a business trip to U.K.
c) Remittance of US $ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.

Advise him, if he can get the Foreign Exchange and under what conditions.

[May 2005]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person.

However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

i. As per Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000, payment of commission on exports under Rupees State Credit Route (except commission up to 10% of invoice value of exports of tea and tobacco) is prohibited.

   Therefore, payment of US $ 10,000 as commission on exports under Rupee State Credit Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.

ii. As per Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, individuals can draw foreign exchange up to $ 2,50,000 for travel for business under the Liberalized Remittance Scheme. Drawal of foreign exchange in excess of US Dollar 2,50,000 shall require prior approval of the Reserve Bank of India.

   Therefore, Mr. F can obtain US Dollar 30,000 for business tour to U.K. without any approval of the Reserve Bank of India.

iii. As per Rule 4 read with Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, drawal of foreign exchange exceeding US$ 1,00,000 for the purpose of remittance of prize money/sponsorship of sports activity abroad by a person other than International/National/State level sports bodies requires the prior approval of the Central Government.

   In the given case, the drawal of US $2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia is organized by Mr. F, who is an Indian National (i.e., not any International, National or State level Sports Body).

   Therefore, Mr. F can obtain US Dollar 1,00,000 without any permission, but for drawal of additional US Dollar 1,00,000, prior approval of the Central Government is required.

Question 20:

Mr. Loma, an Indian National desires to obtain foreign exchange for the following purposes:

i. Payment of commission on exports under Rupee State Credit Route.

ii. Gift remittance exceeding US Dollars 10,000.

Advise him whether he can get foreign exchange and if so, under what condition?

[Nov 2006]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5).

The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

i. As per Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000, Payment of commission on exports under Rupees State Credit Route (except commission up to 10% of invoice value of exports of tea and tobacco) is prohibited.

   Therefore, payment of commission on exports under Rupee State Credit Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.

ii. As per Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules. 2000, individuals can draw foreign exchange up to US Dollar 2,50,000 for gift or donation (referred to as 'the Liberalized Remittance Scheme'). Drawal of foreign exchange in excess of US Dollar 2,50,000 shall require prior approval of the Reserve Bank of India. Therefore, Mr. Loma can obtain more than US Dollar 10,000 for gift without any approval of the Reserve Bank of India provided the total amount drawn by him during the entire financial year does not exceed US Dollar 2,50,000.

Question 21:

State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:

i. X, a Film Star, wants to perform along with associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.

ii. R wants to get his heart surgery done at United Kingdom. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?

[ICAI Module]

OR

State the kind of approval required for the following transactions under the Foreign Exchange Management Act, 1999:

i. L, a famous playback singer of India wants to perform a musical night in Paris for Indians residing there. Foreign exchange to the extent of US D 20,000 is required for this purpose.

ii. N wants to pursue a course in business management in New York. He wants to draw USD 50,000 towards expenses for studying abroad.

[June 2009]

Answer:

Approval to the following transactions under FEMA, 1999:

i. Foreign Exchange drawls for cultural tours require prior permission/approval of the Ministry of Human Resources Development (Department of Education and Culture) irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the said Ministry of the Government of India.

ii. Individuals can avail of foreign exchange facility within the limit of USD 2,50,000 only. Any additional remittance in excess of the said limit for the expenses requires an approval from RBI.

However, in connection with medical treatment abroad, individual may avail facility for amount in excess of limits prescribed if it is so required by the medical institute upto the amount estimated by the medical institute offering such treatment and, in such case, no approval of the Reserve Bank of India is required.

Therefore, R can draw foreign exchange up to amount estimated by a medical institute offering treatment.

Question 22:

State the kind of approval required for the following transactions under the Foreign Exchange Management Act. 1999:

i. X wants to draw USD 20,000 to make donation to a charitable trust situated in South Korea.
ii. M requires USD 5,000 to make payment related to 'call back services' of telephone.

[CA Final June 2009]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes. In the light of the above, answer to the given problem is as under:

i. As per Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules 2000 individuals can draw foreign exchange up to $2,50,000 for gift or donation (referred to as the Liberalized Remittance Scheme'). Therefore, Mr. X can obtain US Dollar 20,000 for making donation to a charitable trust situated in South Korea without any approval of the Reserve Bank of India.

ii. Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules 2000 prohibits drawal of foreign exchange for payments related to call back services of telephones. Therefore, payment of US $ 5,000 for callback services of telephone is prohibited.

Question 23:

Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:

(i) M requires U.S. $ 5,000 for remittance towards hiring charges of transponders.
(ii) P requires U.S. $ 2,000 for payment related to call back services of telephones.

[ICAI Module]

Answer:

Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are freely permitted transactions and some others are prohibited transactions. Accordingly,

i. It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.
ii. Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P cannot obtain US $ 2,000 for the said purpose.

Question 24:

Mr. Basu desires to draw foreign exchange for the following purposes:

i. Payment related to Call back services of telephones
ii. USD 1,20,000 for studies abroad on the basis of estimates given by the foreign university
iii. USD 25,000 for sending a cultural troupe on a tour of Europe.

[CA (Final) Nov 2008]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5).

The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

(i) As per Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000, drawal of foreign exchange for payments related to call back services of telephones is prohibited. Therefore, payment related to call back services' of telephone is prohibited.

(ii) As per Rule 5 read with Schedule III of Foreign Exchange Management (Current Account Transactions) Rules, 2000, individuals can draw foreign exchange up to US Dollar 2,50,000 for studies abroad (referred to as the Liberalized Remittance Scheme'). However, an individual may draw more than US Dollar 2, 50,000 under the Liberalized Remittance Scheme if it is so required by the university or educational institution abroad. Therefore, Mr. Basu Can obtain Us Dollar 1, 20,000 for studies abroad without any approval of the Reserve Bank of India.

(iii) As per Rule 4 read with Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, drawal of foreign exchange for cultural tours requires the prior approval of the Central Government. Therefore, Mr. Basu can obtain USD 25,000 for sending a cultural troupe on a tour of Europe with the prior approval of Central Government.

Brownie point - However, no approval of the Central Government is required if the payment is made out of the funds held in Resident Foreign Currency Account.

Question 25:

Examine the provisions of Foreign Exchange Management Act, 1999 and advice whether the approval of Central Govt. is needed where X wants to remit certain sum of money out of lottery winnings.

[May 2001]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in

consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5).

The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:
Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits remittances out of lottery winnings.

Therefore, Mr. X cannot obtain any foreign exchange out of winnings of a lottery ticket.

Question 26:

Examine with reference to the Provisions of the Foreign Exchange management Act. 1999 and the rules made there under whether foreign exchange can be drawn for the following purposes:

i. Mr. Gopal, a cine artist in India proposes to organize a cultural programme at Dubai and requires to c aw foreign exchange US $ 1, 00,000 for this purpose.
ii. Mr. Shah proposes to visit United States on a business tour and for this purpose he wants to draw foreign exchange US $ 40,000 for meeting expenses.

[Nov 2013]

Answer:

If a sale or drawal satisfies the conditions of a current account transaction, then any person may sell or draw foreign exchange to or from an authorized person. However, the Central Government may, in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000. The rules stipulate some restrictions on drawal of foreign exchange for certain purposes.

In the light of the above, answer to the given problem is as under:

i. As per Rule 4 read with Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, drawal of foreign exchange for cultural fours requires the prior approval of the Central Government.

   Therefore, in the given case, prior approval of the Central Government is required for drawal of foreign exchange of US $1,00,000 for organizing the cultural programme.

   Brownie points - However, approval of the Central Government is not required if the payment is made out of funds held in Resident Foreign Currency Account.

ii. As per Rule 5 read with Schedule II of Foreign Exchange Management (Current Account Transactions) Rules, 2000, individuals can draw foreign exchange up to US Dollar 2,50,000 to travel for business (referred to as the Liberalized Remittance Scheme).

   Drawal of foreign exchange in excess of US Dollar 2,50,000 shall require prior approval of the Reserve Bank of India.

   Therefore, Mr. Shah can obtain US Dollar 40,00 for business tour to United States without any approval of the Reserve Bank of India.

Question 27:

(i) Mr. P has won a big lottery and wants to remit US Dollar 20,000 out of his winnings to his son who is in USA. Advise whether such remittance is possible under the Foreign Exchange Management Act, 1999.

(ii)Mr. Z is unwell and would like to have a kidney transplant done in USA. He would like to know the formalities required and the amount that can be drawn as foreign exchange for the medical treatment abroad.

[ICAI Module]

Answer:

Remittance of Foreign Exchange (Section 5 of the Foreign Exchange Management Act, 1999):

According to section 5 of the FEMA, 1999, any person may sell or draw foreign exchange to or from an authorized person if such a sale or drawal is a current account transaction.

Provided that Central Government may, in public interest and in consultation with the reserve bank, impose such reasonable restrictions for current account transactions as may be prescribed.

As per the rules, drawal of foreign exchange for current account transactions are categorized under three headings-

1. Transactions for which drawal of foreign exchange is prohibited,
2. Transactions which need prior approval of appropriate government of India for drawal of foreign exchange, and
3. Transactions which require RBI's prior approval for drawl of foreign exchange.

(i) Mr. P wanted to remit US Dollar 20,000 out of his lottery winnings to his son residing in USA. Such remittance is prohibited and the same is included in the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

Hence Mr. P cannot withdraw foreign exchange for this purpose.

(ii) "Remittance of foreign exchange for medical treatment abroad" requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 250,000.

The Schedule also prescribes that for the purpose of expenses in connection with medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by a medical institute offering treatment.

Therefore, Mr. Z can draw foreign exchange up to the USD 250,000 and no prior permission/ approval of RBI will be required. For amount exceeding the above limit, authorised dealers may release foreign exchange based on the estimate from the doctor in India or hospital or doctor abroad.

Question 28:

Mr. T. Raghava has secured admission in a reputed and recognized university in Germany, for the study of higher and technical education, outside India. After arrival in Germany, he has gone ill and wants medical treatment facility in a reputed German hospital. He desires to apply to the Government of India for availing the additional remittance beyond the limit approved for foreign currency exchange facility. He has already enjoyed the permitted facility of foreign exchange for studies abroad, for the said financial year. Decide the following as to the facts given in the question as per the provisions of the Foreign Exchange Management Act, 1999:

i. As an individual, to what extent Mr. T. Raghava may avail foreign exchange facilities for higher and technical study in Germany.
ii. Can Mr. T. Raghava avail the facility of additional remittance in foreign exchange, beyond the limit, for the medical treatment?

[Nov 2017 - Old]

Answer:

According to the Schedule III of the FEMA, 1999 following shall be the limit for the remittance of Foreign Exchange in the given situations:

i. Remittance of Foreign Exchange for Studies Abroad:
Foreign exchange may be released for studies abroad up to a limit of US $ 2, 50,000 without any permission from the RBI. Above this limit, RBI's prior approval is required.

ii. Remittance for Medical Treatment:
Remittance of foreign exchange for medical treatment abroad requires prior permission or approval of RBI where the individual requires withdrawal of foreign exchange exceeding USD 2,50,000.

The Schedule also prescribes that for the purpose of expenses in connection with studies abroad and medical treatment, the individual may avail of exchange facility for an amount in excess of the limit prescribed under the Liberalized Remittance Scheme, if so required by the university concerned or the medical institute offering treatment respectively.

Such amount shall be reduced from USD 2, 50,000 by the amount so remitted.

Therefore, Mr. T. Raghava can draw foreign exchange exceeding USD 2, 50,000 without prior permission provided it is so required by the university concerned or the medical institute offering treatment.

Question 29:

Lifesys Limited, a billion dollar, Indian company wishes to create a chair in a reputed university in the U.S. This chair is for the department of computer science. The company wishes to obtain your advice in regard to the following with reference to the FEMA, 1999.

(i) Is such "chair" creation permissible?
(ii) What is the maximum amount that can be donated for such chair?
(iii) Any formalities to be complied with?

[Nov 2016 - Old]

Answer:

As per Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, read with section 5 of the Foreign Exchange Management Act, 1999 donations exceeding 1% of their foreign exchange earnings during the previous 3 financial years or $ 5,000,000, whichever is less, can be remitted by persons other than individuals for creation of Chairs in reputed educational institutes with the prior approval of the Reserve Bank of India.

Considering the above provision:

(i) In the first case, "chair" creation for the department of computer science in reputed university in the U.S. is permissible.
(ii) Maximum amount that can be donated for such chair will be one per cent of their foreign exchange earnings during the previous 3 FY or USD 5,000,000, whichever is less without prior approval of the Reserve Bank of India.
(iii) In case where donations exceeds one per cent of their foreign exchange earnings during the previous three financial years or USD 5,000,000, it shall require prior approval of Reserve Bank of India.

Question 30:

Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

(A) US$ 1, 20,000 for studies abroad on the basis of estimates given by the foreign university.

(B) Gift Remittance amounting US$ 10,000.

Advise him whether he can get Foreign Exchange and if so, under what condition(s)?

[ICAI Module/May 2015 - Old]

Answer:

(A) Remittance of Foreign Exchange for studies abroad: Foreign exchange may be released for studies abroad up to a limit of US $ 250,000 for the studies abroad without any permission from the RBI. Above this limit, RBI's prior approval is required. Further proviso to Para I of Schedule III states that individual may be allowed remittances exceeding USD 250,000 based on the estimate received from the institution abroad. In this case since US $ 120,000 is the drawal of foreign exchange, so permission of the RBI is not required.

(B) Gift remittance exceeding US $ 10,000: Under the provisions of Section 5 of FEMA 1999, certain Rules have been made for drawal of foreign exchange for current account transactions. Gift remittance is a current account transaction. Gift remittance exceeding US $ 250,000 can be made after obtaining prior approval of the RBI. in the present case, since the amount to be gifted by an individual, Mr. Rohan is USD 10,000, there is no need for any permission from the RBI.

Question 31:

ABC Limited hired the services of Mr. Taylor, a technician from Germany for the installation of a machinery. The company paid USD 40,000 for the services rendered by Mr. Taylor. Examine under the Foreign Exchange Management Act, 1999, whether payment of remuneration to foreign technician Mr. Taylor is a permissible transaction under the provisions of the said Act.

[Nov 2019 - Old]

Answer:

Remuneration payable to a foreign technician is a current account transaction. According to Section 5 of the Foreign Exchange Management Act, 1999 any person can sell or draw foreign exchange to or from authorized person if such sale or drawal is a current account transaction.

Reasonable restrictions on current account transactions can be imposed by the Central Government. Basically, all current account transactions are free unless specifically restricted by the Central Government.

Hiring of foreign national as technicians is permissible without restriction. There is no ceiling on salary which can be paid as per contract. Their salary can be remitted abroad after tax deductions, contribution to provident fund and other deductions at source.

Question 32:

Examine whether the following transactions are permissible or not under the above Act as Capital Account transactions:

1. Investment by person resident in India in Foreign Securities.
2. Foreign currency loans raised in India and abroad by a person resident in India.
3. Export, import and holding of currency/currency notes.
4. Trading in transferable development rights.
5. Investment in a Nidhi Company.

[Nov 2007]

Answer:

Relevant provision:

i. Investment by person resident in India in Foreign Securities is a capital account transaction. It is permitted within the limit, subject to the compliance of conditions and if declaration is made as per the provisions contained in the Regulations relevant to the transaction.

ii. Foreign currency loans raised in India and abroad by a person resident in India is a capital account transaction. It is permitted within the limit, subject to the compliance of conditions and if declaration is made as per the provisions contained in the Regulations relevant to the transaction.

iii. Export, import and holding of currency /currency notes is a capital account transaction. It is permitted within the limit, subject to the compliance of conditions and if declaration is made as per the provisions contained in the Regulations relevant to the transaction.

iv. Trading in transferable development rights is prohibited since no person resident outside India shall make investment in India in any entity which is engaged, or proposes to engage in trading in Transferable Development Rights (TDRs) (Regulation 4 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000).

v. Investment in a Nidhi Company is prohibited since no person resident outside India shall make investment in India in any entity which is engaged, or proposes to engage as Nidhi Company (Regulation 4 of Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

Question 33:

State whether there are any restrictions in respect of the following transactions:

(i) Drawal of foreign exchange for payments due on account of amortization of loans in ordinary course of business.

(ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.

[Nov 2005]

OR

State whether there are any restrictions in respect of the following transactions:

(i) Drawal of foreign exchange for payments due on account of amortization of loans.

(ii) Purchase of shares of a company engaged in plantation activities by a person resident outside India.

[CA Final Nov 2002]

OR

Examine with reference to the provisions of the Foreign Exchange Management Act, 1999 whether there are any restrictions in respect of the following:

(i) Drawal of Foreign Exchange for payments due on account of amortization of loans in the ordinary course of business.

(ii) A person resident outside India proposes to invest in the shares of an Indian company engaged in plantation activities.

[Nov 2010]

Answer:

1. Amortization of loans is permitted

Section 6 specifically mentions that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of –

(a) amortization of loans in the ordinary course of business; or

(b) Depreciation of direct investments in the ordinary course of business.

Thus, there is no restriction on drawal of foreign exchange for payments due on account of amortization of loans in ordinary course of business.

2. Investment in plantation activities is prohibited

The Reserve Bank of India has framed Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. As per these Regulations, no person resident outside India shall make investment in India in any entity which is engaged, or proposes to engage in agricultural or plantation activities.

Thus, a person resident outside India cannot purchase shares of a company in India engaged in plantation activities.

Question 34:

Examine with reference to the provisions of the Foreign Exchange Manage Act. 1999 whether there are any restrictions in respect of the following:

A person, who was resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by companies in U.S.A.?

[Nov 2010 - Old]

Answer:

As per Section 6(4), a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Hence, the USA Resident shall be entitled to hold the foreign securities even after he becomes a person resident in India.

Question 35:

Mrs. Chandra, a resident outside India, is likely to inherit from her father some immovable property in India. Are there any restrictions under the provisions of the Foreign Exchange Management Act, 1999 in acquiring or holding such property? State whether Mrs. Chandra can sell the property and repatriate outside India the sale proceeds.

[Nov 12- Old]

Answer:

As per section 6(5), a person resident outsideIndia may hold, own, transfer or invest in India currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

Thus, a person resident outside India may hold, own or transfer any immovable property situated in India if such property is inherited from a person resident in India.

Accordingly, Mrs. Chandra is entitled to acquire as well as hold the immovable property in India inherited by her.

Regulation 8(a) of the Foreign Exchange Management [Acquisition and Transfer of Immovable property in India) Regulations 2018 states that a person referred to in sub-section (5) of Section 6 of the Act, or his successor shall not, except with the general or specific permission of the Reserve Bank, repatriate outside India the sale proceeds of any immovable property referred to in that sub-section.

Hence, Mrs. Chandra may sell the immovable property in India, but she can repatriate outside India the sale proceeds of such immovable property only with the general or specific permission of the Reserve Bank or India.

Question 36:

Mrs. Kamala, a resident in India is likely to inherit an immovable property in U.S.A. from her father, who is a resident outside India. Advise Mrs. Kamala about the restrictions, if any, in this regard under the Foreign Exchange Management Act, 1999 explaining the relevant provisions of the Act. Will your answer be different, if she is likely to inherit foreign securities?

[CA Final Nov 2006]

Answer:

Relevant provision:

Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of person's resident outside India [Section 2(e) read with Section 6.]

As per Section 6, a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Hence, in the given case, there is no restriction on Mrs. Kamala when she inherits an immovable property in USA or foreign securities from her father who is a resident outside India.

Question 37:

Ms. Ashima daughter of Mr. Mittal (an exporter), is residing in Australia since long. She wants to buy a flat in Australia. Since she is unmarried, she wants to make her father Mr. Mittal a joint holder in that flat, for which entire proceeds are to be paid by her.

i. What are the provisions of FEMA governing such type of transaction?
ii. Can Mr. Mittal join her daughter in acquiring such a flat in Australia?
iii. Mr. Mittal, wants to receive advance payments against his exports from a buyer outside India. What are the relevant provisions?

[CA Final May 2017]

Answer:

i. The provisions governing the acquisition and transfer of immovable property outside India.

1. A person resident in India may acquire immovable property outside India:
   a. By way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the FEMA or referred to in clause (b) of regulation 4 acquired by a person resident in India on or before 8th July, 1947 and continued to be held by him with the permission of Reserve Bank [as per Section 9].
   b. by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the foreign exchange management (Foreign Currency accounts by a person resident in India) Regulations 2015.
   c. Jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India.

2. A person resident in India may acquire immovable property outside India, by way of Inheritance or gift from a person resident in India who has acquired such property in accordance with the foreign exchange provision in force at the time of such acquisition.

3. A Company incorporated in India having overseas offices, may acquire immovable property outside India for its business and for residential purposes of its staff, in accordance with the direction issued by the Reserve Bank of India from time to time.

i. In the light of above discussions in 1(c), it is quite clear that Mr. Mittal, a resident in India, can join his daughter who is a resident outside India, in acquiring a Flat at Australia.

ii. Advance payment against export:

The following are the provisions governing the advance payments against exports :

1. Where an exporter receives advance payments (with or without interest) from a buyer/ third party named in the export declaration made by the Exporter, outside India, the exporter shall be under the obligation to ensure that:
   i. The shipment of goods is made within one year from the date of receipt of advance payment.
   ii. The rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
   iii. The documents covering the shipment are routed through the authorised dealer through whom advance payment is received.

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment or towards, no remittance towards refund of un-utilized portions of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve bank of India.

2. Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

Question 38:

In terms of the provisions of the Foreign Exchange Management Act, 1999 Mr. SAM is a person of India origin resident outside India. He wants to acquire some immovable properties in India not being agricultural property, plantation or a farm house. Referring to the provisions of the Foreign Exchange Management Act, 1999, state the permitted sources, means and restrictions imposed in this regard. Also state the provisions where the acquisition will be in the form of gift or inheritance by Mr. SAM.

[May 18 - Old]

Answer:

Relevant provision:

A person of Indian origin resident outside India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.

Sources: In case of acquisition of immovable property, payment of purchase price, if any, shall be made out of

i. funds received in India through normal banking channels by way of inward remittance from any place outside India or
ii. Funds held in any non-resident account maintained in accordance with the provisions of the Act and the regulations made by the Reserve Bank.

Restriction: It is also provided that no payment of purchase price for acquisition of immovable property shall be made either by traveler's cheque or by currency notes of any foreign country or any mode other than those specifically permitted by this clause.

Acquisition in the form of gift

A person of Indian origin resident outside India may acquire any immovable property in India other than agricultural land/farm house/plantation property by way of gift from a person resident in India or from a person resident outside India who is a citizen of India or from a person of Indian origin resident outside India.

