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CORPORATE & OTHER LAWS

SANJEEVNI BOOTI QUESTION BANK

CA GURPREET SINGH

CHAPTER -1

PRELIMINARY

PRACTICE QUESTIONS

1. What does the term Financial Statements include in relation to a company under the Companies Act, 2013? Which companies need not prepare a cash flow statement? [May 2018]

Sol. According to section 2(40) of the Companies Act, 2013, Financial statement in relation to a company, includes:

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub- clause (iv).

Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up company) may not include the cash flow statement.

2. Geeta Private Limited is a start-up company. Mr. Prabodh has been appointed as Accounts Manager of Geeta Private Limited. The Board meeting for approval of accounts is to be held on 01.08.2022 and he has to prepare the financial statements for approval by the Board. Referring to section 2(40) of the Companies Act, 2013, advise Mr. Prabodh about the statements that are required to be prepared. [RTP Nov 22]

Sol. As per section 2(40) of the Companies Act, 2013, Financial Statement in relation to a company, includes—

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub-clause (i) to sub-clause (iv)

Exemption: As per the proviso to section 2(40),the financial statement,with respectto one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement

In the instant case, Mr. Prabodh has to prepare the above financial statements except Cash Flow Statement; since Geeta Private Limited is a start-up private company

3. SKP Limited (Registered in India), a wholly owned subsidiary company of Herry Limited Foreign Company decided to follow different financial year for consolidation of its accounts outside India. State the procedure to be followed in this regard [Nov 2019]

Sol. Where a company or body corporate, which is a holding company or a subsidiary or associate company of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Central Government may, on an application made by that company or body corporate in such form and manner as may be prescribed, allow any period as its financial year, whether or not that period is a year.

Any application pending before the Tribunal as on the date of commencement of the Companies (Amendment) Act, **2019**, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

Also, a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause. SKP Limited is advised to follow the above procedure accordingly.

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

Sol. Relevant Provisions: 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.

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

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

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

(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.

Conclusion: In the given question, Teresa Ltd. will be treated as a foreign company within the meaning of section 2(42) of the Companies Act, 2013 since it is doing online business through data interchange in India.

5. Flora Fauna Limited was registered as a public company. There are 230 members in the company as noted below:

(a) Directors and their relatives 50

(b) Employees 15

(c) Ex-Employees (Shares were allotted when they were employees) 10

(d) 5 couples holding shares jointly in the name of husband and wife (5*2) 10

(e) Others 145

The Board of Directors of the company propose to convert it into a private company. Also advise whether reduction in the number of members is necessary. **[ICAI Module]**

Sol. Relevant Provisions: According to section 2(68) of the Companies Act, 2013,"Private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles, except in case of One Person Company, limits the number of its members to two hundred. However, where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member. It is further provided that:

(a) Persons who are in the employment of the company; and

(b) Persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased, shall not be included in the number of members.

In the instant case, Flora Fauna Limited may be converted* into a private company only if the total members of the company are limited to 200. Total Number of members

I Directors and their relatives	50
ii 5 Couples (5 × 1)	5
ii Others	145
Total	200

Therefore, there is no need for reduction in the number of members since existing number of members are 200 which does not exceed maximum limit of 200. *The provisions relating to conversion of public company to private company is covered in the Chapter 2 – Incorporation of Company and Matters incidental thereto.

6. Mr. Abhi is a Chartered Accountant and MBA by profession, has been appointed as an Executive Director on the Board of XYZ Limited. His job profile includes advising the Board of Directors of the company on various compliance matters, strategies, business plans, and risk matters relating to the company. Keeping in view of above position whether Mr. Abhi can be classified as the Promoter of XYZ Limited? Please examine the same under the provisions of the Companies Act, 2013 [**RTP May 22]**

Sol. According to section 2(69) of the Companies Act, 2013, Promoter means a person:-

(d) Who has been named as such in a prospectus or is identified by the company in the annual return; or

(e) Who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(f) In accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity. As the job profile of Mr. Abhi is only limited to advise the Board of Directors on various compliance matters, strategies, business plans and risk matters relating to business of the company and that too only in a professional capacity, he will not be classified as a Promoter of XYZ Limited.

7. The paid-up share capital of Saras Private Limited is `1 crore, consisting of 8 lacs Equity Shares of `10 each, fully paid-up and 2 lacs Cumulative Preference Shares of `10 each, fully paid-up. Jeevan (JVN) Private Limited and Sudhir Private Limited are holding 3 lacs Equity Shares and 50,000 Equity Shares respectively in Saras Private Limited. Jeevan Private Limited and Sudhir Private Limited are the subsidiaries of Piyush Private Limited. With reference to the provisions of the Companies Act, 2013 examine whether Saras Private Limited is a subsidiary of Piyush Private Limited? Would your answer be different if Piyush Private Limited has 8 out of 9 Directors on the Board of Saras Private Limited? **[RTP May 19]**

Sol. Relevant Provisions: In terms of section 2 (87) of the Companies Act 2013 "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company:

(i) Controls the composition of the Board of Directors; or
(ii) Exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation: For the purposes of this clause,

(a) A company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) The composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors.

Conclusion: In the present case, Jeevan Pvt. Ltd. and Sudhir Pvt. Ltd. together hold less than one half of the total share capital. Hence, Piyush Private Ltd. (holding of Jeevan Pvt. Ltd. and Sudhir Pvt) will not be a holding company of Saras Pvt. Ltd. However, if Piyush Pvt. Ltd. has 8 out of 9 Directors on the Board of Saras Pvt. Ltd. i.e. controls the composition of the Board of Directors; it (Piyush Pvt. Ltd.) will be treated as the holding company of Saras Pvt. Ltd

8. Following are some of the securities, issued by different companies related with each other, as follows:

Company	Securities Issued	Remarks
Kleshrahit Ltd.	Listed non-convertible redeemable preference shares issued on private placement basis in terms of relevant SEBI Regulations.	Has the power to appoint 2/3rd directors in Indriyadaman Ltd.
Indriyadaman Ltd.	Listed non-convertible debt securities issued on private placement basis in terms of relevant SEBI Regulations.	Holding 60% voting power in Sajagta (P) Ltd.
Sajagta (P) Ltd.	Listed non-convertible debt securities issued on private placement basis in terms of relevant SEBI Regulations.	The company holds 52% equity shares in Pratibodh Ltd. as an investment on behalf of another company in a capacity of a trustee.

Equity shares issued by the Kleshrahit Ltd. And Indriya daman Ltd. Are not listed in any of the recognized stock exchanges.

In the context of aforesaid facts, answer the following question(s):-

(a) Whether the aforesaid companies can be considered as listed company(ies)?

(b) Explain the relationship between the aforesaid companies? [RTP May 22]

Sol. (*a*) According to section 2(52) of the Companies Act, 2013, listed company means a company which has any of its securities listed on any recognized stock exchange;

Provided that such class of companies, which have listed or intend to list such class of securities, as may be prescribed in consultation with the Securities and Exchange Board, shall not be considered as listed companies.

According to rule 2A of the Companies (Specification of definitions details) Rules, 2014, the following classes of companies shall not be considered as listed companies, namely:-

(a) Public companies which have not listed their equity shares on a recognized stock exchange but have listed their –

I. non-convertible debt securities issued on private placement basis in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008; or

II. non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible non-convertible redeemable preference shares issued on private placement basis in terms of SEBI (Issue and Listing of Non-Convertible Redeemable Preference Shares) Regulations, 2013; or (iii) both categories of (i) and (ii) above.

(b) Private companies which have listed their non-convertible debt securities on private placement basis on a recognized stock exchange in terms of SEBI (Issue and Listing of Debt Securities) Regulations, 2008;

(c) public companies which have not listed their equity shares on a recognized stock exchange but whose equity shares are listed on a stock exchange in a jurisdiction as specified in sub-section (3) of section 23 of the Act.

Company	Analysis and Conclusion
Kleshrahit Ltd.	Equity shares issued by the company are not listed. However, the company has issued listed non- convertible redeemable preference shares issued on private placement basis in terms of relevant SEBI Regulations which falls in the exceptions to the listed company, given as per clause (a)(ii) to Rule 2A, as aforesaid, and accordingly, Kleshrahit Ltd. **shall not be considered as a listed company.**
Indriyadaman Ltd.	Equity shares issued by the company are not listed. However, the company has issued listed non- convertible debt securities issued on private placement basis in terms of relevant SEBI Regulations which falls in the exceptions to the listed company, given as per clause (a)(i) to Rule 2A, as aforesaid, and accordingly, Indriyadaman Ltd. **shall not be considered as a listed company.**
Sajagta (P) Ltd.	The company has issued listed non-convertible debt securities issued on private placement basis on a recognised Stock Exchange in terms of relevant SEBI Regulations which falls in the exceptions to the listed company given as per clause (b) to Rule 2A, as aforesaid, and accordingly, Sajagta (P) Ltd. **shall not be considered as a listed company.**

(*b*) According to section 2(46) of the Companies Act, 2013, holding company in relation to one or more other companies, means a company of which such companies are subsidiary companies.
According to section 2(87) of the Companies Act, 2013, subsidiary company or subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed. **Explanation**—For the purposes of this clause,—

a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (*i*) or sub-clause (*ii*) is of another subsidiary company of the holding company;

It is given that Sajagta (P) Ltd. holds 52% equity shares in Pratibodh Ltd. as an investment on behalf of another company in a capacity of a trustee i.e. in a fiduciary capacity.

As per the notification dated 27th December 2013, Ministry (MCA) clarified that the shares held by a company or power exercisable by it in another company in a fiduciary capacity shall not be counted for the purpose of determining the holding–subsidiary relationship in terms of the provision of section 2(87) of the Companies Act, 2013.

Accordingly, Sajagta (P) Ltd. & Pratibodh Ltd. do not share any holding– subsidiary relationship as the former holds shares in latter just in a fiduciary capacity on behalf of another company.

9. Hastprat Ltd. is an unlisted public company, having five directors in its board which includes two independent directors.

Sankul (P) Ltd., is subsidiary company of Hastprat Ltd., actively carrying on its business, having paid up capital of ` 1.5 crore with 40 members and turnover of ` 18 crore, respectively and the said company is not a start-up company.

In the context of aforesaid case-scenario, please answer to the following question(s):-

Whether Sankul (P) Ltd. is mandatorily required to prepare cash flow statement for the financial year as a part of its financial statements?

Provide your answer by analyzing Sankul (P) Ltd. into following category of companies:-

(i) One person company, (ii) Small company, (iii) Dormant company and (iv) Private company, respectively. **[RTP May 23]**

Sol. According to section 2(40) of the Companies Act, 2013,

Financial statement in relation to a company, includes—

(i) a balance sheet as at the end of the financial year;

(ii) a profit and loss account, or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;

(iii) cash flow statement for the financial year;

(iv) a statement of changes in equity, if applicable; and

(v) any explanatory note annexed to, or forming part of, any document referred to in sub- clause (*i*) to sub-clause (*iv*):

Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement.

For considering the applicability of preparation cash flow statement in case of Sankul (P) Ltd., it is required first to be analyzed that Sankul (P) Ltd. does not fall in any of the categories of companies mentioned under proviso to section 2(40) of the Companies Act, 2013:

i One person company – It is given that the company is having 40 members and also its name does not contain the words 'OPC', so it is not a one person company.

ii Small company – A company which is a subsidiary company cannot be categorized as a small company as per proviso to section 2(85) even though its paid up capital and turnover are within the prescribed limits and accordingly, as Sankul (P) Ltd. is a subsidiary company of Hastprat Ltd., it cannot be considered as small company also.

iii Dormant company – It is given that the company is actively carrying on its business, so it cannot be also categorized as a dormant company based upon the facts given.

iv Private company (which is a start-up) – It is given that Sankul (P) Ltd. is not a start- up company and also, as per proviso to section 2(71) of the Act, a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

So, Sankul (P) Ltd. shall be deemed to be a public company as it is subsidiary of Hastprat Ltd., an unlisted public company and so it will not fall into this category of exemption as well.

T hus, it can be concluded that Sankul (P) Ltd. is mandatorily required to prepare cash flow statement for the financial year as a part of its financial statements as it does not fall in any of the categories of companies mentioned under proviso to section 2(40) of the Companies Act, 2013.

10. MNP Private Ltd. is a company registered under the Companies Act, 2013 with a paid-up share capital of Rs. 2 crore and turnover of Rs. 60 crore. Explain the meaning of the "Small Company" and examine the following in accordance with the provisions of the Companies Act, 2013:

(i) Whether the MNP Private Ltd. can avail the status of small company?

(ii) What will be your answer if the turnover of the company is Rs. 30 crore?

Sol. Small Company**:** According to Section 2(85) of the Companies Act, 2013, Small Company means a company, other than a public company,—

(1) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and

(2) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.

Nothing in this clause shall apply to—

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act.

As per the Companies (Specification of Definitions Details) Rules, 2014, for the purposes of subclause (i) and sub-clause (ii) of clause (85) of section 2 of the Act, paid up capital and turnover of the small company shall not exceed rupees four crores and rupees forty crores respectively.

(i) In the present case, MNP Private Ltd., is a company registered under the Companies Act, 2013 with a paid up share capital of Rs. 2 crore and having turnover of Rs. 60 crore. Since only one criteria of share capital not exceeding Rs. 4 crore is met, but the second criteria of turnover not exceeding Rs. 40 crore is not met and the provisions require both the criteria to be met in order to avail the status of a small company, MNP Ltd. cannot avail the status of small company.

(ii) If the turnover of the company is Rs. 30 crore, then both the criteria will be fulfilled and MNP Ltd. can avail the status of small company.

PRACTICE QUESTIONS

1. The persons (not being members) dealing with the company are always protected by the doctrine of Indoor management. Explain. Also, explain when doctrine of Constructive Notice will apply.

[ICAI Module]

Sol. According to this doctrine, persons dealing with the company cannot be assumed to have knowledge of internal problems of the company. They can simply assume that all the required things were done properly in the company.

Stakeholders need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps protect external members from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The doctrine of indoor management was evolved around 150 years ago in the context of the doctrine of constructive notice. The role of doctrine of indoor management is opposed to of the role of doctrine of constructive notice. Whereas the doctrine of constructive notice protects a company against outsiders, the doctrine of indoor management protects outsiders against the actions of a company. This doctrine also is a possible safeguard against the possibility of abusing the doctrine of constructive notice.

Basis for Doctrine of Indoor Management

(*i*) What happens internal to a company is not a matter of public knowledge. An outsider can only presume the intentions of a company, but not know the information he/she is not privy to.

(*ii*) If not for the doctrine, the company could escape creditors by denying the authority of officials to act on its behalf.

Exceptions to Doctrine of Indoor Management (Applicability of doctrine of constructive notice) Knowledge of irregularity: In case this 'outsider' has actual knowledge of irregularity within the company, the benefit under the rule of indoor management would no longer be available. In fact, he/she may well be considered part of the irregularity.

Negligence: If, with a minimum of effort, the irregularities within a company could be discovered, the benefit of the rule of indoor management would not apply. The protection of the rule is also not available in the circumstances where company does not make proper inquiry.

Forgery: The rule does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers.

The above doctrines have been well considered while framing the provisions of various Acts pertaining to the companies worldwide. The Companies Act, 2013 and the earlier Acts relevant for the Companies in India are no exception to the same.

2. Mr. Raja along with his family members is running successfully a trading business. He is capable of developing his ideas and participating in the market place. To achieve this, Mr. Raja formed a single person economic entity in the form of One Person Company with his brother Mr. King as its nominee. On 4th May 2020, Mr. King withdrew his consent as Nominee of the One Person Company. Can he do so under the provisions of the Companies Act, 2013?

Examine whether the following individuals are eligible for being nominated as Nominee of the One Person Company as on 5th May 2020 under the above said Act.

(i) Mr. Shyam, son of Mr. Raja who is 15 years old as on 5th May 2020.

(ii) Ms. Devaki an Indian Citizen, sister of Mr. Raja stays in Dubai and India. She stayed in India during the period from 2nd January 2019 to 16th August 2019. Thereafter she left for Dubai and stayed there.

(iii) Mr. Ashok, an Indian Citizen residing in India who is presently a member of a 'One Person Company'.

[Nov. 2020]

Sol. Relevant provisions: As per section 3 of the Companies Act, 2013, the memorandum of One Person Company (OPC) shall indicate the name of the other person (nominee), who shall, in the event of the subscriber's death or his incapacity to contract, become the member of the company.

The other person (nominee) whose name is given in the memorandum shall give his prior written consent in prescribed form and the same shall be *filed with Registrar* of companies at the time of incorporation along with its Memorandum of Association and Articles of Association.

Such other person (nominee) may *withdraw* his consent in such manner as may be prescribed.

Analysis: Therefore, in terms of the above law, Mr. King, the nominee, whose name was given in the memorandum, can withdraw his consent as a nominee of the OPC by giving a notice in writing to the sole member and to the One Person Company.

Conclusion: With reference to Rule 3 of the Companies (Incorporation) Rules, 2014, following are the answers to the second part of the question as regards the eligibility for being nominated as nominee:

(i) No minor shall become member or nominee of the OPC. Therefore, Mr. Shyam, being a minor is not eligible for being nominated as Nominee of the OPC.

(ii) Only a natural person who is an Indian citizen *whether resident of India or otherwise*, shall be a nominee or the sole member of a One Person Company. The term "Resident in India" means a person who has stayed in India for a period of not less than 120 days during the immediately preceding financial year.

Here Ms. Devaki is an Indian Citizen as well as resident in India as she stayed in India for a period of not less than 120 days during the immediately preceding financial year in India.

So, she is eligible for being nominated as nominee of the OPC. Even if she had stayed for less than 120 days, she would have been still eligible for being nominated as the law only requires such person being nominated to be a natural person and Indian citizen. Residential status is not a matter of consideration.

(iii) As per the Rule 3 of the Companies (Incorporation) Rules, 2014, a person shall not be a member of more than one OPC at any point of time and the said person shall not be a nominee of more than one OPC.

Mr. Ashok, an Indian Citizen residing in India who is a member of an OPC (Not a nominee in any OPC), can be nominated as nominee.

3. Red Limited was incorporated on 1st April, 2014 is facing severe effects of depression of the economy. Owing to its bad financial status most of the members have started withdrawing their holding from the company. The company had 250 members on 10th January, 2019. By 15th January, 2019, 244 members had withdrawn their holding. No new member has invested in the company after 15th February till date. Now, Mr. A, an existing member has approached you to advise him regarding his liabilities in such a situation. **[RTP Nov. 2019]**

Sol. Relevant Provisions: According to section 3A of the Companies Act, 2013, if at any time the number of members of a company is reduced, in the case of a public company, below seven, in the case of a private company, below two, and the company carries on business for more than six months while the number of

members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with less than seven members or two members, as the case may be, shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

Conclusion: Hence, in the given situation, the *number* of member in the said public company have fallen below 7 [250 – 244 = 6] and these members have continued beyond the specified limit of 6 months, the reduced members of the company during the period of 1 month shall be severally liable for the payment of the whole debts of the company contracted during that time, and may be severally sued therefor.

4. Yadav Dairy Products Private limited has registered its articles along with memorandum at the time of registration of company in December, 2014. Now directors of the company are of the view that provisions of articles regarding forfeiture of shares should not be changed except by a resolution of 90% majority. While as per section 14 of the Companies Act, 2013 articles may be changed by passing a special resolution only. Hence, one of the directors is of the view that they cannot make a provision against the Companies Act, 2013. You are required to advise the company on this matter. **[ICAI Module]**

Sol. Relevant Provisions: As per section 5 of the Companies Act, 2013 the article may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if more restrictive conditions than a special resolution, are met. The provisions for entrenchment shall only be made either on formation of a company, or by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give *notice to the Registrar* of such provisions in prescribed manner.

Conclusions: In the present case, Yadav Dairy Products Private Limited is a private company and wants to protect provisions of articles regarding forfeiture of shares. It means it wants to make entrenchment of articles, which is allowed. But the company will have to pass a resolution taking permission of all the members and it should also give notice to Register of Companies regarding entrenchment of articles.

5. Mr. Shyamlal is a B. Tech in computer science. He has promoted an IT start up and got it registered as a Private Limited Company. Initially, only he and his family members are holding all the shares in the company. While drafting the Articles of Association of the company, it has been included that Mr. Shyamlal will remain as a director of the company for lifetime.

Mr. Mehra, a close friend of Mr. Shyamlal has warned him (Mr. Shyamlal) that in future if 75% or more shares in the company are held by non- family members then by passing a Special Resolution, the relevant articles can be amended and Mr. Shyamlal may be removed from the post of director. Mr. Shyamlal has approached you to advise him for protecting his position as a director for lifetime. Give your answer as per the provisions of the Companies Act, 2013. **[MTP April 2021]**

Sol. Relevant provisions: As per the provisions of sub-section (3) of section 5 of the Companies Act, 2013, the articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of special resolution are met or complied with. Usually, an article of association may be altered by passing a special resolution but entrenchment makes it one difficult to change it. So, entrenchment means making something more protective.

Manner of inclusion of the entrenchment provision: As per the provisions of sub-section (4) of section 5 of the Companies Act, 2013, the provisions of entrenchment shall only be made either on formation of a company, or by an amendment in the Articles of Association as agreed to by all the members of the company in the case of a private company and by a special resolution in case of a public company.

Notice to the Registrar of the entrenchment provision: As per the provisions of sub-section (4) of section 5 of the Companies Act, 2013, where the articles contain provision for entrenchment whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed.

Conclusion: In the said situation the IT startup company is a private company. Therefore, Mr. Shyamlal can get the articles altered which is agreed to by all the members whereby the amended article will say that he can be removed from the post of director only if, say, 95% votes are cast in favour of the resolution and give notice of the same to the Registrar.

6. Mahima Ltd. was incorporated by furnishing false information. As per the Companies Act, 2013, state the powers of the Tribunal (NCLT) in this regard. **[Nov 2019]**

Sol. Relevant Provisions Order of the Tribunal: According to section 7(7) of the Companies Act, 2013, where a company has been got incorporated by furnishing false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the Tribunal may, on an application made to it, on being satisfied that the situation so warrants:

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

(ii) direct that liability of the members shall be unlimited; or

(iii) direct removal of the name of the company from the register of companies; or

(iv) pass an order for the winding up of the company; or

(v) pass such other orders as it may deem fit.

However before making any order:

(*i*) the company shall be given a reasonable opportunity of being heard in the matter; and

(ii) the Tribunal shall take into consideration the transactions entered into by the company, including the obligations, if any, contracted or payment of any liability.

7. Mr. Bindra is holding 950 equity shares of Bio safe Herbals, a section 8 company. Bio safe Herbals is planning to declare dividend in the Annual General Meeting for the Financial Year ended 31-03-2020. Examine whether the act of the company is in accordance with the provisions of the Companies Act, 2013. **[RTP May 2021]**

Sol. Relevant Provisions: According to Section 8(1) of the Companies Act, 2013, the companies licensed under Section 8 of the Act (Formation of companies with Charitable Objects, etc.) are prohibited from paying any dividend to their members. Their profits are intended to be applied only in promoting the objects for which they are formed.

Conclusions: Hence, in the instant case, the proposed act of Bio safe Herbals, a company licensed under Section 8 of the Companies Act, 2013, which is planning to declare dividend, is not in accordance to the provisions of the Companies Act, 2013.

8. One of the matters contained in the articles of Dhimaan Foundation, incorporated as a limited company under section 8 of the Companies Act, 2013, was altered by passing a special resolution in its general meeting and thereafter, intimation for the same was given to Registrar of Companies. However, such alteration in the articles was opposed by Dhwaj & Co., a partnership firm which is its member that there such alteration was not valid.

Advise, as per the provisions of the Companies Act, 2013, whether the contention of Dhwaj & Co. was valid and whether it can be a member in such company? **[RTP May 2022]**

Sol. According to section 8 of the Companies Act, 2013, a company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government (the power has been delegated to Registrar of Companies).

Also, a firm may be a member of the company registered under section 8. Here, one of the matters of articles of Dhimaan Foundation was altered by passing a special resolution in its general meeting and thereafter, intimation for the same was given to Registrar of Companies.

As per the provisions of the Act, it is necessary to take previous approval of the Registrar of Companies for the same which was not done in the present case and thus the contention of Dhwaj & Co. was valid. Also, section 8 allows a firm to be a member of such company and hence, Dhwaj & Co. can be its member.