Acquisition in the form of inheritance

A person of Indian origin resident outside India may acquire any immovable property, in India by way of inheritance from a person resident outside India who had acquired such property in accordance with the provisions of the foreign exchange law in force at the time of acquisition by him or the provisions of these Regulations or from a person resident in India.

Question 39:

Mr. Bandha, a software Engineer, Indian Origin took employment in USA. He is a resident of USA for a long time. He desires

i. to acquire a farmhouse in Munar (Kerala).
ii. to make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.
iii. to make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township.

Mr. Unsatisfactory, brother of Mr. Bandha residing at Chennai is aggrieved by an order made by Appellate Tribunal established under Foreign Exchange Management Act, 1999, desires to file further appeal.

With references to the provisions of Foreign Exchange Management Act, 1999, analyze whether there are any restrictions in respect of the transactions desired by Mr. Bandha. Also determine the appeal procedure to Mr. Unsatisfactory on the order of Appellate Tribunal under the said Act.

[May 2018 - New]

Answer:

i. Acquisition of a Farmhouse:

Mr. Bandha cannot acquire a farmhouse in Munnar (Kerala) because a person resident outside India who is a citizen of India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.

ii. Making Investments in KLJ Nidhi Limited

Mr. Bandha cannot make investment in KLJ (Nidhi) Ltd., as a person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage as Nidhi Company.

iii. Making Investments in Rose Real Estate Limited

The person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farmhouses. However, development of townships shall not be included in the real estate business.

Thus, Mr. Bandha can make investment in Rose Real Estate Ltd.

Appeal to High Court (Section 35)

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such Order.

However, the High Court may, if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

Mr. Unsatisfactory can file an appeal to the High Court, as per the above procedure.

Question 40:

Mr. Ramesh is an exporter of goods and services. Briefly explain his duties under the Foreign Exchange Management Act with regard to the following:

i. Furnishing of information relating to such exports.
ii. Realization and repatriation of foreign exchange on such exports.

[May 2003]

Answer:

Reserve Bank of India's right over the exporter and export proceeds (Section 7)

1. Furnishing of declaration by an exporter of goods.

   Every exporter of goods shall furnish to the Reserve Bank or other specified authority a declaration in such form and in such manner as may be specified. The declaration shall contain true and correct material particulars.

   The declaration shall indicate the full export value of the goods exported. However, if the full export value of the goods is not ascertainable at the time of export, the exporter shall specify the amount which he expects to receive by way of sale of such goods in the overseas market. While determining the expected export value, the exporter shall pay due regard to the prevailing market conditions.

   Furnishing of information by exporter of goods: Every exporter of goods shall furnish to the Reserve Bank such information as may be required by the Reserve Bank for the purpose of ensuring the realization of the export proceeds by such exporter.

   Declaration by and exporter of services: Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services.

2. Issue of directions by RBI: The Reserve Bank may, for the purpose of ensuring that the full export value or the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it deems fit.

   Realization and repatriation of foreign exchange, i.e., and export proceeds (Section 8.) Where any amount or foreign exchange is due or has accrued to any person resident in India. Such person shall take all reasonable steps to realize and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Question 41:

Bharat Computer Hardware Ltd. received an advance payment for export of high-tech hardware to a business concern in Singapore by entering into an export agreement to supply the hardware within six months from the date of receipt of advance payment. The shipment of hardware was made after 9 months and the documents covering the shipment were routed through an authorized dealer through whom the advance payment was received.

i. Examine whether Bharat Computer Hardware Ltd. has discharged its obligation in accordance with the provisions of the Foreign Exchange Management Act, 1999?
ii. Is it possible to receive advance payment where the export agreement provides for shipment of goods within 15 months from the date of receipt of advance payment?
iii. Also identify the maximum rate of interest payable on the advance payment under the said Act.

[Nov 2018 - New]

Answer:

According to the FEM (Export of Goods and Services) Regulations, 2015, provision relating to Advance payment against exports is as follows:

Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –

i. the shipment of goods is made within one year from the date of receipt of advance payment;
ii. the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
iii. the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

In the light of the provisions as enumerated above,

1. Since Bharat Computer Hardware Ltd. has exported the hardware within 9 months of the date of receipt of advance payment, it has discharged its obligations within the provisions of the Foreign Exchange Management Act, 1999.
2. Yes, it is possible to receive advance payment where the export agreement provides for shipment of goods extending beyond the period of one year (here in question 15 months) from the date of receipt of advance payment.
3. The maximum rate of interest, if any, payable on the advance payment should not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points.

Question 42:

Indian Software Ltd. seeks to export software to its client in Indonesia, in this regard -

i. Explain the procedure to be adopted for export of software under the Foreign Exchange Management Act, 1999 and also state the period within which export value is to be realised.

ii. Explain the position in case of delay in receipt of payment from its client

[May 2016]

Answer:

Given case:

i. Procedure for the export of the software under the FEMA, 1999

1. Furnishing of declaration- In case of exports taking place through Customs manual ports, every exporter of goods or software in physical form or through any other form, either directly or indirectly, to any place outside India, other than Nepal and Bhutan, shall furnish to the specified authority, a declaration in one of the forms set out in the Schedule and supported by such evidence as may be specified, containing true and correct material particulars including the amount representing-
   a. the full export value of the goods or software; or
   b. if the full export value is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions expects to receive on the sale of the goods or the software in overseas market, and affirms in the said declaration that the full export value of goods (whether ascertainable at the time of export or not) or the software has been or will within the specified period be, paid in the specified manner.

2. Export of services without furnishing any declaration- In respect of export of services to which none of the Forms specified in these Regulations apply, the exporter may export such services without furnishing any declaration, but shall be liable to realise the amount of foreign exchange which becomes due or accrues on account of such export, and to repatriate the same to India in accordance with the provisions of the Act, and these Regulations, as also other rules and regulations made under the Act.

3. Period within which export value of goods/software to be realised.
   The amount representing the full export value of goods or software exported shall be realised and repatriated to India within 9 months from the date of export.

   For the purpose of this regulation, the "date of export" in relation to the export of software in other than physical form, shall be deemed to be the date of invoice covering such export.

   Provided that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within 15 months from the date of shipment of goods:

   Provided further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period of 9 months or 15 months, as the case may be.

ii. Delay in Receipt of Payment- Where in relation to goods or software export, which is required to be declared on the specified Form, the specified period has expired and the payment therefore has not been made, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing,-

a. The payment thereof if the goods or software has been sold, and
b. The sale of goods and payment thereof, if goods or software has not been sold, or
c. Re-import thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf:

Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

Question 43:

Referring to the provisions of the Foreign Exchange Management Act. 1999, examine whether V, an exporter, is bound to make declaration on gift exported from India to United Kingdom of jewelry valued at Rs. 20,000 to his friend in United Kingdom.

[ICAI Module]

Answer:

In accordance with provisions of the FEMA, 1999 as contained in section 7 read with section 8, an exporter shall make appropriate declaration of the value of the goods being exported and he is also required to repatriate the foreign exchange due to India in respect of such exports to India in the manner within the time as may be prescribed.

Under section 8, the exporter is under an obligation to realise and repatriate to India such foreign currency. However, if there is an delay in the receipt of export, it will not be a violation which shall be punishable. Section 8 applies to a resident who shall take all the reasonable steps, depending upon the individual case.

There are certain categories of export for which declaration need not be made. These are given under the Regulation 4 of the Foreign Exchange Management (Export of Goods & Services) Regulations, 2015.

According to the regulation, export of goods by way of gift shall be accompanied by a declaration by the exporter that they are not more than five lakh rupees in value.

Taking into consideration the above, since the value of gift of jewellery to V's friend in the United Kingdom is less than Rs. 5 lac in value, the gift does not need any declaration to be furnished by exporter to the specified authority.

Author's Note:
As the value of Gift is less than Rs. 5 lakhs, no specific declaration (Form EDF) shall be made but a general declaration stating that the value of goods is less than Rs. 5 lakhs will have to be given.

Question 44:

Sunita Garments limited is engaged in the business of exporting leather garments. The company is neither located in a Special Economic Zone, not has availed any special status like Status Holder Exporter, Export Oriented Unit or a unit under Bio-Technology Park. The company seeks your advice regarding the time limit within which the company is required to realize and import into India the foreign exchange arising out of export of goods by them and to be paid to the authorised dealer. Referring of the provisions of the foreign Exchange Management Act. 1999 advise the company.

[Nov 2019 - Old]

Answer:

As per Section 7 of the FEMA, 1999 read with FEM(Export of Goods and Services) Regulations, 2015:
The amount representing the full export value of goods/software/services exported shall be realized and repatriated to India within 9 months from the date of export, provided:

a. that where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorized dealer as soon as it is realized and in any case within 15 months from the date of shipment of goods;
b. Extension of Period: Further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorized dealer may, for a sufficient and reasonable cause shown, extend the period of 9 months or 15 months, as the case may be.

Sunita Garments Limited may be advised as above.

Question 45:

Explain the meaning of the term 'Adjudicating Authority' under the Foreign Exchange Management Act, 1999.

[May 2002]

Answer:

Meaning of 'Adjudication'

'Adjudication' means the process by which a contravention of any provision of the Act, rule, regulation, notification, direction or order issued under the Act is dealt with by the appropriate Adjudicating Authority.

For the purpose of Adjudication, the Central Government has been empowered vide section 16 to appoint the Adjudicating Authorities who shall hold the inquiry in the manner prescribed under the Act read with Foreign Exchange Management (Adjudication Proceedings and Appeal) Rules, 2000.

Meaning of 'Adjudicating Authority [Section 2(a)]

Adjudicating Authority' means an officer authorized under section 16(1).

Appointment of Adjudicating Authority (Section 16)

1. For the purpose of adjudication and imposing penalties, the Central Government may appoint certain officers as the Adjudicating Authorities for holding inquiries in respect of any contravention under the Act. Such appointments shall be made by the Central Government by issuing a notification in the Official Gazette [Section 16(1)].
2. The Central Government shall specify the respective jurisdictions of various Adjudicating Authorities.

Question 46 :

TKM Exporters of New Delhi are engaged in export business. It made certain exports, but failed to realise and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999 (FEMA). Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeal. You are required to advise on the matter.

[May 2008/Nov 2005]

OR

Adjudicating Authority imposes a penalty under the provisions of Foreign Exchange Management Act, 1999 on ABC Limited for failure to realise and repatriate to India foreign exchange due on its exports. ABC Limited, being aggrieved by this penalty, seeks your advice as to the authority to which appeal can be made under the provisions of FEMA and the time limit for making such appeals. Advise

[Nov 2002]

OR

India Exports Limited engaged in the export of software products to U.S. One party in U.S. to whom the company exported certain products failed to pay the amount due for these exports resulting into non repatriation of amount

to India. The Adjudicating Authority on coming to know about this, levied a penalty on India Exports Limited under the provisions of the Foreign Exchange Management Act, 1999. The company seeks your advice as to which authority, to whom it can make an appeal against the decision of Adjudicating Authority. State also, the time limit within which the appeal can be lodged.

[Nov 2015]

Answer:

In accordance with the provisions of the Foreign Exchange Management Act, 1999, as contained under Sections 17 and 19 appeals against orders of Adjudicating Authority can be made by India Exports Ltd.,

If the Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for Foreign Exchange against the order of Adjudicating Authority and the Special Director (Appeals).

However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

Appeal to Special Directors (Appeals)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under section 17 within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person.

The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there was sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass the order.

Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal:

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange, 1999 within 45 days from the date on which the copy of the order was made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person.

In this case also, the delay can be condoned by the Appellate Tribunal. in case of an appeal against the order imposing penalty, the applicant has to deposit the amount of such penalty with the authority prescribed by the Central Government.

However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass the order.

Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal. Therefore, India Exports Ltd., can go for appeals as stated above.

Question 47:

A person aggrieved by an order made by the Special Director (Appeals) desires to file an appeal against the said order to the Appellate Tribunal but the period of limitation of 45 days as prescribed in Section 19(2) of the Foreign Exchange Management Act, 1999 has expired, Advise.

[Nov-16 - Old]

Answer:

As per section 19 of the Foreign Exchange Management Act, 1999:

An appeal against the order of the Special Director (Appeals) may be filed with the Appellate Tribunal within 45 days from the date of order of the Special Director (Appeals) (excluding the time required in obtaining a copy of the order).

However, if sufficient cause is shown, the Appellate Tribunal may condone the delay.

Thus, even if the stipulated time of 45 days for filing the appeal has expired, the Appellate Tribunal has the discretion to condone such delay, if the Appellate Tribunal is satisfied that there was sufficient cause for not filing the appeal within the stipulated period of 45 days.

Question 48:

Mr. Joe, a resident in India had obtained an External Commercial Borrowing of $ 25,000 from a foreign lender on a collateral charge of his residential property in India. Mr. Joe, however, could not repay the loan and the lender prefers the property charged to be sold in India to any person (resident in India or not) and repatriate the same proceeds to him. You are required to provide the correct legal position to the above situation in the light of the provisions of the Foreign Exchange Management Act, 1999 and Rules made thereunder

[May 21 – New]

Answer:

As per the ECB Framework, AD Category I banks are permitted to allow creation of charge on immovable assets, movable assets, financial securities and issue of corporate and/or personal guarantees in favour of overseas lender / security trustee, to secure the ECB to be raised/ raised by the borrower.

Following are the requisite conditions for creation of Charge on Immovable Assets/ property:

a. Such security shall be subject to provisions contained in the Foreign Exchange Management (Acquisition and Transfer of Immovable Property in India) Regulations, 2017.
b. The permission should not be construed as a permission to acquire immovable asset (property) in India, by the overseas lender/ security trustee.
c. In the event of enforcement / invocation of the charge, the immovable asset/ property will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.
d. Accordingly, in the given case, Mr. Joe, a resident in India, obtained an ECB of $25,000 from foreign lender on a collateral charge of his residential property in India. He failed to repay the loan. As of that, lender prefers the property charged to be sold in India to any person whether resident in India or not so as to repatriate the sale proceeds to him.
e. Therefore, in line with the clause (iii) of the above stated provision, in the event of enforcement of the charge, the immovable property (Residential property of the Joe) will have to be sold only to a person resident in India and the sale proceeds shall be repatriated to liquidate the outstanding ECB.

Question 49: Intentionally Left Blank for Future Additions.

Question 50:

A foreign tourist comes to India, and he purchases a antiques from a shop. He would like to pay US$ 30 in cash to the shopkeeper. Comment in the light of the FEMA, whether shopkeeper is permitted to accept foreign currency?

[RTP May 21]

Answer:

As per section 3 of the FEMA, save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

Here in the given case, the foreign tourist wanted to pay foreign currency in cash on purchase of antiques to shopkeeper which as per section 3, is not permissible to any person to receive any payment by order or on behalf of any person resident outside India in any manner except received through an authorised person. Therefore, the Shopkeeper cannot accept cash as it will be a receipt otherwise than through Authorised Person except where the shopkeeper have taken a money changers license to accept foreign currency

Question 51:

What is an overseas direct investment? Differentiate between Automatic Route and Approval Route for direct investment?

[MTP March 21]

Answer:

Direct investment outside India/overseas direct investment means investments, either under the Automatic Route or the Approval Route, by way of:

i. contribution to the capital or subscription to the Memorandum of a foreign entity or
ii. purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).

<u>Difference between Automatic Route and Approval Route for direct investment</u>

Automatic route for direct investment or financial commitment outside India: An Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

<u>Approval route for direct investment or financial commitment outside India:</u>

i. Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.
ii. Reserve Bank would, inter alia, take into account the following factors while considering such applications:
    a. Prima facie viability of the JV / WOS outside India;
    b. Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);

c. Financial position and business track record of the Indian Party and the foreign entity; and
d. Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category - I banks.

Question 52:

Ice Slash (P) Ltd. had taken an INR denominated ECB of ₹ 10 crore from HBSG Bank, a designated AD Category-I bank. It had last filed its Form ECB 2 Return on 5th April, 2019. The bank had sent over 10 remainders vide emails during the past 9 quarters to the company to file Form ECB 2 for the month of April, 2019 and thereafter but there has been no response from either the entity or its directors till date. Also, the company had not submitted Statutory Auditor's Certificate with respect to ECB transactions for F.Y. 2019-20 and F.Y. 2020-21, respectively. During the visit by the officials of the HBSG Bank at the registered office address of Ice Slash (P) Ltd., it was found inoperative. Accordingly, HBSG bank filed form ECB 2 Return without certification from Ice Slash (P) Ltd. with 'UNTRACEABLE ENTITY' written in bold on top. The amount outstanding from the company at that time was ₹ 2 crore.

In the context of aforesaid case-scenario, please answer to the following questions:-

(i) Whether HBSG Bank can be considered to have validly treated Ice Slash (P) Ltd. as an 'untraceable entity'?

(ii) How the outstanding amount of ₹ 2 crore shall be treated and what other actions would be taken in respect of Ice Slash (P) Ltd.?

[MTP - Dec'21]

Answer:

(i) Under the ECB framework, any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:

a. Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;
b. Entities have not submitted Statutory Auditor's Certificate for last two years or more.

Ice Slash (P) Ltd. or its directors have not responded to over 10 remainders made by HBSG Bank during the past 9 quarters for filing returns and had not submitted Statutory Auditor's Certificate for F.Y. 2019-20 and F.Y. 2020-21, respectively. Also, the company was found inoperative by the officials of the HBSG Bank.

Thus, HBSG Bank can be considered to have validly treated Ice Slash (P) Ltd. as an 'untraceable entity' as all the conditions with respect to the same had been satisfied in the case of it.

(ii) Under the ECB framework, in respect of 'untraceable entities', the outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means. Thus, the outstanding amount of Rs. 2 crore shall be written-off from the external debt liability of the country and it might be retained by the HBSG Bank for recovery.

Other actions that would be taken in respect of Ice Slash (P) Ltd. are as follows:-

a. No fresh ECB application by Ice Slash (P) Ltd. should be examined/processed by the AD bank;
b. Directorate of Enforcement should be informed about Ice Slash (P) Ltd. being designated as 'UNTRACEABLE ENTITY'; and
c. No inward remittance or debt servicing will be permitted under auto route for Ice Slash (P) Ltd.

Question 53:

The Adjudicating authority under FEMA Act, 1999 based on the complaints received in writing from the officer authorized by the Central Government, had issued show cause notice to following persons accused of committing contravention under the Act, to show cause as to why an inquiry should not be held against them as follows:

Noticed issued to whom	Alleged contravention prescribed in the show-cause notice issued	Reply by the accused person to the show- cause notice
Global Shipping Ltd.	Made remittance for membership of P & I club without taking the requisite approval	The amount for the same was remitted through the RFC Account and EEFC Account, respectively, for which no approval was required.
Siphonic Ltd.	Made remittance of $ 1,10,000 to BMT Inc., a US co., without taking requisite approval, as reimbursement of pre- incorporation expenses incurred for setting up the co. by bringing investment of Rs. 18 CR to India. (1 USD = Rs. 75)	Such remittance does not exceed the limit as specified, so, no approval was required.

In the context of aforesaid case-scenario, examine in the lights of the provisions of the FEMA Act, 1999 and its rules & regulations, the validity of the contentions made by the aforesaid persons?

[MTP - Dec'21]

Answer:

i. Validity of Contention made by Global Shipping Ltd.

As per Rule 4 read with the Schedule II of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, for making remittance for membership of P & I Club, prior approval of Ministry of Finance (Insurance Division) is required to be taken.

No approval is required where any remittance has to be made for the transactions listed in Schedule II from an RFC account and EEFC account, respectively. However, if payment has to be made for remittance for membership of P & I, approval is required even if payment is from EEFC account.

Here, Global Shipping Ltd. was required to take approval of the Ministry of Finance (Insurance Division) for making the remittance through EEFC account and in case of RFC account only, no approval was required.

Thus, its contention is partially invalid.

ii. Validity of Contention made by Siphonic Ltd.

As per Rule 5 read with the Schedule III of the Foreign Exchange Management (Current Account Transactions) Rules, 2000, for remittances exceeding five per cent of investment brought into India or USD 100,000 whichever is higher, by an entity in India by way of reimbursement of pre-incorporation expenses, prior approval of the Reserve Bank of India shall be required. Here, Siphonic Ltd. made remittance of $ 1,10,000 equivalent to Rs. 82.5 lakhs (1 USD = Rs. 75) to BMT Inc., a US company, as reimbursement of pre-incorporation expenses for bringing investment of Rs. 18 crore into India. So, the amount remitted comes to approximately 4.58% (Rs. 82.5 lakhs / Rs. 1800 lakhs) of the investment made into India which is lesser than the prescribed limit of 5%. However, as it exceeds $ 1,00,000 and so approval was required irrespective of whether the amount remitted exceeds 5% of the investment or not. Thus, the contention of Siphonic Ltd. is invalid.

Author's Note: Here the conclusion of ICAI in case of Siphonic Limited seems to be incorrect. Let me explain this in a different manner.

Provision - If amount of reimbursement exceeds the limit, then approval is required.

Limit = Higher of $100k or 5% of investment (5% of Rs. 18 crores = Rs. 90 lakh i.e., $120k) = $120k

Here, reim. Of $110k is lower than limit & hence no approval is reqd. Hence, contention of co. is valid.

The Prevention of Money Laundering Act,

Question 1:

Explain the meaning of the term "Money Laundering". Z, a known smuggler was caught in transfer of funds illegally exporting narcotic drugs from India to some countries in Africa. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

[ICAI Module]

Answer:

Money Laundering:

As per Section 2(1)(p) and Section 3 of the Prevention of Money Laundering Act, 2003:

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money laundering.

Paragraph 2 of Part A of the Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. Whereby, illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances (section 23) is covered under paragraph 2 of Part A.

Punishment: Section 4 of the said Act provides for the punishment for Money-Laundering.

Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine.

But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years.

Question 2:

'Money Laundering does not mean just siphoning of fund. Comment on this statement explaining the significance and aim of the Prevention of Money Laundering Act, 2002.

Answer:

Mere earning of money or income or deriving any property by committing a crime does not amount to money laundering, though it may mount to siphoning of funds. Deriving or obtaining any property by committing a crime which amounts to a Scheduled offence, and then projecting such property as untainted property amounts to money laundering.

Question 3:

i. Define the term 'Payment System' under the provisions of the Prevention of Money Laundering Act, 2002.
ii. Explain the meaning of the term 'Property' under the Prevention of Money Laundering Act, 2002.

[May 2018 -Old]

Answer:

i. Payment system [Section 2(1)(rb)]

Payment system means a system that enables payment to be effected between a payer and a beneficiary, involving clearing payment or settlement service or all of them.