9. Alfa school started imparting education on 1.4.2010, with the sole objective of providing education to children of weaker society either free of cost or at a very nominal fee depending upon the financial condition of their parents. However, on 30th March 2018, it came to the knowledge of the Central Government that the said school was operating by violating the objects of its objective clause due to which it was granted the status of a section 8 company under the Companies Act, 2013. Describe what powers can be exercised by the Central Government against the Alfa School, in such a case? **[ICAI Module]**

Sol. Section 8 of the Companies Act, 2013 deals with the formation of companies which are formed to promote the charitable objects of commerce, art, science, education, sports etc. Such company intends to apply its profit in promoting its objects.

Section 8 companies are registered by the Registrar only when a license is issued by the Central Government to them. Since, Alfa School was a Section 8 company and it had started violating the objects of its objective clause, hence in such a situation the following powers can be exercised by the Central Government:

(i) The Central Government may by order revoke the license of the company where the company contravenes any of the requirements or the conditions of this sections subject to which a license is issued or where the affairs of the company are conducted fraudulently, or violative of the objects of the company or prejudicial to public interest, and on revocation the Registrar shall put 'Limited' or 'Private Limited' against the company's name in the register.

Provided that, no such order shall be made unless the company is given a reasonable opportunity of being heard.

(ii) Where a license is revoked, the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section.

However, no such order shall be made unless the company is given a reasonable opportunity of being heard.

(iii) Where a license is revoked and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

10. A group of individuals intend to form a club namely 'Budding Pilots Flying Club' as limited liability company to impart class room teaching and aircraft flight training to trainee pilots. It was decided to form a limited

liability company for charitable purpose under Section 8 of the Companies Act, 2013 for a period of ten years and thereafter the club will be dissolved and the surplus of assets over the liabilities, if any, will be distributed amongst the members as a usual procedure allowed under the Companies Act, 2013.

Examine the feasibility of the proposal and advise the promoters considering the provisions of the Companies Act, 2013. **[ICAI Module]**

Sol. Relevant provision: According to section 8(1) of the Companies Act, 2013, where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company:

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

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

(iii) intends to prohibit the payment of any dividend to its members;

The Central Government may, by issue of license, allow that person or association of persons to be registered as a limited liability company.

Conclusion: In the instant case, the decision of the group of individuals to form a limited liability company for charitable purpose under section 8 for a period of ten years and thereafter to dissolve the club and to distribute the surplus of assets over the liabilities, if any, amongst the members *will not hold good*, since there is a *restriction* as pointed out in point (*b*) above regarding *application of its profits* or other income only in promoting its objects.

Further, there is *restriction in the application of the surplus assets* of such a company in the event of winding up or dissolution of the company as provided in sub-section (9) of Section 8 of the Companies Act, 2013.

Therefore, the proposal is not feasible.

11. Mr. Dinesh incorporated a new Private Limited Company under the provisions of the Companies Act, 2013 and desires to commence the business immediately. Please advise Mr. Dinesh about the procedure for commencement of business as laid under the provisions of the Section 10A of the Companies Act, 2013. **[MTP April 2021]**

Sol. As per Section 10A of the Companies Act, 2013, a company incorporated after the commencement of the Companies (Amendment) Second Ordinance, 2019 and having a share capital shall not commence any business or exercise any borrowing powers unless:

(i) A declaration is filed by a director within a period of 180 days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and

(ii) The company has filed with the Registrar a verification of it registered office as provided in sub-section (2) of section 12.

Mr. Dinesh has to comply with the above requirements and procedure for commencing the business of the company.

12. XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Nashik (within the State of Maharashtra). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain. **[ICAIModule]**

Sol. The Companies Act, 2013 under section 13 provides for the process of altering the Memorandum of a company. Since the location or Registered Office clause in the Memorandum only names the state in which its registered office is situated, a change in address from Mumbai to Nashik, does not result in the alteration of the Memorandum and hence the provisions of section 13 (and its sub sections) do not apply in this case.

However, under section 12 (5) of the Act which deals with the registered office of company, the change in registered office from one town or city to another in the same state, must be approved by a special resolution of the company.

Further, presuming that the Registrar will remain the same for the whole state of Maharashtra, there will be no need for the company to seek the confirmation to such change from the Regional Director.

13. Examine the validity of the following different decisions/proposals regarding change of office by A Ltd. under the provisions of the Companies Act, 2013:

(i) The Registered office is shifted from Thane (Local Limit of Thane District) to Dadar (Local limit of Mumbai District), both places falling within the jurisdiction of the Registrar of Mumbai, by passing a special resolution but without obtaining the approval of the Regional Director.

(ii) The Registered office is situated in Mumbai, Maharashtra (within the jurisdiction of the Registrar, Mumbai, Maharashtra State) whereas the Corporate Office is situated in Pune, Maharashtra State (within the jurisdiction of the Registrar, Pune). A Ltd. proposes to shift its corporate office from Pune to Mumbai under the authority of a Board resolution.

(iii) The registered office situated in certain place of a city is proposed to be shifted to another place within the local limits of the same city under the authority of Board Resolution. **[July 2021]**

Sol. Regarding the validity of Proposals w.r.t change of registered office by A Ltd. in the light of the section 12 of the Companies Act, 2013:

(i) In the first case, where the Registered office is shifted from Thane to Dadar (one District to another District) falling under jurisdiction of same ROC i.e. Registrar of Mumbai.

As per Section 12 (5) of the Act which deals with the change in registered office outside the local limit from one town or city to another in the same state, may take place by virtue of a special resolution passed by the company. No approval of regional director is required as both the places are falling within the jurisdiction of the Registrar of Mumbai. Accordingly, said proposal is valid.

(ii) Section 12 talks about shifting of Registered office only, In the second case the corporate office is being shifted from Pune to Mumbai under the authority of Board resolution. Shifting of corporate office under the board resolution is valid.

(iii) In the third case, change of registered office within the local limits of the same city. Said proposal is valid in terms it has been passed under the authority of Board resolution.

14. Anushka security equipment's limited is a manufacturer of CCTV cameras. It has raised `100 crores through public issue of its equity shares for starting one more unit of CCTV camera manufacturing. It has utilized 10 crores rupees and then it realized that its existing business has no potential for expansion because government has reduced customs duty on import of CCTV camera hence imported cameras from china are cheaper than its own manufacturing. Now it wants to utilize remaining amount in mobile app development business by adding a new object in its memorandum of association.

Does the Companies Act, 2013 allow such change of object. If not then what advise will you give to company. If yes, then give steps to be followed. **[ICAI Module]**

Sol. Relevant Provisions: According to section 13 of the Companies Act, 2013 a company, which has raised money from public through prospectus and still has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and:

(i) the details in respect of such resolution shall also be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;

(ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with SEBI regulations.

Company will have to file copy of special resolution with ROC and he will certify the registration within a period of thirty days. Alteration will be effective only after this certificate by ROC.

15. The object clause of the Memorandum of Vivek Industries Limited., empowers it to carry on realestate business and any other business that is allied to it. Due to a downward trend in real-estate business, the management of the company has decided to take up the business of Food processing activity. The company wants to alter its Memorandum, so as to include the Food Processing Business in its objects clause. Examine whether the company can make such change as per the provisions of the Companies Act, 2013? **[ICAI Module]**

Sol. Relevant provision: The Companies Act, 2013 has made alteration of the memorandum simpler and more flexible. Under section 13(1) of the Act, a company may, by a special resolution after complying with the procedure specified in this section, alter the provisions of its Memorandum.

In the case of alteration to the objects clause, section 13(6) requires the filing of the Special Resolution by the company with the Registrar. Section 13 (9) states that the Registrar shall register any alteration to the Memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution by the company.

Section 13 (10) further stipulates that no alteration in the Memorandum shall take effect unless it has been registered with the Registrar as above.

Conclusion: Hence, the Companies Act, 2013 permits any alteration to the objects clause with ease. Vivek Industries Limited can make the required changes in the object clause of its Memorandum of Association.

16. Manglu and friends got registered a company in the name of Taxmann Advisory private limited. Taxmann is a registered trademark. After 5 years when the owner of trademark came to know about the same, it filed an application with relevant authority. Can the company be compelled to change its name by the owner of trademark? Can the owner of registered trademark request the company and then company changes its name at its discretion? **[ICAI Module]**

Sol. Relevant provision: According to section 16 of the Companies Act, 2013 if a company is registered by a name which,:

(*i*) in the opinion of the Central Government, is identical with the name by which a company had been previously registered, it may direct the company to change its name. Then the company shall by passing an ordinary resolution change its name within 3 months.

(*ii*) is identical with a registered trade mark and owner of that trade mark apply to the Central Government within three years of incorporation of registration of the company, it may direct the company to change its name. Then the company shall change its name by passing an ordinary resolution within 3 months.

Company shall give notice to ROC along with the order of Central Government within 15 days of change. In case of default company and defaulting officer are punishable.

In the given case, owner of registered trade- mark is filing objection after 5 years of registration of company with a wrong name. While it should have filed the same within 3 years. Therefore, the company cannot be compelled to change its name.

As per section 13, company can anytime change its name by passing a special resolution and taking approval of Central Government. Therefore, if owner of registered trademark request the company for change of its name and the company accepts the same then it can change its name voluntarily by following the provisions of sec 13.

17. S Ltd. is a company in which H Ltd. is holding 60% of its paid up share capital. One of the shareholder of H Ltd. made a charitable trust and donated his 10% shares in H Ltd. And 50 crores to the trust. He appoints S Ltd. as the trustee. All the assets of the trust are held in the name of S Ltd. Can a subsidiary hold shares in its holding company in this way? **[ICAI Module]**

Sol. Relevant Provisions: According to section 19 of the Companies Act, 2013 a company shall not hold any shares in its holding company either by itself or through its nominees. Also, holding company shall not allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Following are the exceptions to the above rule:

(i) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(ii) where the subsidiary company holds such shares as a trustee; or

(iii) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company but in this case it will not have a right to vote in the meeting of holding company.

Conclusion: In the given case one of the shareholders of holding company has transferred his shares in the holding company to a trust where the shares will be held by subsidiary company. It means now subsidiary will hold shares in the holding company. But it will hold shares in the capacity of a trustee. Therefore, we can conclude that in the given situation S Ltd. can hold shares in H Ltd.

18. Kavya Ltd. has a paid up share-capital of `80 crores. Amjali Ltd. holds a total of `50 crores of Kavya Ltd. Now, Kavya ltd. is making huge profits and wants to expand its business and is aiming at investing in Amjali Ltd. Kavya Ltd. has approached you to analyze whether as per the provisions of the Companies Act, 2013, they can hold 1/10th of the share capital of Amjali Ltd. **[MTP March 2021]**

Sol. Relevant provision: In terms of section 2 (87) of the Companies Act 2013 "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company—

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Since, Amjali Ltd. is holding more than one half (50 crores out of 80 crores) of the total share capital of Kavya Ltd., it (Amjali Ltd.) is holding of Kavya Ltd.

Further, as per the provisions of section 19 of the Companies Act, 2013, no company shall, either by itself or through its nominees, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void:

Provided that nothing in this sub-section shall apply to a case:

(i) where the subsidiary company holds such shares as the legal representative of a deceased member of the holding company; or

(ii) where the subsidiary company holds such shares as a trustee; or

(iii) where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company;

Conclusion: In the given question, Kavya ltd. cannot acquire the shares of Amjali Ltd. as the acquisition of shares does not fall within the ambit of any of the exceptions provided in section 19.

19. AB Limited issued equity shares of `1,00,000 (10000 shares of `10 each) on 01.04.2020 which have been fully subscribed whereby XY Limited holds 4000 shares and PQ Limited holds 2000 shares in AB Limited. AB Limited is also holding 20% equity shares of RS Limited before the date of issue of equity shares stated above. RS Limited controls the composition of Board of Directors of XY Limited and PQ Limited from 01.08.2020. Examine with relevant provisions of the Companies Act, 2013:

(i) Whether AB Limited is a subsidiary of RS Limited?

(ii) Whether AB Limited can hold shares of RS Limited?

(iii) Whether AB Limited can vote at Annual General Meeting of RS Limited held on 30.09.2020?

[RTP Nov 2021]

Sol. Relevant Provisions: This given problem is based on sub-clause (87) of Clause 2 read with section 19 of the Companies Act, 2013.

As per sub-clause (87) of Clause 2 of the Companies Act, 2013 "subsidiary company" or "subsidiary", in relation to any other company (i.e., the holding company), means a company in which the holding company:

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies.

For the purposes of this clause, Explanation is given providing that a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in point (*i*) or point (*ii*) above, is of another subsidiary company of the holding company.

Whereas Section 19 provides that, no company shall, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

Provided that nothing in this sub-section shall apply to a case where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

Here in the instant case, AB Ltd. issued 10,000 equity shares on 1.4.2020 whereby XY Ltd. & PQ Ltd. holds 4000 & 2000 shares respectively in AB Ltd., Considering 1 share = 1 vote, XY Ltd. and PQ Ltd. together holds more than one-half (50%) of the total voting power. Therefore, AB Ltd. will be subsidiary to XY Ltd. & PQ Ltd. from 1.4.2020.

Whereas AB Ltd. is already holding 20% equity shares of RS Ltd. before the date of issue of equity shares i.e. 1.4.2020.

Further, RS Ltd. controls the composition of Board of Directors of XY Ltd. and PQ Ltd. from 01.08.2020. In the light of sub-clause (87) of Clause 2, RS Ltd. is a holding company of XY Ltd.and PQ Ltd. (Subsidiary companies).

Conclusions: Following are the answers to the questions:

(i) Yes. In this case AB Ltd. shall be deemed to be a subsidiary company of the holding company (RS Ltd.) as RS Ltd. controls the composition of subsidiary companies XY Ltd. & PQ Ltd. as per explanation to sub-clause (87) of Clause 2.

(ii) Yes. In this case AB Limited is a subsidiary of RS Limited as AB Ltd. was holding 20% of equity shares of RS Ltd. even before it became a subsidiary company of the RS Ltd. (i.e. on 01 08.2020), according to the exception to section 19.

(iii) No. The subsidiary company shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee but not where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company. Therefore, AB Ltd. cannot vote at AGM of RS Ltd. held on 30.9.2020.

20. S Ltd acquired 10% paid up share capital of H Ltd on 15th March 2017. H Ltd acquired 55% paid up share capital of S Ltd on 10th March 2018. H Ltd. on 25th September, 2020 decided to issue bonus shares in the ratio of 1:1 to the existing shareholders. Accordingly, bonus shares were allotted to S Ltd. Examine under the provisions of the Companies Act, 2013 and decide

(i) the validity of holding of shares by S Ltd. in H Ltd.

(ii) allotment of Bonus shares by H Ltd. to S Ltd. **[Nov. 2020]**

Sol. Relevant provision: As per Section 19 of the Companies Act, 2013, no company shall, hold any shares in its holding company and no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void.

However, this shall not apply where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company.

In the given case, H Ltd. has acquired 55% paid up share capital of S Ltd. on 10th March 2018.

Whereas, S Ltd. has been holding 10% paid up share capital of H Ltd. since 15th March, 2017. The said instance as asked in the question falls under the exception stated above.

Conclusion: Therefore:

(i) Holding of shares by S Ltd. in H Ltd. is valid in view of the proviso (c) to sub-section (1) of section 19 of the Act, which states that the restrictions of provisions of section 19(1) will not be applicable where the subsidiary company is a shareholder even before it became a subsidiary company of the holding company;

(ii) Allotment of bonus shares by H Ltd. to S Ltd. is also valid in view of the above proviso.

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

(i) Can S Ltd. make further investment in equity shares of H Ltd. during 2018-19?

(ii) Can S Ltd. exercise voting rights at Annual general meeting of H Ltd.?

(iii) Can H Ltd. allot or transfer some of its shares to S Ltd.? **[May 2019]**

Sol. The paid up share capital of S Ltd. is 1,00,00,000 divided into 10,00,000 equity shares of 10 each. Of this, H Ltd. is holding 6,00,000 equity shares. Hence, H Ltd. is the holding company of S Ltd. and S Ltd. is the subsidiary company of H Ltd. by virtue of section 2(87) of the Companies Act, 2013.

In the instant case,

(i) As per the provisions of sub-section (1) of Section 19 of the Companies Act, 2013, no company shall, either by itself or through its nominees, hold any shares in its holding company.

Therefore, S Ltd. cannot make further investment in equity shares of H Ltd. during 2018-19.

(ii) As per second proviso to Section 19, a subsidiary company shall have a right to vote at a meeting of the holding company only in respect of the shares held by it as a legal representative or as a trustee. Therefore, S Ltd. can exercise voting rights at the Annual General Meeting of H Ltd. only in respect of 1% shares held as a legal representative of a deceased member of H Ltd.

(iii) Section 19 also provides that no holding company shall allot or transfer its shares to any of its subsidiary companies and any such allotment or transfer of shares of a company to its subsidiary company shall be void. Therefore, H Ltd. cannot allot or transfer some of its shares to S Ltd.

22. Vijay, a member of Mayur Electricals Ltd. gave in writing to the company that the notice for any general meeting be sent to him only by registered post at his residential address at Kanpur for which he deposited sufficient money. The company sent notice to him by ordinary mail under certificate of posting. Vijay did not receive this notice and could not attend the meeting and contended that the notice was improper.

Decide:

(*i*) Whether the contention of Vijay is valid.

(*ii*) Will your answer be the same if Vijay remains in London for two months during the notice of the meeting and the meeting held? **[ICAI Module]**

Sol. Relevant Provisions: According to section 20(2) of the Companies Act, 2013, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed.

Provided that a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Thus, if a member wants the notice to be served on him only by registered post at his residential address at Kanpur for which he has deposited sufficient money, the notice must be served accordingly, otherwise service will not be deemed to have been effected.

Conclusions: Accordingly, the questions as asked may be answered as under:

(*i*) The contention of Vijay shall be tenable, for the reason that the notice was not properly served.

(*ii*) In the given circumstances, the company is bound to serve a valid notice to Vijay by registered post at his residential address at Kanpur and not outside India.

23. Explain the provisions of the Companies Act, 2013 relating to the 'Service of Documents' on a company and the members of the company. **[ICAI Module]**

Sol. Under section 20 of the Companies Act, 2013 a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed

post or by courier service or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed.

However, in case where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

Under section 20 (2), save as provided in the Act or the rule thereunder for filing of documents with the registrar in electronic mode, a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed.

However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

24. Parag Constructions Limited is a leading infrastructure company. One of the directors of the company Mr. Parag has been signing all construction contracts on behalf of company for many years. All the parties who ever deal with the company know Mr. Parag very well. Company has got a very important construction contract from a renowned software company. Parag constructions will do construction for this site in partnership with a local contractor Firozbhai. Mr. Parag signed partnership deed with Firozbhai on behalf of company because he has an implied authority. Later in a dispute company denied to accept liability as a partner. Can the company deny its liability as a partner? **[ICAI Module]**

Sol. Relevant provision: As per section 22 of the Companies Act, 2013 a company may authorize any person as its attorney to execute deeds on its behalf in any place either in or outside India. But common seal should be affixed on his authority letter or the authority letter should be signed by two directors of the company or it should be signed by one director and secretary. This authority may be either general for any deeds or it may be for any specific deed.

A deed signed by such an attorney on behalf of the company and under his seal shall bind the company as if it were made under its common seal.

Conclusion: In the present case company has not neither given any written authority not affixed common seal of the authority letter. It means that Mr. Parag is not legally entitled to execute deeds on behalf of the company. Therefore, deeds executed by him are not binding on the company.

Therefore, company can deny its liability as a partner.

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

Sol. Relevant Provisions

Doctrine of Indoor Management: According to this doctrine, persons dealing with the company need not inquire whether internal proceedings relating to the contract are followed correctly, once they are satisfied that the transaction is in accordance with the memorandum and articles of association.

Stakeholders *need not enquire* whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner.

The doctrine helps to *protect external members* from the company and states that the people are entitled to presume that internal proceedings are as per documents submitted with the Registrar of Companies.

The company is bound to Mr. X:

(i) since the lender, Mr. X, had lent the money to the company assuming that the company was authorized to borrow money after obtaining authorization from the members in GM;

(ii) since, on the same facts, the Court held in "Royal British Bank vs. Turquand" that the outsiders dealing with the company were not required to inquire into the internal management of the company, and the outsiders were entitled to assume that as far as internal proceedings of the company were concerned, everything had been done regularly (termed as doctrine of indoor management).

Conclusion: In the present case, XYZ Ltd. will be bound to return the money to Mr. X.

CHAPTER-3

PROSPECTUS AND ALLOTMENT O SECURITIES

PRACTICE QUESTIONS

1. Explain various instances which make the allotment of securities as irregular allotment under the Companies Act, 2013. **[ICAI MODULE]**

Sol. Irregular allotment: The Companies Act, 2013 does not specifically provide for the term "Irregular Allotment" of securities. Hence, we have to examine the requirements of a proper issue of securities and consider the consequences of non- fulfillment of those requirements.

In broad terms, an allotment of shares is deemed to be irregular when it has been made by a company in violation of Sections 23, 26, 39 or 40. Irregular allotment therefore arises in the following instances:

1. Where a company does not issue a prospectus in a public offer as required by section 23; or
2. Where the prospectus issued by the company does not include any of the matters required to be included therein under section 26 (1), or the information given is misleading, faulty and incorrect; or
3. Where the prospectus has not been filed with the Registrar for filing under section 26 (4); or
4. The minimum subscription as specified in the prospectus has not been received in terms of section 39; or
5. The minimum amount receivable on application is less than 25% of the nominal value of the securities offered or lower than the amount prescribed by SEBI in this behalf; or
6. In case of a public issue, approval for listing has not been obtained from one or more of the recognized stock exchanges under section 40 of the Companies Act, 2013.

2. What is a Shelf-Prospectus? State the important provisions relating to the issuance of Shelf-Prospectus under the provisions of the Companies Act, 2013 and the Companies (Prospectus and Allotment of securities) Rules, 2014. **[ICAI MODULE]**

Sol. As per explanation to section 31, the expression "shelf prospectus" means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

A company is required to issue a prospectus each time it accesses the capital market. It leads to unnecessary repetition for a company which makes more than one offer of securities in a year to mobile funds from the public. A way out is shelf prospectus which remains valid (on the shelf) a specified time period during which offers for securities may be made by a company to the public without going through the arduous exercise of issuing fresh prospectus every time.

(i) Filing of shelf prospectus with the Registrar Shelf prospectus may be filled with the Registrar at the stage of first offer of securities, by class or classes of companies as the Securities and Exchange Board may provide by regulations in this behalf.

It has to indicate a period not exceeding one year as the period of validity of such shelf prospectus. The period of validity is to commence from the date of opening of the first offer of securities under such prospectus.

In respect of any second or subsequent offer of such securities issued during the period of validity of such prospectus, no further prospectus is required.

(ii) Filing of 'Information Memorandum' with the Shelf Prospectus

A company filing a shelf prospectus shall be required to file an information memorandum with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus containing;

(a) All material facts relating to new charges created,

(b) Changes in the financial position of the company as have occurred between the first offer of securities or the previous offer of securities and the succeeding offer of securities, and

(c) Such other changes as may be prescribed, The information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

(iii) Safeguard (in case of changes) to applicants who made payment in advance. It is provided that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

(iv) Information Memorandum together with Shelf Prospectus is deemed Prospectus

Where an information memorandum is filed, every time an offer of securities is made under sub-section (2), such memorandum together with the shelf prospectus shall be deemed to be a prospectus.

3. The Board of Directors of Chandra Mechanical Toys Limited proposes to issue a prospectus inviting offers from the public for subscribing to the equity shares of the Company. State the reports which shall be included in the prospectus for the purposes of providing financial information under the provisions of the Companies Act, 2013. **[ICAI MODULE]**

Sol. As per section 26(1) of the Companies Act, 2013, every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be dated and signed and shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government.

It is provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

According to clause (c) of Section 26 (1), the prospectus shall make a declaration about the compliance of the provisions of the Companies Act, 2013 and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder.

Accordingly, the Board of Directors of Chandra Mechanical Toys Limited which proposes to issue the prospectus shall provide such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government to comply with the above stated provisions and make a declaration about such compliance.

4. Examine the validity of this allotment in the light of the provisions of the Companies Act, 2013: The Board of Directors of Reckless Investments Ltd. have allotted shares to the investors of the company without issuing a prospectus with the concerned Registrar of Companies. Explain the remedy available to the investors in this regard. **[MTP Aug. 2018]**

Sol. Relevant Provision: According to Section 23 of the Companies Act, 2013, a public company can issue securities to the public only by issuing a prospectus. Section 26(1) lays down the matters required to be disclosed and included in a prospectus and requires the registration of the prospectus with the Registrar before its issue.