Explanation: For the purpose of this clause, payment system includes the systems enabling credit card operations, debit card Operations, smart card operations, money transfer operations or similar operations.

ii. According to clause (v) of sub - Section (1) of Section 2 of the Prevention of Money Laundering Act, 2002, "property" means any property or assets of every description, whether corporeal or incorporeal, movable or immovable, tangible or intangible and includes deeds and instruments evidencing title to, or interest in, such property or assets, wherever located.

Explanation.—For the removal of doubts, it is hereby clarified that the term "property" includes property of any kind used in the commission of an offence under this Act or any of the scheduled offences.

Question 4:

State on the nature of liability caused on an offence committed under the Prevention of Money Laundering Act, 2002.

[MTP March 2021 (New)]

Answer:

Money Laundering, basically, is knowingly dealing with proceeds of crime, directly or indirectly. The Act provides both for civil and criminal liability.

Criminal liability under the Prevention of Money Laundering Act

Crime which results in tainted money is a separate offence under various laws as specified in Schedule to Prevention of Money Laundering Act. These offences are punishable under those Acts. The punishment is to the person who is/are involved in actually committing that offence.

The offence as specified in section 4 of the Prevention of Money Laundering Act is a separate offence. The punishment under section 4 of Prevention of Money Laundering Act is not only to those who are actually involved in dealing with tainted money but also on those who are knowingly involved, directly or indirectly, in dealing with proceeds of crime.

This is a criminal offence, which will be tried by special courts designated for this purpose under section 2(z) of the Prevention of Money Laundering Act. The trial will be both for charges under the specific Act which is a crime and also offence of money laundering under Prevention of Money Laundering Act. However, it is not 'joint trial'.

Civil Liability i.e., confiscation of tainted property

In addition to criminal liability, the property involved in money laundering can be attached and frozen by Central Government and later confiscated.

Question 5:

Sudip of Jaipur was posted as Tehsildar in a Tehsil Headquarter near Jaipur. After a year of his joining, he purchased a ready built house in Jaipur in the name of his wife. He ostensibly shows the business income of his wife and availed loan of 90% of the value of house from a bank and also gave a guarantee of house loan.

The Bank in this case, did not ensure the business activity of his wife, (address of business place, Income tax Return filed, how long she is doing business etc.) and solely relying on that Sudip is giving the guarantee, it sanctioned the loan. After availing the loan, he continued to deposit some amount in the house loan account of his wife, regularly (apart from the EMI) and within a year, liquidated the loan account. One of the employee in his office made compliant to ED of taking of bribe/commission by him on regular basis and so liquidating the account in just a year. Examine whether Sudip was involved in the money laundering activity in the light of the given facts.

[RTP Nov 2021 -New/Old]

Answer:

As per the Section 3 of the Prevention of Money Laundering Act -

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money- laundering.

The process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

Section 2(1)(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

Section 2(1)(y) of the PML Act provides that:

"Scheduled Offence" means the offences specified under Part A of the Schedule;

Under Schedule -Part A - Paragraph 8: Offences under the Prevention of Corruption Act, 1988 specifies Section 7- Offence relating to public servant being bribed.

In the light of the above mentioned sections, act of Sudip is a case of money laundering i.e., converting of black income earned through bribe and efforts in converting it into white money and raising the house loan in the name of wife.

Question 6:

i. Mr. Dawood Moosa, a known smuggler was caught in transfer of funds illegally exporting narcotic drugs from India to some countries in Africa. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

ii. Mr. Robert has been arrested for a cognizable and non-bailable offence under Part- A of the schedule punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advice as to how can he be released on bail. Advise him.

[May 2019 – New]

OR

i. Mr. Gambler has been arrested for a cognizable and non-bailable offence punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advice as to how can he be released on bail. Advise him.

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

[Nov -2015 (Old)]

OR

Mr. Fraudulent has been arrested for a cognizable and non-bailable offence punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. Advise, as to how can he be released on bail in this case?

[ICAI Module]

Answer:

1. Paragraph 2 of Part A of the Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 whereby, illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances (section 23) is covered under paragraph 2 of Part A.

   Punishment: Section 4 of the said Act provides for the punishment for Money- Laundering.
   Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years.

   Thus, in the given case, the maximum punishment may extend to 10 years.

2. Section 45 of the Prevention of Money Laundering Act, 2002 provides that the offences under the Act shall be cognizable and non bailable.
   Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence [under this Act shall be released on bail or on his own bond unless-
   i) The Public Prosecutor has been given an opportunity to oppose the application for such release and
   ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

   In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs.

   In compliance to above provision, Mr. Robert can be released on bail.

Question 7:

Mr. Honest, a notorious, was caught in possession of Counterfeit Currency Notes, an offence specified under Part A - Paragraph 1 of the Schedule of the Prevention of Money Laundering Act, 2002. State the Punishment that can be awarded to him under the above Act. Also identify the punishment for the offence specified under Part A - paragraph 2 of the Schedule of the Prevention of Money Laundering Act, 2002.

[May 2018 - New]

Answer:

Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering.
According to the Section, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine. But where the proceeds of crime involved in money- laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to ten years instead of seven years.
Since, counterfeiting of currency notes is a predicate offence, specified under paragraph 1 of Part A of the Schedule (and not under paragraph 2 of Part A of the Schedule), Mr. Honest can be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Where the offence specified falls under Part A- Paragraph 2 of the Schedule of PMLA, maximum punishment may extend to 10 years.

Question 8:

Sohan Lal, a farmer, was found involved in embezzlement of opium cultivated by him. State the punishment that can be awarded to him under the Prevention of Money Laundering Act, 2002.

[May 2017]

Answer:

Section 4 of the Prevention of Money Laundering Act, 2002 provides for the punishment for Money-Laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine.

But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years.

Paragraph 2 of Part A of Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs And Psychotropic Substances Act, 1985 Whereby, embezzlement of opium by cultivator (section 19) is covered under paragraph 2 of Part A.

In the present case, Sohan Lal, a farmer, who was involved in embezzlement of opium cultivated by him shall be liable for the rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine.

Question 9:

Mr. Rohit has been in employment in Germany for past 3 years. He was involved in a conduct which constituted an offence in Germany. The conduct would have been considered an offence in India as well if it had been committed in India. The proceeds involved in the offence was Rs 60 lakhs. Mr. Rohit attempted to remit Rs 50,00,000 out of the Rs 60 lakhs to India but was not successful. The Government of India held this offence as an Offence of Cross Border implications as per Sec 2(ra) of the Prevention of Money Laundering Act, 2002. State whether the contention of Government of India is correct?

[ICAI Module]

Answer:

As per the provision of Sec 2(ra) of the Prevention of Money Laundering Act, 2002 Offence of cross border implications means -

i. Any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person remits the proceeds of such conduct or part thereof to India; or
ii. Any offence specified in Part A, Part B or Part C of the Schedule which has been committed in India and the proceeds of crime, or part thereof have been transferred to a place outside India or any attempt has been made to transfer the proceeds of crime, or part thereof from India to a place outside India.

It is evident from point (ii) of the above definition that an attempt to remit the proceeds will be considered as an offence of cross border implications where the offence is committed in India.

If offence is committed outside India then it will be considered as an offence of cross border implications when:-

- Such offence is an offence if it would have been committed in India; AND
- Proceeds or part thereof is remitted to India.

The word "attempt to remit" is missing in part (i) of the definition.

Also, where even part of the proceeds is remitted still it would be covered under the above definition.

Also the definition of "offence of cross border implications" does not contain any monetary limit. Hence , the contention of government is not correct, since the proceeds were not successfully remitted to India and only an attempt was made hence the offence will not be considered as an offence of cross border implications.

Question 10:

Mr. 'B' purchased a flat out of the proceeds earned by Drug Trafficking. The flat was attached by the Director, Director of Enforcement after complying the procedures under Section 5 of the Prevention of Money Laundering Act, 2002. Mr. 'B' got a stay from the High Court for any proceedings under the said Act. The stay was subsequently vacated.

State the relevant provisions of the PMLA, 2002 for computing the period of provisional attachment including extension, if any.

Whether Mr. 'C', son of Mr. 'B' can occupy the flat during the period of provisional attachment?

[ICAI Module/Nov 2019 - New]

Answer:

According to section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer (not below the rank of Deputy Director authorised by the Director), has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that:

a. any person is in possession of any proceeds of crime; and
b. such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.

Provided further that, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Computation of period of attachment:

Provided also that for the purposes of computing the period of 180 days, the period during which the proceeding under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted.

No effect on the right to enjoy the property:

This section shall not prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.

Here, "person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

In the given case, Mr. C, son of Mr. B can occupy the flat during the period of provisional attachment if he claims to have any interest in the said property.

Question 11: [Good question]

Based on the provisions of the PMLA,2002, analyze with reasons, the contentions of the Adjudicating Authority with regard to the following:

a. Whether interest created in a property prior to event of money laundering leading up to the attachment of property, takes priority over the attachment?
b. Whether a mere nexus between the attached property where it did not qualify as "proceeds of crime" under the PMLA and the party accused of money laundering was sufficient for the attachment to take place?

[MTP April 2021 -Mew]

Answer:

i. As per Section 5(4) of the Prevention of Money Laundering Act, 2002, nothing in this section shall prevent the person interested in the enjoyment of the immovable property attached under Section 5(1) from such enjoyment.

"Person interested", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

Accordingly, an order of attachment under money laundering Act is not said to be illegal merely because a person interested (i.e., third party) had a prior interest in such property and further issuance of an order of attachment under PML Act cannot, by itself, render illegal the prior statutory right of a person interested in attached property.

Therefore, interest created in a property prior to attachment of property, takes priority over attachment.

ii. According to Section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer for the purposes of this section, has reason to believe, on the basis of material in his possession, that:
   a. any person is in possession of any proceeds of crime; and
   b. such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding one hundred and eighty days from the date of the order, in such manner as may be prescribed.

Hence, it is necessary that the attached property should qualify as 'proceeds of crime'.

However, mere nexus between the attached property whether it qualify as a proceeds of crime/not, the party accused of money laundering, is sufficient for the attachment of such property to take place.

Question 12:

Mr. 'K' used his car for smuggling cash and the Special Court found on conclusion of trial that an offence of money laundering was committed by Mr. 'K' under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA, 2002). The car was under hypothecation to a Nationalized Bank for the car loan obtained. Referring to provisions of the PMLA, 2002, examine whether the car can be confiscated despite the existence of encumbrance?

[ICAI Module/Nov 2019 - New]

Answer:

Vesting of property in Central Government [Section 9]:

Where an order of confiscation has been made under section 8(5) or section 8(7) or section 58B or section 60(2A) of PMLA, 2002 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances.

However, where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen, is

of the opinion that any encumbrance on the property or lease-hold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

In the instant case, Mr. K used his car for smuggling cash and Special Court found on conclusion of trial that an offence of money laundering was committed by Mr. K.

The car was under hypothecation to an nationalized bank for the car loan obtained. As the encumbrance on the car has been created to defeat the provisions, special court may order to declare such encumbrance to be void and therefore the car can be confiscated and shall vest in the Central Government.

Question 13:

SSG Bank Limited has recently started its operations. The bank approached you for your advice regarding the maintenance of records as a reporting entity in terms of the provisions of the Prevention of Money Laundering Act, 2002. Referring to and analyzing the relevant provisions of the Prevention of Money Laundering Act, 2002, advice the Bank.

[Jan 2021 -New]

Answer:

Section 12 of the Prevention of Money Laundering Act, 2002, provides for the obligation of Banking Companies, Financial Institutions and Intermediaries i.e., the reporting entity to maintain records of transactions.

SSG Bank Limited have been advised to maintain records in the compliance to said section.

Accordingly, every reporting entity shall -

i. Maintain a record of all transactions, including information relating to transactions covered under point (ii) below, in such manner as to enable it to reconstruct individual transactions.

   Here records shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

ii. furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

iii. Maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

   The records here shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

Question 14:

Who is a "Reporting Entity" under the Prevention of Money Laundering Act, 2002 and what are the obligations cast on them under Sec. 12 of the Act? The Bank account of Amar has been attached by the order of an Assistant Director for a period of 180 days. The lawyer of Amar objected to this attachment. Decide the validity of the attachment.

[May 2019 - New]

Answer:

"Reporting entity" means a banking company, financial institution, intermediary or a person carrying on a designated business or profession.

As per Section 12 of the Prevention of Money Laundering Act, 2002, every Banking Companies, Financial Institutions and Intermediaries shall:

1. Maintenance records:
   a. maintain a record of all transactions,
   b. furnish to the Director information relating to such transactions, whether attempted or executed, the nature and value of the said transactions;
   c. Maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

2. Maintenance of records related to the transactions (i.e., for above clause a): The records shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

3. Maintenance of records related to evidencing identity of its clients and beneficial owners (i.e., for above clause c): The records shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

In the instant case, the bank account of Amar has been attached by the order of an Assistant Director for a period of 180 days.

As per section 5 of the Prevention of Money Laundering Act, 2002, attachment of a property can be done by the Director or any other officer not below the rank of Deputy Director.

Here the order is issued by an Assistant Director who is below the rank of the Deputy Director. Therefore, the objection of the lawyer of Amar is valid.

Question 15:

Manav Kalyan", a charitable organization, opened a current account with M/s ABZ Bank on 1st July, 2012. This account was closed on 30th June, 2016. Referring to the obligations of banking companies under the Prevention of Money Laundering Act, 2002, specify the period upto which the said bank has to maintain records relating to the account of "Manav Kalyan".

[Nov 2017]

Answer:

As per Section 12 of the Prevention of Money Laundering Act, 2002, every Banking Companies, Financial Institutions and Intermediaries shall maintain the records referred to in clause (a) of sub-section (1) for a period of five years from the date of transaction between a client and the reporting entity.

For the records referred to in clause (e) of sub-section (1), it shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

As per the facts given in the questions, Manav Kalyan, a charitable organization opened current account with ABZ Bank on 1st July, 2012 and closed the account on 30th June 2016.

As per the above provisions, ABZ Bank shall maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

So, accordingly the ABZ Bank has to maintain the records relating to the account of "Manav Kalyan" till 30th June, 2021.

Question 16:

The Reporting Authority failed to provide additional information called for by the Director under section 12A. Consequently, after inquiry, he imposed penalty on the Reporting Authority under section 13. Examine, under the provision of the Prevention of Money Laundering Act, 2002, the maximum monetary penalty the Director can impose for contravention of section 12A and state, what is the remedy available to the Reporting Authority aggrieved by the order of the Director.

[Jan 2021 -Old]

Answer:

Maximum Monetary Penalty

According to Section 13 of the Prevention of Money Laundering Act, 2002, the maximum monetary penalty the Director can impose for contravention of Section 12A is not less than ten thousand rupees but may extend to one lakh rupees for each failure.

Remedies Available

According to Section 26 of the Act, any reporting entity aggrieved by any order of the Director may prefer an appeal to the Appellate Tribunal within a period of 45 days from the date on which a copy of the order made by the Director is received.

Appellate Tribunal may, after giving an opportunity of being heard, entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

Question 17: [*Hadd hogayi out of syllabus question ki*]

In the case, the Director, on the basis of information in his possession, has reason to believe that Mr. X, is in possession of proceeds of crime involved in money-laundering. He authorised Mr. Y, officer subordinate to him to seize property found as a result of such search. Mr. Y seized the said property on 10.2.2020 and filed an application requesting for retention of such property seized before Adjudicating Authority. Enumerate the law as regards the retention of the seized property and Compute the time period for retention of such seized property by Mr. Y.

[MTP March 2021 - New]

Answer:

Retention of seized property

As per section 20 of the Prevention of Money Laundering Act, 2002 [PMLA], property seized under section 17 or 18 of the Prevention of Money Laundering Act or frozen under section 17(1A) of the Prevention of Money Laundering Act can be retained by authorised officer, if he has reason to believe that such property is required to be retained for adjudication under section 8 of Prevention of Money Laundering Act.

The property can be retained for a period of 180 days from day on which the asset was seized or frozen. Details of property seized or frozen have to be informed to Adjudicating Authority in prescribed manner.

The seized property is required to be returned to person from whom it was seized after 180 days, unless Adjudicating Authority permits retention of property beyond this period.

Time period for retention of such seized property:

As per section 17(4) of the PMLA, 2002, the authority seizing any record or property under sub-section (1) or freezing any record or property under sub-section (1A) shall, within a period of 30 days from such seizure or freezing, as the case may be, file an application, requesting for retention of such record or property seized under sub-section (1) or for continuation of the order of freezing served under sub-section (1A), before the Adjudicating Authority.

As Mr. Y seized the property of Mr. X on 10.2.2020. He can file an application requesting for retention of such property seized before Adjudicating Authority latest by 13th March, 2020.

Question 18:

The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching certain properties of XYZ Limited alleged to be involved in money laundering for a specified period. The company aggrieved by the order of the Adjudicating Authority seeks your advice about the remedy that is available under the Act. Advise explaining the relevant provisions of the Prevention of Money Laundering Act, 2002.

[ICAI Module/May 2019 - Old/ Nov 2019 -Old]

Answer:

Relevant provision

According to section 25 of the Prevention of Money Laundering Act, 2002, the Appellate Tribunal constituted under sub-section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal. The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees. The appeal shall be in such form and be accompanied by such fee as may be prescribed.

The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.

Appeals to High Court

The Act also provides further appeal. According to Section 42 any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the provisions of the Act explained above the company is advised to prefer an appeal to Appellate Tribunal in the first instance

Question 19:

i. An Appellate Tribunal consisting of two members was formed to hear the appeal preferred by Mr. Hari, being aggrieved by an Order made by the Adjudicating Authority under the Prevention of Money Laundering Act, 2002. Two members of the Bench differ in their opinion on a particular point referred in the appeal. Explain the next course of action to be followed by the Bench members under the said Act.

ii. Mr. Narayan willfully gives false information, refuses to give evidence and to sign statement made by him in the course of proceedings under the provisions of Prevention of Money Laundering Act, 2002. Explain the penal provisions and mode of recovery of fine or penalty enumerated under the said Act.

[Nov 2018 - New]

Answer:

i. Decision to be by majority [Section 38 of the Prevention of Money Laundering Act, 2002]

If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by third Member of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

In the instant case, the above procedure has to be followed by the Bench members.

ii. Punishment for false information or failure to give information, etc. [Section 63 of the Prevention of Money Laundering Act, 2002]

1. Any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.
2. If any person,-
   a. refuses to give evidence and
   b. refuses to sign statement made by him in the course of proceedings

   he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Mode of Recovery of fine or penalty [Section 69]

Where any fine or penalty imposed on any person under section 13 or section 63 is not paid within six months from the day of imposition of fine or penalty, the Director or any other officer authorised by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

Question 20:

By means of an order in writing, the Adjudicating Authority (AA) appointed under the Prevention of Money Laundering Act, 2002, attached certain properties under Section 8 of the Act belonging to Mr. AAA alleged to be involved in money laundering. Aggrieved by the order of the AA, Mr. AAA preferred an appeal before the Appellate Tribunal (AT). Subsequently, after proper hearing, an order was passed by the AT upholding the decision of the AA. Aggrieved by the order of the AT, Mr. AAA preferred a further appeal before the Honorable High Court. During the pendency of the appeal before the High Court, unfortunately, Mr. AAA dies.

In the light of the provisions of the Prevention of Money Laundering Act, 2002 :

i. What is the time limit for preferring an appeal before the High Court against the order of the AT?
ii. By how many days an extension of time can be sought if the appellant was prevented by sufficient cause from filing the appeal within the said period?
iii. On the death of Mr. *AAA* can the appeal be further continued in the High Court? If so, by whom?
iv. What will be the position if Mr. *AAA* dies before appeal has been preferred in the Honorable High Court?
v. What shall be the jurisdiction of the High Court, if the Central Government is the aggrieved party?

[Jan 2021 – New]

Answer:

i. According to Section 42 of the Prevention of Money Laundering Act, 2002, a person aggrieved by any order of the Appellate Tribunal can file an appeal to the High Court within 60 days from the date of communication of the order on question of law/fact.

ii. The High Court, if satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, it can allow filing of appeal within a further period not exceeding sixty days.

iii. On the death of Mr. *AAA*, the appeal filed with High Court can be continued even after the death of Mr. *AAA* by legal representatives of Mr. *AAA*. [Section 72(2)]

iv. In case Mr. *AAA* dies before filing an appeal with High Court, it shall be lawful for the legal representative of Mr. *AAA* to prefer an appeal with High Court. [Section 72(2)]

v. Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there is more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain shall be the jurisdiction. [Section 42]

Question 21:

Discuss the jurisdiction for the nature of offences triable by the special court under the Prevention of Money Laundering Act. What will be the consequences, if the court which has taken cognizance of the scheduled offence, is other than the offence of money laundering on which Special Court has taken cognizance upon a complaint made by an authority.

[MTP April 2021 -New]

Answer:

Section 44 of the Prevention of Money Laundering states that an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed.

A Special Court while trying the scheduled offence or the offence of money-laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973, as it applies to a trial before a Court of Session.

Further, as per clause (c) of section 44 of the PMLA, if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering , it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

Question 22:
Mr. JJ found guilty by the authorities under section 13 of the Prevention of Money Laundering Act, 2002 and monetary penalty was levied on Mr. JJ. But Mr. JJ could not pay the penalty amount. What is the mechanism to recover the fine or monetary penalty proposed on any person by the authorities under section 13 or section 63 of the Prevention of Money Laundering Act, 2002?

Answer:
Punishment for willfully and maliciously giving false information resulting in arrest or search [Section 63(1)]
Any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to 2 years or fine which may extend to Rs. 50,000 or both.

Punishment for refusing to produce books, sign any statement, answer any question etc. [Section 63(2)]
If any person, -

a. being legally bound to state the truth of any matter relating to an offence under section 3, refuses to answer any questions put to him by an authority in the exercise of its powers under this Act; or
b. refuses to sign any statement made by him in the course of any proceedings under this Act, which an authority may legally require to sign; or
c. to whom a summon is issued under section 50 either to attend to give evidence or produce books of account or other documents at a certain place and time, omits to attend or produce books of account or documents at such place or time,

he shall pay, by way of penalty, a sum which shall not be less than Rs. 500 but which may extend to Rs. 10,000 for each such default or failure.

No order levying the penalty shall be passed by any authority unless the person on whom the penalty is proposed to be imposed is given an opportunity of being heard in the matter by such authority.

Question 23:
The declared suspect, Mr. SP, was facing charges under the Prevention of Money Laundering Act, 2002. Mr. SP died in the midst of the proceedings. What shall happen to the confiscated property under the Act and whether a claimant with a legitimate interest in the property who suffered a loss, is entitled for claims.
[May 21 - New and MTP - Dec'21]

Answer:
According to Section 8(6) of the Prevention of Money Laundering Act, 2002, where the trial under this Act cannot be conducted by reason of the death of the accused, the Special Court shall, on an application moved by a person claiming to be entitled to possession of a property in respect of which an order has been passed, pass appropriate orders regarding confiscation or release of the property, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Where a property stands confiscated to the Central Government under section 8(5), the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.

In the light of above, a claimant with a legitimate interest in the property and suffered a loss is entitled for claim.

Question 24:

Mr. D was given an offer by the Company vendor, Mr. TR that if he discloses him confidential data of the Company HNI Ltd. in which he was working as an Accounts Executive, Mr. TR will pay him a huge sum of money. Mr. D accessed the computer of his Executive Director and passed on the confidential information of Company to Mr. TR in return of huge sum of money. Examine and analyze the situation and conclude whether Mr. D will be held liable under the Prevention of Money Laundering Act, 2002?

[May 21 – New and MTP – Dec'21]

Answer

As per Section 4 of the Prevention of Money Laundering Act, 2002, whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

In the instant case, Mr. D, the Accounts Executive of HNI Ltd. accessed the computer of his Executive Director and passed on the confidential information of the company to Mr. TR in return of huge sum of money which is an offence as per section 3 of the PMLA, 2002. This is a Schedule Offence under Para 22 of Part A.

Hence, Mr. D shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.

Question 25:

Comment upon nature of offence committed under the Prevention of Money Laundering Act? In the case, a spouse sold their property in Rs. 175 lakh to Mr. Y. In lieu of the sale, they obtained amount of Rs. 100 lakh through RTGS in his account and rest amount of Rs. 75 lakh in cash which he transferred to wife's offshore bank account . Examine the liability of the spouse in the given case in the light of the PMLA, 2002. Also state whether they will be liable to be released on bail.

[RTP – May 21]

Answer:

Nature of offence committed under the Act: Section 45 of the PMLA, 2002, provides that the offences under the Act shall be cognizable and non-bailable. Person accused of an offence under this Act shall not be released on bail or on his own bond unless-

i. The Public Prosecutor has been given an opportunity to oppose the application for such release, and
ii. Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

Exceptions: In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, may be released on bail, if the Special Court so directs.

As per the said section the spouse, are liable for commission of an offence of money laundering by transferring an unaccounted money obtained through sale of their property to an offshore bank account of his wife with an intent to evade tax. As the husband and his wife, i.e., the spouse jointly acted in the commission of the act of money-laundering of a sum less than one crore rupees, so both the Husband and wife, are falling under the exception. Therefore, they shall be released on bail, if the Special Court so directs.

Question 26:

Sabina took a flat on rent from Kishori Lal in Mumbai introducing that she is engaged in the business of trading of commodities and goods used to be transported from Chittorgarh-Rajasthan to Mumbai. Infact, Sabina was involved in trading of opium. Different persons used to visit her flat in odd hours either for selling or purchasing of the opium. Gradually Kishori Lal understood what is going on in the name of trading of commodities, but Sabina paid one lakh rupees to Kishori Lal and promised to pay every month in addition to the rent and not to disclose the matter to anyone.

This activity came into radar of the Narcotics Dept, and it sent a bogus customer to her flat. After finalisation of the deal, the bogus customer gave a miss call to his team and the Dept. caught red handed Sabina. Around 100 kg of opium was found in her possession and cash of around 100 lakh rupees. From the Sabina's possession five property related documents were also found. When the sources of the purchase value were interrogated from Sabina, she was unable able to give any satisfactory respond.

Based on the above facts, answer the following questions:

a. Whether the business of trading of opium comes within the ambit of Prevention of Money Laundering Act, 2002.
b. Whether Kishori Lal can also be made culprit in the case.

[MTP - Dec'21]

Answer:

Part (i)

In order to find the answer of this question, we may have to refer the definition of the money laundering as given in the PML Act.

Section 3 deals with the offence of money-laundering. It provides that-

Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

Explanation: For the removal of doubts, it is hereby clarified that:

(a) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:
    a. concealment; or
    b. possession; or
    c. acquisition; or
    d. use; or
    e. projecting as untainted property; or
    f. claiming as untainted property, in any manner whatsoever;
(b) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.

Further Paragraph 2 of Part A of the Schedule of the PML Act lists out the offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 [Section 17 Contravention in relation to prepared opium]

Here, in the given case, Sabina was involved in the process or activity connected with the proceeds of crime (i.e. trading of opium) which comes within the ambit of money laundering.

Part (ii)

Yes, the definition of the money laundering as given in section 3 of the PML Act provides that whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering.

When Kishori Lal came to know that Sabina is engaged in the trading of opium, he should have secretly inform to the Police / Narcotics Dept. But instead of informing to the law enforcing agencies, he received a hand some amount from Sabina for keeping silence over the matter. Thus, he was indirectly assisting in the happening of the crime, hence he is also an accused person.

Foreign Contributions (Regulations) Act, 2010

Question 1:

i. Discuss whether foreign remittances received from a relative are to be treated as foreign contribution as per the FCRA, 2010?

ii. In the light of the foreign contribution Regulation Act, 2010, discuss whether foreign contribution be received in and utilized from multiple Bank Accounts?

[RTP May 2018 - New]

Answer:

i. As per Section 4(e) of the Foreign Contribution Regulation Act, 2010 and Rule 6 of Foreign Contribution Regulation Rules, 2011, even the persons prohibited under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives.

However, in terms of Rule 6 of Foreign Contribution Regulation Rules, 2011, any person receiving foreign contribution in excess of one lakh rupees or equivalent thereto in a financial year from any of his relatives shall inform the Central Government in prescribed Form within 30 days from the date of receipt of such contribution.

ii. As per Section 17 of the Foreign Contribution Regulation Act, 2010, every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf.

Provided that such person may also open another FCRA Account in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi.

Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice.

However, no funds other than foreign contribution shall be received or deposited in any such account.

Therefore, Foreign contribution can be received in only one bank account i.e., FCRA Account opened with SBI, New Delhi. However, one or more accounts can be opened for the utlisation thereof.

Question 2:

In the light of the provisions of the Foreign Contribution (Regulation) Act, 2010 examine and decide whether the following persons in India are permitted to receive the amount/articles in the following situations:

i. M/s KG & C, a partnership firm obtained loan from a club registered in London for its business purpose.

ii. Hello FM, a registered association, received funds from a foreign company for establishing Frequency Model Radio Station to broadcast audio news.

iii. Mr. Happy received a wrist watch as marriage anniversary gift from his uncle, a citizen of USA. The market value of the wrist watch is Rs. 25,000.

[Nov 2019 - New]

Answer:

This question is based on Section 3 of FCRA, 2013 which states about person prohibited from accepting foreign contribution.

i. M/s KG & Co., being a partnership firm, is not covered under Section 3 of the FCRA and therefore it can receive Foreign contribution subject to obtaining registration or prior permission of Central Government.

ii. As per section 3 of the FCRA, 2010, no foreign contribution shall be accepted by any association or company engaged in the production or broadcast of audio news or audio visual news or current affairs programs through any electronic mode, or any other electronic form as defined in the Information Technology Act, 2000 or any other mode of mass communication;

Accordingly, Hello FM is not permitted to receive any fund from a foreign company.

iii. As per the provisions of the Foreign Contribution (Regulation) Act, 2010, "foreign contribution" means the donation, delivery or transfer made by any foreign source, of any article, not being an article given to a person as a gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than Rs. 1 lakh.

In the given situation, Mr. Happy received the wrist watch (market value Rs. 25,000) as marriage anniversary gift from his uncle, a citizen of USA.

Since, the value of the wrist watch is within the prescribed limit, hence, Mr. Happy is permitted to receive the article.

Question 3:

A foreign company, Max Ltd. was established by few Indians in Singapore. The management of the company used to donate a huge amount to the religious trust, in Mumbai, India. Enumerate in the given situation in the light of the Foreign Contribution and Regulation Act, 2010 whether the donation so made by Max Ltd. is a foreign contribution? Is the acceptance of such donation by the Religious trust is valid?

[Nov 2019 - New]

Answer:

As per the definition of Foreign Contribution given in section 2(1)(h) of FCRA 2010, "Foreign contribution" means the donation, delivery or transfer made by any foreign source,-

i. of any article, (except given as a gift for personal use, if the market value, in India, of such article, on the date of such gift, is not more than Rs. 1 lakh)
ii. of any currency, whether Indian or foreign;
iii. of any security and includes any foreign security under the Foreign Exchange Management Act,1999

As per explanation to the section, a donation, delivery or transfer of any article, currency or foreign security so referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

Whereas the foreign source as per the definition given in section 2(j) of the FCRA includes a foreign company. Since the Max Ltd. is a foreign company, so donation made by the Max Ltd is a foreign contribution for the religious and charitable purpose.

Yes, the Religious Trust can accept foreign contribution either by obtaining Certificate of Registration or seeking prior permission of the Central Government.

Question 4:
Mr. Satish, General Secretary of a political party received an invitation from the American Labor Party. He wants to avail foreign hospitality. Define the term "foreign hospitality". In the light of the provisions of the Foreign Contribution (Regulation) Act, 2010, decide whether he can avail it. Discuss also the exception, if any, under which the provisions of the said Act may be relaxed.

[May 2018 -New]

Answer:
Definition of "Foreign Hospitality" [Section 2(i) of the Foreign Contribution (Regulation) Act, 2010]
"Foreign hospitality" means any offer, not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country or territory or with free boarding, lodging, transport or medical treatment.

Whether Mr. Satish can avail foreign Hospitality?
As per Section 6 of the Act, Office bearers of political parties require prior approval from Ministry of Home Affairs before accepting Foreign Hospitality.

In the instant case, Mr. Satish, General Secretary of a political party, before availing foreign hospitality shall require prior approval from Ministry of Home Affairs.

Exceptions
It shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India. But, where such foreign hospitality has been received, the person receiving such hospitality shall give an intimation to the Central Government as to the receipt of such hospitality within 1 month from the date of receipt of such hospitality, and the source from which, and the manner in which, such hospitality was received.

Question 5:
Mr. Peter, a Member of the Legislature in India, visited Sydney, Australia to attend World Trade Conference as a representative of Government of India after obtaining due permission of the Central Government as per the provisions of Foreign Contribution (Regulation) Act, 2010. His expenditure on foreign travel was borne by Bret Lee Limited, a foreign company. While attending the conference, Mr. Peter suddenly encountered chest pain and he was immediately admitted in the nearby hospital for medical care and treatment. The medical expenses of Rs.2,00,000/- was borne by Bret Lee Limited. Mr. Peter seeks your advice about the procedure to be followed in the above situation under the provisions of Foreign Contribution (Regulation) Act, 2010. Please advise suitably.

[RTP May 2018/MTP Oct 2018 - New]

Answer:
Section 6 of the Foreign Contribution (Regulation) Act, 2010 prescribes that no member of a Legislature shall while visiting any country accept any foreign hospitality except with the prior permission of the Central Government.

Foreign Hospitality [as per section 2(m)] means any offer not being a purely casual one, made in cash or kind by a foreign source for providing a person with the costs of travel to any foreign country with free boarding lodging or medical treatment.
Therefore, prior approval is required from Central Government for the medical expenses.
Provided that it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India, but where such foreign hospitality has been received, the person receiving such hospitality shall give, within one month from the date of receipt of such hospitality an intimation to the Central Government as to the receipt of such hospitality, and the source from which and the manner in which such hospitality was received by him.
Hence, Mr. Peter has to follow the above procedure.

Question 6:

X, a registered association transfers the Foreign Contribution received by it to another person? Comment upon the validity of said act of X in terms of Foreign Contribution (Regulation) Act, 2010?

[ICAI Module/May 2021 -New]

Answer:

In the light of section 7 of the FCRA, 2010, no person who -

- is registered and granted a certificate or has obtained prior permission under this Act; and
- receives any foreign contribution,

Shall transfer such foreign contribution to any other person.

According to the section, the act of X, an association of transferring the Foreign Contribution to another person, is not valid.

Question 7:

An Association registered under the Foreign Contribution (Regulation) Act, 2010 (the Act) received donation from a club registered in Singapore. The Association proposes:

i. To transfer 10% of the donation to "Home for Aged Society", an unregistered person and 15% to "Welfare Club" a registered person under the Act,
ii. To invest portion of the donation in Chits promising high returns.

In the light of provisions of the Foreign Contribution (Regulation) Act, 2010 decide whether the Association can carry out the above proposals and if so, state the procedures to be followed under the said Act?

[Nov 2018 - New]

Answer:

i. According to Section 7 of the Foreign Contribution (Regulation) Act, 2010, no person who -
   - is registered and granted a certificate or has obtained prior permission under this Act; and
   - receives any foreign contribution,

   shall transfer such foreign contribution to any other person. It is not relevant as to whether such person to whom foreign contribution is proposed to be transferred is registered or not.

   In the instant case, the association intends to transfer 10% of the donation to "Home for Aged Society" an unregistered person and 15% to "Welfare Club" a registered person under the Act.

   The proposed transfer is not in accordance with the provision of this Act and hence can't be done.

ii. According to proviso to Section 8 of the FCRA, 2010 any foreign contribution shall not be used for speculative business.

   Speculative activities have been defined in Rule 4 of FCRR, 2011 as under:-
   a. any activity or investment that has an element of risk of appreciation or depreciation of the original investment, linked to market forces, including investment in mutual funds or in shares;
   b. participation in any scheme that promises high returns like investment in chits or land or similar assets not directly linked to the declared aims and objectives of the organization or association.

   In the instant case, the association cannot invest portion of donation in Chits promising high returns.

Question 8:

Amol Open University of Languages, a private university established under a State Act was meant to provide degree/ diploma/ certificate course to the students, through an online leaning platform of various foreign languages. The examination was also decided to be held online through their PC/Laptop.

Several Foreign Governments intend to offer donations / contributions for the development of their language. Mr. Bhupendra, the Registrar applied for the registration of the university and was granted certificate to receive foreign exchange for the purpose of preparing the educational material (print or soft copy), paying of honorarium

to teachers and IT related infrastructure for online classes only. Mr. Bhupendra faced financial problems for building the infrastructure of the University Campus. Advice Mr. Bhupendra, whether foreign contribution received for language development, can be used by him for building the infrastructure of the University Campus.

[RTP Nov 2021 -New]

Answer:

Section 8(1) of the FCRA, 2010 provides that every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution:

a. shall utilise such contribution for the purposes for which the contribution has been received.

   Provided that any foreign contribution or any income arising out of it shall not be used for speculative business.

b. Shall not defray as far as possible such sum, not exceeding twenty per cent. of such contribution, received in a financial year, to meet administrative expenses:

   Provided that administrative expenses exceeding twenty per cent of such contribution may be defrayed with prior approval of the Central Government.

   The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred to in sub-section (1) shall be calculated.

Accordingly, the purpose for which the Certificate of Registration has been granted, cannot be diverted. The end use of the funds has to ensure to utilise in that purpose only.

Therefore, Mr. Bhupendra, the registrar of Amol Open University cannot use the foreign contribution for building the infrastructure of the University Campus.

Question 9:

After giving a reasonable opportunity of being heard, Central Government cancelled the certification of registration of Toastea Ltd, a company registered under FCRA on the ground of public interest.

2.5 years have passed since such cancellation. Company has submitted its written declaration not to involve in such activity again and request to restore the registration.

Advise Toastea Ltd. on its eligibility for re-registration or grant of prior permission. Also state the circumstance under which Government can cancel the certificate of registration granted to a person under the Foreign Contribution (Regulation) Act, 2010.

[May 2019 -New]

Answer:

Restoration of Registration:

As per section 14(3) of the Foreign Contribution (Regulation) Act, 2010, any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

In the instant case, Toastea Ltd. is not eligible for re-registration or grant of prior permission as only 2.5 years have passed since such cancellation. So, requirement of 3 years of cooling period from the date of cancellation of such certificate for re-registration is not complied with.

Circumstances for cancellation of certificate of registration [Section 14(1) of the Foreign Contribution (Regulation) Act, 2010]

The Central Government may, by an order, cancel the certificate if:

a. the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or
b. the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or
c. in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or
d. the holder of certificate has violated any of the provisions of this Act or rules or order made there under; or
e. If the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

Question 10:

Bharat Ltd. is a subsidiary of Global Ltd., which is a MNC registered in Hong Kong. Bharat Ltd. had obtained the permission to receive foreign contribution in a designated account in the SBI. Later it was discovered that the obtained foreign contribution were deposited in other account for its functioning. Advise on the given situation as to depositing of the amount of foreign contribution from designated account to any other account. And state the duty of the bank on the said transactions made?

[May 2020 - New]

Answer:

Every person who has been granted a certificate or given prior permission shall receive foreign contribution in a single account named FCRA Account opened with the main branch of SBI New Delhi. However, person may open one or more accounts in one or more scheduled banks for utilizing the foreign contribution received by him. No funds other than foreign contribution shall be received or deposited in such account or accounts.

Every bank or authorised person (as per FEMA) shall report to such authority as may be specified —

(a) prescribed amount of foreign remittance;
(b) the source and manner in which the foreign remittance was received; and
(c) Other particulars, in such form and manner as may be prescribed.

As per the above stated provisions, Foreign contributions should be received only in the exclusive FCRA Account opened with SBI, New Delhi. Depositing the same in other account, is an offence. However, for utilisation of the funds, one or more banks are permissible [proviso to section 17(1) of FCRA, 2010].

Obligations of Bank receiving foreign contribution of its customer

According to Rule 16 of FCR, Rule 2011, the bank shall report to the Central Government within 48 hours any transaction in respect of receipt or utilisation of any foreign contribution by any person whether or not such person is registered or granted prior permission under the Act.

Author's Note - Global Limited is a foreign company as it as MNC registered in Hong Kong. Subsidiary of Global Limited will also be a foreign company and therefore, Bharat Limited is a foreign company. However, it is also a Person as person includes company incorporated in India so the provision of this Act will be applicable accordingly.

Question 11:
Bharat Sevak, an NGO granted a certificate of registration to receive foreign contribution in terms of the provisions of the Foreign Contribution (Regulation) Act, 2010. The organization intends to invest some of the contribution amount in some mutual funds, which is projected to give good results and thereby strengthening the financial position of the organization. Bharat Sevak is also planning to defray around 65% of the amount of foreign contribution received towards administrative expenses. Advise the organization in the light of the provisions of the Foreign Contribution (Regulation) Act, 2010, whether it can give effect to the above two proposals.

[Jan 2021 -New]

Answer:

Restriction to utilize foreign contribution for administrative purpose [Section 8 of Foreign Contribution (Regulation) Act, 2010 read with Rule 4 of FCR, Rule 2011]

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall—

a. utilise such contribution for the purposes for which the contribution has been received:
   Provided that any foreign contribution or any income arising out of it shall not be used for speculative business;
b. not defray such sum, exceeding 20% of such contribution, received in a financial year, to meet administrative expenses:
   Provided that administrative expenses exceeding 20% of such contribution may be defrayed with prior approval of the Central Government.

In the instant case, Bharat Sevak intends to invest some foreign contribution in mutual fund which is a speculative activity under Rule 4 of FCR, Rule 2011. Thus, Bharat Sevak cannot give effect to this proposal.

Also, Bharat Sevak is planning to defray around 65% of the amount towards administrative expenses. This proposal is also not valid as it is exceeding 20% of contribution. But this proposal can be given effect if prior approval of Central Government has been taken.

Question 12:
State under what circumstances Government can cancel the certificate of registration granted to a person under FCRA?

[ICAI Module]

Answer:

As per section 14 of the FCRA, Central Government may cancel the certificate, after carrying out an inquiry, on the following grounds -

a. the holder of the certificate has made an incorrect/false statement in the application for the grant of registration or renewal
b. the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof
c. in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate
d. The holder of the certificate has violated any of the provisions of this Act or rules or order made thereunder.
e. If the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

Any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

Question 13:
Can foreign contribution be received in and utilised from multiple Bank Accounts?

[ICAI Module]

Answer:

As per Section 17 of the Foreign Contribution Regulation Act, 2010, every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank, which shall be opened by him for the purpose of remittances of foreign contribution in such branch of the State Bank of India at New Delhi, as the Central Government may, by notification, specify in this behalf.

Provided that such person may also open another FCRA Account in any of the scheduled bank of his choice for the purpose of keeping or utilising the foreign contribution which has been received from his "FCRA Account" in the specified branch of State Bank of India at New Delhi.

Provided further that such person may also open one or more accounts in one or more scheduled banks of his choice to which he may transfer for utilising any foreign contribution received by him in his "FCRA Account" in the specified branch of the State Bank of India at New Delhi or kept by him in another "FCRA Account" in a scheduled bank of his choice.

However, no funds other than foreign contribution shall be received or deposited in any such account.

Therefore, Foreign contribution can be received in only one bank account i.e., FCRA Account opened with SBI, New Delhi. However, one or more accounts can be opened for the utlisation thereof.

Question 14:

Can capital assets purchased with the help of foreign contributions be acquired in the name of the Mr. Ram, an office bearer of the association?

[ICAI Module]

Answer:

No. Every asset purchased with foreign contribution should be acquired and possessed in the name of the association since an association has a separate legal entity distinct from its members.

Question 15:

Mr. X, an individual of Indian origin but currently a citizen of a foreign country gives a donation. State whether the donation given by Mr. X will be treated as 'foreign contribution'?

[ICAI Module]

Answer:

Yes. Donation from a Person of Indian origin who has acquired foreign citizenship is treated as foreign contribution.

This will also apply to Person of Indian Origin / Overseas Citizen of India cardholders. However, this will not apply to 'Non-resident Indians', who still hold Indian citizenship and they are not foreigners. Therefore, donation given by Mr. X, an individual of Indian origin with foreign nationality will be treated as foreign contribution.

Question 16:

Mr. Rohit, a relative of Mr. Suman, who is residing in France remitted foreign contribution of Rs. 2 lakhs to her for arrangement of religious programme for the believers of Gurudev. Whether foreign remittances received from a relative are to be treated as foreign contribution as per FCRA, 2010?

[ICAI Module]

Answer:
As per Section 4(e) of FCRA, 2010 and Rule 6 of FCRR, 2011, even the persons prohibited under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives.