Conclusion: In the given case, the company has violated with the above provisions of the Act and hence the allotment made is void. The company will have to refund the entire moneys received and will also be punishable under section 26 of the Act.

5. The Board of Directors of Chandra Ltd. proposes to issue the prospectus inviting offers from the public for subscribing the shares of the Company. State the reports which shall be included in the prospectus for the purposes of providing financial information under the provisions of the Companies Act, 2013. **[RTP May 2022]**

Sol. Relevant Provision: As per *section 26(1)* of the Companies Act, 2013, every prospectus issued by or on behalf of a public company either with reference to its formation or subsequently, or by or on behalf of any person who is or has been engaged or interested in the formation of a public company, shall be *dated and signed* and shall state such *information* and set out such reports on *financial information* as may be specified by the Securities and Exchange Board in consultation with the Central Government:

Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this sub-section, the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

Prospectus issued make a *declaration* about the *compliance* of the provisions of this Act and a *statement* to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder.

Conclusion: Accordingly, the Board of Directors of Chandra Ltd. who proposes to issue the prospectus shall provide such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government in compliance with the above stated provision and make a declaration about the compliance of the above stated provisions.

6. Prakhar Ltd. intends to raise share capital by issuing Equity Shares in different stages over a certain period of time. However, the company does not wish to issue prospectus each and every time of issue of shares.

Considering the provisions of the Companies Act, 2013, discuss what formalities Prakhar Ltd. should follow to avoid repeated issuance of prospectus? **[RTP Nov. 2018]**

Sol. Relevant Provision: *Shelf prospectus* means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus According to Section 31 of the Company Act, 2013 ny class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the *stage*:

(i) of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and

(ii) in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

The *other formalities* related to such repeated/subsequent issue of shares:

A company filing a shelf prospectus shall be required to file an *information memorandum* containing all material facts relating to new *charges* created, changes in the *financial position* of the company as have occurred between the first or previous offer of securities and the succeeding offer of securities and such *other changes* as may be prescribed, with the *Registrar* within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

Conclusion: Thus, Prakhar Ltd. can follow the above provisions and can issue a shelf prospectus.

7. An allottee of shares in a Company brought action against a Director in respect of false statements in prospectus. The director contended that the statements were prepared by the promoters and he has relied on them. Is the Director liable under the circumstances? Decide referring to the provisions of the Companies Act, 2013. **[MTP March 2021]**

Sol. Yes, the Director shall be held liable for the false statements in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus, section 35 more particularly includes a director of the company in the imposition of liability for such misstatements.

The only situations when a director will not incur any liability for mis statements in a prospectus are as under: No criminal liability under section 34 shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

No civil liability for any mis statement under section 35 shall apply to a person if he proves that:

(*i*) Having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(*ii*) The prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

Conclusion: Therefore, in the present case the *director cannot hide* behind the excuse that he had relied on the promoters for making correct statements in the prospectus. *He will be liable for mis statements in the prospectus*.

8. With a view to issue shares to the general public a prospectus containing some false information was issued by a company. Mr. X received copy of the prospectus from the company, but did not apply for allotment of any shares. The allotment of shares to the general public was completed by the company within the stipulated period. A few months later, Mr. X bought 2000 shares through the stock exchange at a higher price which later on fell sharply. X sold these shares at a heavy loss. Mr. X claims damages from the company for the loss suffered on the ground the prospectus issued by the company contained a false statement. Referring to the provisions of the Companies Act, 2013 examine whether X's claim for damages is justified.

[MTP March 2018]

Sol. Under section 2(70) of the Companies Act, 2013, "prospectus" means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.

A prospectus is a document inviting offers from the public. The prospectus and any statement therein has no legal binding either on the company or its directors, promoters or experts to a person who has not purchased securities in response to it. Since, X purchased shares through the stock exchange (open market) which cannot be said to have bought shares on the basis of prospectus. *X cannot bring action for deceit against the directors*.

Hence, X will not succeed. It was also held in the case of *Peek Vs. Gurney* that the above-mentioned remedy by way of damage will not be available to a person if he has not purchased the shares on the basis of prospectus.

9. RD Ltd. issued a prospectus. All the statements contained therein were literally true. It also stated that company had paid dividends for a number of years but did not disclose the fact that the dividends were not paid out of trading profits but out of capital profits. An allotee of shares claims to avoid the contract on the ground that the prospectus was false in material particulars. Decide that the argument of shareholder, as per the provision of the Companies Act, 2013, is correct or not? **Dec. 2021]**

Sol. Relevant Provision: According to section 34 of the Companies Act, 2013, where a prospectus, issued, circulated or distributed, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorises the issue of such prospectus shall be liable under section 447.

Further, Section 35(3) provides that, where it is proved that a prospectus has been issued with intent to defraud the applicants for the securities of a company or any other person or for any fraudulent purpose, every person referred to in section 35(1), shall be personally responsible, without any limitation of liability, for all or any of the losses or damages that may have been incurred by any person who subscribed to the securities on the basis of such prospectus.

Conclusion: In the given question, the non-disclosure of the fact that dividends were paid out of capital profits is a *concealment of material fact* as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances it can pay dividend out of capital profits. Hence, a material misrepresentation has been made.

Accordingly, in the given case the allottee can avoid the contract of allotment of shares.

10. Sudarshan Exports Ltd. was dealing in export of rubber to specified foreign countries. The company was willing to purchase rubber trees in Andhra Pradesh. The prospectus issued by the company contained some important extracts of the expert report and number of trees in Andhra Pradesh.

The report was found untrue. Mr. Alok purchased the shares of Sudarshan Exports Ltd. on the basis of the expert report published in the prospectus. Will Mr. Alok have any remedy against the company? State also the circumstances where an expert is not liable under the Companies Act, 2013. **[May 2020]**

Sol. Relevant Provision: Under section 35(1) of the Companies Act 2013, where a person has subscribed for securities of a company acting on any statement included in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person including an expert shall, be liable to pay compensation to the person who has sustained such loss or damage.

In the present case, Mr. Alok purchased the shares of Sudarshan Exports Ltd. on the basis of the expert report published in the prospectus. Mr. Alok can claim compensation for any loss or

damage that he might sustained from the purchase of shares, which has not been mentioned in the given case.

Conclusion: Hence, Mr. Alok will have no remedy against the company.

Circumstances when an expert is not liable: An expert will not be liable for any mis-statements in the prospectus under the following situations:

- Under section 26(5), that having given his consent, but withdrew it in writing before delivery of the copy of prospectus for registration, or
- Under section 35(2), that the prospectus was issued without his knowledge/consent and that on becoming aware of it, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent;
- That, as regards every misleading statement purported to be made by an expert or contained in what purports to be a copy of or an extract from a report or valuation of an expert, it was a correct and fair representation of the statement, or a correct copy of, or a correct and fair extract from, the report or valuation; and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe, that the person making the statement was competent to make it and that the said person had given the consent required by section 26(5) to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder.

11. State in what way does the Companies Act, 2013 regulate and restrict the following in respect of a company going for public issue of shares:

(i) Minimum Subscription; and

(ii) Application Money payable on shares being issued. **[ICAI MODULE]**

Sol. Relevant Provision: The Companies Act, 2013 by virtue of provisions as contained in Section 39(1) and (2) regulates and restricts the minimum subscription and the application money payable in a public issue of shares as under:

Minimum subscription [Section 39(1)] No Allotment shall be made of any securities of a company offered to the public for subscription; unless:

(i) the amount stated in the prospectus as the minimum amount has been subscribed; and

(ii) the sums payable on application for such amount has been paid to and received by the company.

Application money: Section 39(2) provides that the amount payable on application on each security shall not be less than 5% of the nominal amount of such security or such amount as SEBI may prescribe by making any regulations in this behalf.

Further section 39(3) provides that if the stated minimum amount is not received by the company within 30 days of the date of issue of the prospectus or such time as prescribed by SEBI, the company will be required to refund the application money received within such time and manner as may be prescribed.

In case of any *default* under sub-section, the company and its officer who is in default shall be liable to a penalty, for each default, of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

Section 40(3) provides that all moneys received on application from the public for subscription to the securities shall be kept in a separate bank account maintained with a scheduled bank.

12. A Ltd. issued 1,00,000 equity shares of `100 each at par to the public by issuing a prospectus. The prospectus discloses the minimum subscription amount of `15,00,000 required to be received on application of shares and share application money shall be payable at `20 per share.

The prospectus further reveals that A Ltd. has applied for listing of shares in 3 recognised stock exchanges of which 1 application has been rejected. The issue was fully subscribed and A Ltd. received an amount of `20,00,000 on share application. A Ltd., then proceeded for allotment of shares.

Examine the *three disclosures* in the above case study which are the deciding factors in an allotment of shares and the consequences for violation, if any under the provisions of the Companies Act, 2013. **[Jan. 2021]**

Sol. Relevant Provision: As per the requirement of the question, disclosures which are the deciding factors in an allotment of shares are laid down in section 39 of the Companies Act, 2013.

According to Section 39(1), no allotment of any securities of a company offered to the public for subscription shall be made unless:

(i) the amount stated in the prospectus as the minimum amount has been subscribed; and

(ii) the sums payable on application for the amount so stated have been paid to, and received by the company by cheque or other instrument.

The amount payable on application on every security shall not be less than five per cent of the nominal amount of the security or such other percentage or amount, as may be specified by the Securities and Exchange Board by making regulations in this behalf.

Given Case and Analysis: In the question, A Ltd. issued shares to public by issuing of prospectus, disclosing minimum subscription, sum payable on application for the amount; and the amount received on share application is more than 5% of the nominal amount of the security.

Further, it revealed that A Ltd. has applied for listing of shares in 3 recognised stock exchanges of which one application was rejected.

In the given instance, there is compliance to section 23, as nothing is talked about matters required to be included in the prospectus under section 26(1) and about filing with the registrar; assuming that the said requirements have been complied with, requirement of section 39 as regards obtaining of minimum subscription and the minimum amount receivable on application (not less than 5% of the nominal value of the securities offered) are fulfilled.

The provisions of section 40 of the Companies Act, 2013 states that every company making public offer shall, before making such offer, make an application to one or more recognized stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

The above provision is very clear that not only the company has to apply for listing of the securities at a recognized stock exchange, but also obtain permission thereof from all the stock exchanges where it has applied, before making the public offer.

Since one of the three recognized stock exchanges, where the company has applied for enlisting, has rejected the application and the company has proceeded with making the offer of shares, it has *violated the provisions of section 40*. Therefore, this shall be deemed to be irregular allotment of shares.

Conclusion: Consequently, A Ltd. shall be required to refund the application money to the applicants in the prescribed manner within the stipulated time frame.

13. Kapoor Builders Limited decides to pay 2.5 percent of the value of debentures as underwriting commission to the underwriters but the Articles of the company authorise only 2.0 percent underwriting commission on debentures. The company further decides to pay the underwriting commission in the form of flats. Examine the validity of the above arrangements under the provisions of the Companies Act,2013. **[ICAI MODULE]**

Sol. Relevant Provision: Section 40(6) of the Companies Act 2013, provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to a number of conditions which are prescribed under Companies (Prospectus and Allotment of Securities) Rules, 2014. In relation to the case given, the conditions applicable under the above Rules are as under:

(*i*) The payment of such commission shall be authorised in the company's articles of association;

(*ii*) The commission may be paid out of proceeds of the issue or the profit of the company or both;

(*iii*) The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half per cent (2.5%) of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;

Conclusion: Thus, the Underwriting commission is limited to 5% of issue price in case of shares and 2.5% in case of debentures subject to the rates in articles of association.

In view of the above, the decision of Kapoor Builders Ltd. to pay underwriting commission exceeding 2% as prescribed in the Articles is invalid.

The company may pay the underwriting commission in the form of flats as both the Companies Act and the Rules do not impose any restriction on the mode of payment though the source has been restricted to either the proceeds of the issue or profits of the company.

14. Examine the validity of the following statement referring to the provisions of the Companies Act, 2013 and/or Rules: "The Articles of Association of X Ltd. contained a provision that upto 4% of issue price of the shares may be paid as underwriting commission to the underwriters. The Board of Directors of X Ltd. decided to pay 5% underwriting commission." **[ICAI MODULE]**

Sol. Relevant Provision: Section 40(6) of the Companies Act 2013, provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the number of conditions which are prescribed under Companies (Prospectus and Allotment of Securities) Rules, 2014.

Under the Companies (Prospectus and Allotment of Securities) Rules, 2014 the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less.

In the given problem, the articles of X Ltd. have prescribed 4% underwriting commission but the directors decided to pay 5% underwriting commission.

Conclusion: Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid.

15. TDL Ltd., a public company is planning to bring a public issue of equity shares in June, 2018. The company has appointed underwriters for getting its shares subscribed. As a Chartered Accountant of the company appraise the Board of TDL Ltd. about the provisions of payment of underwriter's commission as per Companies Act, 2013. **[May 2018]**

Sol. The provisions of the Companies Act, 2013 regarding the payment of underwriter's commission are as follows:

Payment of commission: A company may pay commission to any person in connection with the subscription to its securities, whether absolute or conditional, subject to such conditions as given in Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014.

Conditions for the payment of commission:

(a) The payment of such commission shall be *authorised* in the company's *articles* of association;

(b) The commission may be paid out of *proceeds* of the issue or the *profit* of the company or both.

Rate of commission: The rate of commission paid or agreed to be paid shall not exceed, in case of shares, 5% of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed *two and a half per cent* of the price at which the debentures are issued, or as specified in the company's articles, whichever is less.

Disclosure of particulars: The prospectus of the company shall disclose the following particulars:

(a) The name of the underwriters;

(b) The rate and amount of the commission payable to the underwriter; and

(c) The number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

No commission to be paid: There shall not be paid commission to any underwriter on securities which are not offered to the public for subscription.

Copy of contract of payment of commission to be delivered to registrar: A copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

16. Prakash Limited wants to raise funds for its upcoming project. Accordingly, it has issued private placement offer letters for issuing equity shares to 55 persons, of which four are qualified institutional buyers and remaining are individuals. Before the completion of allotment of equity shares under this offer letter, company issued another private placement offer letter to another 155 persons in their individual names for issue of its debentures. Being a public company is it possible for Prakash Limited to issue securities under a private placement offer? By doing so, whether the company is in compliance with provisions relating to private placement or should these offers be treated as public offers? What if the offer for debentures is given after allotment of equity shares but within the same financial year? **[ICAI MODULE]**

Sol. Relevant Provision: According to section 42 of the Companies Act, 2013 any private or public company may make private placement through issue of a private placement offer letter.

However, the offer shall be made to the persons not exceeding fifty or such higher number as may be prescribed, in a financial year. For counting number of persons, Qualified Institutional Buyers (QIBs) and employees of the company being offered securities under a scheme of employees' stock option will not be considered.

Further, Rule 14(2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014 prescribes maximum of 200 persons who can be offered securities under the private placement in a financial year, though this limit should be counted separately for each type of security.

It is to be noted that if a company makes an offer or invitation to more than the prescribed number of persons, it shall be deemed to be an offer to the public and accordingly, it shall be governed by the provisions relating to prospectus.

Also, a company is not permitted to make fresh offer under this section if the allotment with respect to any offer made earlier has not been completed or otherwise, that offer has been withdrawn or abandoned by the company. This provision is applicable even if the issue is of different kind of security.

Any offer or invitation not in compliance with the provisions of this section shall be treated as a public offer and all provisions will apply accordingly.

Conclusion: In the given case Prakash Limited, though a public company but the private placement provisions allow even a public company to raise funds through this route. The company has given offer to 55 persons out of which 4 are qualified institutional buyers and hence, the offer is given effectively to only 51 persons which is well within the limit of 200 persons. From this point of view, the company complies the private placement provisions.

However, as per the question, the company has given another private placement offer of debentures before completing the allotment in respect of first offer and therefore, the second of fer does not comply with the provisions of section 42. Hence, the offers given by the company will be treated as public offer.

In case the company gives offer for debentures in the same financial year after allotment of equity shares is complete then both the offers can well be treated as private placement offers.

17. CDS Ltd. is planning to make a private placement of securities. The Managing Director arranged to obtain a brief note from some source explaining the salient features of the issue of private placement that the Board of Directors shall keep in mind while approving the proposal on this subject. The brief note includes, inter alia, the information/suggestions on the following points:

(*i*) A private placement shall be made only to a select group of identified persons not exceeding 200 in a financial year.

The aforesaid ceiling of identified persons shall not apply to the offer made to the qualified institutional buyers but is applicable to the employees of the Company who will be covered under the Company's Employees Stock Option Scheme.

(*ii*) The offer on private placement basis shall be made only once in a financial year for any number of identified persons not exceeding 200.

The Company solicits your remarks on the points referred above as to whether they are valid or not? Reasoned remarks should be given in accordance with the provisions of the Companies Act, 2013. **[Jan. 2021]**

Sol. Relevant Provision: As per the provisions of sub-section (2) of section 42 of the Companies Act, 2013, private placement shall be made only to a select group of persons who have been identified by the Board (herein referred to as "identified persons"), whose number shall not exceed 50 or such higher number as may be prescribed, in a financial year subject to such conditions as may be prescribed.

It is also provided that any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees' stock option as per provisions of section 62(1)(b) shall not be considered while calculating the limit of two hundred persons.

According to Rule 14 (2) of the Companies (Prospectus and Allotment of Securities) Rules, 2014, an offer or invitation to subscribe securities under private placement shall not be made to persons more than two hundred in the aggregate in a financial year.

As per Explanation given in this Rule, it is clarified that the restrictions aforesaid would be reckoned individually for each kind of security that is equity share, preference share or debenture.

Referring to the above mentioned provisions of sub-section (2) of section 42 of the Companies Act, 2013 and Rule 14 the Companies (Prospectus and Allotment of Securities) Rules, 2014, we can conclude as follows:

(*i*) The company is correct in proposing that private placement shall be made only to a select group of identified persons not exceeding 200 in a financial year. This part of the proposal is correct.

The company is also correct in proposing that the aforesaid ceiling of identified persons shall not apply to offer made to the qualified institutional buyers, but the company is not correct in saying that the said ceiling is applicable to employees covered under the Company's Employee Stock Option Scheme.

Hence, the second part of the proposal is only partially correct.

(*ii*) The Companies (Prospectus and Allotment of Securities) Rules, 2014 provides that an offer or invitation to subscribe securities under private placement shall not be made to persons more than 200 in aggregate in a financial year.

Keeping the ceiling of 200 persons in aggregate during a financial year, offer of private placement can be made more than once in a financial year. Therefore, the second statement is not fully correct.

CHAPTER- 4

SHARE CAPITAL AND DEBENTURES

PRACTICE QUESTIONS

1. Growmore Limited's share capital is divided into different classes. Now, Growmore Limited intends to vary the rights attached to a particular class of shares. Explain the provisions of the Companies Act, 2013 to Growmore Limited as to obtaining consent from the shareholders in relation to variation of rights. **[RTP Nov. 2018]**

Sol. According to section 48 of the Companies Act, 2013:

1. **Variation in rights of shareholders with consent:** Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class:

   (a) if provision with respect to such variation is *contained in the memorandum or articles* of the company; or

   (b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class:

   Provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the *consent of three-fourths of such other class* of shareholders shall also be obtained and the provisions of this section shall apply to such variation.

2. **Cancellation of variation:** Where the holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal:

Provided that an application under this section shall be made within *twenty-one days* after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.

2. Mr. A was having 500 equity shares of Open Sky Aircrafts Limited. Mr. B acquired these shares of the company from Mr. A but the signature of Mr. A, the transferor on the transfer deed was forged. The company registered the shares in the name of Mr. B by issuing share certificate. Mr. B sold 100 equity shares to Mr. C on the basis of share certificate issued by Open Sky Aircrafts Ltd.

Mr. B and Mr. C are not having the knowledge of forgery. State the rights of Mr. A, Mr. B and Mr. C under the Companies Act, 2013. **[Nov. 2021]**

Sol. According to Section 46(1) of the Companies Act, 2013, a share certificate once issued under the common seal, if any, of the company or signed by two directors or by a director and the Company Secretary, wherever the company has appointed a Company Secretary", specifying the shares

held by any person, shall be prima facie evidence of the title of the person to such shares. Therefore, in the normal course the person named in the share certificate is for all practical purposes the legal owner of the shares therein and the company cannot deny his title to the shares.

However, a forged transfer is a nullity. It does not give the transferee (Mr. B) any title to the shares. Similarly any transfer made by Mr. B (to Mr. C) will also *not give a good title* to the shares as the *title of the buyer is only as good as that of the seller*.

Therefore, if the company acts on a forged transfer and removes the name of the real owner (Mr. A) from the Register of Members, then the company is *bound to restore the name of Mr. A* as the holder of the shares and to *pay him any dividends* which he ought to have received (*Barton v. North Staffordshire Railway Co.*).

In the above case, 'therefore, Mr. A has the right against the company to get the shares recorded in his name. However, neither Mr. B nor Mr. C have any rights against the company even though they are bona fide purchasers.

However, since Mr. A seems to be the perpetrator of the forgery, he will be liable both criminally and for compensation to Mr. B and Mr. C

3. Walnut Limited has an authorised share capital of 1,00,000 equity shares of `100 per share and an amount of `3 crores in its Share Premium Account as on 31-3-2018. The Board of Directors seeks your advice about the application of share premium account for its business purposes. Please give your advice **[RTP May 2019, ICAI Module]**

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

The securities premium account may be applied by the company:

(a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

(d) in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or

(e) for the purchase of its own shares or other securities under section 68.

The securities premium account may be applied by such class of companies, as may be prescribed and whose financial statement comply with the accounting standards prescribed for such class of companies under section 133:

(a) in paying up unissued equity shares of the company to be issued to members of the company as fully paid bonus shares; or

(b) in writing off the expenses of or the commission paid or discount allowed on any issue of equity shares of the company; or

(c) for the purchase of its own shares or other securities under section 68. Share Capital and Debentures

Keeping the above points in view Walnut Foods Limited should proceed to utilise the amount of Securities Premium Account.

4. ABC Limited is a public company incorporated in New Delhi. The Board of Directors (BOD) of the company wants to bring a public issue of 100000 equity shares of `10 each. The BOD has appointed an underwriter for this issue for ensuring the minimum subscription of the issue. The underwriter advised the BOD that due to current economic situation of the Country it would be better if the company offers these shares at a discount of `1 per share to ensure full subscription of this public issue. The Board of Directors agreed to the suggestion of underwriter and offered the shares at a discount of `1 per share. The issue was fully subscribed and the shares were allotted to the applicants in due course.

Decide whether the issue of shares as mentioned above is valid or not as per Section 53 of Companies Act 2013. What would be your answer in the above case if the shares are issued to employees as Sweat equity shares? **[Nov. 2020]**

Sol. As per the provisions of section 53(1) read with section 54 of the Companies Act, 2013, a company shall not issue shares at a discount, except in the case of an issue of sweat equity shares.

As per the provisions of section 53(2) of the Companies Act, 2013, any share issued by a company at a discount shall be *void*.

In terms of the above provisions, issue of shares by ABC Limited at a discount of `1 per share is *not valid*.

In case the above shares have been issued to employees as Sweat equity shares, then the issue of shares at discount is valid. [Section 54(1) of the Companies Act, 2013]

5. Trisha Data Security Limited was incorporated on 1st August, 2019 with a paid- up share capital of `200 crores. Within such a small period of about one year in operation, it has earned sizeable profits and has topped the charts for its high employee-friendly environment. The company wants to issue sweat equity to its employees. A close friend of the CEO of the company has told him that the company cannot issue sweat equity shares as minimum 2 years have not elapsed since the time company commenced its business. The CEO of the company has approached you to advise about the essential conditions to be fulfilled before the issue of sweat equity shares especially since their company is just about a year old. **[ICAI Module, MTP May 2019]**

Sol. Relevant provision: *Sweat equity shares of a class of shares already issued.*

According to section 54 of the Companies Act, 2013, a company *may issue* sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:

(*i*) The issue is authorised by a *special resolution* passed by the company;

(*ii*) The resolution *specifies* the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;

(*iii*) Where the equity shares of the company are *listed* on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the *Securities and Exchange Board* in this behalf and if they are *not so listed*, the sweat equity shares are issued in accordance with *such rules* as prescribed under Rule 8 of the Companies (Share and Debentures) Rules, 2014

The rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under Section 54 and the holders of such shares shall *rank pari passu* with other equity shareholders.

Given case and analysis: Trisha Data Security Limited can issue Sweat equity shares by following the conditions as mentioned above. It *does not make a difference that the company is just about a year old* because no such minimum time limit of 2 years in operations is specified under Section 54.

6. Yellow Pvt Ltd. is an unlisted company incorporated in the year 2012. The company have share capital of rupees fifty crores. The company has decided to issue sweat equity shares to its directors and employees. The company decided to issue 10% sweat equity shares (which in total will add up to 30% of its paid up equity shares), with a locking period of five years, as it is a start-up company.

How would you justify these facts in relation to the provision for issue of sweat equity shares by a start-up company, with reference to the provision of the Company Act, 2013. Explain?

[RTP May 2019, MTP March 19, May 2020]

Sol. Relevant provision: Sweat Equity Shares is governed by Section 54 of the Companies Act, 2013 and Rule 8 of Companies (Share capital and debentures) Rules, 2014. According to Section 54 the company can issue sweat equity shares to its director and permanent employees of the company.

According to rule 8 (4) proviso, states that a start up company, is defined in a notification number Ministry of Commerce and industry Government of India, may issue sweat equity share not exceeding 50% of its paid up share capital up to 10 years from the date of its in incorporation or registration.

According to Rule 8(5), the sweat equity shares issued to directors or employees shall be locked in/ non transferable for a period of *3 years* from the date of allotment and the fact that the share certificates are under lock-in too.

Analysis and conclusion: Hence, in the above case the company can issue sweat equity shares by passing special resolution at its general meeting. The company as a startup company is right in issue of 10% sweat equity share as it is overall within the limit of 50% of its paid up share capital.

But the lock in period of the shares is limited to maximum three years period from the date of allotment.

7. Due to insufficient profits, Silver Robotics Limited is unable to redeem its existing preference shares amounting to `10,00,000 (10,000 preference shares of `100 each) though as per the terms of issue they need to be redeemed within next two months. It did not, however, default in payment of dividend as and when it became due. What is the remedy available to the company in respect of outstanding preference shares as per the Companies Act, 2013? **[ICAI Module]**

Sol. Relevant provision: According to Section 55(3) of the Companies Act, 2013, where a company is not in a position to redeem any preference shares or to pay dividend, if any, on such shares in accordance with the terms of issue (such shares hereinafter referred to as unredeemed preference shares), it may:

- with the consent of the holders of three-fourths in value of such preference shares, and
- with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon, in respect of the unredeemed preference shares, and on the issue of such further redeemable preference shares, the unredeemed preference shares shall be deemed to have been redeemed.

Provided that the Tribunal shall, while giving approval under this sub-section, order the redemption forthwith of preference shares held by such persons who have not consented to the issue of further redeemable preference shares.

Given case and conclusion: In view of the provisions of Section 55 (3), Silver Robotics Limited can initiate steps for the issue of further redeemable preference shares equal to the amount due i.e., `10,00,000. For this purpose, it shall obtain the consent of the holders of three-fourths in value of such preference shares and also seek approval of the Tribunal by making a petition.

In case, there are certain preference shareholders who have not accorded their consent for the proposal of issuing further redeemable preference shares, the Tribunal may order the company to redeem forthwith such preference shares.

Accordingly, Silver Robotics Limited must be ready with sufficient funds for the redemption of preference shares held by those who have not consented. On the issue of such further redeemable preference shares by the company, the unredeemed preference shares shall be deemed to have been redeemed.

8. Ramesh, a resident of New Delhi, sent a transfer deed duly signed by him as transferee and his brother Suresh as transferor, for registration of transfer of shares to Ryan Entertainment Private Limited at its Registered Office in Mumbai. He did not receive the transferred shares certificates even after the expiry of four months from the date of dispatch of transfer deed. He lodged a criminal complaint in the Court at New Delhi. Decide, under the provisions of the Companies Act, 2013, whether the Court at New Delhi is competent to act in the said matter? **[ICAI Module]**

Sol. Relevant provision: According to Section 56 (4) of the Companies Act, 2013 every company, unless prohibited by any provision of law or of any order of court, Tribunal or other authority,

shall *deliver the certificates* of all shares transferred within a period of *one month* from the date of receipt by the company of the instrument of transfer.

Further, as per Section 56 (6), where any default is made in complying with the provisions of sub-sections (1) to (5), the company and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

In this case, the jurisdiction binding on the company is that of the State in which the registered office of the company is situated i.e., Mumbai. Hence, the Court at Delhi is not competent to act in the matter.

9. The Directors of Mars Motors India Ltd. desire to alter Capital Clause of the Memorandum of Association of their company. Advise them about the ways in which the said clause may be altered under the provisions of the Companies Act, 2013. **[ICAI Module, MTP May 2020]**

Sol. Alteration of Capital: Under section 61 (1) a limited company having a share capital may, if *authorised by its Articles*, alter its Memorandum in its general meeting to:

(i) increase its authorised share capital by such amount as it thinks expedient;

(ii) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares;

However, no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

(iii) convert all or any of its paid- up shares into stock and reconvert that stock into fully paid shares of any denomination.

(iv) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the Memorandum;

(v) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

Further, under *section 64* where a company alters its share capital in any of the abovementioned ways, the company shall file a notice in the prescribed form with the Registrar within a period of *thirty days* of such alteration, along with an altered memorandum.

The capital clause of memorandum, if authorised by the articles, shall be altered by passing an *ordinary resolution* as per Section 61 (1) of the Companies Act, 2013.

10. VRS Company Ltd. is holding 45% of total equity shares in SV Company Ltd. The Board of Directors of SV Company Ltd. (incorporated on January 1, 2019) decided to raise the share capital by issuing further equity shares. The Board of Directors resolved not to offer any shares to VRS Company Ltd., on the ground that it was already holding a high percentage of the total number of shares issued by SV Company Ltd. The Articles of Association of SV Company Ltd. provide that the new shares should first be offered to the existing shareholders of the company. On March 1, 2019 SV Company Ltd. offered new equity shares to all the shareholders except VRS Company Ltd.

Referring to the provisions of the Companies Act, 2013 examine the validity of the decision of the Board of Directors of SV Company Ltd. of not offering any further shares to VRS Company Limited. **[ICAI Module]**

Sol. Relevant provision: The legal issues involved herein are covered under Section 62 (1) of the Companies Act, 2013.

Section 62 (1) (*a*) of the Companies Act, 2013 provides that if, at any time, a company having a share capital proposes to increase its subscribed capital by issue of further shares, such shares should *first be offered to the existing equity shareholders* of the company as at the date of the offer, n proportion to the paid-up capital on those shares. Hence, the company cannot ignore a section of the existing shareholders and must offer the shares to the existing equity shareholders in proportion of their holdings.

Given case: As per facts of the case, the Articles of SV Company Ltd. provide that the new shares should first be offered to the existing shareholders. However, the company offered new shares to all shareholders excepting VRS Company Ltd., which held a major portion of its equity shares. It is to be noted that under the Companies Act, 2013, SV Company Ltd. did not have any legal authority to do so.

Analysis and conclusion: Therefore, in the given case, decision of the Board of Directors of SV Company Ltd. not to offer any further equity shares to VRS Company Ltd. on the ground that VRS Company Ltd. already held a high percentage of shareholding in SV Company Ltd. is *not valid*. Such a decision violates the provisions of Section 62 (1) (*a*) as well as Articles of the issuing company.

11. Shilpi Developers India Limited owed to Sunil `10,000. On becoming this debt payable, the company offered Sunil 100 shares of `100 each in full settlement of the debt. The said shares were allotted to Sunil as fully paid-up in lieu of his debt. Examine the validity of this allotment in the light of the provisions of the Companies Act, 2013. **[ICAI Module]**

Sol. Relevant provision: Under Section 62 (1) (*c*) of the Companies Act, 2013 where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, either for cash or for a consideration other than cash, *such shares may be offered to any persons*, if it is authorised by a *special resolution* and if the *price* of such shares is determined by a empowered to allot the shares to Sunil in settlement of its debt to him. This valuation report of a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

In the present case, Shilpi Developers India Limited's allotment, to be classified as shares issued for consideration other than cash, must be approved by the members by a special resolution.

Further, the valuation of the shares must be done by a registered valuer, subject to the compliance with the applicable provisions of Chapter III and any other conditions as may be prescribed.

12. X Ltd. issued a notice on 1st Feb, 2018 to its existing shares holders offering to purchase one extra share for every five shares held by them.

The last date to accept the offer was 15th Feb, 2018 only. Mr. Kavi has given an application to renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company.

Examine the validity of application of Mr. Kavi under the provisions of the Companies Act, 2013. Would your answer differ if Mr. Kavi is a shareholder of X Ltd.? **[Nov 2019]**

Sol. Relevant provision: According to section 62 of the Companies Act, 2013, where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares shall be offered to persons who, at the date of the offer, *are holders of equity shares* of the company in proportion, as nearly as circumstances admit, to the paid-up share capital on those shares *by sending a letter of offer* subject to the following conditions, namely:

(i) the offer shall be made by notice specifying the number of shares offered and limiting a time not being less than fifteen days and not exceeding thirty days from the date of the offer within which the offer, if not accepted, shall be deemed to have been declined;

(ii) unless the articles of the company otherwise provide, the offer aforesaid shall be deemed to include a right exercisable by the person concerned to renounce the shares offered to him or any of them in favour of any other person; and the notice referred to in clause (*i*) shall contain a statement of this right;

(*iii*) after the expiry of the time specified in the notice aforesaid, or on receipt of earlier intimation from the person to whom such notice is given that he declines to accept the shares offered, the Board of Directors may dispose of them in such manner which is not dis-advantageous to the shareholders and the company.

Given case: In the instant case, X Ltd. issued a notice on 1st Feb, 2018 to its existing shares holders offering to purchase one extra share for every five shares held by them. The last date to accept the offer was 15th Feb, 2018 only. Mr. Kavi has given an application to renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company.

Analysis and conclusion: As nothing is specified related to the Articles of the company, it is assumed offer shall be deemed to include a right of renunciation. Hence, Mr. Kavi can renounce the shares offered to him in favour of Mr. Ravi, who is not a shareholder of the company.

In the second part of the question, even if Mr. Ravi is a shareholder of X Ltd. then also it does not affect the right of renunciation of shares of Mr. Kavi to Mr. Ravi.

13. ABC Ltd. has following balances in their Balance Sheet as on 31st March, 2018:

		`
(1)	Equity shares capital (3:00 lakhs equity shres of `10 each)	30.00 lacs
(2)	Free reserves	5.00 lacs
(3)	Securities Premium Account	3.00 lacs
(4)	Capital redemption reserve account	4.00 lacs
(5)	Revaluation Reserve	3.00 lacs

Directors of the company seeks your advice in following cases:

(i) Whether company can give bonus shares in the ratio of 1:3?

(ii) What if company decide to give bonus shares in the ratio of 1:2? **[Nov 2018]**

Sol. Relevant provision - Issue of bonus shares [Section 63]: As per Section 63 of the Companies Act, 2013, a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of:

(*a*) its free reserves;

(b) he securities premium account; or

(c) the capital redemption reserve account.

Provided that no issue of bonus shares shall be made by capitalising reserves created by the revaluation of assets.

Analysis and Conclusion: As per the given facts, ABC Ltd. has total eligible amount of `12 lakhs (i.e. 5.00 + 3.00 + 4.00) out of which bonus shares can be issued and the total share capital is `30.00 lakhs. Accordingly:

(i) For issue of 1:3 bonus shares, there will be a requirement of `10 lakhs (i.e., 1/3 × 30.00 lakh) which is well within the limit of available amount of `12 lakhs. So, ABC Limited can go ahead with the bonus issue in the ratio of 1:3.

(ii) In case ABC Limited intends to issue bonus shares in the ratio of 1:2, there will be a requirement of `15 lakhs (i.e., 1/2 × 30.00 lakh). Here in this case, the company cannot go ahead with the issue of bonus shares in the ratio of 1:2, since the requirement of `15 Lakhs is exceeding the available eligible amount of `12 lakhs.

14. Shankar Portland Cement Limited is engaged in the manufacture of different types of cements and has got a good brand value. Over the years, it has built a good reputation and its Balance Sheet as at March 31, 2020 showed the following position:

1. Authorised Share Capital (25,00,000 equity shares of `10/- each) `2,50,00,000
2. Issued, subscribed and paid-up Share Capital (10,00,000 equity shares of `10/- each, fully paid-up) `1,00,00,000
3. Free Reserves `3,00,00,000

The Board of Directors are proposing to declare a bonus issue of 1 share for every 2 shares held by the existing shareholder. The Board wants to know the conditions and the manner of issuing bonus shares under the provisions of the Companies Act, 2013. **[ICAI Module, MTP Nov 2020]**

Sol. According to Section 63 of the Companies Act, 2013, a company may issue fully paid-up bonus shares to its members, in any manner whatsoever, out of:

(i) its free reserves;

(ii) the securities premium account; or

(iii) the capital redemption reserve account.

Provided that no issue of bonus share shall be made by capitalising reserves created by evaluation of assets.

Conditions for issue of Bonus Shares: No company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares, unless:

(i) it is authorised by its Articles;

(ii) it has, on the recommendation of the Board, been authorised in the general meeting of the company;

(iii) it has not defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;

(iv) it has not defaulted in respect of payment of statutory dues of employees, such as, contribution to provident fund, gratuity and bonus;

(v) the partly paid-up shares, if any, outstanding on the date of allotment, are made fully paid-up;

(vi) it complies with such conditions as are prescribed by Rule 14 of the Companies (Share Capital and debentures) Rules, 2014 which states that the company which has once announced the decision of its Board recommending a bonus issue, shall not subsequently withdraw the same.

Further, the company has to ensure that the bonus shares shall not be issued in lieu of dividend. For the issue of bonus shares Shankar Portland Cement Limited will require reserves of `50,00,000 (i.e. half of `1,00,00,000 being the paid-up share capital), which is readily available with the company.

Hence, after following the above conditions relating to the issue of bonus shares, the company may proceed for a bonus issue of 1 share for every 2 shares held by the existing shareholders.

15. The Authorised share capital of SSP Limited is `5 crore divided into 50 Lakhs equity shares of `10 each. The Company issued 30 Lakhs equity shares for subscription which was fully subscribed. The Company called so far `8 per share and it was paid up. Later on the Company proposed to reduce the Nominal Value of equity share from `10 each to `8 each and to carry out the following proposals:

(i) Reduction in Authorised Capital from `5 crore divided into 50 Lakhs equity shares of `10 each to `4 crore divided into 50 Lakhs equity shares of `8 each.

(ii) Conversion of 30 Lakhs partly paid up equity shares of `8 each to fully paid up equity shares of `8 each there by relieving the shareholders from making further payment of `2 per share. State the procedures to be followed by the Company to carry out the above proposals under the provisions of the Companies Act, 2013. **[Nov 2020]**

Sol. (*i*) **Procedure for reduction of share capital:** In order to carry out proposals by SSP Limited to reduce the nominal value of the equity share, the company has to comply with the procedure given under section 66 of the Companies Act, 2013 which deals with the Reduction of share capital.

Procedure:

1. ***Reduction of share capital by special resolution:*** Subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, *by a special resolution*, reduce the share capital in any manner and in particular, may:

   (*a*) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or

   (*b*) either with or without extinguishing or reducing liability on any of its shares,:

      (i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or

      (ii) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

2. ***Issue of Notice from the Tribunal:*** The Tribunal shall give notice of every application made to it to the Central Government, Registrar and the creditors of the company and shall take into consideration the representations, if any, made to it by them *within a period of three months* from the date of receipt of the notice.

3. ***Order of tribunal:*** The Tribunal may, if it is satisfied that the debt or claim of every creditor of the company has been discharged or determined or has been secured or his consent is obtained, make an order confirming the reduction of share capital on such terms and conditions as it deems fit.

4. ***Publishing of order of confirmation of tribunal:*** The order of confirmation of the reduction of share capital by the Tribunal shall be published by the company in such manner as the Tribunal may direct.

5. ***Delivery of certified copy of order to the registrar:*** The company shall deliver a certified copy of the order of the Tribunal and of a minute approved by the Tribunal to the Registrar within thirty days of the receipt of the copy of the order, who shall register the same and issue a certificate to that effect.

   (ii) **Alteration of Share Capital:** SSP Limited proposes to alter its share capital. The Present authorised share capital `5 Crore will be altered to `4 Crore. According to Section 61 of the Companies Act, 2013, a limited company having a share capital may alter its capital part of the memorandum.

   A limited company having a share capital may, if so authorised by its articles, alter its memorandum in its general meeting to:

   1. *cance*l shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so canceled. The cancellation of shares shall not be deemed to be reduction of share capital.

2. a company shall *within 30 days* of the shares having been consolidated, converted, subdivided, redeemed, or canceled or the stock having been reconverted, shall give a notice to the Registrar in the prescribed form along with an altered memorandum [Section 64 of the Companies Act, 2013].

The Company has to follow the above procedures to alter its authorised share capital.

16. OLAF Limited, a subsidiary of PQR Limited, decides to give a loan of `4,00,000 to its Human Resource Manager Mr. Surya Nayan, who does not fall in the category of Key Managerial Personnel and draws a salary of `40,000 per month, to buy 500 partly paid-up equity shares of `1000 each in OLAF Limited. Examine the validity of company's decision under the provisions of the Companies Act, 2013. **[ICAI Module, RTP May 2020]**

Sol. Restrictions on purchase by company or giving of loans by it for purchase of its share: As per section 67 (3) of the Companies Act, 2013 a company is allowed to give a loan to its employees subject to the following limitations:

(a) The employee must *not be a director* or Key Managerial Personnel;

(b) The amount of such loan shall *not exceed an amount equal to six months' salary* of the employee.

(c) The loan must be extended for *subscribing fully paid-up shares.*

In the given instance, Human Resource Manager Mr. Surya Nayan is not a Key Managerial Personnel of the OLAF Limited. Further, he is drawing a salary of `40,000 per month and wants to avail loan for purchasing 500 partly paid-up equity shares of `1000 each of OLAF Limited in which he is employed.

Keeping the above facts and legal provisions in view, decision of OLAF Limited in granting a loan of `4,00,000 for purchase of its partly paid-up shares to Human Resource Manager is *invalid* due to following reasons:

(*a*) The amount of loan is more than 6 months' salary of Mr. Surya Nayan, the HR Manager. It should have been restricted to `2,40,000 only.

(*b*) The loan to be given by OLAF Limited to its HR Manager Mr. Surya Nayan is meant for purchase of partly paid shares.

17. Heavy Metals Limited wants to provide financial assistance to its employees, to enable them to subscribe for certain number of fully paid shares. Considering the provision of the Companies Act, 2013, what advice would you give to the company in this regard? **[RTP Nov 2018]**

Sol. Under section 67 (2) of the Companies Act, 2013 *no public company* is allowed to give, directly or indirectly and whether by means of a loan, guarantee, or security, any financial assistance for the purpose of, or in connection with, a purchase or subscription, by any person of any shares in it or in its holding company.

However, section 67 (3) makes an exception by allowing companies to give loans to their employees other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

It is further provided that *disclosures* in respect of *voting rights not* exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board's report in such manner as may be prescribed.

Hence, Heavy Metals Ltd can provide financial assistance up to the specified limit to its employees to enable them to subscribe for the shares in the company provided the shares are purchased by the employees to be held for beneficial ownership by them.

However, the directors or key managerial personnel will not be eligible for such assistance.

18. State the legal provisions in respect of 'Declaration of Solvency', which an unlisted public company needs to adhere to while taking steps to buy-back its own shares. **[ICAI Module]**

Sol. According to Section 68 (6), where an *unlisted public company* has passed a special resolution under Section 68 (2) (*b*) or the Board has passed a resolution under item (*ii*) of the proviso to Section 68 (2) (*b*) to buy-back its own shares, it shall, before making such buy-back, file with the Registrar a 'Declaration of Solvency' in *Form SH-9*.

The declaration shall be verified by an *affidavit* to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and *will not be rendered insolvent* within a period of one year from the date of declaration of solvency adopted by the Board.

The declaration shall be *signed* by at least two directors of the company, one of whom shall be the managing director, if any.

19. Kavish Ltd., desirous of buying back of all its equity shares from the existing shareholders of the company, seeks your advice. Examining the provisions of the Companies Act, 2013 discuss whether the above buy back of equity shares by the company is possible. Also, state the sources out of which buy-back of shares can be financed? **[RTP May 2018]**

Sol. In terms of section 68 (2) (*c*) of the Companies Act, 2013 a company is allowed to buy back a maximum of *25% of the aggregate of its paid- up capital and free reserves*. Hence, the company in the given case is not allowed to buy back its entire equity shares.

Section 68 (1) of the Companies Act, 2013 specifies the sources of funding buy back of its shares and other specified securities as under:

(*a*) Free reserves or

(*b*) Security Premium account or

(*c*) Proceeds of the issue of any shares or other specified securities

However, under the proviso to section 68 (1) no buy back of shares or any specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of specified securities.

20. Xgen Limited has a paid-up equity capital and free reserves to the extent of `50,00,000. The company is planning to buy-back shares to the extent of `4,50,000. The company approaches you for advice with regard to the following:

(*a*) Is special resolution required to be passed?

(*b*) What is the time limit for completion of buy-back?

(*c*) What should be ratio of aggregate debts to the paid-up capital-and free reserves after buyback? **[May 2018]**

Sol. According to the provisions of section 68 (2) of the Companies Act, 2013, no company shall purchase its own shares or other specified securities under sub- section (1), unless:

(*a*) the buy-back is authorised by its articles;

(*b*) a *special resolution* has been passed at a general meeting of the company authorising the buy-back: Provided that nothing contained in this clause shall apply to a case where:

(i) the buy-back is, ten per cent or less of the total paid-up equity capital and free reserves of the company; and

(*ii*) such buy-back has been authorised by the Board by means of a resolution passed at its meeting.

Time limit for Completion of Buy Back: As per section 68(4), every buy-back shall be completed within a period of *one year* from the date of passing of the special resolution, or as the case may be, the resolution passed by the Board under sub-section (2).

Ratio of aggregate debts: Provision also specifies that ratio of the aggregate debts (secured and unsecured) owed by the company after buy back is not more than twice the paid up capital and its free reserves. However, Central Government may prescribe higher ratio of the debt for a class or classes of companies.

As per the stated facts, Xgen Ltd. has a paid up equity capital and free reserves to the extent of `50,00,000. The company planned to buy back shares to the extent of `4,50,000.

Referring to the above provisions, the answers will be as follows:

1. No, special resolution will not be required as the buyback is less than 10% of the total paid-up equity capital and free reserves (50,00,000x10/100= 5,00,000) of the company, but such buy back must be authorised by the Board by means of a resolution passed at its meeting.
2. Time limit for completion of buy back will be- within a period of one year from the date of passing of the resolution by the Board.
3. The ratio of the aggregate debts (secured and unsecured) owed by the company after buy back should not be more than twice the paid up capital and its free reserves.

The above buy-back is possible when backed by the authorization by the articles of the company.

21. "The offer of buy-back of its own shares by a company shall not be made within a period of six months from the date of the closure of the preceding offer of buy-back, if any and cooling period to make further issue of same kind of shares including allotment of further shares shall be a period of one year from the completion of buy back subject to certain exceptions." Examine the validity of this statement by explaining the provisions of the Companies Act, 2013 in this regard. **[July 2021]**

Sol. According to proviso to section 68(2) of the Companies Act, 2013, *no offer of buy- back, shall be made within a period of one year from the date of the closure of the preceding offer of buy-back*, if any

Section 68 (8) casts an obligation that where a company completes a buy-back of its shares or other specified securities under this section, it shall *not make further issue of same kind of shares including allotment of further shares under section 62 (1) (a) or other specified securities within a period of six months* except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.

Keeping in view of the above provisions, the statement "the offer of buy-back of its own shares by a company shall not be made within a period of six months from the date of the closure of the preceding offer of buy back, if any and cooling period to make further issue of same kind of shares including allotment of further shares shall be a period of one year from the completion of buy back subject to certain exceptions" is not valid.