However, in terms of Rule 6 of FCRR, 2011, any person receiving foreign contribution in excess of one lakh rupees or equivalent thereto in a financial year from any of his relatives shall inform the Central Government in Form FC-1 within 30 days from the date of receipt of such contribution.

Here in the given situation, since the amount remitted by Mr. Rohit is more than Rs. 1 lakh, so Ms. Suman is required to inform the Central Government in Form FC-1 within thirty days from the date of receipt of such contribution.

Question 17:
Mr. Ramakant Hathi, an Indian Administrative Service (IAS) officer has received an invitation to visit Germany for representing India in an Annual Summit programme. Mr. Ramakant Hathi, on his visit has met with a sudden illness and received foreign hospitality of amount 65,000 in the form of emergent medical treatment. Under the given scenario, you are required to advise Mr. Ramakant Hathi regarding his responsibility to intimate the receipt of Foreign Hospitality as per the provisions of the Foreign Contribution (Regulation) Act, 2010 and rules made thereunder

[ICAI Module]

Answer:
As per section 6 of the Foreign Contribution (Regulation) Act, 2010, various categories of persons are required to take prior permission of the Central Government before accepting Foreign Hospitality, while visiting any country or territory outside India. Government servants are one of such persons who are required to take prior permission.

Provided it shall not be necessary to obtain any such permission for an emergent medical aid needed on account of sudden illness contracted during a visit outside India.

Further as per Rule 7 of Foreign Contribution Rules 2011 and amendments thereto, in case of emergent medical treatment aid needed on account of sudden illness during a visit abroad, the acceptance of foreign hospitality shall be required to be intimated to the Central Government within 1 month of such receipt giving full details including the source, approximate value in Indian rupees, and the purpose for which and the manner in which it was utilised.

However, no such intimation is required if the value of such hospitality in emergent medical aid is upto one lakh rupees or equivalent.

Accordingly, Mr. Ramakant Hathi is not required to intimate such details of acceptance of foreign hospitality as the value of such hospitality in emergent medical treatment is within the limits specified in Rule 7 of Foreign Contribution (Regulation) Rules, 2011.

Question 18:
XYZ Foundation, a society registered under the Societies Registration Act, 1860, has received foreign contribution from a Mala Company LLC, a company incorporated in Singapore. XYZ Foundation deposited the amount of foreign contribution in a bank and earned interest on it. XYZ Foundation desires to invest maturity proceeds from deposits in mutual funds. You are required to advise whether XYZ Foundation is allowed to make such investment considering the provisions of the Foreign Contribution (Regulation) Act, 2010 (the Act) (Note: XYZ Foundation has obtained certificate of registration under section 11 of the Act).

[ICAI Module]

Answer:

As per the explanation 2 to the definition of Foreign Contribution under the Act, the interest accrued on the foreign contribution deposited in any bank referred to in section 17(1) or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.

Further as per section 8 of the Act, every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall utilize such contribution for the purpose for which the contribution has been received.

Further, any foreign contribution or any income arising out of it shall not be used for speculative business, where speculative business includes investment in mutual fund.

Therefore, XYZ Foundation cannot use the contribution as well as the interest component for the Investment in Mutual Fund as it is investment in Speculative business.

Question 19:

Mr. Robin has received foreign contribution under the Foreign Contribution Regulation Act, 2010 (FCRA) and wants to utilize the amount for the administrative purposes and also to make investment in Gold Deposit Scheme of a private entity. Advise Mr. Robin in the light of the provisions of the FCRA, 2010.

[May 21 - New]

Answer:

Restriction to utilize foreign contribution for administrative purpose (Section 8 of the Foreign Contribution Regulation Act, 2010)

Every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall—

a. utilise such contribution for the purposes for which the contribution has been received:
   Provided that any foreign contribution or any income arising out of it shall not be used for speculative business;

   Speculative activities have been defined in Rule 4 of FCR, Rule 2011 as under:-
   i. any activity or investment that has an element of risk of appreciation or depreciation of the original investment, linked to market forces, including investment in mutual funds or in shares;
   ii. participation in any scheme that promises high returns like investment in chits or land or similar assets not directly linked to the declared aims and objectives of the organization or association.

b. not defray as far as possible such sum, not exceeding twenty per cent of such contribution, received in a financial year, to meet administrative expenses:

   Provided that administrative expenses exceeding twenty per cent of such contribution may be defrayed with prior approval of the Central Government.

In the instant case, Mr. Robin cannot utilize the foreign contribution not exceeding twenty per cent of such contribution except with prior approval of the Central Government for administrative purposes specified in the Act and cannot make investment in Gold Deposit Scheme of a private entity as this is a speculative business.

Question 20:

A foreign company, XJD Ltd. was established by few Indians in South America. The management of the company used to donate a huge amount to the religious trust, in Mumbai, India. In the light of the Foreign Contribution Regulation Act, 2010 examine:

1. Whether the donations so made by XJD Ltd. is a foreign contribution?
2. Is the acceptance of such donation by the religious trust valid?

[May 21 - New]

Answer:

As per definition of Foreign Contribution given in section 2(1)(h) of the FCRA, 2010, Foreign Contribution means the donation, delivery or transfer made by any foreign source:

a. of any article (except given as a gift for personal use), if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be prescribed from time to time, by the Central Government by the rules made by it in this behalf;
b. of any currency, whether Indian of foreign; security and includes any foreign security under the Foreign Exchange Management Act, 1999.

As per explanation to the section, a donation, delivery or transfer of any article, currency or foreign security so referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.

i. The foreign source as per the definition given in section 2(1)(j) of the FCRA, 2010 includes a foreign company. Since XJD Ltd. is a foreign company, so donation made by XJD Ltd. is a foreign contribution for the religious and charitable purpose.
ii. Person having a definite cultural, economic, educational, religious or social programme [Section 11(1) of the FCRA, 2010]- shall not accept foreign contribution unless such person obtains a certificate of registration from the Central Government.

In the instant case, as nothing is mentioned in the question regarding certificate of registration by religious trust (in Mumbai), it can be assumed that certificate has not been taken and if such religious trust accept donation from XJD Ltd., it shall not be valid.

The Arbitration and Conciliation Act, 1996

Question 1:

Examine the validity of the following statements with reference to The Arbitration and Conciliation Act, 1996:

(i) Every Court would be a Judicial Authority, but every Judicial Authority would not be a Court.

(ii) The disputes submitted to arbitration must be arbitrable.

[Nov 2018 – New]

Answer:

i. Judicial authority - The term judicial authority is not defined in Act. The Supreme Court in "SBP v. Patel Engineering observed that "A judicial authority as such is not defined in the Act. It would certainly include the court as defined in Section 2(e) of the Act and would also, include other courts and may even include a special tribunal like the Consumer Forum." Therefore, it is a concept wider than courts as ordinarily understood and would include special tribunals and quasi-judicial authorities. The functions performed would include reference to arbitration. Every court would be a judicial authority, but every judicial authority would not be a court.

ii. Arbitrability: The disputes submitted/ proposed to be submitted to arbitration must be arbitrable. In other words, the law must permit arbitration in that matter. There are certain disputes that the law retains exclusively for the court, and the same cannot be submitted for arbitration. The rationale is that given the nature of disputes, the courts are the only appropriate forum for adjudicating the matter.
For example, criminal offences, matrimonial disputes, guardianship matters, testamentary matters, mortgage suit for sale of a mortgaged property, etc. cannot be arbitrated.

Question 2;

Smart Automobiles Limited and Apex Four wheelers Limited entered into an agreement regarding annual maintenance services to be provided by Smart Automobiles for all vehicles within the state of Uttar Pradesh for five years. The agreement was containing a clause that in the event of a dispute between the parties the matter would be submitted to arbitration. At the end of the fifth year, the service agreement was not renewed. Decide whether the Arbitration Agreement should be treated as terminated or not? Also describe the other grounds of termination of an arbitration agreement.

[May 2018 – New]

Answer:

Termination of an arbitration agreement

Just the way parties can enter into an arbitration agreement, they can also terminate an arbitration agreement. Thus, an arbitration agreement could be put to an end by:

1. Mutual consent: Like any contract, the parties involved can jointly agree to put an end to a particular arbitration agreement.
2. Termination of principal contract: An arbitration agreement always operates in relation to a principal contract. If the principal contract is terminated through discharge or novation, the arbitration agreement terminates with the contract. However, if the principal contract is breached, then the arbitration agreement survives because of the operation of the doctrine of separability.

In the given instance, at the end of the fifth year, the Service Agreement was not renewed. Hence, the contract terminates, and along with it the arbitration agreement also terminates.

Question 3:

ABC Pvt. Ltd. is a construction company. Mr. Builder is a Chief Engineer of the ABC Pvt. Ltd. A common arbitration agreement was framed by ABC Pvt. Ltd. in case of disputes if arises under any contract. According to the term of an agreement , any question, claim, right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of dispute bought into notice, give written notice of his decision to the contractor. Chief Engineer's decision shall be final. Examine on the validity of such arbitration agreement

[MTP Aug 2018 - New]

Answer:

Relevant provision

As per the requirements of a valid arbitration agreement, parties to the arbitration agreement must agree that the determination of their substantive rights by a neutral third person acting as the arbitral tribunal would be final and binding upon them.

Since in the given case, the arbitration agreement formed by the XYZ Pvt. Ltd. contained a clause that any questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of' the work, or after the completion, termination or abandonment thereof, the dispute shall, firstly, be referred to the Chief Engineer, Mr. Builder.

He will have jurisdiction over the work specified in the contract. He shall within a period of ninety days from the date of dispute bought into notice, give written notice of his decision to the contractor. Chief Engineer's decision shall be final and binding on both the parties.

Here Chief Engineer is not a neutral party and has a Control over the work specified in the contract, so this is not a valid arbitration agreement.

Question 4:

In 2016, Company Amar, food processor manufacturing unit entered into a joint venture agreement with Company USHA, the largest manufacturer of Food processors for supply of parts of mixer & grinder for manufacturing its latest model. Both the companies are registered under the Companies Act 2013. Agreement carries the term that all disputes shall be arbitrated in Mumbai. State the type of arbitration agreement made between them.
What will happen if the agreement does not have any clause relating to arbitration? Disputes arose between them concerning quality of material supplied in 2017.

[ICAI Module/RTP May 2018 - New]

OR

On 1st day of April, 2018, Almond Food Processors limited, a company engaged in food processor manufacturing unit entered into a joint venture agreement with Ronnie and Coleman Company Limited, the largest manufacturer of Food processors. Both the companies are registered under the Companies Act, 2013. Agreement carries the term that all disputes shall be arbitrated in Delhi. In the light of the Arbitration and Conciliation Act, 1996, discuss:

(i) The type of arbitration agreement made between them.

(ii) Examine what will happen if the agreement does not have any clause relating to arbitration where disputes arose between them concerning quality of material supplied in 2019.

[Nov 2019 - New]

Answer:

There are two basic types of arbitration agreement. These are:

a. Arbitration clause - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.
b. Submission agreement - An agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

In first case, the agreement already carries the term that all disputes shall be arbitrated in Mumbai at the time of entering into joint venture agreement. This would be an arbitration clause as it is contained in the principal contract (JVA) and no disputes have arisen till yet. It concerns future disputes that may arise.

In the second case, the Principal contract (JVA) does not have any term relating to arbitration. Disputes arose between the parties concerning quality of supplied goods in 2017. To resolve this dispute, parties later entered into an agreement "That all disputes including quality of goods supplied by Company USHA to Company Amar shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator."

Such an agreement that is made after the disputes have arisen would be called a submission agreement.

Question 5:

How important are the ideas of independence and impartiality in arbitration?

(a) Is the arbitrator required to disclose anything to the parties?

(b) Is membership of the same sports club as one of the parties problematic?

[ICAI Module]

Answer:

a. The arbitrator are under a duty of disclose any relations with parties or their lawyers that might give rise to justifiable doubts as to their independence and impartiality.
b. Such an association is too remote to count as a relation that might lead to doubts of bias.

Question 6:

Can an arbitrator resign on their own account? Do they have to give reasons for their resignation? Could an award be challenged on the ground that the arbitrator had resigned without giving any proper justifications?

[ICAI Module]

Answer:

An arbitrator can resign when they want, without giving reasons for their resignation. This action does not affect the validity either of the arbitration proceedings or the arbitral award.

Question 7:

XYZ Company Ltd entered into an agreement with PQR Company Ltd for the supply of terrain tyres to PQR Company Ltd for a period of 5 years. The agreement had referred to the terms and conditions contained in the Indian Tyre Manufacturing Association for sale and purchase of manufacturing tyres. Clause 14 of the terms provided that if any dispute arises between the parties, the same shall be mutually decided by the parties or shall be referred for arbitration if the parties so determine. You are required to state whether the parties under the agreement will be able to refer the dispute, if any, to the arbitration considering the given scenario and the provisions of the Arbitration and Conciliation Act, 1996.

[ICAI Module]

Answers:

The provisions of the Arbitration and Conciliation Act, 1996 outlines the requirements of a valid arbitration agreement. One of such requirements is clarity of consent i.e. the intention to go to arbitration must be clear in other words there must be consensus ad idem. Utilization of vague words cannot be considered as adequate.
Further the Arbitration and Conciliation Act, 1996 envisages the possibility of an arbitration agreement coming into being through incorporation i.e., arbitration agreement through reference. In other words, parties to an agreement could agree to arbitrate by referring to another contract containing an arbitration agreement.

In the given scenario, it was an arbitration agreement through reference, but the terms and conditions of the said agreement were not clear and vague and therefore the said agreement is not a valid arbitration agreement as the italicized portion in the agreement clearly highlights the need for further agreement between the parties.

Accordingly in the given instance, the parties will not be able to refer the disputes, if any, to arbitration since the terms and conditions of arbitration agreement through reference are vague and not clear and thus the arbitration agreement is not valid in law.

Question 8:

By virtue of the arbitration agreement between Mr. C and Mr. P, a matter between them which could not be resolved smoothly, was referred to the arbitrator tribunal having three arbitrators. Two among the arbitrators were of the opinion that Mr. C has to pay a compensation of Rs. 2 crore to Mr. P. The third arbitrator was of the opinion that Mr. P is not eligible to get any compensation from Mr. C. The award was then written and signed by the first two arbitrators, while the third arbitrator refused to sign. The fact that the third arbitrator refused to sign and the reason behind that was stated in the award. Mr. C contended that since all the arbitrators did not sign, the award is invalid. In the light of the provisions of the Arbitration and Conciliation Act, 1996, decide, whether the contention of Mr. C is tenable?

[Jan 2021 -New]

Answer:

According to Section 31(1)(a) of the Arbitration and Conciliation Act, 1996, it requires that an arbitral award to be in writing and having the signature of majority of the members of the arbitral tribunal. It is not an award unless these two conditions are fulfilled.

It is quite possible that a particular arbitrator may not agree with the contents of the award. Therefore, the law only requires majority of the arbitrators to sign. The law however requires the award to note why the signature of an arbitrator was missing.

In the instant case, the arbitral award is written and signed by two arbitrators along with the fact and the reason of refusal to sign by third arbitrator. So, this award is valid.

Hence, the contention of Mr. C that since all the arbitrators did not sign, the award is invalid, is not tenable.

Question 9:

Shyam started a fresh juice shop and contacted Naresh for supply of fruits and vegetables. Most of the communication between them happened over email. On the email, they decided the payment, terms and other conditions of service. For initial 5 months, Shyam was regular in making payment to Naresh for the fruits bought, but later on stopped making payments. Naresh filed a suit against Shyam in a Magisterial Court but Shyam contended that the matter should be settled through Arbitration. Referring to provision of the Arbitration and Conciliation Act, 1996, state, whether the contention of Shyam is correct?

[Nov 2020 - New]

OR

Mr. Ghia started a juice point in the heart of the City. He contacted Mr. Bhajiwala for supply of fruits and vegetables. On the communication made over email, they decided the payment, terms and other conditions of service. Initially, Mr. Ghia was regular in making payment to Mr. Bhajiwala for the supply of fruits and vegetables, but later on gapped and defaulted in making payments. Mr. Bhajiwala filed a suit against Mr. Ghia in a Court. However Mr. Ghia, contended that the matter should be settled through Arbitration. Considering the relevant provision of the Arbitration and Conciliation Act, 1996, determine the validity of the contention stated by Mr. Ghia.

[MTP April 2021- New]

Answers:

Arbitration is a private method of dispute resolution. Under the Indian law every individual has the right to approach the court for resolution of his/her dispute that may involve infringement of right(s) vested upon that individual. This protection is so stringent that it cannot be contracted away. The Indian Contract Act, 1872 however notes an exception in favor of arbitration.

Arbitration cannot happen without the parties consenting to submit their dispute to arbitration. Consent of the parties therefore is the most fundamental requirement for an arbitration to happen. An arbitration agreement records the consent of the parties that in the event of a dispute between them that matter instead of being taken to court, will be submitted for resolution to arbitration. Arbitration agreement therefore is necessary to start arbitration.

In the instant case, there is no express arbitration agreement between the parties (Naresh &Shyam) as regards to reference of disputes for arbitration. Further, Naresh filed a suit against Shyam in the Magisterial court but Shyam contended that the matter of dispute should be settled through Arbitration.

Here, since no express arbitration agreement was made between the parties, Shyam contention to submit the dispute for arbitration, is not correct. Even the court cannot refer the parties to arbitration unless there's a written consent by parties by way of joint application or memo or an affidavit.

Question 10:

Mr. R, the respondent had placed an order of purchase of various quantities of phosphoric acid from the Mr. P, the petitioner. The purchase order noted that the terms and conditions were to be as per the Fertilizer Association of India (FAI). Terms and Conditions for Sale and Purchase of Phosphoric Acid were as per Clause 15 of the FAI which also provided terms for settlement of disputes by arbitration. Enumerate in the light of the given circumstances as to existence of a valid arbitration agreement between the parties as per the Arbitration and Conciliation Act, 1996.

[RTP May 2020 -New]

Answer:

Arbitration agreement through reference: The Arbitration and Conciliation Act, 1996 envisages a possibility of an arbitration agreement coming into being through incorporation. In other words, parties to an agreement could agree to arbitrate by referring to another contract containing an arbitration agreement. The requirement is that the reference must leave no doubt in the mind of the reader that the parties indeed wanted to incorporate the arbitration agreement into the agreement between them.[Section 7(5)]

Accordingly, as per the said provision, yes, this a valid reference for an arbitration agreement to come into existence. It was held by the Supreme Court of India in Groupe Chimique Tunisien SA v. Southern Petrochemicals

Industries Corpn Ltd 2006 (SC) that for a reference to constitute an arbitration agreement the contract should be in writing and reference should be such as to make that arbitration clause a part of the contract.

Both the conditions were held to be fulfilled in the present instance.

Question 11:

Anil, who is a Chartered Accountant with his own independent practice, is the arbitrator in an arbitration between Tata Tea Inc., and Suzuki Ltd.

Scenario I - Prior to starting his practice, Anil had worked for five years with Tata Tea Inc.
Scenario II - During the proceedings before the arbitral tribunal, Anil would allow Tata Tea to take many liberties, for instance taking as much time for making oral arguments, cross examining the witnesses, for submitting documents, etc. Also, the proceedings were adjourned (postponed) whenever so requested by Tata Tea. When Suzuki Motors wanted to take extra time, they were not allowed. In few instances when they were permitted, they are asked to pay heavy cost to Tata Tea for delaying the proceedings.
Suziki Ltd. on the basis of above scenarios wanted to challenge the appointment of Mr. Anil. State whether the appointment of Mr. Anil as an arbitrator can be challenged?

[May 2021 -New]

Answer:

As per section 12 of the Arbitration and Conciliation Act, 1996, when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances-

a. such as existence either direct or indirect of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and
b. which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

In the first case Anil had worked for five years with Tata Tea Inc. In this situation the law would deem Anil to be lacking independence.

In second case, arbitrator by his / her behavior gives an impression that he is favoring one party over the other.

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his independence or impartiality. In the given scenarios, it would be deemed that Anil to be lacking independence and whereas in the second case it clearly reflects that arbitral tribunal favors and is partial towards Tata Tea, and therefore lacks impartiality. Yes, appointment of Mr. Anil as an arbitrator can be challenged.

Question 12:

John is a writer. He entered into an agreement with Mumbai Publishing House (MPH). It contains various clauses such as time limit within which the manuscript is to be given, payment of royalty of 10% of amount received by the publisher, recovery of royalty amount in case of sales return, revision in the material, etc. The agreement also contains a clause that in case of dispute, the matter may be referred to arbitration, at the sole discretion of the publisher.

For the FY 2017-18, John received the royalty amount of Rs. 2.50 lakh. During the FY 2018- 19 the syllabus of management subject was changed, and the author wrote manuscript for 2nd edition.

The statement of royalty payment for the FY 2018-19 was given by the publisher as under:

1	Royalty payable @ 10% of amount received by the publisher	1,85,000
2	Less: Sales return of 1st edition of the book	(-) 95,000
3	Less: Future Sales return expected for during FY 2019-20	(-) 45,000
4	Gross amount payable	45,000
5	Less: TDS @10%	(-) 4,500
6	Net amount paid	40,500

When John compared the amount of royalty which he received in previous FY which was Rs. 2.50 lakh, whereas in the next year the publisher paid the amount for FY 2018 -19 only of Rs. 40,500.

John's arguments were:

- Future sale return and royalty deduction cannot be made.
- The retail book seller cannot return the book after 3 months, then why the publisher has allowed / accepted the sale return even after the lapse of 3 months. This resulted in big deduction of sales return.

In the light of the provided facts, answer the following questions as per the Arbitrating and Conciliation Act, 1996:

i. In the absence of separate arbitration agreement, whether the matter can be referred to the Arbitration?

ii. In the contract agreement, it was mentioned that in case of dispute, the matter may be referred to arbitration, at the sole discretion of the publisher. Whether the arbitration clause, as written in the contract agreement is perfect? Give your comments.

[RTP Nov 2021 -New]

Answer:

i. Section 7(2) of the Arbitration and Conciliation Act, 1996 provides that an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Further section 7(5) states that the reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

In the given case, the arbitration clause was there in the contract agreement. There is no need to have a separate arbitration clause. It is sufficient, if it has a clause in the contract agreement itself.

ii. Section 7(1) of the Arbitration and Conciliation Act, 1996, provides that "Arbitration Agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

In the contract agreement the words written were "the matter may be referred to Arbitration, at the sole discretion of the publisher". Here the matter "may be referred to" have been used and further "at the sole discretion of the publisher".