22. Which fund may be utilised by a public limited company for purchasing (buy back) its own hares? Also explain the provisions of the Companies Act, 2013 regarding the circumstances in which a company is prohibited to buy back its own shares. **[May 2019]**

Sol. Funds utilised for purchase of its own securities: Section 68 of the Companies Act, 2013 states that a company may purchase its own securities out of:

(i) its free reserves; or

(ii) the securities premium account; or

(iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

Prohibition for buy-back in certain circumstances [Section 70]:

1. The provision says that no company shall directly or indirectly purchase its own shares or other specified securities:

   (*a*) through any subsidiary company including its own subsidiary companies; or

   (*b*) through any investment company or group of investment companies; or

   (*c*) if a default is made by the company in repayment of deposits or interest payment thereon, redemption of debentures or preference shares or payment of dividend to any

shareholder or repayment of any term loan or interest payable thereon, to any financial institutions or banking company;

But where the default is remedied and a period of three years has lapsed after such default ceased to subsist, then such buy-back is not prohibited.

2. No company shall directly or indirectly purchase its own shares or other specified securities in case such company has not complied with provisions of Sections 92 (Annual Report), 123 (Declaration of dividend), 127 (Punishment for failure to distribute dividends), and section 129 (Financial Statements).

23. XYZ unlisted company passed a special resolution in a general meeting on January 5th, 2019 to buy back 30% of its own equity shares. The Articles of Association empowers the company to buy back its own shares. Earlier the company has also passed a special resolution to buy back its own shares on January 15th, 2018. The company further decided that the payment for buyback be made out of the proceeds of the company's earlier issue of equity share. In the light of the provisions of the Companies Act, 2013,

(i) Decide, whether the company's proposal is in order.

(ii) What will be your answer if buy back offer date is revised from January 5 th, 2019 to January 25th 2019 and percentage of buyback is reduced from 30% to 25% keeping the source of purchase as above? **[Nov. 2019]**

Sol. (i) In the instant case, the company's proposal is not in order due to the following reasons:

(*a*) Though XYZ unlisted company passed a *special resolution* but it proposed to buy back 30% of its own equity shares. But as per section 68(2)(*c*) of the Companies Act, 2013, buy-back of equity shares in any financial year *shall not exceed 25%* of its total paid up equity capital in that financial year.

(*b*) The *Articles of Association* empowers the company to buy back its own shares. This condition is in order as per section 68(2)(*a*).

(*c*) Earlier the company has also passed a *special resolution* to buy back its own shares on January 15th, 2018, now the company passed a special resolution on January 5th, 2019 to buy back its own shares. This is not valid as no offer of buy-back, shall be *made within a period of one year* from the date of the closure of the preceding offer of buy-back, if any. [proviso to section 68(2)].

(*d*) The company further decided that the payment for buy back be made out of the proceeds of the company's earlier issue of equity share. This is not in order as according to proviso to section 68(1), buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

(*ii*) If buy back offer date is revised from 5th January 2019 to January 25th 2019 and percentage of buy back is reduced from 30% to 25% keeping the source of purchase as above, then also the company's proposal is not in order as buy-back of any kind of shares or other specified

securities *cannot be made out of the proceeds of an earlier issue of the same kind of* shares or same kind of other specified securities.

24. What are the provisions of the Companies Act, 2013 relating to the appointment of 'Debenture Trustee' by a company? Whether the following can be appointed as 'Debenture Trustee':

(i) A shareholder who has no beneficial interest.

(ii) A creditor whom the company owes `499 only.

(iii) A person who has given a guarantee for repayment of amount of debentures issued by the company? **[ICAI Module]**

Sol. Appointment of Debenture Trustee: Under section 71 (5) of the Companies Act, 2013, no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

Rule 18 (2) of the Companies (Share Capital and Debentures) Rules, 2014, framed under the Companies Act for the issue of secured debentures provide that before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures. Further according to the rules, no person shall be appointed as a debenture trustee, if he:

(i) beneficially holds shares in the company;

(ii) is promoter, director or key managerial personnel or any other officer or an employee of the company or its holding, subsidiary or associate company;

(*iii*) is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;

(*iv*) is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(*v*) has furnished any guarantee in respect of principal debts secured by the debentures or interest thereon;

(*vi*) has any pecuniary relationship with the company amounting to two percent. or more of its gross turnover or total income or fifty lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(*vii*) is a relative of any promoter or any person who is in the employment of the company as director or key managerial personnel;

Thus, based on the above provisions answers to the given questions are as follows:

(i) A shareholder who has no beneficial debenture trustee. interest, can be appointed as a

(ii) A creditor whom company owes `499 cannot be appointed as a debenture trustee. The amount owed is immaterial.

(iii) A person who has given guarantee for repayment of principal and interest thereon in respect of debentures also cannot be appointed as a debenture trustee.

25. What are provisions of the Companies Act, 2013, relating to the appointment of 'Debenture Trustee' by a company? Whether the following can be appointed as 'Debenture Trustee'?

(*i*) A shareholder of the company who has shares of `10,000.

(*ii*) A creditor whom the company owes `999 only.

A person who has given a guarantee for repayment of amount of debentures issued by the company **[RTP NOV 22]**

Sol. Appointment of Debenture Trustee: Under section 71 (5) of the Companies Act, 2013, no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

Rule 18 (2) of the Companies (Share Capital and Debentures) Rules, 2014, framed under the Companies Act for the issue of secured debentures provide that before the appointment of debenture trustee or trustees, a written consent shall be obtained from such debenture trustee or trustees proposed to be appointed and a statement to that effect shall appear in the letter of offer issued for inviting the subscription of the debentures.

Further according to the provided rules inter-alia, no person shall be appointed as a debenture trustee, if he-

1. beneficially holds shares in the company;
2. is beneficially entitled to moneys which are to be paid by the company otherwise than as remuneration payable to the debenture trustee;
3. has furnished any guarantee in respect of the principal debts secured by the debentures or interest thereon;

Thus, based on the above provisions answers to the given questions are as follows:

(i) A shareholder who has holds shares of `10,000, cannot be appointed as a debenture trustee.

(ii) A creditor whom company owes `999 cannot be appointed as a debenture trustee. The amount owed is immaterial.

(iii) A person who has given guarantee for repayment of principal and interest thereon in respect of debentures, cannot be appointed as a debenture trustee.

CHAPTER-5

ACCEPTANCE OF DEPOSITS BY COMPANIES

PRACTICE QUESTIONS

1. Answer the following citing relevant provisions:

(a) Prayas Electricals Limited having paid-up capital of ₹1 crore availed a term loan of ₹10,00,000 from Beta Bank Limited to purchase electrical items. Mr. Sambhav, one of the directors of the company, is of the opinion that it shall be considered as 'deposit'. Is his contention correct?

(b) Eklavya Publishing Company Limited facing acute cash crunch wants to utilise a portion of 'Deposit Repayment Reserve Account' to pay off its short-term creditors who are pressing hard for epayment of ₹20,00,000. Is it justified to use funds lying in 'Deposit Repayment Reserve Account' in this manner?

(c) Sanjiv is a shareholder in Utsah Textiles Private Limited holding 10,000 shares of ₹10 each. His wife Sneha and his three sons Aayush, Pranav and Himanshu are also shareholders in the company holding 1,000 shares each. In response to the invitation from the company inviting deposits from its members, Sanjiv wants to deposit ₹1,00,000 for 36 months jointly with his wife and three sons. Whether Utsah Textiles Private Limited can accede to the request of Sanjiv and accept deposit jointly in five names since all the depositors are shareholders of the company. **[ICAI MODULE]**

Sol. (a) In terms of Rule 2 (1) (c) (iii) of the Companies (Acceptance of Deposits) Rules, 2014, any amount received as a loan or facility from any banking company shall not be considered as 'deposit'.

In view of the above, the contention of Mr. Sambhav that the term loan of ₹10,00,000 availed by the company from Beta Bank Limited shall be considered as 'deposit' is not correct.

(b) Rule 13 of the Companies (Acceptance of Deposits) Rules, 2014, states that the amount deposited in the 'Deposit Repayment Reserve Account' shall not be used by a company for any purpose other than repayment of deposits.

Since there is a prohibition, Eklavya Publishing Company Limited is not permitted to utilize its 'Deposit Repayment Reserve Account' to pay off its short-term creditors.

(c) Rule 3 (2) of the Companies (Acceptance of Deposits) Rules, 2014, provides that where depositors so desire, deposits may be accepted in joint names not exceeding three.

In view of this provision, Sanjiv can deposit Rs. 1,00,000 with Utsah Textiles Private Limited jointly with two other persons only irrespective of the fact that all the five persons are members of the company.

2. Shubhra Chemicals Private Limited (not a start-up company) is desirous of accepting 'deposits' from its members amounting to two hundred percent of aggregate of its paid-up share capital, free reserves and securities premium account. What are the conditions it must fulfill before such acceptance? **[ICAI MODULE]**

Sol. According to first proviso to Rule 3 (3), a private company may accept from its members monies not exceeding 100% of aggregate of the paid-up share capital, free reserves and securities premium account.

According to second proviso to Rule 3(3), the maximum limit in respect of deposits to be accepted from members shall not apply to the classes of private company which fulfils all of the following conditions, namely:

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

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

(c) such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under section 73:

According to third proviso all the companies accepting deposits shall file the details of monies so accepted with the Registrar in Form DPT-3.

In case Shubhra Chemicals Private Limited is not an associate or a subsidiary company of any other company and its borrowings from banks, etc. is less than twice of its paid-up share capital or fifty crore rupees, whichever is less and also it has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits, then it can accept 'deposits' from its members amounting to two hundred percent of aggregate of its paid-up share capital, free reserves and securities premium account.

Further, it shall file the details of monies so accepted with the Registrar in Form DPT-3.

3. State true or false

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

(ii) A Government Company, which is eligible to accept deposits under Section 76 of the Companies Act, 2013 cannot accept deposits from public exceeding 25% of the aggregate of its paid-up capital, free reserves and security premium account. **[ICAI Module, MTP April 2022]**

Sol. (i) **Relevant Provisions:** As per the provisions of Section 73(2) of the Companies Act, 2013 read with Rule 3 of the Companies (Acceptance of Deposits) Rules, 2014, as amended by the Companies (Acceptance of Deposits) Amendment Rules, 2016, a company shall accept any deposit from its members, together with the amount of other deposits outstanding as on the date of acceptance of such deposits not exceeding 35% of the aggregate of the Paid-up share capital, free Reserves and securities premium account of the company.

Provided that a private company may accept from its members monies not exceeding one hundred per cent of aggregate of the paid up share capital, free reserves and securities premium account and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.

Conclusion: Therefore, the given statement of eligibility of XYZ Private Ltd. to accept deposits from its members to the extent of ₹60.00 lakh is **True**.

(ii) **Relevant Provision:** A Government company is not eligible to accept or renew deposits under section 76, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five per cent of the aggregate of its Paid-up share capital, free Reserves and securities premium account of the company.

Conclusion: Therefore, the given statement prescribing the limit of 25% to accept deposits is **False**.

4. Enumerate the amounts which when received by a company in the ordinary course of business are not to be considered as deposits. **[ICAI Module]**

Sol. According to Rule 2 (1) (*c*) (*xii*), following amounts if received by a company in the course of, or for the purposes of, the business of the company, shall not be considered as deposits:

(a) any amount received as an advance for the supply of goods or provision of services accounted for in any manner whatsoever to be appropriated within a period of 365 days from date of acceptance of such advance: However, in case any advance is subject matter of any legal proceedings before any court of law, the time limit of three hundred and sixty-five days shall not apply.

(b) any amount received as advance in connection with consideration for an immovable property under an agreement or arrangement.

However, such advance is required to be adjusted against such property in accordance with the terms of agreement or arrangement;

(c) any amount received as security deposit for the performance of the contract for supply of goods or provision of services;

(d) any amount received as advance under long term projects for supply of capital goods except those covered under item (b) above;

(e) any amount received as an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;

(f) any amount received as an advance and as allowed by any *sectoral regulator* or in accordance with directions of Central or State Government;

(g) any amount received as an advance for *subscription* towards publication, whether in print or in electronic to be adjusted against receipt of such publications;

However, if the amount received under items (*a*), (*b*) and (*d*) above becomes refundable (with or without interest) due to the reasons that the company accepting the money does not have necessary permission or approval, wherever required, to deal in the goods or properties or

services for which the money is taken, then the amount received shall be deemed to be a deposit under these rules.

Further, for the purposes of this sub-clause the amount shall be deemed to be deposits on the expiry of fifteen days from the date they become due for refund.

5. State the procedure to be followed by companies for acceptance of deposits from its members according to the Companies Act, 2013. What are the exemptions available to a private limited company? **[ICAI Module]**

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

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

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

(c) Depositing, on or before the 30th day of April each year, such sum which shall not be less than twenty per cent of the amount of its deposits maturing during the following financial year and kept in a scheduled bank in a separate bank account to be called deposit repayment reserve account;

(d) Omitted

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

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

Every deposit accepted by a company shall be repaid with interest in accordance with the terms and conditions of the agreement. Where a company *fails to repay* the deposit or part thereof or any interest thereon, the *depositor* concerned may *apply to the Tribunal* for an order directing the company to pay the sum due or for any loss or damage incurred by him as a result of such non-payment and for such other orders as the Tribunal may deem fit.

Exemption to certain private companies: Clauses (*a*) to (*c*) and (*e*) of sub-section (2) of section 73 with respect to issue of circular, filing the copy of such circular with the Registrar, depositing of certain amount and certification as to no default committed, shall not apply to a private company:

(A) which accepts from its members monies not exceeding one hundred per cent of aggregate of the paid-up share capital, free reserves and securities premium account; or

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

(C) which fulfills all of the following conditions, namely:

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

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

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

However, such a company [as referred to in clauses (A), (B) or (C)] shall file the details of monies accepted to the Registrar in the specified manner (i.e., in Form DPT-3).

6. Explain the provisions for 'Appointment of Trustee for Depositors' under the Companies Act, 2013 read with the 'Acceptance of Deposits' Rules, 2014. **[ICAI Module]**

Sol. Appointment of Trustee for Depositors: In this respect following provisions are required to be observed as mentioned in Rule 7 of the Companies (Acceptance of Deposits) Rules, 2014:

- One or more trustees for depositors need to be *appointed by the company* for creating security for deposits.
- A *written consent* shall be obtained from the trustees before their appointment.
- A statement shall appear in the circular or advertisement with reasonable prominence to the effect that the trustees for depositors have given their consent to the company for such appointment.
- The company shall execute a *deposit trust deed* in Form DPT-2 at least seven days before issuing the circular or circular in the form of advertisement.

No person (including a company) that is in the business of providing trusteeship services shall be appointed as a trustee for the depositors, if the proposed trustee:

(a) Is a director, key managerial personnel or any other officer or an employee of the company or of its holding, subsidiary or associate company or a depositor in the company;

(b) Is indebted to the company, or its subsidiary or its holding or associate company or a subsidiary of such holding company;

(c) Has any material pecuniary relationship with the company

(d) Has entered into any guarantee arrangement in respect of principal debts secured by deposits or interest

(e) Is related to any person specified in clause (*a*) above.

No trustee for depositors shall be removed from office after the issue of circular or advertisement and before the expiry of his term except with the consent of all the directors present at a meeting

of the board. In case the company is required to have independent directors, at least one independent director shall be present in such meeting of the Board.

7. What are the provisions relating to 'Credit Rating' which an 'eligible company' must follow if it wants to raise public deposits? **[ICAI Module]**

Sol. The provisions relating to obtaining of 'Credit Rating' to be followed by an 'eligible company' are contained in Section 76 (1) of the Companies Act, 2013 and Rule 3 (8) of the Companies (Acceptance of Deposits) Rules, 2014 as amended from time to time.

Accordingly, an '*eligible company*' which desires to raise *public deposits* shall be required to obtain the rating (including its net-worth, liquidity and ability to pay its deposits on due date) from a recognised credit rating agency. The given rating which *ensures adequate safety* shall be informed to the public at the time of invitation of deposits from the public. Further, the rating shall be obtained every year during the tenure of deposits.

As per Rule 3 (8), copy of the credit rating which is being obtained at least once in a year shall be sent to the Registrar of Companies along with the Return of Deposits in *Form DPT-3*.

Further, the credit rating *shall not be below the minimum investment grade rating or other* specified credit rating for fixed deposits. It shall be obtained from any one of the approved credit rating agencies as specified for Non- Banking Financial Companies in the Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998, as amended from time to time.

8. Discuss the following situations in the light of 'deposit provisions' as contained in the Companies Act, 2013 and the Companies (Acceptance of Deposits) Rules, 2014, as amended from time to time.

(i) Samit, one of the directors of Zarr Technology Private Limited, a start-up company, requested his close friend Ritesh to lend to the company ₹30.00 lacs in a single tranche by way of a onvertible note repayable within a period six years from the date of its issue.

(ii) Polestar Traders Limited received a loan of ₹30.00 lacs from Rachna who is one of its directors. Advise whether it is a deposit or not.

(iii) City Bakers Limited failed to repay deposits of ₹50.00 crores and interest due thereon even after the extended time granted by the Tribunal. Is the company or Swati, its officer-indefault, liable to any penalty?

(iv) Shringaar Readymade Garments Limited wants to accept deposits of ₹50.00 lacs from its members for a tenure which is less than six months. Is it a possibility?

(v) Is it in order for the Diamond Housing Finance Limited to accept and renew deposits from the public from time to time? **[ICAI Module, Dec 2021]**

Sol. (i) In terms of Rule 2 (1) (c) (xvii) if a start-up company receives rupees twenty-five lakh or more by way of a convertible note (convertible into equity shares or repayable within a period not exceeding ten years from the date of issue) in a single tranche, from a person, it shall not be treated as deposit.

In the given case, Zarr Technology Private Limited, a start-up company, received ₹30 lacs from Ritesh in a single tranche by way of a convertible note which is repayable within a period of six years from the date of its issue. In view of Rule 2 (1) (*c*) (*xvii*) which requires a convertible note to be repayable within a period of ten years from the date of its issue, the amount of ₹30 lacs shall not be considered as deposit.

(ii) In terms of Rule 2 (1) (*c*) (*viii*), any amount received from a person who is director of the company at the time of giving loan to the company shall not be treated as deposit if such director furnishes to the company at the time of giving money, a written declaration to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others and further, the company shall disclose the details of money so accepted in the Board's report.

In the given case, it is assumed that Rachna was one of the directors of Polestar Traders Limited when the company received a loan of ₹30 lacs from her. Further, it is assumed that she had furnished to the company at time of giving money, a written declaration to the effect that the amount was not being given out of funds acquired by her by borrowing or accepting loans or deposits from others and in addition, the company had disclosed the details of money so accepted in the appropriate Board's report. If these conditions are satisfied ₹30.00 lacs shall not be treated as deposit.

(iii) By not repaying the deposit of ₹50.00 crores and the interest due thereon even after the extended time granted by the Tribunal, City Bakers Limited has contravened the conditions prescribed under Section 73 of the Act. Accordingly, following penalty is leviable:

- Punishment for the company: City Bakers Limited shall, in addition to the payment of the amount of deposit and the interest due thereon, be punishable with fine which shall not be less than rupees one crore or twice the amount of deposit accepted by the company, whichever is lower but which may extend to rupees ten crores.
- Punishment for officer-in-default: Swati, being the officer-in-default, shall be punishable with imprisonment which may extend to seven years and with fine which shall not be less than rupees twenty- five lakhs but which may extend to rupees two crores.

Further, if it is proved that Swati had contravened such provisions knowingly or wilfully with the intention to deceive the company or its shareholders or depositors or creditors or tax authorities, she will be liable for action under section 447 (Punishment for fraud).

(iv) According to Rule 3 (1), a company is not permitted to accept or renew deposits (whether secured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty six months.

However, as an exception to this rule, for the purpose of meeting any of its short-term requirements of funds, a company is permitted to accept or renew deposits for repayment earlier than six months subject to the conditions that:

(i) Such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company; and

(ii) Such deposits are repayable only on or after three months from the date of such deposits or renewal. In the given case of Shringaar Readymade Garments Limited, it wants to accept deposits of Rs 50 lacs from its members for a tenure which is less than six months. It can do so if it justifies that the deposits are required for the purpose of meeting any of its short-term requirements of funds but in no case such deposits shall exceed 10% ten per cent of the aggregate of its paid-up share capital, free reserves and securities premium account and further, such deposits shall be repayable only on or after three months from the date of such deposits.

(v) According to section 73 (1) of the Act, no company can accept or renewal of deposits from public unless it follows the manner provided under Chapter V of the Act (contains provisions regarding acceptance of deposits by companies) for acceptance or renewal of deposits from public.

However, Proviso to Section 73 (1) states that such prohibition with respect to the acceptance or renewal of deposit from public, inter-alia, shall not apply to a housing finance company registered with the National Housing Bank established under the National Housing Bank Act, 1987.

In the given case, it is assumed that Diamond Housing Finance Limited is registered with the National Housing Bank and therefore the prohibition contained in section 73 (1) of the Act with respect to the acceptance renewal of deposit from public shall not apply to it. In other words, it being an exempted company, can accept deposits from the public from time to time without following the prescribed manner.

9. ABC Limited having a net worth of ₹120 crores wants to accept deposit from its members. The directors of the company have approached you to advise them as to what special care has to be taken while accepting such deposit from the members in case their company falls within the category of an 'eligible company'. **[ICAI Module, Jan 2021]**

Sol. Relevant Provisions: According to section 76 (1) of the Act, an "eligible company" means a public company, having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a special resolution and also filed the said resolution with the Registrar of Companies before making any invitation to the public for acceptance of deposits.

However, an 'eligible company', which is accepting deposits within the limits specified under section 180 (1) (*c*), may accept deposits by means of an ordinary resolution.

According to Rule 4 (*a*), an 'eligible company' shall accept or renew any deposit from its members, if the amount of such deposit together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits from members does not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.

ABC Limited is having a net worth of 120 crore rupees. Hence, it falls in the category of 'eligible company'. Thus, ABC Limited has to ensure that acceptance of deposits from its members together with the amount of deposits outstanding as on the date of acceptance or renewal of such deposits

from the members, in no case, exceeds 10% of the aggregate of the paid-up share capital, free reserves and securities premium account of the company.

10. Define the term 'deposit' under provisions of the Companies Act, 2013 and comment quoting relevant provisions whether the following amounts received by a company will be considered as deposits or not:

(i) ₹5,00,000 raised by Rishi Confectionaries Limited through issue of non-convertible debentures not constituting a charge on the assets of the company and listed on a recognized stock exchange as per the applicable regulations made by the Securities and Exchange Board of India.

(ii) ₹2,00,000 received by Raja Yarns Limited from its employee Mr. T, who draws an annual salary of ₹1,50,000, as a non-interest bearing security deposit under a contract of employment.

(iii) ₹3,00,000 received by a private company from one of the relatives of a Director. The said relative has furnished a declaration that the amount was received by him from his mother as a gift. **[ICAI Module]**

Sol. Deposit: According to Section 2 (31) of the Companies Act, 2013, the term 'deposit' includes any receipt of money by way of deposit or loan or in any other form, by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve bank of India.

Rule 2 (1) (*c*) of the Companies (Acceptance of Deposit) Rules, 2014 states various amounts received by a company which will not be considered as deposits. In terms of this Rule the answers to the given situations shall be as under:

(i) ₹5,00,000 raised by Rishi Confectionaries Limited through issue of non-convertible debentures not constituting a charge on the assets of the company and listed on recognized stock exchange as per the applicable regulations made by the SEBI, will not be considered as deposit in terms of sub-clause (ixa) of Rule 2 (1) (*c*).

(ii) ₹2,00,000 received by Raja Yarns Limited from its employee Mr. T, who draws an annual salary of ₹1,50,000, as a non-interest bearing security deposit under a contract of employment will be considered as deposit in terms of sub-clause (*x*) of Rule 2 (1) (*c*), for the amount received is more than his annual salary of ₹1,50,000.

(iii) ₹3,00,000 received by a private company from one of the relatives of a Director. When the relative furnishes a declaration that the said amount was received by him from his mother as a gift, then it will not be considered as deposit in terms of sub-clause (*viii*) of Rule 2 (1) (*c*).

In fact, the preceding sub-clause requires that any amount given by a relative of a director of a private company shall not be considered as deposit if the relative furnishes a declaration in writing to the effect that the amount is not being given out of funds acquired by him by borrowing or accepting loans or deposits from others.

Thus, the amount given to the private company out of gifted money by one of the relatives of a director is not a 'deposit'. As an additional requirement, the company shall disclose details of money so accepted in Board's report.

11. The Promoters of Green Limited contributed in the form of unsecured loan to the company in fulfillment of the margin money requirements stipulated by State Industries Development Corporation Ltd. (SIDCL) for granting loan. In the light of the provisions of the Companies Act, 2013 and Rules made thereunder whether the unsecured loan will be regarded as Deposit or not?

[MTP March 2022, July 2021]

Sol. According to Rule 2 (1) (*c*) of the Companies (Acceptance of Deposits) Rules, 2014, the following amount is not considered as deposit:

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

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

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

(c) such exemption shall be available only till the loans of financial institution or bank are repaid and not thereafter.

Hence, in the instant case, the *unsecured loan contributed by promoters of Green Limited will not be regarded as deposit* as the unsecured loan is brought because of the stipulation imposed by the SIDCL and the loan is provided by the promoters themselves.

12. Viki Limited engaged in the business of consumer durables. It is managed by a team of professional manage. The Company has not made default in payment of statutory dues, and repayment of debenture/Institutional loan with interest. The Company advertised a circular in the newspaper dated 20th September 2020 inviting the deposits from the members and public for the first time.

The latest audited financial statement of the Company revealed the following data, as on 31.3.2020:

Paid up share capital	₹70 Crores
Securities Premium	₹20 Crores
Free Reserves	₹20 Crores
Long-term borrowings	₹50 Crores

The Company in the advertisement invited public deposit for a period of 4 Months Plan A & Plan B for 36 Months.

(i) Explain the term 'eligible company' and calculate the Maximum amount of Deposit that can be accepted from Public (Non-Member) for Plan A and Plan B based on latest audited Financial Statement under the provisions of the Companies Act, 2013.

(ii) Calculate the maximum amount of deposit Viki Limited can accept from the public under Plan B in case it is a wholly owned Government Company under the provisions of the said Act.

[Nov. 2020]

Sol. (i) According to Rule 2(1)(*e*) of the Companies (Acceptance of Deposits) Rules, 2014 "eligible company" means a public company as referred to in sub-section (1) of section 76 of the Companies Act, 2013, having a net worth of not less than one hundred crore rupees or a turnover of not less than five hundred crore rupees and which has obtained the prior consent of the company in general meeting by means of a *special resolution* and also filed the said resolution with the Registrar of Companies before making any invitation to the Public for acceptance of deposits. Provided that an eligible company, which is accepting deposits within the limits specified under clause (*c*) of sub-section (1) of section 180, may accept deposits by means of an *ordinary resolution*.

Net worth of Viki Limited as per section 2(57) of the Companies Act, 2013 can be calculated as follows:

Paid up share capital:	₹70 crores
Free Reserves:	₹20 crores
Securities premium:	₹20 crores
Total:	₹110 crores

Hence, Viki Limited is an eligible company, since its Net worth is in excess of ₹100 crores.

Tenure for which Deposits can be Accepted: As per Rule 3(1)(*a*) of the Companies (Acceptance of Deposits) Rules, 2014, a company is not permitted to accept or renew deposits (whether ecured or unsecured) which is repayable on demand or in less than six months. Further, the maximum period of acceptance of deposit cannot exceed thirty six months.

Exception to the rule of tenure of six months: As per the proviso to the above rule, for the purpose of meeting any of its short-term requirements of funds, a company may accept or renew deposits for repayment earlier than six months subject to the condition that such deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company. As per Rule 3(1)(*b*) of the Companies (Acceptance of Deposits) Rules, 2014, such deposits are repayable not earlier than three months from the date of such deposits or renewal thereof.

Maximum Amount of Deposits: As per Rule 3(4)(*b*) of the Companies (Acceptance of Deposits) Rules, 2014, an eligible company is permitted to accept or renew deposits from persons other than its members. As per the law the amount of such deposit together with the amount of outstanding deposits (excluding deposits from members) on the date of acceptance or renewal

can be maximum twenty-five per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account of the company.

For Plan A: Since the maximum period of deposits is 4 months, the maximum amount of deposits shall not exceed ten per cent. of the aggregate of the paid-up share capital, free reserves and securities premium account of the company. Maximum amount of deposits: 10% of 110 crores (70 + 20 + 20) = 11 crores.

For Plan B: Maximum amount of deposits: 25% of 110 crores (70 + 20 + 20) = 11 crores (outstanding deposit under plan A) = 16.5 crores.

(*ii*) In terms of Rule 3(5) of the Companies (Acceptance of Deposits) Rules, 2014, in case Viki Limited is a wholly owned Government Company, so it can accept deposit together with the amount of other outstanding deposits as on the date of acceptance or renewal maximum up to Thirty-five per cent. of the aggregate of its paid-up share capital, free reserves and securities premium account. For Plan B: Maximum amount of deposits: 35% of 110 crores (70 + 20 + 20) = 38.5 crores.

13. RS Ltd. received share application money of ₹50 Lakh on 01.06.2019 but failed to allot shares within the prescribed time limit. The share application money of ₹5 Lakh received from Mr. Khanna, a customer of the Company, was refunded by way of book adjustment towards the dues payable by him to the company on 30.07.2019. The Company Secretary of RS Ltd. reported to the Board that the entire amount of ₹50 Lakh shall be deemed to be 'Deposits' as on 31.07.2019 and the Company is required to comply with the provisions of the Companies Act, 2013 applicable to acceptance of deposits in relation to this amount. You are required to examine the validity of the reporting of the Company Secretary in the light of the relevant provisions of the Companies Act, 2013. **[Jan. 2021]**

Sol. According to Rule 2(1)(*c*) of the Companies (Acceptance of Deposits) Rules, 2014, the following category of receipt is not considered as deposit:

Any amount received and held pursuant to an offer made in accordance with the provisions of the Companies Act, 2013 towards subscription to any securities, including share application money or advance towards allotment of securities, pending allotment, so long as such amount is appropriated only against the amount due on allotment of the securities applied for;

It is clarified by way of Explanation that if the securities for which application money or advance for such securities was received cannot be allotted within 60 days from the date of receipt of the application money or advance for such securities and such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit under these rules.

Further, it is clarified that any adjustment of the amount for any other purpose shall not be treated as refund.

In the given question, RS Limited has received ₹50 Lakhs as share application money on 01.06.2019. It failed to allot shares within the prescribed limit. Further, on 30.07.2019 the

company adjusted the amount of ₹5 Lakhs received from Mr. Khanna (a customer of the company), by way of book adjustment towards the dues payable by him to the company.

In the light of the facts of the question and provisions of Law:

1. If such application money or advance is not refunded to the subscribers within 15 days from the date of completion of 60 days, such amount shall be treated as a deposit.

   In the question, the prescribed limit of 60 days will end on 31.07.2019 and the company has 15 more days to refund such application money to the subscribers. Otherwise, after lapse of such 15 days, the amount not so refunded will be treated as deposit.

   Hence, the Company Secretary of RS Limited is not correct in treating the entire amount of ₹50 Lac as 'Deposits' on 31.07.2019.

2. Any adjustment of the amount for any other purpose shall not be treated as refund. Thus, the amount of ₹5 Lakhs adjusted against payment due to be received from Mr. Khanna, cannot be treated as refund.

14. Vrinda Limited is a company manufacturing orange and strawberry candies for kids. Now, the company wants to expand its business and start the manufacturing of 10 more types of candies. The company has raised ₹1 crore through the issue of non-convertible debentures not constituting a charge on the assets of the company and listed on a recognised stock exchange as per the applicable regulations made by the Securities and Exchange Board of India. Advise, whether the above amount of ₹1 crore will be considered as deposit?
[RTP MAY 22]

Sol. As per sub-clause (ixa) of Rule 2 (1) (c) of the Companies (Acceptance of Deposit) Rules, 2014, any amount raised by issue of non-convertible debentures not constituting a charge on the assets of the company and listed on recognised stock exchange as per the applicable regulations made by the Securities and Exchange Board of India, are not considered as deposit.

Hence, ₹1 crore raised by Vrinda Limited will not be considered as deposit in terms of sub-clause (ixa) of Rule 2 (1) (c).

15. Answer the following citing relevant provisions of the Companies Act, 2013:

(a) Wire Electricals Limited having paid-up capital of ₹1.00 crore availed a term loan of ₹10,00,000 from ABC Bank Limited to purchase electrical items. Mr. Taar, one of the directors of the company, is of the opinion that it shall be considered as 'deposit'. Is his contention correct?

(b) A Government Company, which is eligible to accept deposits under Section 76 of the Companies Act, 2013, cannot accept deposits from public exceeding 25% of the aggregate of its paid-up capital, free reserves and security premium account. Is this correct? **[RTP MAY 23]**

Sol.

(a) In terms of Rule 2 (1) (c) (iii) of the Companies (Acceptance of Deposits) Rules, 2014, any amount received as a loan or facility from any banking company shall not be considered as 'deposit'.

In view of the above, the contention of Mr. Taar that the term loan of ₹10,00,000 availed by the company from ABC Bank Limited shall be considered as 'deposit' is not correct.

(b) As per Rule 3 (5) of the Companies (Acceptance of Deposits) Rules 2014, a Government Company is not eligible to accept or renew deposits under section 76, if the amount of such deposits together with the amount of other deposits outstanding as on the date of acceptance or renewal exceeds thirty five per cent of the aggregate of its paid-up share capital, free reserves and securities premium account.

Therefore, the given statement where the limit of 25% has been stated for acceptance of deposits is not correct.

CHAPTER -6

REGISTRATION CHARGES

1. What is 'Floating Charge'? When does it get crystallized? **[ICAI MODULE]**

Sol. A 'Floating Charge' is a type of charge that is created on assets or a class of assets which are of fluctuating or changing in nature. The assets which are under floating charge may include raw material, stock-in-trade, debtors, etc.

It is a charge created upon a class of assets both present and future.
The assets under floating charge keep on changing because the borrowing company is permitted to use them in the ordinary course of business.
The buyers of the assets covered under floating charge will get them free of charge.

Crystallization of a Floating Charge

In the following events, a floating charge will get crystallized or fixed:

(i) When the creditor enforces the security due to the breach of terms and conditions of floating charge like there is non-payment of interest or default in repayment of instalments as per the terms of agreement.
(ii) When the company ceases to continue its business.
(iii) When the borrowing company goes into liquidation.

A floating charge remains dormant until it becomes fixed or crystallized. On crystallization of charge, the security (i.e. raw material, stock-in-trade, etc.) becomes fixed and is available for realization so that borrowed money is repaid.

2. 'A company is required to keep a Register of Charges at its Registered Office'. Considering this statement, mention the provisions of the Companies Act, 2013 in respect of keeping of Register of Charges by the companies. **[ICAI MODULE]**

Sol. In respect of keeping of Register of Charges by a company, Section 85 of the Companies Act, 2013 and Rules 10 as well as 11 of the Companies (Registration of Charges) Rules, 2014 are relevant.

(*i*) According to section 85 (1):

- Every company shall keep a Register of Charges in the prescribed form and manner at its registered office.
- Note: Rule 10 (1) specifies Form CHG-7 in which the Register of Charges shall be maintained.
- The Register shall include all charges and floating charges affecting any property or assets of the company or any of its undertakings, indicating in each case the prescribed particulars.

(ii) According to Proviso to section 85 (1):

- A copy of the instrument creating the charge shall also be kept at the registered office along with the Register of Charges.
- Provisions of Rule 10 are as under:

Entry of Particulars of all Charges

- According to Rule 10 (1), the company shall enter in the Register particulars of all the charges registered with the Registrar on any of its property, assets or undertakings and the particulars of any property acquired subject to a charge as well as particulars of any modification of a charge and satisfaction of charge.

When to make Entries

- According to Rule 10 (2), the entries in the Register shall be made forthwith after the creation, modification or satisfaction of charge, as the case may be.

Who can authenticate Entries

- According to Rule 10 (3), the entries in the Register shall be authenticated by a director or the secretary of the company or any other person authorized by the Board for the purpose.

Inspection of Register of Charges and Instrument of Charges

- As regards inspection, section 85 (2) states that the register of charges and the instrument of charges shall be open for inspection during business hours:
  (a) by any member or creditor without any payment of fees; or (b) by any other person on payment of prescribed fees.
  - Similarly, regarding inspection, Rule 11 states that the Register of Charges and the instrument of charges kept by the company shall be open for inspection (a) by any member or creditor of the company without fees; (b) by any other person on payment of fee.

Preservation of Register

- According to Rule 10 (4) the Register of Charges shall be preserved permanently. However, the instrument creating a charge or modification thereon shall be preserved for a period of eight years from the date of satisfaction of charge.

3. Ranjit acquired a property from PQR Limited which was mortgaged to Pyramid Bank. He settled the dues to Pyramid Bank in full and the same was registered with the sub-registrar who noted that the mortgage had been settled. But neither the company nor Pyramid Bank filed particulars of satisfaction of charge with the jurisdictional Registrar of Companies. Can Ranjit approach the Registrar and seek any relief in this regard? Discuss this matter in the light of provisions of the Companies Act, 2013. [ICAI MODULE]

Sol. Section 83 of the Companies Act, 2013 empowers the Registrar to make entries with respect to the satisfaction and release of charge even if no intimation has been received by him from the company. Accordingly, with respect to any registered charge if an evidence is shown to the satisfaction of Registrar that the debt secured by charge has been paid or satisfied in whole or in part or that the part of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, then he may enter in the register of charges a memorandum of satisfaction that:

- the debt has been satisfied in whole or in part; or
- the part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.
- This power can be exercised by the Registrar despite the fact that no intimation has been received by him from the company.

Information to affected parties

The Registrar shall inform the affected parties within 30 days of making the entry in the Register of Charges.

Issue of Certificate

As per Rule 8 (2), in case the Registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in Form No. CHG-5.

- Therefore, Ranjit can approach the Registrar and show evidence to his satisfaction that the charge has been duly settled and satisfied and request the Registrar to enter a memorandum of satisfaction noting the release of charge.

4. How will a copy of an instrument evidencing creation of charge and required to be filed with the Registrar be verified? **[ICAI Module]**

Sol. A copy of every instrument evidencing any creation or modification of charge and required to be filed with the Registrar shall be verified as follows:

(i) In case property is situated outside India: where the instrument or deed relates solely to the property situated outside India, the copy shall be verified by a certificate issued either under the seal, if any, of the company, or under the hand of any director or company secretary of the company or an authorised officer of the charge holder or under the hand of some person other than the company who is interested in the mortgage or charge:

(ii) In case property is situated in India (whether wholly or partly): where the instrument or deed relates to the property situated in India (whether wholly or partly), the copy shall be verified by a certificate issued under the hand of any director or company secretary of the company or an authorised officer of the charge holder.

5. Define the term "charge" and also explain what is the punishment for default with respect to registration of charge as per the provisions of the Companies Act, 2013. **[ICAI Module]**

Sol. The firm charge has been defined in section 2 (16) of the Companies Act, 2013 as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

According to section 86 of the Companies Act, 2013, if any company is a default in complying with any of the provisions of this chapter, the company shall be liable to a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of fifty thousand rupees.

Further, if any person willfully furnishes any false or incorrect information or knowingly suppresses any material information which is required to be registered under section 77, he shall be liable for action under section 447 (punishment for fraud).

6. Renuka Soaps and Detergents Limited realised on 2nd May, 2019 that particulars of charge created on 12th March, 2019 in favour of a Bank were not registered with the Registrar of Companies. What procedure should the company follow to get the charge registered? Would the procedure be different if the company realised its mistake of not registering the charge on 7th June, 2019 instead of 2nd May, 2019? Explain with reference to the relevant provisions of the Companies Act, 2013. [ICAI Module]

Sol.

Relevant Provisions

The charge in the present case was created after 02-11-2018 (i.e. the date of commencement of the Companies (Amendment) Second Ordinance, 2019) to which another set of provisions is applicable. These provisions are different from a case where the charge was created before 02-11-2018.

Initially, the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced, or a copy thereof, duly verified by a certificate, are to be filed with the Registrar within 30 days of its creation. [Section 77 (1)].

In this case particulars of charge were not filed within the prescribed period of 30 days.

However, the Registrar is empowered under clause (b) of first proviso to section 77 (1) to extend the period of 30 days by another 30 days (i.e. sixty days from the date of creation) on payment of prescribed additional fee.

Analysis

Taking advantage of this provision, Renuka Soaps and Detergents Limited should immediately file the particulars of charge with the Registrar after satisfying him through making an application that it had sufficient cause for not filing the particulars of charge within 30 days of its creation.

if the company realises its mistake of not registering the charge on 7th June, 2019 instead of 2nd May, 2019, it shall be noted that a period of sixty days has already expired from the date of creation of charge. However, Clause (b) of Second Proviso to Section 77 (1) provides another opportunity for

registration of charge by granting a further period of sixty days but the company is required to pay ad valorem fees. Since the first sixty days from creation of charge have expired on 11th May, 2019. Renuka Soaps and Detergents Limited can still get the charge registered within a further period of sixty days from 11th May, 2019 after paying the prescribed ad valorem fees.

Conclusion
The company is required to make an application to the Registrar in this respect giving sufficient cause for non-registration of charge.

7. Mr. Antriksh entered into an agreement for purchasing a commercial property in Delhi belonging to NRT Ltd. At the time of registration, Mr. Antriksh comes to know that the title deed of the company is not free and the company expresses its inability to get the title deed transferred in the name of Mr. Antriksh saying that he ought to have had the knowledge of charge created on the property of the company. Explain with the help of 'Notice of a charge', whether the contention of NRT Ltd. is correct? [ICAI Module]

Sol. Notice of Charge: According to section 80 of the Companies Act, 2013, where any charge on any property or assets of a company or any of its undertakings is registered under section 77 of the Companies Act, 2013, any person acquiring such property, assets, undertakings as part there of or any share or interest therein shall be deemed to have notice of the charge from the date of such registration.

8. Thus, the section clarifies that if any person acquires a property, assets or undertaking for which a charge is already registered, it would be deemed that he has complete knowledge of charge from the date the charge is registered.

9. DN Limited hypothecated its plant to a nationalized Bank and availed a term loan. The Company registered the charge with the Registrar of Companies. The company settled the term loan in full. The Company requested the Bank to issue a letter confirming the settlement of the term loan. The Bank did not respond to the request. State the relevant provisions of the Companies Act, 2013 to register the satisfaction of charge in the above circumstance. State the time frame up to which the Registrar of Companies may allow the Company to intimate satisfaction of charges.

Sol. Intimation regarding Satisfaction of Charge Section 82 of the Companies Act, 2013 requires a company to give intimation of payment or satisfaction in full of any charge earlier registered, to the Registrar in the prescribed form. The intimation needs to be given within a period of 30 days from the date of such payment or satisfaction. Extended period of intimation: Provision to Section 82 (1) extends the period of intimation from thirty days to three hundred days. Accordingly, it is provided that the Registrar may, on an application by the company or the charge holder, allow such intimation of payment or satisfaction to be made within a period of 300 days of such payment or satisfaction on payment of prescribed additional fees.

9. What are the powers of Registrar to make entries of satisfaction and release of charges in absence of intimation from company? Discuss as per the provisions of the Companies Act, 2013 [ICAI Module]

Sol. Section 83 of the Companies Act, 2013 provides powers to the registrar to make entries with respect to the satisfaction and release of charges where no intimation has been received by him from the company.

Accordingly, with respect to any registered charge if an evidence is shown to the satisfaction of Registrar that the debt secured by charge has been paid or satisfied in whole or in part or that the part

of the property or undertaking charged has been released from the charge or has ceased to form part of the company's property or undertaking, then he may enter in the register of charges a memorandum of satisfaction that:

- the debt has been satisfied in whole or in part; or
- the part of the property or undertaking has been released from the charge or has ceased to form part of the company's property or undertaking.

This power can be exercised by the Registrar despite the fact that no intimation has been received by him from the company.

Information to affected parties

The Registrar shall inform the affected parties within 30 days of making the entry in the register of charges.

Issue of certificate

As per rule 8 (2), in case the registrar enters a memorandum of satisfaction of charge in full, he shall issue a certificate of registration of satisfaction of charge in form no. CHG-5.

10. ABC Limited created a charge in favour of OK Bank. The charge was duly registered. Later, the Bank enhanced the facility by another `20 crores. Due to inadvertence, this modification in the original charge was not registered. Advise the company as to the course of action to be pursued in this regard. [ICAI Module]

Sol. The company is advised to immediately file an application for rectification of the Register of Charges in Form No CHG-8 to the Central Government under Section 87 of the Companies Act, 2013.

Section 87 of the Act of 2013 and Rule 12 empowers the Central Government to order rectification of Register of Charges in the following cases of default:

(a) When there was omission in giving intimation to the Registrar with respect to payment or satisfaction of charge within the specified time;

(b) When there was omission or mis-statement of any particulars in any filing previously made to the Registrar. Such filing may relate to any charge or any modification of charge or with respect to any memorandum of satisfaction or other entry made under Section 82 (Company to report satisfaction of charge) or Section 83 (Power of Registrar to make entries of satisfaction and release).

11. Krish Limited created a charge on its assets on 2nd February, 2021. However, the company did not register the charge with the Registrar of companies till 15th March, 2021.

(a) What procedure should the company follow to get the charge registered?

(b) Suppose the company realizes its mistake of not registering the charge on 27th May, 2021 (instead of 15th March, 2021), can it still register the charge?

Advise with reference to the relevant provisions of the Companies Act, 2013. [RTP May 22]

Sol. According to section 77(1) of the Companies Act, 2013 it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within 30 days of its creation.

However, under clause (b) of first proviso to section 77 (1) the Registrar is empowered to extend the period of 30 days by another 30 days (i.e. sixty days from the date of creation) on payment of prescribed additional fee.

(a) Krish Limited did not register the charge with the Registrar of companies till 15th March, 2021. In this case particulars of charge were not filed within the prescribed period of 30 days (i.e. till 4th March, 2021).

(b) Taking advantage of clause (b) of first proviso to section 77 (1), Krish Limited should immediately file the particulars of charge with the Registrar after satisfying him through making an application that it had sufficient cause for not filing the particulars of charge within 30 days of its creation.

(c) Clause (b) of second Proviso to Section 77 (1) provides another opportunity for registration of charge by granting a further period of sixty days but the company is required to pay ad valorem fees.

If the company realizes its mistake of not registering the charge on 27th May, 2021 instead of 15thMarch, 2021, it shall be noted that a period of sixty days has already expired from the date of creation of charge.

Since the first sixty days from creation of charge have expired on 3rd April, 2021, Krish Limited can still get the charge registered within a further period of sixty days from 3rd April, 2021 after paying the prescribed ad valorem fees. The company is required to make an application to the Registrar in this respect giving sufficient cause for non- registration of charge. [Nov. 2019]

CHAPTER-7

MANAGEMENT AND ADMINISTRATION

PRACTICE QUESTIONS

1. Nutty Buddy Limited is manufacturing premium quality milk based ice cream in two flavors- first chocolate and second butter scotch. The company called its Annual General Meeting (AGM) in order to lay down the financial statements for Shareholders' approval. However, due to want of quorum, the meeting was cancelled. Also, the Directors of the company did not file the Annual Return with the Registrar. The directors were of the idea that the time for filing of returns within 60 days from the date of AGM would not apply, as AGM was cancelled. Has the company contravened the provisions of Companies Act, 2013? If the company has contravened the provisions of the Act, how will it be penalized? **[RTP Nov 21]**

Sol. Relevant provision: According to section 92(4) of the Companies Act, 2013, every company shall file with the Registrar a copy of the annual return, *within sixty days from the date on which the annual general meeting is held or where no annual general meeting* is held in any year within sixty days from the date on which the annual general meeting should have been held together with the *statement specifying the reasons for not holding* the annual general meeting.

Section 92(5) also states that *if any company* fails to file its annual return under sub-section (4), before the expiry of the period specified therein, such company and its every officer who is in default shall be liable to a penalty of *ten thousand rupees* and in case of *continuing failure*, with further penalty of *one hundred rupees* for each day during which such failure continues, subject to a *maximum* of *two lakh rupees* in case of a *company* and *fifty thousand rupees* in case of an *officer who is in default*.

Given case: In the instant case, the idea of the directors that since the AGM was cancelled, the provisions requiring the company to file annual returns within 60 days from the date of AGM would not apply, is incorrect.

Analysis and conclusion: In the above case, the annual general meeting of Nutty Buddy Limited should have been held within a period of six months, from the date of closing of the financial year but it did not take place. Thus, the company has *contravened the provisions of section 92* of the Companies Act, 2013 for not filing the annual return and shall attract the penal provisions along with every officer of the company who is in default as specified in **Section 92(5)** of the Act.