It means that referring of the matter to the arbitration was at the sole discretion of the publisher and was not mutually agreed on. Although the author would have signed the contract agreement, but the matter of referring was arbitrary i.e., at the sole discretion of the publisher itself. If the publisher do not want to refer the matter to the arbitration, then no recourse is available to the author, except to move to the civil court.

Question 13:

Ms. Rajkumari launch her boutique. She contacted with M/s Shyamlal merchants for supply of dress materials. The communication between the parties were over email. There was a term of service between the parties containing that "any disputes regarding quality or delivery shall be submitted to arbitration conducted under the guidance of Indian Clothes Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you." Ms. Rajkumari placed an order. Comment on the validity of the such arbitration agreement according to the Arbitration and Conciliation Act, 1996

[MTP Oct 2019]

Answer:

As per the Arbitration and Conciliation Act, 1996 an agreement must be in writing There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement. The communication over email of the term of services is proper valid agreement and the same have been stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

Question 14: *[Partly Out of syllabus question]*

Party A and Party B entered into a contract for construction of residential apartments. The contract contained an arbitration clause whereby all disputes between the parties would be submitted to an arbitrational tribunal consisting of a sole arbitrator Mr. C. There was a dispute in settling the bills of the civil engineers involving a substantial amount and accordingly, the parties decided to refer the matter to arbitration. Mr. C was orally informed about his appointment as an arbitrator on 01-06-2019. Subsequently, a written appointment letter dated 15-06-2019 was sent to him which was received by him on 18-06-2019. In the light of the above facts, explain under the provisions, of Arbitration and Conciliation Act, 1996:

(i) The date within which the arbitrational award shall be made.

(ii) For what period can the parties, by consent, extend the period for making the award?

[May 21 - New]

Answer:

As per section 23 of the Arbitration and Conciliation Act, 1996 (the Act) , the statement of claim and defence under the pleading before the arbitrational Tribunal, shall be completed within a period of six months from the date the arbitrator or all the arbitrators, as the case may be, received notice, in writing, of their appointment. Here in the given instance, Mr. C was orally informed about his appointment as an arbitrator on 1.6.2019. Though communicated through written appointment letter dated 15.6.2019 received by 18.6.2019.

Accordingly, in the first case:

a) Arbitrational award shall be made within 12 months from 17.12.2019 i.e., 17.12.2020.

b) As per section 29 A of the Arbitration and Conciliation Act, 1996, the award has to be made within 12 month from the period mentioned in section 23(4) of the Act. However, this period can be extended by 6 months on consent of the parties by the court. Hence, it can be extended upto 17-06-2021.

Question 15:

Mr. Jayraj Mehta, a stock market investor had filed a complaint against Regency Securities (P) Ltd. regarding unauthorized trading and the case was referred to the arbitration. The arbitral tribunal passed the award in favour of Regency Securities (P) Ltd. which was received by Mr. Jayraj on 25th May, 2021. Regency Securities (P) Ltd. enforced the said award on 30th June, 2021 by selling the securities of Mr. Jayraj in its demat account. Mr. Jayraj after issuing prior notice to Regency Securities (P) Ltd. made an application with the Civil Court on 15th July, 2021 under section 34 of the Arbitration and Conciliation Act, 1996. In the said application, Mr. Jayraj complained that the award has been improperly enforced and an application for recovery of the sold securities was also made along with main application. However, no stay application was made on the enforcement of order as the lawyer of Mr. Jayraj told that there is automatic stay on the enforcement of the award on filing of application under section 34.

In the context of aforesaid case-scenario, please answer to the following questions:-

(i) Whether Regency Securities (P) Ltd. can be considered to have properly enforced the arbitral award?

(ii) Whether the contention of lawyer of Mr. Jayraj is correct?

[MTP - Dec'21]

Answer:

(i) According to section 36 of the Arbitration and Conciliation Act, 1996, where the time for making an application to set aside an award has expired, or when such application was made, but it was rejected, then the award can be enforced. Enforcement of an arbitral award shall happen under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court.

According to section 34 of the Arbitration and Conciliation Act, 1996, a challenge against arbitral award can be raised within a time period of three months from when the award is received by party, with a maximum extension of thirty more days by the court.

Thus, the time limit for making an application for setting aside the arbitral award is 3 months and in the given case, the arbitral award was received by Mr. Jayraj on 25th May, 2021. So, the time for making an application to set aside the said award was to expire on 25th August, 2021 and till that time, the award could not have been enforced as per section 36 of the Act, as aforesaid.

Thus, Regency Securities (P) Ltd. cannot be considered to have properly enforced the arbitral award as the time limit for filing application under section 34 to set aside the award had not expired and it had enforced the said award on 30th June, 2021. It was having the right to enforce the said award only after 25th August, 2021 or, if the court had granted extension of 30 days then after 24th September, 2021.

(ii) According to section 36 of the Arbitration and Conciliation Act, 1996, there is no automatic stay on the enforcement where an application to set aside the arbitral award has been filed in the Court under section 34. A party has to specifically request for a stay, and the court at the time of granting stay can impose conditions.

Thus, the contention of lawyer of Mr. Jayraj that there is automatic stay on the enforcement of the award on filing of application under section 34, is not correct.

Note: The court will order that Regency Securities (P) Ltd. had improperly enforced the arbitral award but after expiry of 3 months, Regency Securities (P) Ltd would have right to enforce the award, so in order to have stay on that, a stay application needs to be filed with the main application filed under section 34 by Mr. Jayraj as there is no automatic stay.

Question 16:

A dispute has been aroused between the management of Paras Furnishing Ltd. and its labours. The dispute was to provide the basic facilities at the workplace, air-conditioning environment and hours of work. The management of the company sent an invitation to leader of the labour union to conciliate on the issues raised by the labours. The union leader accepted the invitation. It was decided between the parties that each one of them shall appoint one conciliator.

In the given case, explain how the two conciliators, appointed by each of them will address the matter under the Arbitration and Conciliation Act, 1996 and the procedure of conciliation?

[MTP – Dec'21]

Answer:

Section 63 of the Arbitration and Conciliation Act, 1996 provides that -

1. There shall be one conciliator unless the parties agree that there shall be two or three conciliators.
2. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Further Section 64, specifies, Procedure of Conciliation – once the conciliators have been appointed both parties are required to submit their statements in writing, supply documents and other evidence to the conciliator. The conciliator then provides a copy of the statements, documents and other evidence of one party to the other party. The conciliator is then required to encourage and assist parties to engage in discussions based on the information to arrive at a settlement.

Insolvency and Bankruptcy Code, 2016

Question 1:

Discuss on the statement "Resolution applicant ineligible if connected person is ineligible".

[MTP April 2021 -New]

Answer:

As per explanation to section 29A of the Insolvency and Bankruptcy Code, "Connected person" means:

i. any person who is the promoter or in the management or control of the resolution applicant; or
ii. any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
iii. The holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii).

Thus, if resolution applicant associated with any 'connected person' who is ineligible under section 29A of Insolvency & Bankruptcy Code, will be ineligible as 'resolution applicant' and hence cannot submit a resolution plan.

Question 2:

Defaulter Limited, an unlisted company registered in India with total assets amounting to Rs. 3 crore and turnover of Rs. 50 lakh as per financial statement immediately preceding the financial year was facing financial crisis. The financial creditors of the firm wanted to file a petition for initiating the insolvency resolution process with the Adjudicating Authority. The financial creditors want an early recovery of their dues. In view of the above position, state whether insolvency process can be initiated under fast track process under the IBC and maximum period for the completion of process?

[MTP March 2021 -New]

Answer:

Vide Notification no. SO 1911(E) dated 14-6-2017, read with section 55(2) of the Insolvency and Bankruptcy Code, the Central Government prescribed the following class of corporate debtors on whom the provisions pertaining to the fast track corporate insolvency resolution process are applicable-

(a) Small company under section 2(85) of the Companies Act
(b) A start-up (other than partnership firm)
(c) An unlisted company with total assets not exceeding Rupees one crore as per financial statement of immediately preceding the financial year.

As per section 56 of the Code, the fast track corporate insolvency resolution process shall be completed within a period of 90 days from the insolvency commencement date. The Adjudicating Authority may on receipt of an application extend the duration of such process by 45 days.

Provided that any extension of fast track corporate insolvency resolution process under this section shall not be granted more than once.

In the above question, the fast track insolvency resolution process is not applicable on the Defaulter Ltd. because the total assets exceed rupees one crore, so the financial creditors of the company cannot file an application under the fast track insolvency. Turnover of the company has no relevance in deciding whether fast track corporate insolvency resolution is applicable on the company or not.

Therefore, an application for fast track insolvency resolution cannot be made. The insolvency resolution process shall be completed within 180 days from the insolvency commencement date and extendable by maximum 90 days.

Question 3:
Ever Lasting Ltd. went into liquidation. XYZ Bank Ltd. the secured creditor, decided to realize its security interest by informing liquidator of such security interest and identify assets subject to which such security interest has to be realized. Liquidator denied the XYZ Bank Ltd. to enforce its security interest as said secured creditor is not a part of Committee of creditors. Throw a light on the stated situation and examine on the validity of the stand taken by the Liquidator.

[MTP March 2021 -New]

Answer:
As per Provisions laid down in section 52 of the Insolvency and Bankruptcy Code, 2016, an option is given to secured creditor to realize its security interest by informing liquidator in respect of such security interest and identify assets subject to which such security interest has to be realized. Therefore, it is not mandatory under Code proceedings for financial creditor to be a part of CoC (Committee of Creditors) to enforce its security interest. Hence, application filed by Financial creditor was to be accepted.

Therefore the stand taken by the liquidator on his denial to the XYZ Bank Ltd. to enforce its security interest on the account that secured creditor is not a part of Committee of creditors, is not valid.

Question 4:
Mr. SP booked office space with Elegant Construction Limited. At the time of booking Rs. 36 lakhs was paid. Remaining amount of Rs. 10 lakhs was paid at the time of taking delivery. He entered into a Memorandum of Understanding (MoU) with the company having various terms and conditions of the sale/allotment. According to the MoU, Elegant Construction Limited was required to build and deliver the possession of the unit within 2 years from the date of execution of the MoU. It also stipulated payment of an assured return of Rs. 82,000 per month (subject to TDS u/s 194A of IT Act, 1961) till possession of the unit was delivered to Mr. SP. Elegant Construction Limited failed to pay the assured return. Thereafter, Mr. SP filed an application for initiating insolvency resolution process. Decide about the validity of the said application in view of the provisions of Insolvency and Bankruptcy Code, 2016 as regards the definition of a "Financial Creditor" under Section 5 (7) read with Section 5 (8) of the Code.

[Nov 2018 - Old]

Answer:
Relevant provision
Financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7) of the IBC]

Financial Debt means a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The financial debt inter-alia, includes any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing [Section 5(8) of the IBC]

As per the given facts, Mr. SP booked office space with Elegant Construction Limited. He entered into MoU with the condition stating to build and deliver the possession of the unit within 2 years from the date of execution of MoU. MoU also stipulated payment of an assured return of Rs. 82,000 per month till possession of the unit was delivered. Elegant Construction Limited failed to pay the assured sum. Mr. SP filed an application for initiating insolvency resolution process against the Elegant Construction Limited.
In the light of the stated provisions in the given circumstances, assured returns are regular payment and qualify as financial debt. As to the promise to pay the assured return of Rs. 19, 68,000 (i.e. 82,000 x 24 months) by Elegant Construction Limited to Mr. SP makes the Mr. SP (applicant) as Financial creditor.

Initiation of corporate insolvency resolution process by financial creditor

As per section 7 of the Code, a financial creditor by itself, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. A default includes a default in respect of a financial debt owed to the applicant financial creditor of the corporate debtor.

Hence, an application for initiating corporate insolvency resolution process against Elegant Construction Limited is valid.

Question 5:

Best Bank, a financial creditor sent a demand notice for a claim of Rs.10.2 crores on XYZ Limited, a corporate debtor on 6th February, 2018. When the petition was filed before NCLT under Insolvency and Bankruptcy Code, 2016, Best Bank claimed that the XYZ Limited has defaulted Rs. 29.8 crores instead of original amount of Rs.10.2 crores. NCLT appointed an interim resolution professional. XYZ Limited made an appeal with NCLAT demanding that the Best Bank's claim is not maintainable as there is a difference in the amount mentioned in the demand notice and the application filed under the Code. Decide whether the contention of XYZ Limited is correct. Also, state who can file Corporate Insolvency Resolution process under the Code.

[Nov 2018 -Old]

Answer:

As per section 7 of the Insolvency and Bankruptcy Code, 2016, a financial creditor either by itself or jointly with other financial creditors, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred. The financial creditor shall, along with the application furnish-

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.

Here, in the given instance, Best Bank (Financial creditor) filed a petition against the XYZ Ltd. (Corporate debtor) for the default of Rs. 29.8 crore instead the earlier demanded amount of Rs. 10.2 Crore.

As per the above provision, NCLT (Adjudicating Authority) shall, 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. When NCLT is satisfied, it admits the submitted application for initiation of corporate insolvency process. Therefore, contention of XYZ Ltd. as to filing of appeal before NCLAT demanding that the best bank's claim is not maintainable due to difference in the claim amount, is incorrect.

Who can file insolvency resolution process: As per section 6 of the Code, where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process in respect of such corporate debtor.

Author's Note:
The Author believe that the answer of ICAI needs to be revised. This case law is based on a practical case study - "Starlog Enterprise Ltd VS ICICI Bank" wherein ICICI had sent a demand notice for Rs. 10 crores but then filed application to AA claiming default of Rs. 29 crores.

This application for initiation of CIRP was admitted by NCLT but however an appeal was filed with NCLAT by Starlog. NCLAT held in favor of Starlog stating that:
Showing an incorrect claim, moving the application in a hasty manner and obtaining an ex-parte order from the 'adjudicating authority' that admitted such an incorrect claim, the Financial Creditor cannot disprove its mala fide intention by stating that the claim submitted is the correct amount.

Hence, it would be pertinent to quote this case law if this question repeats in the exam.

Question 6:
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.

[Nov 2017]

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 where inter-alia includes certificate from Financial institution, if available. The words "if available" clearly indicates that these documents will not stops a person from making application under Section 9.

Being a foreign trade creditor, Standard International Ltd was not having any office or bank account in India and hence, it cannot furnish certificate from financial institution.

However, the petition under Section 9 of the Code is permissible although it doesn't have a certificate from financial institution.

Question 7:

Rose Garden Ltd. was incurring continuous losses and its financial position went bad to worse. Black Stone (Private) Ltd., a trade creditor, issued notice under Section 271 of the Companies Act, 2013 for winding up of Rose Garden Ltd. on the ground that Rose Garden Ltd. was unable to pay its debts. After some time, Black Stone (Private) Ltd. Being an operational creditor filed a petition before the Adjudicating Authority to initiate insolvency process under the Insolvency and Bankruptcy Code, 2016. Demand Notice and copy of invoice were not served to Rose Garden. Ltd. since a notice was earlier issued for winding up. All other formalities were complied with. The Adjudicating Authority initiated Insolvency Resolution Process by admitting the application and appointed Resolution Professional. After complying required formalities, the Adjudicating Authority issued orders for moratorium and other relief within the stipulated time. Being aggrieved by the order of Adjudicating Authority, Rose Garden Ltd. (Corporate debtor) filed an appeal before NCLAT under the Insolvency and Bankruptcy Code, 2016. Determine will the Company succeed in its appeal?

[May 2018 -New]

Answer:

As per Section 8 of the Insolvency and Bankruptcy Code, 2016, once a default has occurred, the operational creditor has to deliver a demand notice or a copy of invoice demanding payment of debt in default to the corporate debtor.

Since in the given case, demand notice and copy of invoice was not served to the Rose Garden Ltd., so the requirement for the initiation of the corporate insolvency resolution process by operational creditor under section 9 of the Code, was not in compliance. So, the admission of application in line with the compliance of other required formality as to issue of order of moratorium and other relief, given by the NCLT was against the law.

As Rose Garden Ltd. (Corporate debtor) was aggrieved by the Order of the Adjudicating Authority on the non-compliance of requirement of Section 8, Rose Garden Ltd. will succeed in its appeal filed before the National Company Law Appellate Tribunal. [*Prideco Commercial Projects Pvt Ltd. vs Era Infra Engineering*]

Question 8:

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 Rs. 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 thereunder

Dheeraj Constructions Private Limited on receipt of the demand notice informed 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 section 9 (1) read with section 8(2) (a) of the Insolvency and Bankruptcy Code, 2016 be permitted?

[May 2018 - Old]

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*" 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 9:
Venus Limited owes a sum of Rs. 12, 00,000 to Mr. Khan, who assigns this debt to his two creditor's viz., Mr. Joseph to an extent of Rs. 4, 00,000 and Mr. Pratap to an extent of Rs. 8, 00,000. Mr. Pratap makes a demand for his money from the company by giving a legal notice. The company could not meet Mr. Pratap's demand or otherwise satisfy him till the expiry of four weeks from the date of notice. Mr. Pratap, therefore, moves to NCLT with an application for initiation of insolvency of the company. Referring to the provisions of the Insolvency and Bankruptcy Code 2016, decide whether Mr. Pratap's application can be accepted by the NCLT.

[Nov 2019 - Old]

Answer:

As per Section 7 of the Insolvency and Bankruptcy Code, 2016, a financial creditor either by itself or jointly with other financial creditors, or any other person on behalf of the financial creditor, as may be notified by the Central Government, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

The term financial creditor as defined under Section 5(7) of the Code, means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.

In the given instance, Venus Limited owes a sum of Rs. 12, 00,000 to Mr. Khan. He assigns this debt to his two creditors Mr. Joseph and Mr. Pratap of sum of Rs. 4, 00,000 & Rs. 8, 00,000 respectively. Mr. Pratap demands for his money from the Venus Ltd. by giving a legal notice. The Company failed to satisfy Mr. Pratap's demand till the expiry of four weeks from the date of notice. Mr. Pratap moved to NCLT and filed an application for initiation of corporate insolvency and Resolution Process against Venus Ltd.

As per the above provision and in the light of the given facts, Mr. Pratap who is an assignee of financial debt will fall within the definition of Financial creditor and eligible to initiate CIRP against the company.

Accordingly, Mr. Pratap's application can be accepted by NCLT as the company fails to pay debt within stipulated time which resulted in the occurrence of the default. However, application should be supported with a copy of the assignment or transfer agreement and other relevant documents as may be required to demonstrate the assignment or transfer.

Author's Note:

Please note that the amount of default has increased to Rs. 1 crore w.e.f., April 2020. Prior to that, the amount of default was Rs. 1 lakh to trigger IBC proceedings. The author has intentionally not revised this question as the intention was to understand other provisions and not the provision relating to Section

Question 10:

In view of the deep recession prevailing in, the market for the past three years, M/s. Infra Limited (Corporate Debtor), which was facing the brunt of financial crisis, could not pay salaries and wages to its workmen and employees for the past 6 months. The workmen and the employees, who are the members of a recognized Trade Union "Infra Labor Federation", made a complaint in this regard. Thereafter, the Trade Union approached and urged the Management of the Company in person and through representations in writing to settle the arrears of wages and salaries due to its members. The Corporate Debtor neither disputed nor took any actions to settle the amount. Under the circumstances, Infra Labor Federation filed an application before the Adjudicating Authority i.e. with the National Company Law Tribunal for initiating a Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016.

In the light of the provisions of the Insolvency and Bankruptcy Code, 2016, examine the following:

(i) Validity of the Application.

(ii) What will be the "Initiation date" for initiating the Corporate Insolvency Resolution Process?

[Nov 2019 - New]

Answer:

Workmen & Employees as Operational Creditor:

As per section 5(20) of the Code, "Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"

Whereas Operational Debt as per Section 5 (21) of the Code means a claim in respect of the provision of goods or services including employment or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."

Accordingly, if there is any dues arising in the course of employment, then that will be considered as an operational debt and the person to whom such operational debt is owed shall be treated as the Operational Creditor. Therefore, workmen & employees shall be treated as Operational Creditor of the Corporate Debtor.

The term "person" as defined under section 3(23) of the IBC, 2016 includes "any other entity established under any statute". A trade union, when registered under the Trade Union Act, 1926 would come within the purview of any other entity "established" under the statute.

Filing of an application by Operational Creditor:

Application can be filed by the Operational Creditor in the NCLT if there is a debt, in compliance with sections 8 & 9 of the Code.

Prior to filling the application before NCLT, an employee has to comply with the procedure of sending the demand notice to the Corporate Debtor. If the Corporate Debtor has not paid the amount of debt even after sending the demand notice, neither intimated to the operational creditor about the existence of any regarding the dispute pertaining to the due debts.

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 date of filing of the application before the NCLT will be the initiation date for initiating the Corporate Insolvency Resolution Process (Section 5(11)).

Accordingly, in the light of the given provisions, following are the answers:

i. Application filed by trade union, Infra Labor Federation on behalf of the workmen & employees in the said instance is valid as operational debt had been being legally assigned to the trade union in terms of section 5(20) of the Code and is included in the definition in section 3(23) of IBC, 2016.

ii. Trade union, Infra Labor Federation may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process after expiry of 10 days from the date of serving demand notice to the M/s Infra Ltd and the date of filing of the application before the NCLT will be the date of initiation.

Author's note: Although the answer of ICAI is correct but the explanation is incomplete.

This question is based on "Jk Jute Mill Mazdoor Morcha vs Juggilal Kamlapat Jute Mills" in which similar events had happened. In this case, the issue was whether a trade union could be said to be an operational creditor for the purpose of IBC when the amount infact is due to the employees and not the trade union?

The appellant trade union had issued a demand notice under section 8 of the IBC on behalf of a large number of workers for their outstanding dues. The NCLT dismissed the petition filed by the trade union stating that a trade union is not an operational creditor as no services are rendered by the trade union to the corporate debtor. The NCLAT upheld the same stating that each worker may file an individual application before the NCLT.

However, Supreme Court held that a registered trade union which is formed for the purpose of regulating the relations between workmen and their employer can maintain a petition as an operational creditor on behalf of its members. Reason being - One of the forms of IBC clearly states - "*Where workmen/employees are operational creditors, the application may be made either in an individual capacity or in a joint capacity by one of them who is duly authorised for the purpose*"

Question 11:

Rose Garden Limited filed its financial statements for the year ending 31st March, 2019 with Registrar of Companies, Chennai which disclosed that the liabilities amounted to Rs. 3.87 crores as against the assets of Rs. 1.37 crores. On the basis of the scrutiny of the financial statements, the Registrar filed an application for Corporate Insolvency Resolution Process under Insolvency & Bankruptcy Code, 2016 against the company that the company is unable to pay its debts on the ground that the value of liabilities far exceeded the value of assets. Examine whether the company has any case to defend against the application filed by the Registrar.

[May 2019 - Old]

Answer:

As per the given facts, Registrar of Company, on the basis of the filed financial statements by the Rose Garden Ltd. came to know of the liabilities of the Company amounted to Rs. 3.87 crore as against the amount of assets of Rs. 1.37 crore. On further scrutiny of the Financial statements, the Registrar filed an application for initiation of Corporate Insolvency Resolution Process (CIRP) against Rose Garden Limited stating the Company is unable to pay its debts on the ground that the value of liabilities far exceeded the value of assets.

As per the Insolvency and Bankruptcy Code, 2016, the process of insolvency is triggered by occurrence of default. Default occurs when a whole or any part of the amount of debt has become due and payable and is not paid by the debtor. The provisions relating to the insolvency and liquidation of corporate debtors shall be applicable only when default of amount, one lakh rupees or such higher amount prescribed by Central Government has been resulted. [Section 4]

Accordingly, in the given situation, there seems to be no occurrence of default against any creditor. It is just that Registrar on the scrutiny of the financial statement of Rose Garden Ltd. was disclosed of the facts of the liabilities of the company exceeding of the value of the assets.

Filing of application before NCLT:

Further, the corporate insolvency resolution process may be initiated against any defaulting corporate debtor by making an application for corporate insolvency resolution, by:-

(a) Financial creditor
(b) Operational creditor
(c) Corporate debtor

So, Registrar of Company is not eligible for filing of application of initiation of corporate insolvency resolution process in the given instance as he is neither a financial nor an operational creditor when the company is regular in filing documents.

Therefore, Rose Garden Ltd. on the basis of said grounds can defend against the application filed by the Registrar.

Question 12:

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.

[Nov 2017]

Answer:

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 Section 12A of the IBC, 2016, The Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

In the given case, Nature India Limited can withdraw application by following the above procedure.

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 a default has occurred and, the application is complete and no disciplinary proceedings pending against the proposed interim resolution professional, it may admit the application.

Where the Adjudicating Authority is satisfied that default has not occurred or the application is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it shall reject the application. However, in case where the application is incomplete, the 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 13:

You are appointed as Interim Resolution Professional in XYZ Company Ltd. under the Insolvency and Bankruptcy Code, 2016. State the time limit to make Public Announcement? Also state the protocol for issuance of public notice. Who shall bear the expenses of public announcement?

[May 2018 - New]

Answer:

(1) Time Limit for making Public Announcement

Interim Resolution Professional shall make the Public Announcement immediately after his appointment. "Immediately" here means not more than three days from the date of appointment of the Interim Resolution Professional. Hence, the time limit to make Public Announcement is within 3 days from the date of appointment of the Interim Resolution Professional.

(2) Protocol for issuance of Public Notice

As per Section 15 of the Insolvency and Bankruptcy Code,2016, public announcement shall include the following:-

a. Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
b. Name of the authority with which the corporate debtor is incorporated or registered.
c. Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
d. Penalties for false or misleading Claims.
e. The last date for the submission of the claims.
f. The date on which the Corporate Insolvency Resolution Process ends.

(3) Expenses of Public Announcement

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

Question 14:

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.

[May 2018 - Old]

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.

Moreover, Section 14(3) clearly states that provisions of Section 14(1) shall not apply to, inter-alia, a surety in a contract of guarantee to a corporate debtor.

In view of this, the Order of NCLT under Section 14(1) (c) of IBC 2016 is not violative. The attachment of movable and immovable asset of Guarantor (promotor) despite the moratorium (on Corporate Debtor) is valid.

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 15: [*Out of syllabus concept*]
Continental Rubber Limited is a supplier of raw materials to Smooth Latex Limited. It filed a petition before the NCLT for the recovery of Rs. 10, 00,000 from Smooth Latex Limited. Smooth Latex Limited, the Corporate Debtor, has other financial creditors to the extent of Rs. 1, 50, 00,000 and they also joined together and filed petitions to NCLT. The Corporate Debtor has a total of 40 financial creditors and 2 operational creditors. Further, all the financial creditors are having equal voting rights/shares. Notice was issued on 1st August, 2018 for the conduct of the first meeting to be held on 5th August, 2018 at a common venue. The meeting was attended by all 40 financial creditors and 2 operational creditors. A resolution was passed to appoint Mr. TK as a Resolution Professional. 25 of the financial creditors voted in favor of the resolution and 10 voted against the resolution and 5 financial creditors and 2 operational creditors abstained from voting. Decide whether the resolution passed is valid? In the light of the provisions of Insolvency and Bankruptcy Code, 2016 read with rules framed thereunder, explain the requirements of issue of notice and quorum for the conduct of the meeting.

[May 2019 -New]

Answer:
According to section 22 of the Insolvency and Bankruptcy Code, 2016,
First Meeting of Creditors

- The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- The committee of creditors in the first meeting may by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Notice of the Meeting
The resolution professional shall give notice of each meeting of the committee of creditors to:-

a. Members of Committee of creditors, including the authorised representatives referred to in sub-sections (6) and (6A) of section 21 and sub-section (5);
b. Members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
c. Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

Quorum for the Meeting

- A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least 33% of the voting rights are present either in person or by video/audio means.
- If the requisite quorum for committee of creditors is not fulfilled the meeting cannot be held and the meeting shall automatically stand adjourned at the same time and place on the next day.
- The adjourned meeting shall quorate with the members of the committee attending the meeting.

As per the facts of the question and the provisions of law:

1. The first meeting of committee of creditors was validly held within three days of the constitution of the committee of creditors.
2. The requisite quorum was present in the meeting as all 40 financial creditors attended the meeting.
3. The Act requires that not less 66% of the financial creditors shall resolve to appoint resolution professional. However, in the given case 71.4% [(25/35)* 100] voted in favor of Mr. TK. Hence, the said appointment is valid.

Question 16:

XY Ltd. filed a petition under Insolvency and Bankruptcy Code, 2016 with NCLT against DF Ltd. (Corporate Debtor) and the petition was admitted. There were only three financial creditors including XY Ltd. During the Corporate Insolvency Resolution process, the Corporate Debtor settled the claims of all the 3 financial creditors. Whether such settlement agreement could be termed as a valid resolution plan? Also discuss whether a financial creditor in respect of whom there is no default can file an application before Adjudicating Authority (NCLT) for initiating corporate insolvency resolution process. Discuss.

[Nov 2018 -New]

Answer:

As per section 7 of the Insolvency and Bankruptcy Code, 2016, a financial creditor either by itself or jointly with other financial creditors, may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.

As per the facts given, the Adjudicating Authority admitted the petition. During the Corporate Insolvency Resolution Process (CIRP), the DF (Corporate debtor) settled the claims of all the 3 financial creditors.

However, as per the Code, during the insolvency resolution process, the IRP/RP was appointed to collate the claims in a collective mechanism to propose a time bound solution to resolve the situation of insolvency and prepare the resolution plan as agreed to by the debtors and creditors and submit the same to Committee of Creditors for its approval.
Since in the give case, debtor itself settled the claims without following the said procedure. Therefore, such a settlement agreement cannot be termed as valid resolution plan.

As per requirement of the Code, the process of insolvency is triggered by occurrence of default. Default means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be. [Section 3(12)].

As it doesn't specifically mention that only the financial creditor on whom the default is so made can file an application. So, a financial creditor in respect of whom there is no default, can also file an application for initiating insolvency resolution process.

Question 17:

The following particulars relate to M/s. Star House (P) Limited which has gone into Corporate Insolvency Resolution Process (CIRP):

S. No.	Particulars	Amount in Rupees
1.	Amount realized from the sale of liquidation of Assets	7,00,000
2.	Secured Creditors who has relinquished the security	2,50,000
3.	Unsecured Financial Creditors.	2,00,000
4.	Income Tax Payable within a period of two years preceding the liquidation commencement date.	25,000

5.	Cess Payable to State Government within a period of one year preceding the liquidation commencement date.	10,000
6.	Fees payable to resolution professional.	37,500
7.	Expenses incurred by the resolution professional in running the business of M/s. Star House (P) Limited on Going concern.	17,500
8.	Workmen salary payable for a period of thirty months preceding the liquidation commencement date. The Workmen salary is equal per month.	1,50,000
9.	Equity Shareholders.	5,00,000

State the priority order in which the liquidator shall distribute the proceeds under the Insolvency & Bankruptcy Code, 2016.

[May 2019 - New]

Answer:

The priority order in which the liquidator shall distribute the proceeds will be as under:

Particulars	Amount (in Rs.)	
Amount realised from the sale of liquidation of assets		7,00,000
Less: (i) Fees payable to resolution professional	37,500	
(ii) Expenses incurred by the resolution professional in running the business of M/s Star House (P) Ltd. ongoing concern	17,500	(55,000)
Balance available		6,45,000
Less: (i) Secured creditors who has relinquished the security	2,50,000	
(ii) Workmen salary payable for a period of 24 months preceding the liquidation commencement date [1,50,000*(24/30)]	1,20,000	(3,70,000)
Balance available		2,75,000
Less: Unsecured Financial Creditor Balance available	2,00,000	(2,00,000)
Less: (i) Income tax payable	25,000	75,000
(ii) Cess payable to State Government Balance available	10,000	(35,000)
Less: Balance Workmen salary payable (apart for a period of 24 months preceding the liquidation commencement date) [1,50,000 - 1,20,000]	30,000	40,000 (30,000)
Balance Available for equity shareholders		**10,000**

Question 18:

As on March 31, 2018, the audited balance sheet of M/s. Sharp Industries Limited, revealed total assets of Rs.1 crore. M/s. Sharp Industries Limited, in the capacity of a Corporate Debtor, filed an application on July 1, 2018 with the Adjudicating Authority for initiating a fast track corporate insolvency resolution process. Explain under the provisions of Insolvency and Bankruptcy Code, 2016 the following:

i. Whether the application made by M/s. Sharp Industries Ltd. for initiating a fast track corporate insolvency resolution process is admissible?

ii. The time period including the extension of time period, if any, within which the fast track corporate insolvency resolution process shall be completed?

[Nov 2018 - New]

Answer:

Application by corporate debtor:

An application for fast track insolvency resolution can be made by any corporate debtor falling under any of the below mentioned category:

a. a corporate debtor with assets and income below a level as may be notified by the Central Government; or
b. a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or
c. Such other category of corporate persons as may be notified by the Central Government.

Government has notified the following companies against whom application can be made for fast track corporate insolvency resolution process:

- Small company as per Sec 2(85) of Companies Act, 2013
- A startup (other than partnership firm) as defined by the Ministry
- Unlisted co. with total assets, as per FS of immediately preceding FY, not exceeding Rs. 1 crores

Time period for completion of fast track corporate insolvency resolution process

The fast track corporate insolvency resolution process shall be completed within a period of 90 days from the insolvency commencement date.

Extension: The aggrieved may make an application to the Adjudicating Authority if it is satisfied that the fast track corporate insolvency resolution process cannot be completed within a period of 90 days, it may, by order; extend the duration of such process to a further period which shall not be exceeding 45 days.

In light of the provisions above and the fact of the question:

i. The application made by M/s Sharp Industries for initiating fast track corporate insolvency resolution process is admissible as the total asset does not exceed Rs. 1 crore.
ii. The fast track corporate insolvency resolution process shall be completed within 135 days (90+45) from the insolvency commencement date.

Questions 19:

MF Capital Private Limited accepted inter-corporate deposits from JS financial Services Private Limited. MF Capital Private Limited is a Non-banking financial company which obtained a certificate from the Reserve Bank of India for carrying on the business of providing financial services. As there was a default in repayment of deposits, JS Financial Services Private Limited filed' an application with the NCLT under Section 7 of the Insolvency and Bankruptcy Code, 2016. Examine the validity of the Application.

[May 2019 - Old]

Answers:

As per Section 2 of the Insolvency and Bankruptcy Code, 2016, the provisions of the Code shall apply for insolvency, liquidation, voluntary liquidation or bankruptcy of the following entities:-

a. Any Company incorporated under the Companies Act, 2013 or under any previous law.
b. Any other Company governed by any Special Act for the time being in force, except in so far as the said provision is inconsistent with the provisions of such Special Act.
c. Any Limited Liability Partnership under the LLP Act, 2008.
d. Any other body incorporated under any law for the time being in force, as the Central Government may by notification specify in this behalf.
e. personal guarantors to corporate debtors;
f. partnership firms and proprietorship firms; and

g. Individuals, other than persons referred to in clause (e) Further, Preamble to the Insolvency & Bankruptcy Code, implicit that the purpose of this Act is to consolidate and amend the laws relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals.

Section 3(7) of Insolvency & Bankruptcy Code, 2016 states that "Corporate Person" shall not include any financial service provider such as Banks, Financial Institutions, Insurance Company, Asset Reconstruction Company, Mutual Funds, Collective Investment Schemes or Pension Funds.

As per decision in the case of Jindal Saxena Financial Services Vs Mayfair Capital (2018), NBFC which has obtained a certificate from the Reserve Bank of India will be considered as a financial service provider.

Further, In exercise of the powers conferred by section 227 of the Insolvency and Bankruptcy Code, 2016, the Central Government in consultation with the Reserve Bank of India has notified that Non-banking finance companies (which include housing finance companies) with asset size of Rs.500 crore or more, as per last audited balance sheet shall be undertaken in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016.

In view of above, filing of an application with NCLT under Section 7 of the IBC, 2016 by JS Financial Services Private Limited against MF Capital Private Limited is valid.

Question 20:

The Committee of Creditors of M/s XYZ Limited proposes to appoint Mr. Ajit, an Insolvency Professional, as Insolvency Resolution Professional in the matter of corporate insolvency process of M/s XYZ Limited. Mr. Ajit was a promoter of M/s ABC Limited which is a holding company of M/s XYZ Limited. Examine and decide whether Mr. Ajit is eligible for appointment as an Insolvency Resolution Professional under the Provisions of Insolvency and Bankruptcy Code, 2016.

[Nov 2019]

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 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.

In the given instance, Committee of Creditors of M/s XYZ Ltd. proposed to appoint Mr. Ajit, as IRP in the matter of corporate insolvency resolution process of M/s XYZ Ltd. However, Mr. Ajit was a promoter of M/s ABC Ltd. which is a holding company of M/s XYZ Ltd.

Accordingly, Mr. Ajit, is a related party of the corporate debtor. Therefore, Mr. Ajit is not eligible for appointment as an insolvency resolution professional in terms of the said legal provisions of the Code.

Question 21:

As at 31st March, 2020, XYZ Limited had the following debts:

Creditors	Nature of Debt	Amt (INR Lakhs)
A	Financial Debt	200
B	Financial Debt	250
C	Financial Debt (Related Party) - Not Regulated by the Financial Sector Regulator.	150
D	Operational Debt	150
E	Operational Debt	250
	Total	1000

Due to impact of heavy losses and liquidity crunch, XYZ Limited could not pay the above debts. Since the debts were overdue for a long time, creditor A filed an application with the Adjudicating Authority (NCLT) to initiate a Corporate Insolvency Resolution Process against XYZ Limited and the application was accepted. Stating the provisions of the Insolvency and Bankruptcy Code, 2016 answer the following with reference to the above financial data:

(i) Who will all form part of the Committee of Creditors ('CoC') from the above list of Creditors?

(ii) Whether the above Operational Creditors have a right to vote in CoC Meeting?

(iii) What is the compulsory agenda to be discussed in the first meeting of CoC?

(iv) What shall be the quorum of the CoC meeting if it is conducted through video conferencing?

[Jan 2021 - New]

Answer:

i. As per section 21 of the Insolvency and Bankruptcy Code, 2016, the Committee of creditors shall comprise of all financial creditors of a corporate debtor. The Resolution Professional shall identify the financial creditors and constitutes a creditors committee. A related party of the corporate debtor cannot form part of the committee of creditors. In the given case, A & B will form CoC.

ii. The directors, partners and operational creditor or representative of operational creditors do not have right to vote in the meeting of Committee of Creditors, however, they may attend the meetings of Committee of Creditors. D & E, operational creditors will not have a right to vote in CoC meeting.

iii. As per section 22 of the Insolvency and Bankruptcy Code, 2016, Committee of Creditors in its first Meeting by majority (not less than 66% of voting shares) appoint Interim Resolution Professional or any other Insolvency Professional to act as Resolution Professional.

iv. Section 21 of the Insolvency and Bankruptcy Code, 2016 provides of quorum for the meeting of committee of creditors. A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means.

Question 22:

Omega Limited is undergoing a Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016 (IBC Code, 2016). Mr. Ravi was appointed as the Resolution Professional. On perusal of the books of accounts of Omega Limited, Mr. Ravi noted a few undervalued transactions had taken place during a period of six months preceding the insolvency commencement date. However, despite having sufficient information, he did not report such transactions to the Adjudicating Authority. Now, the members of Corporate Debtors propose to make an application to the Adjudicating Authority to report the undervalued transactions. Referring to the provisions of IBC Code, 2016, answer the following :-

(i) Whether the members of Corporate Debtors have a legal right to do so?
(ii) What orders the Adjudicating Authority can pass in such a situation?

[Jan 2021 -New]

Answer:

As per section 47 of the Insolvency and Bankruptcy Code, 2016 where an undervalued transaction has taken place with any person within the period of one year preceding the insolvency commencement date under section 46 of the Code, and the liquidator or the resolution professional has not reported it to the Adjudicating Authority, a creditor, member or a partner of a corporate debtor, may make an application to the Adjudicating Authority to declare such transactions void and reverse their effect.

i. Yes, in terms of above stated provision, members of corporate debtors have a legal right to file an application to the Adjudicating Authority to report the undervalued transactions.
ii. The Adjudicating Authority, after examination of the application is satisfied that—
   a. undervalued transactions had occurred; and
   b. Liquidator or the resolution professional, after having sufficient information or opportunity to avail information of such transactions did not report such transaction to the Adjudicating Authority.

   Adjudicating Authority shall pass an order—
   a. Restoring the position as it existed before such transactions and reversing the effects.
   b. Requiring the Board to initiate disciplinary proceedings against the liquidator or the resolution professional as the case may be.

Question 23:

Oil & Gas Energy Limited (Corporate Debtor) borrowed a loan of Rs. 100 crore for its expansion project from State Bank of India (SBI), Bank of India (BOI) and Punjab National Bank (PNB) under the consortium arrangement in the proportion of 50%, 30% and 20% respectively. The corporate insolvency process has begun by order of the Tribunal on an application made by the Financial Creditor. The Interim Insolvency Resolution Professional (IIRP) constituted a Committee of Creditors (CoC) which noted that total financial debt owed by the Corporate Debtor is Rs. 500 crore in aggregate. You are requested to state which of the members of the consortium shall be the member of CoC and what shall be their voting share in the CoC as per the provisions of the Insolvency and Bankruptcy Code, 2016.

[Jan 2021 -Old]

OR

OLAF Limited (Corporate Debtor) borrowed a loan of Rs. 250 crore for expansion of his business under the consortium arrangement in the proportion of 50%, 30% and 20% from A, B & C Banks respectively. The corporate insolvency resolution process has begun by order of the Tribunal on an application made by the Financial Creditor. The Interim Insolvency Resolution Professional, constituted a Committee of Creditors (CoC) which noted that total financial debt owed by the Corporate Debtor is Rs. 500 crore in aggregate. Examine who shall be the member of CoC and what shall be their voting share in the CoC as per the provisions of the Insolvency and Bankruptcy Code, 2016.

[MTP March 2021 -New]

Answer:

Members of Committee of Creditors (CoC)

In case of Joint Financial Creditors: As per the provisions of the Insolvency and Bankruptcy Code, 2016, where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the Committee of Creditors (CoC) and their voting share shall be determined on the basis of the financial debts owed to them.

Voting share shall be based on the proportion of financial debt owed to such financial creditor in relation to the financial debt owed by the Corporate debtor. (Section 5(28)).

On the basis of above provision, SBI, BOI and PNB shall be the members of CoC and their voting share in the CoC shall be in proportion of their debt (i.e., in proportion of 50%, 30% and 20% respectively) to the total debt of the Corporate Debtor (loan amount of Rs. 100 crore under consortium arrangement).

Voting Share in the CoC

The Interim Insolvency Resolutional Professional (IIRP) noted total financial debt (Rs. 500 cr.) owed by the Oil & Gas Energy Ltd. Therefore, the voting share of SBI, BOI and PNB in the given case shall be as under:
SBI = (50% X Rs. 100 Crore) / Rs. 500 Crore = 10%; BOI = (30% X Rs. 100 Crore) / Rs. 500 Crore = 6%; PNB= (20% X Rs. 100 Crore) / Rs. 500 Crore = 4%

Question 24:

Jewar Ltd., a diamond manufacturing company, is undergoing Corporate Insolvency Resolution Process (CIRP). The CIRP had initiated on 1st January 2020. Mr. Shubh was acting as the Interim Resolution Professional who was later appointed as Resolution Professional by the Committee of Creditor. Mr. Shubh has been working hard since day 1 to get a resolution plan approved before the last day of the CIRP. However, due to external factors, as on 31st May, 2020, he realized that he is unable to decide as to which resolution plan can be taken to the committee of creditors for approval and also that he will need another 3 months to get a resolution plan approved. You are his partner in an Insolvency Professional Entity. Advise as to:

1. The factors that need to be considered before taking the resolution plan to the committee of creditors
2. Whether Mr. Shubh can seek an extension for completion of the CIRP?

[RTP Nov 2021 -New]

Answer:

1. Mr. Shubh, the resolution profession will have to consider the following factors while examining the resolution plan before taking it to the Committee of Creditors for approval:
   a. Whether the resolution plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor
   b. Whether the resolution plan provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than higher of:
      i. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
      ii. the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,
   c. Whether the resolution plan provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
   d. Whether the resolution plan provides for the implementation and supervision of the resolution plan
   e. Whether the resolution plan contravene any of the provisions of the law for the time being in force
   f. Whether the resolution plan confirms to such other requirements as may be specified by the Board.

2. Relevant Provision of the Insolvency and Bankruptcy Code for extension of period for completion of CIRP
   As per Section 12, the corporate insolvency resolution process shall be completed within a period of 180 days from the date of admission of the application to initiate such process.

The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond 180 days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares.

On receipt of the application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within 180 days, it may by order extend the duration of such process beyond 180 days by such further period as it thinks fit, but not exceeding 90 days.

Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once

Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

In the given case, Mr. Shubh can seek an extension of maximum 90 days by making an application of the National Company Law Tribunal i.e., till 29th August, 2020.