2. M/s. Techno Ltd. maintains its Register of Members at its registered office in Mumbai. A group of **m**embers residing in Kolkata want to keep the register of members at Kolkata.

(*i*) Explain with provisions of Companies Act, 2013, whether the company can keep the Registersand Returns at Kolkata.

(*ii*) Does Mr. Ranjit, Director (but not a shareholder) of the company have the right to inspect the Register of Members? **[May 2018]**

Sol. (*i*) Maintenance of the Register of Members etc.: As per *section 94(1)* of the Companies Act, 2013, the registers required to be kept and maintained by a company under section 88 andcopies of the annual return filed under **section 92** shall be kept at the *registered office* of thecompany.Provided that such registers or copies of return may also be *kept at any other place* in India in

which *more than one-tenth of the total number of members* entered in the register of members reside, if approved by a *special resolution* passed at a general meeting of the company. So, Techno Ltd. can also keep the registers and returns at Kolkata after compliance with the above provisions, provided more than one-tenth of the total number of members entered in the register of members reside in Kolkata.

(*ii*) Inspection of Register of Members: As per section 94(2) of the Companies Act, the inspection of the records, i.e. registers and indices, and annual return can be done by members, debenture-holders, other security holders or beneficial owners of the company. Accordingly, a *director* Mr. Ranjit, who is not a shareholder of the company, *has no right toinspect* the Register of Members of company, as per the provisions of this section.**3.** Shambhu Limited was incorporated on 1.4.2018. The company did not have much to report to its shareholders, so no general meeting of the company has been held till 30.4.2020. The companyhas recently appointed a new accountant. The new accountant has pointed out that the companyrequired to hold the Annual General Meeting. The company has approached you a senior CharteredAccountant. Please advise the company regarding the time limit for holding the first annual generalmeeting of the Company and the power of the Registrar to grant extension of time for the FirstAnnual General Meeting. **[ICAI MODULE]**

Sol. According to **Section 96** of the Companies Act, 2013, every company shall be required to hold its first annual general meeting within a period of *9 months* from the date of closing of its first financial year.

The first financial year of Shambhu Ltd is for the period 1st April 2018 to 31st March 2019, the First annual general meeting (AGM) of the company should be held on or before 31st *December,2019*.

The section further provides that the 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*.

Thus, the first AGM should have been held on or before 31st December, 2019. Further, the *Registrar does not have the power to grant extension to time limit for the first AGM of the company*.

4. Examine the validity of the following statements in respect of Annual General Meeting (AGM) as per the provisions of the Companies Act, 2013:

(*i*) The first AGM of a company shall be held within a period of six months from the date of closing of the first financial year.

(*ii*) The Registrar may, for any special reason, extend the time within which the first AGM shall be held.

(*iii*) Subsequent (second onwards) AGMs should be held within 6 months from closing of the financial year.

(*iv*) There shall be a maximum interval of 15 months between two AGMs. **[July 2021]**

Sol. (*i*) According to **section 96** of the Companies Act, 2013, *first annual general meeting* of the company should be held *within 9 months* from the closing of the first financial year. Hence, the statement that the first AGM of a company shall be held within a period of six months from the date of closing of the first financial year is incorrect.

(*ii*) According to proviso to section 96(1), the 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.

Thus, the Registrar cannot extend (for any reason) the time period within which the first AGM shall be held. Given statement is incorrect.

(*iii*) According to section 96, subsequent AGM (i.e. second AGM onwards) of the company should be held within 6 months from the closing of the financial year. Hence, the given statement is correct.

(*iv*) According to section 96, the gap between two annual general meetings should not exceed 15 months. Hence, the given statement is correct, that there shall be a maximum interval of 15 months between two AGMs.

5. Primal Limited is a company incorporated in India. It owns two subsidiaries- Privy Limited. (in which it holds 75% shares) and Malvy Limited (a wholly owned subsidiary). Both the subsidiaries are incorporated outside India. The Board of Directors of Primal Limited intends to call an Extraordinary General Meeting (EGM) of Primal Limited on urgent basis. Advise the Board of Directors on the following:

(*i*) EGM be held in India

(*ii*) EGM be held in Netherlands **[RTP May 2019]**

Sol. According to **section 100** of the Companies Act, 2013, the Board may, whenever it deems fit, call an extraordinary general meeting of the company.

Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India. In the light of the above provisions:

(*i*) The Board of Directors can call the EGM in India.

(*ii*) The Board of Directors cannot call the EGM of Primal Limited outside India as it is a company incorporated in India.

6. Madurai Ltd. issued a notice for holding of its Annual general meeting on 7th November 2018. The notice was posted to the members on 16th October 2018. Some members of the company allege that the company had not complied with the provisions of the Companies Act, 2013 with regard to the period of notice and as such the meeting was valid. Referring to the provisions of the Act, decide:

(*a*) Whether the meeting has been validly called?

(*b*) if there is a shortfall, state and explain by how many days does the notice fall short of the statutory requirement?

(*c*) can the delay in giving notice be condoned? **[ICAI MODULE]**

Sol. According to **section 101(1)** of the Companies Act, 2013, a general meeting of a company may be called by giving not less than *clear twenty-one days*' notice either in writing or through electronic mode in such manner as may be prescribed. Also, it is to be noted that 21 clear days mean that the date on which notice is *served and* the date of *meeting* are *excluded* for sending the notice. Further, **Rule 35(6)** of the Companies (Incorporation) Rules, 2014, provides that in case of delivery by *post*, such *service* shall be *deemed* to have been effected – in the case of a notice of a meeting, at the expiration of *forty eight hours after* the letter containing the same is posted.

Hence, in the given question:

(*i*) A 21 days' clear notice must be given. In the given question, only 19 clear days' notice is served (after excluding 48 hours from the time of its posting and the day of sending and date of meeting). Therefore, the meeting was not validly called.

(*ii*) As explained in (*i*) above, notice *falls short by 2 days*.

(*iii*) *The Companies Act, 2013 does not provide anything specific regarding the condonation of delay in giving of notice. Hence, the delay in giving the notice calling the meeting cannot be condoned.*

7. Om Limited served a notice of General Meeting upon its members. The notice stated that the following resolutions will be considered at such meeting:
(*i*) Resolution to increase the Authorised share capital of the company.
(*ii*) Appointment and fixation of the remuneration of Mr. Prateek as the auditor.
A shareholder complained that the amount of the proposed increase and the remuneration was not specified in the notice. Is the notice valid under the provisions of the Companies Act, 2013.
[Nov. 2019]

Sol. Under **section 102(2)(b)** of the Companies Act, 2013, in the case of any meeting other than an Annual General Meeting, all business transacted thereat shall be deemed to be special business.
Further, under **section 102(1)**, an explanatory a statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:
(*a*) the nature of concern or interest, financial or otherwise, if any, in respect of each items, of:
(*i*) Every director and the manager, if any;
(*ii*) Every other key managerial personnel; and
(*iii*) Relatives of the persons mentioned in sub-clauses (*i*) and (*ii*);
(*b*) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.
The information about the amount is also a material fact that may enable members to understand the meaning and implication of items of business to be transacted and to take decision thereon.
Section 102 also prescribes ordinary businesses for which explanatory statement is not required.
Part (*i*) of the question relating to increase in the Authorised Capital falls under special business and hence in the absence of amount of proposed increase of share capital, the notice will be treated as invalid.
Part (*ii*) is an ordinary business and hence explanatory statement is not required. However, considering the two resolutions mentioned in the question are to be passed in the same meeting, notice of the meeting is invalid.
Thus, the objection of the shareholder is valid since the details on the item to be considered are lacking. The information about the amount is a material fact with reference to the proposed increase of authorized share capital and remuneration of Mr. Prateek as the auditor.
The notice is, therefore, *not a valid* notice under Section 102 of the Companies Act, 2013.

8. P Limited had called its Annual General Meeting on 30th August 2019. Mr. Pawan has filed a complaint against the company, that he could attend the meeting as the company did not serve the notice to him for attending the annual general meeting. The company, in turn, provided the proof that they had sent the notice, by way of an email to Mr. Pawan, inviting him to attend the annual general meeting of the company. Mr. Pawan alleged that he never received the email.
In the light of the provisions of the Companies Act, 2013, advise the whether the company has erred in serving the notice of Annual General Meeting to Mr. Pawan. **[MTP April 2021]**

Sol. As per **Rule 18** of the Companies (Management & Administration) Rules, 2014, sending of notices through electronic mode has been statutorily recognised. A notice may be sent through e-mail as a text or as an attachment to e-mail or as a notification providing electronic link or Uniform Resource Locator for accessing such notice. The e-mail shall be *addressed* to the person entitled to

receive such e-mail as per the records of the company as provided by the depository. Also, the company shall provide an advance opportunity at least once in a financial year, to the member to register his e-mail address and the changes therein and such request may be made by only those members who have not got their email id recorded or to update a fresh email id and not from the members whose email id s are already registered.

In the light of the above provisions of the Act, *the company's obligation shall be satisfied when it transmits the e-mail and the company shall not be held responsible for a failure in transmission beyond its control*. Also, if the member entitled to receive the notice fails to provide or update relevant e-mail address to the company, or to the depository participant as the case may be, the company shall not be in default for not delivering notice via e-mail.
Hence, the company has *not erred* in serving notice of Annual General Meeting to Mr. Pawan.

9. Kurt Limited is a company engaged in the business of manufacturing papers. The company has approached you to explain them the following as per the provisions of the Companies Act, 2013:
(*a*) Quorum for the general meeting if the company has 800 members.
(*b*) Quorum for the general meeting if the company has 6500 members.
(*c*) Quorum for the general meeting if the company has 5500 members. The articles of association has prescribed the quorum for the meeting to be 50. **[MTP April 2022]**

Sol. According to **section 103(1)** of the Companies Act, 2013, unless the articles of the company provide for a larger number, in case of a public company:
(1) Five members personally present if the number of members as on the date of meeting is not more than one thousand,
(2) Fifteen members personally present if the number of members as on the date of meeting is more than one thousand but up to five thousand,
(3) Thirty members personally present if the number of members as on the date of the meeting exceeds five thousand.
The term 'members personally present' as mentioned above refers to the members entitled to vote in respect of the items of business on the agenda of the meeting.
Thus,
(*a*) If the company has 800 members, quorum shall *be 5 members* personally present.
(*b*) If the company has 6500 members, quorum shall be *30 members* personally present.
(*c*) If the company has 5500 members, quorum shall be 30 members personally present.
However, since the articles of association has prescribed the quorum for the meeting to be 50, the *quorum shall be 50* (higher of 30 and 50).

10. (*i*) The Articles of Association of DJA Ltd. require the personal presence of 7 members to constitute quorum of General Meetings. The company has 965 members as on the date of meeting. The following persons were present in the extra-ordinary meeting to consider the appointment of Managing Director:
(1) A, the representative of Governor of Uttar Pradesh.
(2) D, representing Y Ltd. and Z Ltd.
(3) E, F, G and H as proxies of shareholders.
Determine whether the quorum was present in the meeting?
(*ii*) Sirhj, a shareholder, gives a notice for inspecting proxies, five days before the meeting is scheduled and approaches the company two days before the scheduled meeting for inspecting the same. What is the legal position relating to his actions (as per the provisions of the Companies Act, 2013)? **[ICAI MODULE]**

Sol. (*i*) According to **section 103** of the Companies Act, 2013, unless the articles of the company provide for a larger number in case of a public company, *five members personally present* if the number of members as on the date of meeting is not more than one thousand, shall be the quorum.

In this case the quorum for holding a general meeting is *7 members* to be personally present (higher of 5 or 7). For the purpose of quorum, only those members are counted who are entitled to vote on resolution proposed to be passed in the meeting.

Again, only members present in person and not by proxy are to be counted. Hence, proxies whether they are members or not will have to be excluded for the purposes of quorum.
If a company is a member of another company, it may authorise a person by resolution to act as its representative at a meeting of the latter company, then such a person shall be *deemed* to be a *member present in person* and counted for the purpose of quorum.

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

Further the *President of India or Governor of a State*, if he is a member of a company, may appoint such a person as he thinks fit, to act as his representative at any meeting of the company. A person so appointed shall be deemed to be a member of such a company and thus considered as member personally present.
In view of the above there are *only three members* personally present. 'A' will be included for the purpose of quorum. D will have two votes for the purpose of quorum as he represents two companies 'Y Ltd.' and 'Z Ltd.' E, F, G and H are not to be included as they are not members but representing as proxies for the members.
Thus, it can be said that the requirements of *quorum has not been met* and it shall not constitute a valid quorum for the meeting.

(*ii*) Under section 105 (8) of the Companies Act, 2013 every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning *twenty-four hours before* the time fixed for the commencement of the meeting *and ending with the conclusion of the meeting*, to inspect the proxies lodged, at any time during the business hours of the company, provided *not less than three days' notice in writing* of the intention so to inspect is given to the company.
In the given case, Sirhj has given proper notice. However, such inspection can be undertaken only during the period beginning 24 hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting.
So, Sirhj can undertake the inspection only during the above mentioned period and not two days prior to the meeting.

11. The Board of Directors of Shrey Ltd. called an extraordinary general meeting upon the requisition of members. However, the meeting was adjourned on the ground that the quorum was not present at the meeting. Advise the company. **[ICAI MODULE]**

Sol. According to **section 100 (2)** of the Companies Act 2013, the Board of directors must convene a general meeting upon requisition by the stipulated minimum number of members.
As per **Section 103 (2) (b)** of the Companies Act, 2013, if the quorum is not present within half

an hour from the appointed time for holding a meeting of the company, the meeting, if called on the requisition of members, shall *stand cancelled*. Therefore, the meeting stands cancelled and the stand taken by the Board of Directors to *adjourn it, is not proper*.

12. KMN Ltd. scheduled its annual general meeting to be held on 11th March, 2018 at 11:00 A.M. The company has 900 members. On 11th March, 2018 following persons were present by 11:30 A.M.

- P1, P2 & P3 shareholders
- P4 representing ABC Ltd.
- P5 representing DEF Ltd.
- P6 & P7 as proxies of the shareholders

(1) Examine with reference to relevant provisions of the Companies Act, 2013, whether quorum was present in the meeting.

(2) What will be your answer if P4 representing ABC Ltd., reached in the meeting after 11:30 A.M.?

(3) In case lack of Quorum, discuss the provisions as applicable for an adjourned meeting in terms of date, time & place.

(4) What happens if there is no Quorum in the Adjourned meeting? **[ICAI MODULE]**

Sol. According to **section 103** of the Companies Act, 2013, unless the articles of the company provide for a larger number, the quorum for the meeting of a Public Limited Company shall be 5 members personally present, if number of members is not more than 1000.

- P1, P2 and P3 will be counted as three members.
- *If a company is a member of another company, it may authorise a person by resolution to act as its representative at a meeting of the latter company, then such a person shall be deemed to be a member present in person and counted for the purpose of quorum.* Hence, P4 and P5 representing ABC Ltd. and DEF Ltd. respectively will be counted as *two* members.
- Only members present in person and not by proxy are to be counted. Hence, proxies whether they are members or not will have to be excluded for the purposes of quorum. Thus, P6 and P7 shall not be counted in quorum.

(1) In the light of the provision of the Act and the facts of the question, it can be concluded that the quorum for Annual General Meeting of KMN Ltd. is 5 members personally present. Total 5 members (P1, P2, P3, P4 and P5) were present. Hence, the requirement of quorum is fulfilled.

(2) The section further states that, if the required quorum is not present within half an hour, the meeting shall stand adjourned for the next week at the same time and place or such other time and place as decided by the Board of Directors.

Since, P4 is an essential part for meeting the quorum requirement, and he reaches after 11:30 AM (i.e. half an hour after the starting of the meeting), the meeting will be adjourned as provided above.

(3) In case of lack of quorum, the meeting will be adjourned as provided in section 103. In case of the adjourned meeting or change of day, time or place of meeting, the company shall give not less than 3 days' notice to the members either individually or by publishing an advertisement in the newspaper.

(4) Where quorum is not present in the adjourned meeting also within half an hour, then the members present shall form the quorum.

13. PQ Limited is a public company having its registered office in Mumbai. It has 3680 members. The company sent notice to all its members for its Annual general Meeting to be held on 2nd September 2019 (Monday) at 11 :00 AM at its registered office. On the day of meeting there were only 12

members personally present upto 11:30 AM. The Chairman adjourned the meeting to same day in next week at the same time and place.

On the day of adjourned meeting only 10 members were personally present. The Chairman initiated the meeting after 11:30 AM and passed the resolutions after discussion as per the agenda of the meeting given in the notice. Comment whether the AGM conducted after adjournment is valid or not as per the provisions of section 103 of Companies Act 2013 by explaining the relevant provisions in this regard.

What would be your answer in the above case, if PQ Limited is a Private company? **[Nov. 2020]**

Sol. According to section 103 of the Companies Act, 2013, unless the articles of the company provide for a larger number, in case of a public company, *fifteen members personally present* may fulfill the requirement of quorum, if the number of members as on the date of meeting is more than one thousand but up to five thousand.

If the specified quorum is *not present within half-an-hour* from the time appointed for holding a meeting of the company, the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine.

If at the *adjourned meeting* also, a *quorum* is *not present* within half-an-hour from the time appointed for holding meeting, the *members present shall be the quorum*.

In the instant case, *there were only 12 members personally present* on the day of meeting of PQ Limited upto 11:30 AM. This was *not in compliance* with the required quorum as per the law. In the adjourned meeting also, the required quorum was not present but in the adjourned meeting, the members present shall be considered as quorum in line with the provisions of section 103.

Hence, *the AGM conducted by PQ Limited after adjournment is valid.*

As per the provisions of section 103(1)(b), in *case of a private company*, two *members personally present*, shall be quorum for the meeting of a company. Therefore, in case, PQ Limited is a private company, then only two members personally present shall be the quorum for AGM and there was no need for adjournment.

14. A General Meeting was scheduled to be held on 15th April, 2019 at 3.00 P.M. As per the notice the members who are unable to attend a meeting in person can appoint a proxy and the proxy forms duly filled should be sent to the company so as to reach at least 48 hours before the meeting. Mr. X, a member of the company appoints Mr. Y as his proxy and the proxy form dated 10-04-2019was deposited by Mr. Y with the company at its registered Office on 11-04-2019. Similarly, another member Mr. W also gives two separate proxies to two individuals named Mr. M and Mr. N. In the case of Mr. M, the proxy dated 12-04-2019 was deposited with the company on the same day and the proxy form in case of Mr. N was deposited on 14-04-2019. All the proxies viz., Y, M and N were present before the meeting.

According to the provisions of the Companies Act, 2013, who would be the persons allowed to represent as proxies for members X and W respectively? **[ICAI MODULE]**

Sol. A Proxy form is an *instrument* in writing executed by a shareholder authorising another person to *attend* a *meeting and to vote thereat* on his behalf and in his absence. As per the provisions of Section 105 of the Companies Act, 2013, every shareholder who is entitled to attend and vote has a statutory right to appoint another person as his proxy.

It is *not necessary* that the proxy be a *member* of the company. Further, any provision in the articles of association of the company requiring instrument of proxy to be lodged with the company more

than 48 hours before a meeting shall have effect as if 48 hours had been specified therein. *The members have a right to revoke the proxy's authority by voting himself before the proxy has voted but once the proxy has voted the member cannot retract his authority*.

Where two proxy instruments by the same shareholder are lodged of in such a manner that one is lodged before and the other after the expiry of the date fixed for lodging proxies, the former will be counted.

Thus, in case of *member X, the proxy Y* will be permitted to vote on his behalf as form for appointing proxy was submitted within the permitted time.

However, in the case of *Member W, the proxy M* (and not Proxy N) will be permitted to vote as the proxy authorizing N to vote was deposited in less than 48 hours before the meeting.

15. A company received a proxy form 54 hours before the time fixed for the start of the meeting. The company refused to accept the proxy form on the ground that the Articles of the company provided that a proxy form must be filed 60 hours before the start of the meeting. Define proxy and decide under the provisions of the Companies Act, 2013, whether the proxy holder can compel the company to admit the proxy in this case? **[Jan. 2021]**

Sol. Section 105 *of the Companies Act, 2013 deals with the provisions of proxy for meetings.*

Section 105(1) of the Act provides that any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

Further, **Section 105(4)** of the Act provides that a *proxy form received 48 hours before the meeting will be valid* even if the articles provide for a longer period.

In the given case, the company received a proxy form 54 hours before the time fixed for start of the meeting. The Company refused to accept proxy on the ground that articles of the company provides filing of proxy before 60 hours of the meeting. In the said case, in line with requirement of the above stated legal provision, a *proxy received 48 hours before the meeting will be valid* even if the articles provide for a longer period. Accordingly, *the proxy holder can compel the company to admit the proxy*.

16. Examine the validity of the following decisions of the Board of Directors with reference of the provisions of the Companies Act, 2013.

(i) In an Annual General Meeting of Vrinda Ltd. having share capital, 80 members present in person or by proxy holding more than 1/10th of the total voting power, demanded for poll. The chairman of the meeting rejected the request on the ground that only the members present in person can demand for poll.

(*ii*) In an annual general meeting, during the process of poll, the members who earlier demanded for poll want to withdraw it. The chairman of the meeting rejected the request on the ground that once poll started, it cannot be withdrawn. **[ICAI MODULE]**

Sol. Section 109 of the Companies Act, 2013 provides for the demand of poll before or on the declaration of the result of the voting on any resolution on show of hands. Accordingly law says that:

Order of demand for poll by the chairman of meeting: *Before or on the declaration* of the result of the voting on any resolution on show of hands, a poll may be ordered to be taken by the Chairman of the meeting *on his own motion*, and *shall* be ordered to be taken by him on a demand made in that behalf:

(*a*) In the case a *company having a share capital*, by the members present in *person or by proxy*,

where allowed, and having *not less than one-tenth of the total voting power* or holding shares on which an aggregate sum of not less than *five lakh rupees* or such higher amount as may be prescribed has been *paid-up*; and

(*b*) In the case of any other company, by any member or members present in person or by proxy, where allowed, and having not less than one tenth of the total voting power.

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

Hence, on the basis on the above provisions of the Companies Act, 2013:

(*i*) The chairman *cannot reject the demand* for poll as poll can be demanded by the members present in person or by proxy. Subject to provision in the articles of company.

(*ii*) The chairman *cannot reject* the request of the members for *withdrawing* the demand of the Poll.

17. Mr. Pink held 100 partly paid up shares of Red Limited. The company asked him to pay the final call money on the shares. Due to some unavoidable circumstances he was unable to pay the amount of call money to the company. At a general meeting of the shareholders, the chairman disallowed him to cast his vote on the ground that the articles do not permit a shareholder to vote if he has not paid the calls on the shares held by him. Mr. Pink contested the decision of the Chairman. Referring to the provisions of the Companies Act, 2013 decide whether the contention of Mr. Pink is valid. **[RTP Nov. 2019]**

Sol. Section 106 (1) of the Companies Act, 2013 states that the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.

In the present case the *articles of the company do not permit a shareholder to vote* if he has not paid the calls on the shares held by him. Therefore, the *chairman* at the meeting *is well within its right to refuse him the right to vote* at the meeting and Mr. Pink's contention is not valid.

18. 'X' a member of LKM Ltd. is holding 250 shares, which are partly paid. The company held its general meeting where voting right was denied to 'X' claiming he has not paid the calls on the shares held by him. Examine the validity of company's denial to 'X' with reference to the relevant provisions of the Companies Act, 2013, assuming that Articles of association of the Company do not restrict the voting right of such members. **[Nov. 2018]**

Sol. Restriction on voting rights [**Section 106** of the Companies Act, 2013] According to the said Section:

(1) Notwithstanding anything contained in this Act, ***the articles of a company may provide*** that *no member shall exercise any voting right* in respect of any shares registered in his name on which any *calls* or other sums are presently payable by him have *not been paid*, or in regard to which the company has exercised any right of *lien*.

(2) A company shall not, except on the grounds specified in sub-section (1), prohibit any member from exercising his voting right on any other ground.

In the given question, Mr. X (member) holding 250 shares of LKM Ltd. has not paid certain calls on the shares. The company has denied his voting rights in the general meeting though the Articles of association of the company does not contain any restriction in the voting rights of such members.

On examination of the above provisions of the Act and the facts of the case, *LKM Ltd.'s denial to 'X' for exercising his voting rights is not valid*.