Author's Note:
The date of 29th August, 2020 in ICAI's answer seems to be incorrect. 270 days from 1st January would be 27th September 2020. If you agree, consider this a typo error from ICAI and move on.

Question 25:
When will the provisions of insolvency and liquidation be applicable to a corporate person?

[ICAI Module]

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 26:
What is the Insolvency Resolution Process for financial creditors?

[ICAI Module]

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 are no disciplinary proceedings pending against the proposed resolution professional, it may admit such application made by the financial creditor.

If the Adjudicating Authority is satisfied that default has not occurred (reasons to be recorded in writing) or the application is incomplete or any disciplinary proceeding is pending against the resolution professional, it shall reject the application. However, the applicant may rectify the defect within seven days of receipt of notice of rejection from the Adjudicating Authority.

Question 27:

What is the Insolvency Resolution Process for operational creditors?

[ICAI Module]

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 28:

What are the eligibility criteria for appointment of an Insolvency Professional as a Resolution Professional for a corporate insolvency resolution process?

[ICAI Module]

Answer:

As per Regulation 3 of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 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 under Section 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 secretarial auditors 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 5% or more of the gross turnover of such firm in the last three financial years.

Question 29:

What is the procedure of Insolvency Resolution Process for a Corporate Applicant?

[ICAI Module]

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 shall be allowed to rectify the defect within seven days of receipt of notice of such rejection.

Question 30:

Is there any time limit for completion of the Insolvency Resolution Process?

[ICAI Module]

Answer:

Section 12 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 66% of voting shares, after consideration provide one extension which shall not extend more than 90 days.

Second proviso to Section 12 (3) states that the corporate insolvency resolution process (CIRP) shall compulsorily be completed within 330 days from the insolvency commencement date including any extension of the time period of corporate insolvency resolution process granted under Section 12 and also the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

Question 31:

What is the effect of order of moratorium?

[ICAI Module]

Answer:

Section 14 contains the provisions relating to moratorium. 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.
e.

Explanation to Section 14 (1)clarifies that notwithstanding anything contained in any other law for the time being in force, a license, permit, registration, quota, concession, clearance or a similar grant or right given by the Central Government, State Government, local authority, sectoral regulator or any other authority constituted under any other law for the time being in force, shall not be suspended or terminated on the grounds of insolvency, subject to the condition that there is no default in payment of current dues arising for the use or continuation of the license or a similar grant or right during moratorium period.

Question 32:

What is a Resolution plan?

[ICAI Module]

Answer:

According to Section 5 (26), a 'resolution plan' means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II of the Code. Explanation to Section 5 (26) clarifies that a resolution plan may include provisions for the restructuring of the corporate debtor, including by way of merger, amalgamation and demerger.

The aim of the Code is to revive the corporate debtor and therefore, resolution plan should be such that it is capable of resolving the insolvency of the corporate debtor as a going concern.

As per Section 30, the resolution applicant shall prepare resolution plan on the basis of information memorandum and submit the same to the resolution professional.

Each Resolution Plan shall be examined by the resolution professional to confirm that each such plan:

(i) provides for payment of insolvency resolution costs;

(ii) provides for repayment of the debts to operational creditors;

(iii) provides for management of affairs of the company after approval of the resolution plan;

(iv) provides for implementation and supervision of the resolution plan;

(v) does not contravene provisions of the law for the time being in force; and

(vi) Conforms to such other requirement as may be specified by the Board.

The resolution plan needs to be submitted within the prescribed time as provided by Section 12. The prescribed time limit is 180 days and in case of extension it is 270 days. Further, 330 days have also been mandated which shall include any extension of the time period of corporate insolvency resolution process granted under Section 12 and also the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

In case of Fast Track Resolution, the time limit is 90 days and if extension is required, another 45 days can be granted.

The resolution professional shall submit the resolution plan to the committee of creditors for its approval which may approve the plan by a vote of not less than 66% of voting share of the financial creditors. Operational creditors have no say in approving the resolution plan.

The resolution professional shall submit the approved plan to the Adjudicating Authority.

Question 33:

When can a corporate person initiate voluntary liquidation process?

[ICAI Module]

Answer:

Section 59 of the Code empowers a corporate person to get liquidated itself voluntarily if it has not committed any default. This will pave the way for initiating 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 that:

   i. 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. 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;
   ii. A report of the valuation of the assets of the company, if any, prepared by a registered valuer.

c. After making the declaration the company shall within four weeks:
   i. Pass a special resolution at a general meeting stating that the company be liquidated voluntarily and insolvency professional be appointed to act as the liquidator.
   ii. Pass a resolution at a general meeting stating that the company be liquidated voluntarily as a result of expiry of the period of its duration (fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, if any) and appointing an insolvency professional to act as the liquidator.

Question 34:

What is the significance of the Corporate Insolvency Resolution Commencement Date?

[ICAI Module]

Answer:

The commencement date of the corporate insolvency resolution is the beginning of moratorium or a calm period till the completion of the corporate insolvency resolution process during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status.

Question 35:

Can a resolution professional act as a liquidator?

[ICAI Module]

Answer:

Yes, under section 34 (1), where the Adjudicating Authority passes an order for liquidation of the corporate debtor under section 33, the resolution professional appointed for the corporate insolvency resolution process under chapter II shall, subject to submission of a written consent by the resolution professional to the Adjudicatory Authority, may act as the liquidator for the purposes of liquidation unless replaced by the Adjudicating Authority.

Question 36:

Mr. Ram, an operational creditor filed an application for corporate insolvency resolution process. He did not propose for the appointment of an interim resolution professional in the application. State the provisions given by the Code to resolve such a scenario including the term of IRP so appointed.

[ICAI Module]

Answer:

Appointment of IRP: As per Section 16 of the Code where the application for corporate insolvency resolution process is made by an operational creditor and no proposal for an interim resolution professional is made in the said application, the Adjudicating Authority shall make a reference to the Board (IBBI) for the recommendation of an insolvency professional who may act as an interim resolution professional.

The Board (IBBI) shall recommend the name of an insolvency professional to the Adjudicating Authority against whom no disciplinary proceedings are pending, within ten days of the receipt of a reference from the Adjudicating Authority.

Period of appointment of IRP: the term of the Interim Resolution Professional shall continue from his appointment till the date of appointment of the Resolution Professional by COC in its first meeting under Section 22 of the Code.

Question 37:

Mr. J was proposed to be appointed as a resolution professional for the Corporate Insolvency Resolution Process (CIRP) initiated against BMR Ltd. Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. J is a partner. In the light of the given facts, examine whether Mr. J is eligible for appointment as Resolution Professional for the conduct of the CIRP as per the Insolvency and Bankruptcy Code, 2016?

[May 21 - New]

Answer:

As per Regulation 3 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016, an insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process against a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

Explanation- A person shall be considered independent of the corporate debtor, if he:

a. is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;
b. is not a related party of the corporate debtor; or
c. is not an employee or proprietor or a partner:
    (iii) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or
    (iv) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

As per the given facts, Mr. J was proposed to be appointed as a resolution professional for the insolvency resolution process initiated against BMR Ltd. Whereas, Mr. R, a relative of director of BMR Ltd. is a partner in the insolvency professional entity in which Mr. J is partner.

Since, Mr. R is the partner in insolvency professional entity in which Mr. J is a partner, so, Mr. J is not eligible for appointment as Resolution Professional as he is not independent of the corporate debtor.

Question 38:

Committee of creditors of XYZ Ltd. (Corporate Debtor) consists of financial creditors of Rs. 245 crore and operational creditors of Rs. 25 crore. They appointed a resolution professional Mr. P in their first meeting held on 5th September 2020. Resolution professional issued a notice for a meeting to be held on 10th November to approve a resolution plan with respect to management of affairs of company, but notice was not given to operational creditors. Meeting was conducted on 10th November and resolution plan was approved by committee of creditors by not less than 75% of financial creditors. Referring to the provisions of the Insolvency and Bankruptcy Code, 2016, examine:

(i) Whether meeting was valid as notice was not given to operational creditors?
(ii) whether resolution plan approved will be binding on all creditors and the corporate debtor?

[May 21 - New]

Answer:

i. According to section 24 of the Insolvency and Bankruptcy Code, 2016, the notice of meeting of committee of creditors, among others, shall be served on operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent of the debt.

    In the given question, since the aggregate dues of operational creditor is less than 10% of the debt i.e. [(25/270)*100], hence the meeting was valid even if the notice was not given to operational creditors.

ii. Section 24 also provides that, all the decisions of the committee of creditors shall be taken by vote of minimum 66% of the voting share of the financial creditors. Where any action is taken without seeking the approval of the committee of creditors, such action shall be void.

Section 31 provides that if the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors.

In the given question, since the resolution plan was approved by not less than 75% of financial creditors, it shall be binding on creditors and the corporate debtor (assuming that all other conditions are fulfilled).

Question 39:

SLX International Ltd., a foreign trade creditor, having its office in New York wants to file a petition under the Insolvency and Bankruptcy Code, 2016 on default of a 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 could not submit a "certificate from financial institution" as required under the Code. Examine whether the petition is admissible under the Insolvency & Bankruptcy Code, 2016?

[May 21 - New]

Answer:

As per section 9 of the Insolvency and Bankruptcy Code, 2016, after the expiry of the period of ten days from the date of delivery of the notice or invoice demanding payment under section 8(1), if the operational creditor does not receive payment from the corporate debtor or notice of the dispute under section 8(2), the operational creditor may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.

The application shall be filed by the operational creditor, besides with the other documents, a copy of the certificate from the financial institutions maintaining accounts of the operational creditor, confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available.

According to the facts, since SLX International Ltd., a foreign trade creditor, was not having any office/bank account in India and so not submitted a certificate from financial institution. In line with section 9, where financial institutions having bank accounts in India, there only, it will be required to submit the certificate confirming that there is no payment of an unpaid operational debt by the corporate debtor. Here in the given case, its not mandatory to submit the said certificate. So, petition filed by SLX International Ltd., is admissible with the furnishing of other requisite documents and in compliances with requirements of the section.

Question 40:

X Inc Ltd is a holding company of Y Infrastructure Ltd. Insolvency resolution process was initiated against the X Inc Ltd on 15th December 2020. In the meantime, another financial creditor initiated corporate insolvency resolution process against Y Infrastructure Ltd. Later X Inc Ltd filed an appeal contending that resolution process against Y Infrastructure Ltd. should not continue till corporate insolvency resolution process is decided in the case of X Inc Ltd. on the basis of initiation of moratorium. Also, the Resolution plan of X Inc Ltd. approved by CoC, was still pending before the Adjudicating authority for its approval. In the light of given situation, examine whether corporate insolvency resolution process initiated against the X Inc Ltd., can bar the corporate insolvency resolution process initiated against the Y Infrastructure Ltd.?

[RTP May 21 - New]

Answer:

In the given case, both the X Inc Ltd. and Y Infrastructure Ltd. in the eyes o f law are separate entity. Further section 14 of IBC, 2016 which deals with moratorium, no where prohibits initiation of corporate insolvency resolution process on the subsidiary company or its holding company. Further also that a separate CIRP has been initiated against another corporate debtor by another financial creditor, which is altogether separate and have no connection with the CIRP initiated against X Inc Ltd. or Y Infrastructure Ltd.

Therefore, in the given case, corporate insolvency resolution process initiated against the X Inc Ltd, which is a holding company, cannot bar the corporate insolvency resolution process initiated against the Y Infrastructure Ltd which is its subsidiary or vice versa.

Question 41:

The Adjudicating authority under the Insolvency and Bankruptcy Code, 2016, had received an application on 10th August from the Committee of Creditors of Bhisma Ltd. which proposed name of a resolution professional, Mr. Dev, to be appointed as a replacement of resolution professional, Mr. Kunal.

A written consent from Mr. Dev was obtained for his appointment in form AA of the Schedule and then the CoC of Bhisma Ltd. had made such decision of replacing Mr. Kunal by a vote of 70% of the voting shares. Actually, Mr. Kunal had sanctioned for a transaction of Bhisma Ltd. with its associate company without seeking required approval from the CoC, due to which reason, the CoC of Bhisma Ltd. was aggrieved as Mr. Kunal had exceeded his scope of authority and accordingly, such a decision of replacing him was taken.

In the context of aforesaid case-scenario, please answer to the following questions:-

(ii) Whether the application of the Committee of Creditors of Bhisma Ltd. can be maintained by the Adjudicating authority and when Mr. Dev would be considered to be appointed as the new resolution professional of Bhisma Ltd.?

(iii) Whether Mr. Kunal can be said to have exceeded his scope of authority?

[MTP - Dec 21]

Answer:

(i) As per Section 27 of the Insolvency and Bankruptcy Code, 2016, resolution professional shall be replaced in the following manner:

- If at any time during the Corporate Insolvency Resolution Process the Committee of creditors is of the opinion that the resolution professional appointed is required to be replaced, they may apply to the Adjudicating Authority for replacement of such professional.
- As per Section 27 of the Code, the committee of creditors may, at a meeting, by a vote of sixty- six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.
- The Committee of Creditors shall forward the name of the new proposed Insolvency Professional to the Adjudicating Authority, and Adjudicating Authority shall forward such name to the Board for confirmation.
- After the confirmation of the proposed insolvency resolution professional by the Board he shall be appointed in the same manner as laid down in Section 16 which deals with the Appointment of IRP.
- Where any disciplinary proceedings are pending against the proposed resolution professional, the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional.

In the given case, it is given that the CoC of Bhisma Ltd. had made the decision of replacing Mr. Kunal by a vote of 70% of the voting shares i.e. the criteria of vote of 66% of voting shares had been satisfied.

Also, a written consent from Mr. Dev was obtained for his appointment in specified form prior to the aforesaid resolution of the CoC.

Thus, the application of the Committee of Creditors of Bhisma Ltd. can be maintained by the Adjudicating authority and Mr. Dev would be considered to be appointed as the new resolution professional of Bhisma Ltd. on confirmation of the same by the Board ('IBBI').

(ii) As per Section 5(24) of the IBC, 2016, an associate company is considered as a related party of the corporate debtor.

According to section 28 of the Code, the resolution professional, during the corporate insolvency resolution process, shall not undertake any related party transaction without the prior approval of the committee of creditors by a vote of 66% of the voting shares.

In the given case, Mr. Kunal had sanctioned for a transaction of Bhisma Ltd. with its associate company i.e. with a related party, without seeking required approval from the CoC.

Thus, it can be said that Mr. Kunal had exceeded his scope of authority by not taking required approval from the CoC for undertaking a related party transaction

Question 42:

Crown Industrial Conveyors Limited had advanced a loan of Rs. 1 crore to M & Co. Private Limited whose office was functioning in a rented house property belonged to Mr. M, the Managing Director. The lending company intends to attach the property of Mr. M as liquidation asset and seeks your advice with regard to its position in a Liquidation proceeding initiated under the Insolvency and Bankruptcy Code 2016.

[MTP - Dec'21]

Answer:

According to Section 36 of the Insolvency and Bankruptcy Code, 2016 (the Code) for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor. The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

Exceptions

In terms of Section 36(4) of the Code, the assets owned by a third party which are in possession of the corporate debtor, shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. These assets include other contractual arrangements which do not stipulate transfer of title but only use of the assets.

In the given instance, Crown Industrial Conveyors Limited has advanced a loan of ` 1 crore to M & Co. Private Limited. Its (M & Co. Private Limited) office was functioning in a rented house property belonged belonging to Mr. M, the Managing Director.

On liquidation of M& Co. Private Limited (the Corporate debtor), Crown Industrial Conveyors Limited, the Financial Creditor, intends to attach the property of Mr. M as a liquidation asset.

In line with above stated exclusion, the property in which M & Co. Private Limited was operating its office on rent belonged to Mr. M i.e., third party.

Therefore, Crown Industrial Conveyors Limited, the lending Company, cannot attach the property of Mr. M as it cannot be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

Question 43:

The resolution plan of Ankush Ltd. was approved by the Adjudicating Authority under the provisions of the Insolvency and Bankruptcy Code, 2016. As a result of the implementation of the resolution plan, there was change in the entire management of Ankush Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue. Ankush Ltd. was liable for an offence committed under the provisions of the Prevention of Money Laundering Act, 2002, prior to the commencement of corporate insolvency resolution process, due to which one of its properties was liable to be attached by the Enforcement Director (ED) under the said Act. Such property has been covered under the resolution plan approved by the Adjudicating Authority. Also, one another property of Ankush Ltd. was liable to be seized under the provisions of the Foreign Contribution Regulation Act, 2010, prior to the commencement of corporate insolvency resolution process. However, such property was acquired by Lavan Ltd. through the corporate insolvency resolution process, covered in the resolution plan.

In the context of aforesaid case-scenario, enumerate whether any actions can be taken against the two aforesaid properties of Ankush Ltd., one of which has been acquired by Lavan Ltd.?

[MTP - Dec'21]

Answer:

As per the Section 32A(2) of the Insolvency and Bankruptcy Code, 2016, no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not:

i. a promoter or in the management or control of the corporate debtor or a related party o f such a person; or
ii. a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.

Explanation:- For the purposes of this sub-section, it is hereby clarified that-

a. an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
b. nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.

Here, it is given that, as a result of the resolution plan, there was change in the entire management of Ankush Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue.

Also, both the properties had been covered under the resolution plan approved by the Adjudicating Authority.
It appears from the given facts that conditions as demonstrated in section 32A(2) has been satisfied by Ankush Ltd. and thus, no action can be taken against the property of Ankush Ltd. which was liable to be attached by the Enforcement Director (ED), prior to the commencement of the corporate insolvency resolution process, for an offence committed under the provisions of the Prevention of Money Laundering Act, 2002, by it.

However, the said immunity has been not provided to such a property which has been acquired by a person through corporate insolvency resolution process. So, the property which has been acquired by Lavan Ltd. can be seized under the provisions of the Foreign Contribution Regulation Act, 2010, as there is no bar in doing so, under the provisions of the Insolvency and Bankruptcy Code, 2016.

Question 44:

Datavision Ltd. was ordered for winding up by the Tribunal. Raman, a provisional liquidator was appointed by the Tribunal amongst the panel of the insolvency professionals registered with the Insolvency and Bankruptcy Board of India (IBBI). Raman was supposed to file a declaration disclosing a conflict of interest or lack of independence in respect of his appointment, if any within the prescribed time. However, Raman deliberately did not filed such declaration. Actually, Raman was having interest in the company, since his wife is holding the position of Whole Time Director in that company.

Answer the following questions:

(i) After appointment as a provisional liquidator, in what time, he is required to file a disclosure of conflict of interest/ lack of independence, if any?
(ii) To whom such disclosure is required to be filed by the provisional liquidator?)
(iii) What are the consequence, if the provisional liquidator do not submit such disclosure?

[MTP - Dec'21]

Answer:

(i) Section 275(6) provides that on appointment as provisional liquidator or Company Liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.

Thus, the disclosure of interest / independence has to be filed by the provisional liquidator within 7 days from the date of appointment. The order given by the Tribunal may provide the date of appointment. If no such date has been mentioned in the order by the Tribunal, the date of the order may be treated as date of appointment.

(ii) Section 275(6) provides that on appointment as provisional liquidator or Company Liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.

Thus, the disclosure of interest / independence has to be filed by the Provisional Liquidator with the

Tribunal.

(iii) Section 276(1) provides that the Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on ground, of conflict of interest or lack of independence during the term of his appointment that would justify removal.

Thus, the liquidator has to be independent and should not have the conflict of interest. In the given case Raman's wife is already holding the post of Whole Time Director in the company, which can vitiate the independence of the liquidator.

Further, Raman, has deliberately not filed such declaration before the Tribunal. Hence the Tribunal after having such information, can remove him.

Question 45:

Financial creditor initiated CIRP which was admitted by the NCTL. Interim Resolution Professional was appointed. The Interim Resolution Professional (IRP) after collation of all the claims, constituted the Committee of Creditors (CoC) and meeting of the CoC was called on. The expression of interest was called on from the prospective resolution applicants.

One Resolution Applicant named ABC Ltd, expressed its interest in owning the company. The IRP observed that ABC Ltd. is in the array of defaulters as announced by the RBI.

Meanwhile the CoC thought to replace the IRP, since the present IRP was not able to invite sufficient number of prospective resolution applicants.

Based on the above facts, whether CoC can replace the existing IRP with another Resolution Professional (RP)? Also state the manner of replacement of IRP with another RP.

[MTP - Dec'21]

Answer:

Section 22 of the IBC, 2016 deals with the matter relating to the appointment of resolution professional. It provides that the committee of creditors, may, in the first meeting, by a majority vote of not less than sixty-six per cent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

Further, where the committee of creditors resolves to replace the interim resolution professional, it shall file an application before the Adjudicating Authority. Adjudicating Authority shall forward the name of the resolution professional proposed to the Board for its confirmation and shall make such appointment after confirmation by the Board. Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.

Thus, the CoC can by majority of vote of 66% of the voting shares of financial creditors can replace the existing IRP to another RP in the above stated manner.

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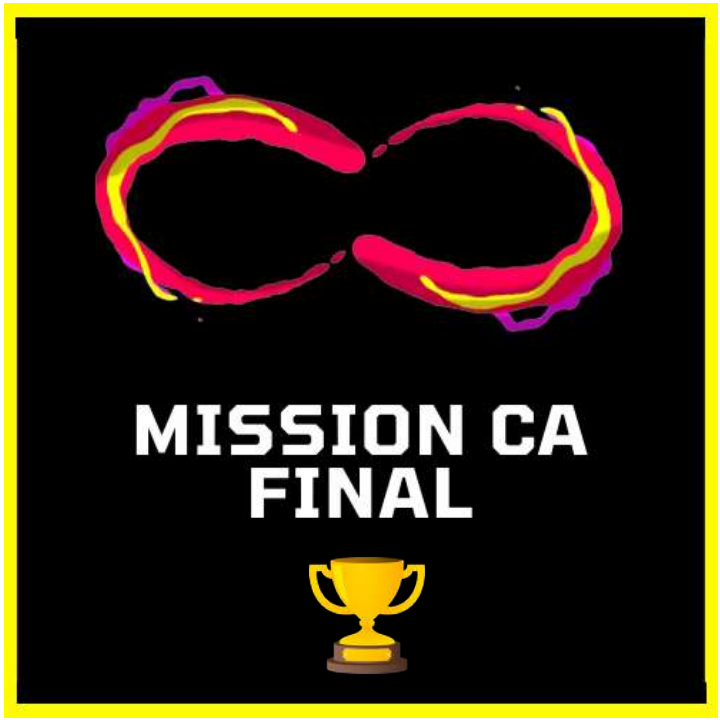

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