19. Miraj Limited issued a notice with the agenda for nine businesses to be transacted in the Annual General Meeting (two businesses were regarding appointment of Mr. S and Mr. P as directors). The chairman decided to move the resolutions for all the nine businesses together to save the time of the members present. Examine the validity of the resolutions.

[May 2018, MTP Oct. 2018, ICAI Module]

Sol. For the *sake of avoiding confusion and mixing up*, the resolutions are generally moved separately in the Annual General Meeting. However, there is *nothing illegal* if the Chairman of the meeting desires that two or more resolutions should be moved together, unless any member requires that each resolution should be put to vote separately or unless a poll is demanded in respect of any.

Where notice has been given of several resolutions, each resolution must be put separately. However, if the meeting unanimously adopts all the resolutions, this would not be illegal barring a few occasions. One resolution which should be moved separately is relating to appointment of directors

at a general meeting of a public or private company, where two or more directors cannot be appointed as directors by a single resolution.

Hence, in the *instant case*, all the nine businesses *cannot be moved together as two businesses were regarding appointment of Mr. S and Mr. P as directors*. Besides these two resolutions, other seven resolutions can be moved together if the members unanimously agree.

20. At a General meeting of a XYZ Limited, a matter was to be passed by a special resolution. Out of 40 members present, 20 voted in favour of the resolution, 5 voted against it and 5 votes were found invalid. The remaining 10 members abstained from voting. The Chairman of the meeting declared the resolution as passed. With reference to the provisions of the Companies Act, 2013, examine the validity of the Chairman's declaration. **[MTP Oct 2019]**

Sol. Under **Section 114(2)** of the Companies Act, 2013, for a valid special resolution to be passed at a meeting of members of a company, the following conditions need to be satisfied:

(1) The *intention* to propose the resolution, as a special resolution must have been specified in the notice calling the general meeting or other intimation given to the members;

(2) The *notice* required under the Companies Act must have been duly given of the general meeting;

(3) The *votes cast in favour* of the resolution (whether by show of hands or electronically or on a poll, as the case may be) by members present in person or by proxy or by postal ballot are *not less than 3 times* the number of *votes*, if any, cast *against* the resolution by members so entitled and voting.

Thus, in terms of the requisite majority, votes cast in favour have to be compared with votes cast against the resolution. *Abstentions or invalid votes, if any, are not to be taken into account*.

Accordingly, in the given problem, the votes cast in favour (20) being more than 3 times of the votes cast against (5), and presuming other conditions of Section 114(2) are satisfied, the decision of the Chairman is in order.

21. Members of ZA Ltd. holding less than 1% of total voting power want the company to give a special notice to move a resolution for appointment of an auditor other than retiring auditor. Explain whether members have complied with relevant provisions of the Companies Act, 2013 in making their request. **[Nov. 2018]**

Sol. Section 115 of the Companies Act, 2013 states that where any provision of this Act specifically requires or Articles of Association of a company so require that a special notice is required for

passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding *not less than 1% of the total voting power*, *or* holding shares on which such aggregate sum not exceeding *`5,00,000/- has been paid-up*. In such a case, the company shall give its members notice of the resolution in the manner as prescribed in Rule 22 of the Companies (Management & Administration) Rules, 2014. Further, **Section 115** *of the Act specifies that special notice is required to appoint as auditor a person other than a retiring auditor* under **Section 140** of the Act. According to the given facts in the question, there is non-compliance of requirement of **section 115** as stated above i.e. the notice of the intention to move such resolution as to appointment of auditor other than retiring auditor was given by members of ZA Ltd. holding less than 1% of the total voting power.

22. Give the points of distinction between ordinary resolution and special resolution. **[May 2019]**

Sol. Difference between ordinary resolution and Special resolution Ordinary Resolution: Section

114(1) of the Companies Act, 2013 states that a resolution shall be ordinary resolution, if the notice required under this Act has been duly given and it is required to be passed by the *votes cast*, whether on a show of hands, or electronically or on a poll, as the case may be, *in favour* of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, *exceed the votes*, if any *cast against* the resolution by members, so entitled and voting. Simply put, the votes cast in the favour of the resolution, by any mode of voting should exceed the votes cast against it.

Special Resolution: As per Section 114(2) of the Act, a resolution shall be a special resolution, when:

(*a*) The *intention* to propose the resolution as a special resolution has been duly specified in the notice calling the general meeting or other intimation given to the members of the resolution;

(*b*) The *notice* required under this Act has been duly given; and
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(*c*) The *votes cast in favour* of the resolution, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote of the Chairman, if any, of the Chairman, by members, who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, *are required to be not less than 3 times the number of the votes*, if any, cast *against* the resolution by members so entitled and voting.

23. In a General Meeting of Amit Limited, the Chairman directed to exclude certain matters detrimental to the interest of the company from the minutes. Manoj, a shareholder contended that the minutes must contain fair and correct summary of the proceedings thereat. Decide, whether the contention of Manoj is maintainable under the provisions of the Companies Act, 2013? **[ICAI MODULE]**

Sol. Under **Section 118 (5)** of the Companies Act, 2013, there shall not be included in the Minutes of a meeting, any matter which, in the opinion of the Chairman of the meeting:

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

(*ii*) is *irrelevant* or immaterial to the proceeding; or

(*iii*) is detrimental to the *interests* of the company.

Further, under **section 118(6)** the chairman shall exercise *absolute discretion* in regard to the inclusion or non-inclusion of any matter in the Minutes on the grounds specified in sub-section

(5) above.

Hence, in view of the above, the contention of Manoj, a shareholder of Amit Limited is *not valid* because the Chairman has absolute discretion on the inclusion or exclusion of any matter in the minutes for aforesaid reasons.

24. Veena Ltd. held its Annual General Meeting on September 15, 2018. The meeting was presided over by Mr. Mohan Rao, the Chairman of the Company's Board of Directors. On September 17, 2018, Mr. Mohan Rao, the Chairman, without signing the minutes of the meeting, left India to look after his father who fell sick in London. Referring to the provisions of the Companies Act, 2013, state the manner in which the minutes of the above meeting are to be signed in the absence of Mr. Mohan Rao and by whom? **[MTP Oct. 2018, April 2019, Jan. 2021]**

Sol. Section 118 of the Companies Act, 2013 provides that every company shall prepare, sign and keep minutes of proceedings of every general meeting, including the meeting called by the requisitionists and all proceedings of meeting of any class of shareholders or creditors or Board of Directors or committee of the Board and also resolution passed by postal ballot within thirty days of the conclusion of every such meeting concerned. Minutes kept shall be evidence of the proceedings recorded in a meeting.

By virtue of **Rule 25** of the Companies (Management and Administration) Rules, 2014 read with **section 118** of the Companies Act, 2013, *each page of every such book shall be initialled or signed* and the *last page* of the record of proceedings of each meeting or each report in such books shall be *dated and signed by*, in the case of minutes of proceedings of a general meeting, *by the chairman* of the same meeting within the aforesaid period of *thirty days* or in the event of the *death or inability* of that chairman within that period, by a *director duly authorised by the Board* for the purpose.

Therefore, the minutes of the meeting referred to in the case of Veena Ltd. can be signed in the absence of Mr. Mohan Rao, by any director, authorised by the Board in this respect.

25. Mr. Laurel, a shareholder in Hardly Limited, a listed company, desires to inspect the minutes book of General Meetings and to have copy of some resolutions. In the light of the provisions of the Companies Act, 2013 answer the following:

(*i*) Whether he can inspect the minutes book and to have copies of the minutes at free of cost?

(*ii*) Whether he can authorise his friend to inspect the minutes book on behalf of him by signing a power of authority? **[July 2021]**

Sol. As per **section 119** of the Companies Act, 2013, the books containing the minutes of the proceedings of any general meeting of a company shall be open for inspection, during business hours, by any member, *without charge*, subject to such reasonable restrictions as specified in the articles of the company or as imposed in the general meeting.

Any member shall be entitled to be furnished, *within seven working days* after he has made a request in that behalf to the company, and on payment of such fees as may be prescribed, with a copy of any minutes

Accordingly, following are the answers:

(*i*) As in given case, Mr. Laurel, in requirement with law, *he can inspect* the minutes book and so to have soft copies of the same up to last three years.

(*ii*) As provision does not specify anything on authorizing anyone else to inspect the minutes book. Therefore, *Mr. Laurel cannot authorize his friend to inspect the minutes book* on behalf of him.

26. Pristine Limited, a listed public company, conducted its Annual General Meeting on 31st August, 2020. However, 10 days have passed since 31st August, 2020, but it has still not filed report on Annual General Meeting. The Accountant of the company has approached you to advise them whether Pristine Limited is required to file report on Annual General Meeting? **[RTP May 2021]**

Sol. According to **Section 121**, every *listed public company* shall prepare a report on each annual general meeting including the confirmation to the effect that the meeting was convened held and conducted as per the provisions of the Act and the rules made thereunder.
A copy of the report is to be filed with the Registrar in *Form No. MGT-15* within *thirty days* of the conclusion of AGM along with the prescribed fee. If the company does not file such report on Annual General Meeting within 30 days of the conclusion of the Annual General Meeting then the company and defaulting officers are liable for prescribed penalties.
Since, Pristine Ltd. is a listed company, hence it has to file a copy of 1annual Report with the Registrar within 30 days from 31st August, 2020.

27. State with reason whether the following statement is correct or incorrect:
(*i*) An annual general meeting can be held on a national holiday.
(*ii*) A company should file its annual return within six months of the closing of the financial year
[MTP April 21]

Sol. (*i*) An annual general meeting *cannot be held on a national holiday*. Under section 96(2) of the Companies Act, 2013 every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday. A national holiday has been defined in the explanation to section 96 as a day declared as National Holiday by the Central Government.
Thus, the statement 'An annual general meeting can be held on a national holiday' *is incorrect*.
(*ii*) The statement *is incorrect* in terms of section 92(4) of the Companies Act, 2013.**Section 92(4)** states that every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying there a sons for not holding the annual general meeting, with such fees or additional fees as may be prescribed.

28. 'A' and his wife 'B' has joint Demat Account in Vrinda Limited. The company's Annual General Meeting is to be held on 28.08.2022. In such a case, who will cast the vote in the Annual General Meeting? Give your answer as per the provisions of the Companies Act, 2013. **[RTP Nov. 22]**

Sol. The voting in case of joint shareholders is done in the order of seniority, which is determined on the basis of the order in which their names appear in the register of members/ shareholders.
The joint-holders have a right to instruct the company as to the order in which their names are to appear in the register.
As per Rule 21 of the Companies (Management and Administration) Rules, 2014, the Scrutinizers shall arrange for Polling papers and distribute them to the members and proxies present at the meeting; in case of joint shareholders, the polling paper shall be given to the first named holder or in his absence to the joint holder attending the meeting as appearing in the chronological order in the folio.

Thus, in the given case, 'A' or his wife 'B', whosoever names appears first in chronological order in the register of members/ shareholders shall be entitled to vote.

29. Prabhas Limited is a company having its shares listed on a recognized stock exchange. The company
has 5,000 members. The Annual General Meeting of the company is to be held on 07-09-2022. As per the provisions of the Companies Act, 2013, advise the company, the remote e- voting period and the time of closing of remote e-voting. **[RTP Nov. 22]**

Sol. Rule 20 of the Companies (Management & Administration) Rules, 2014, provides that:

(*i*) Every company which has listed its equity shares on a recognised stock exchange and company having not less than one thousand members shall provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means.

(*ii*) The facility for remote e-voting shall remain open for not less than three days and shall close at 5.00 p.m. on the date preceding the date of the general meeting.

In the question, Prabhas Limited has its shares listed on recognized stock exchange and has 5,000 members, hence, it has to provide to its members facility to exercise their right to vote on resolutions proposed to be considered at a general meeting by electronic means. Thus, if the Annual General Meeting of Prabhas Limited is going to be held on 7.9.2022, the facility for remote e- voting shall open on 4.9.2022 and close at 5.00 p.m. on 6.9.2022.

CHAPTER 8

DECLARATION AND PAYMENT OF DIVIDEND

PRACTICE QUESTIONS

1. MNP Ltd. has a paid-up share capital of ₹10 crore and free reserves of ₹50 crore, as on 31st March, 2019. The company made a loss of ₹40 lakh after providing for depreciation for the year ended 31st March, 2019 and as a result, the company was not in a position to declare any dividend for the said year out of profits. However, the Board of directors of the company announced the declaration of dividend of 20% on the equity shares payable out of free reserves. The average dividend declared by the company in the last three years is 25%. Referring to the provisions of the Companies Act, 2013, examine the validity of declaration of dividend. [ICAI Module]

Sol. As per Second Proviso to Section 123(1), in the event of inadequacy or absence of profits in any financial year, a company may declare dividend out of the accumulated profits of previous years which have been transferred to the free reserves.

However, such declaration shall be subject to the following conditions as per Rule 3 of Companies (Declaration and Payment of Dividend) Rules, 2014

(i) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by the company in the immediately preceding three years. As per facts of the question the present rate of dividend is 20% and average dividend declared in the last three years is 25%. So, this condition is fulfilled.

(ii) The total amount to be drawn from free reserves shall not exceed one-tenth i.e., 10% of its paid-up share capital and free reserves as per the latest audited financial statement. Amount of dividend proposed: ₹2 Crores (20% of ₹10 Crore i.e., on paid up capital) 10% of paid-up share capital and free reserves: 10% of (10 crore + 50 crore) = ₹6 Crore. This condition is fulfilled as amount of dividend is not exceeding 10% of its paid-up share capital and free reserves.

(iii) The amount so drawn shall first be utilized to set off the losses incurred in the financial year in which dividend is declared and only thereafter, any dividend in respect of equity shares shall be declared.

(iv) After such withdrawal from free reserves, the residual reserves shall not fall below 15% of its paid-up share capital as per the latest audited financial statement. Balance of reserves after payment of dividend: ₹48 crore (50 crore – 2 crore) 15% of paid-up share capital: 1.5 crore (15% of 10 crore) This condition is fulfilled.

Taking into account all the conditions, it can be said that declaration of dividend by MNP Limited is valid

2. (i) YZ Medical Instruments Limited is a manufacturing company & has proposed a dividend @ 10% for the year 2018-19 out of the profits of current year. The company has earned a profit of ₹910 crores during 2018-19. The company does not intend to transfer any amount to the

general reserves out of the profits. Is YZ Medical Instruments Limited allowed to do so? Comment.

(ii) Karan, holder of 5,000 equity shares of ₹100 each of M/s. Rachit Leather Shoes Limited did not pay final call of ₹10 per share. M/s. Rachit Leather Shoes Limited declared dividend of 10%. Examine with reference to relevant provisions of the Companies Act, 2013, the amount of dividend Karan should receive. [ICAI Module, RTP May 2021]

Sol.(i) **According to section 123** of the Companies Act, 2013 a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Such transfer is not mandatory and the percentage to be transferred to reserves is at the discretion of the company.

As per the given facts, YZ Medical Instruments Limited has earned a profit of ₹910 crores for the financial year 2018-19. It has proposed a dividend @ 10%. However, it does not intend to transfer any amount to the reserves of the company out of the profits of current year.

As per the provisions stated above, the amount to be transferred to reserves out of profits for any financial year is at the discretion of the company acting through its Board of Directors.

Therefore, at its discretion, if YZ Medical Instruments Limited decides not to transfer any profit to reserves before the declaration of dividend at 10%, it is legally allowed to do so.

(ii) As per the proviso to section 127 of the Companies Act, 2013, no offence will be deemed to have been committed by a director for adjusting the calls in arrears remaining unpaid or any other sum due from a member against the dividend declared by the company.

Thus, as per the given facts, M/s. Rachit Leather Shoes Limited can adjust the unpaid call money of ₹50,000 against the declared dividend of 10%, i.e., 5,00,000 × 10/100 = 50,000.

Hence, call money of ₹50,000 not paid by Karan can be adjusted fully from the entitled dividend amount of ₹50,000 payable to him.

3. Alex limited is facing loss in business during the financial year 2018-2019. In the immediately preceding three financial years, the company had declared dividend at the rate of 7%, 11% and 12% respectively. The Board of Directors has decided to declare 12% interim dividend for the current financial year at least to be in par with the immediately preceding year. Is the act of the Board of Directors valid? [ICAI Module, MTP May 2022]

Sol. **As per Section 123(3)** of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared. Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

Conclusion: According to the given facts, Alex Ltd. is facing loss in business during the financial year 2018-2019. In the immediately preceding three financial years, the company declared dividend at the rate of 7%, 11% and 12% respectively.

Accordingly, the rate of dividend declared shall not exceed 10%, the average of the rates (7 + 11 + 12 = 10%) at which dividend was declared by it during the immediately preceding three financial years.

Therefore, the act of the Board of Directors as to declaration of interim dividend at the rate of 12% during the F.Y. 2018-2019 is not valid.

4. Referring to the provisions of the Companies Act, 2013, examine the validity of the following: The Board of Directors of ABC Tractors Limited proposes to declare dividend at the rate of 20% to the equity shareholders, despite the fact that the company has defaulted in repayment of public deposits accepted before the commencement of this Act. [ICAI Module, Nov. 2019]

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

Conclusion: In the given instance, the Board of Directors of ABC Tractors Limited proposes to declare dividend at the rate of 20% to the equity shareholders, in spite of the fact that the company has defaulted in repayment of public deposits accepted before the commencement of the Companies Act, 2013.

Hence, according to the above provision, declaration of dividend by the ABC Tractors Limited is not valid.

5. The Board of Directors of Future Fashions Limited at its meeting recommended a dividend on its paid-up equity share capital which was later on approved by the shareholders at the Annual General Meeting. Thereafter, the directors at another meeting of the Board passed a board resolution for diverting the total dividend to be paid to the shareholders for purchase of certain short-term investments in the name of the company. As a result, dividend was paid to shareholders after 45 days.

Examining the provisions of the Companies Act, 2013, state whether the act of directors is in violation of the provisions of the Act and if so, state the consequences that shall follow for the above violative act. [ICAI Module]

Sol. **According to section 124** of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in any scheduled bank to be called the Unpaid Dividend Account.

Further, according to section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any entitled shareholder, every director of the company shall, if he is knowingly a party to the default, be liable for punishment.

In the present case, the Board of Directors of Future Fashions Limited at its meeting recommended a dividend on its paid-up equity share capital which was later on approved by the shareholders at the Annual General Meeting.

Thereafter, the directors at another meeting of the Board decided by passing a board resolution for diverting the total dividend to be paid to the shareholders for purchase of certain short-term investments in the name of the company. As a result, dividend was paid to shareholders after 45 days.

1. Since, declared dividend has not been paid within 30 days from the date of the declaration to any shareholder entitled to the payment of dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in any scheduled bank to be called the Unpaid Dividend Account.
2. The Board of Directors of Future Fashions Limited has violated section 127 of the Companies Act, 2013 as it failed to pay dividend to shareholders within 30 days due to its decision to divert the total dividend to be paid to shareholders for purchase of certain short-term investments in the name of the company.

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

(a) Every director of the company shall, if he is knowingly a party to the default, be punishable with maximum imprisonment of two years and shall also be liable for a minimum fine rupee one thousand for every day during which such default continues.

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

6. RST Ltd. declared dividend at the rate of 20% for the financial year 2017-2018 in the AGM scheduled on 15th June 2018. As RST Ltd. is left with certain unpaid and unclaimed dividend, it transferred amount of unpaid and unclaimed dividend to UDA (unpaid dividend account). After remaining unpaid and unclaimed for more than 2 years in the UDA, some of the entitled shareholders made RST Ltd. liable for noncompliance of section 124, and claimed for their unpaid dividend amount. RST Ltd. denies saying that there were certain legal issues on the entitlement of the dividend amount to the respective shareholders. [RTP May 2019]

Sol. **As per section 124** of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid/claimed to/by shareholder within 30 days from the date of the declaration, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid/unclaimed to the Unpaid Dividend Account. The company shall, within a period of 90 days of making any transfer of an amount, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the web-site of the company, if any,

and also on any other web-site approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

Accordingly, in the given situation, RST Ltd. failed to give statement of Unpaid/unclaimed dividend and so liable for the said noncompliance of section 124 of the Companies Act, 2013.

Any person claiming to be entitled to any money transferred under section 124(1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed. Since RST Ltd. failed to comply with the requirements of this section as to the preparing of a statement of unpaid dividend, so shall be liable to penalty of one lakh rupees and in case of continuing failure five hundred for each day subject to maximum of 10 lakh rupees and every officer of the company who is in default shall be liable to penalty twenty five thousand rupees and in case of continuing failure, one hundred for each day subject to maximum of 2 lakh ruppes.

7. PQ Ltd. declared and paid 10% dividend to all its shareholders except Mr. Kumar, holding 500 equity shares, who instructed the company to deposit the dividend amount directly in his bank account. The company accordingly remitted the dividend, but the bank returned the payment on the ground that the account number as given by Mr. Kumar doesn't tally with the records of the bank. The company, however, did not inform Mr. Kumar about this discrepancy. Comment on this issue with reference to the provisions of the Companies Act, 2013 regarding failure to distribute dividend. [ICAI Module, MTP March 2021]

Sol. **Section 127** of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time.

One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has not been communicated to the shareholder.

In the instant case, PQ Ltd. has failed to communicate to the shareholder Mr. Kumar about non-compliance of his direction regarding payment of dividend. Hence, the penal provisions under section 127 will be attracted.

8. Star Computers Limited declared and paid dividend in time to all its equity holders for the financial year 2018-19, except in the following two cases:

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

(ii) Dividend amount of ₹50,000 was not paid to the successor of Late Mr. Mohan, in view of the court order restraining the payment due to family dispute about succession. You are required to analyses these cases with reference to provisions of the Companies Act, 2013 regarding failure to distribute dividends. [ICAI Module, MTP Nov 2019]

Sol. **(i)** **Section 127** of the Companies Act, 2013 provides for punishment for failure to distribute dividend on time.

One of such situations is where a shareholder has given directions to the company regarding the payment of the dividend and those directions could not be complied with but the noncompliance was not communicated to him.

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

(ii) Section 127, inter-alia, provides that no offence shall be deemed to have been committed where the dividend could not be paid by reason of operation of law. In the present case, the dividend could not be paid because it was not allowed to be paid by the court until the matter was resolved about succession. Hence, there will not be any liability on the company and its directors, etc.

9. The Annual General Meeting of ABC Bakers Limited held on 30th May 2019, declared a dividend at the rate of 30% payable on its paid-up equity share capital as recommended by Board of Directors. However, the Company was unable to post the dividend warrant to Mr. Ranjan, an equity shareholder, up to 25th July 2019. Mr. Ranjan filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for the period of default. Decide in the light of provisions of the Companies Act, 2013, whether Mr. Ranjan would succeed? Also, state the directors' liability in this regard under the Act. [ICAI Module]

Sol. **Section 127** of the Companies Act, 2013 lays down the penalty for non-payment of dividend within the prescribed time period of 30 days.

According to this section where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration of dividend to any shareholder entitled to the payment of dividend:

(a) every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment maximum up to two years and with minimum fine of rupees one thousand for every day during which such default continues; and
(b) the company shall be liable to pay simple interest at the rate of 18% per annum during the period for which such default continues.

Therefore, in the given case Mr. Ranjan will not succeed if he claims interest at 20% interest as the limit under section 127 is 18% per annum.

10. Alpha Herbals, a Section 8 company is planning to declare dividend in the Annual General Meeting for the Financial Year ended 31-03-2019. Mr. Chopra is holding 800 equity shares as on date. State whether the act of the company is according to the provisions of the Companies Act, 2013. [ICAI Module, RTP May 2021]

Sol. According to Section 8(1) of the Companies Act, 2013, the companies licensed under Section 8 of the Act (Formation of companies with Charitable Objects, etc.) are prohibited from paying any dividend to their members.

Their profits are intended to be applied only in promoting the objects for which they are formed. Hence, in the instant case, the proposed act of Alpha Herbals, a company licensed under Section 8 of the Companies Act, 2013, which is planning to declare dividend, is not according to the provisions of the Companies Act, 2013.

11. The Director of Happy Limited proposed dividend at 12% on equity shares for the financial year 2016-17. The same was approved in the annual general meeting of the company held on 20th September, 2017. The Directors declared the approved dividends.

Analyzing the provisions of the Companies Act, 2013, give your opinion on the following matters:

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

(ii) Ms. N was the holder of 1,000 equity shares on 31st March, 2017, but she has transferred the shares to Mr. R, whose name has been registered on 20th May, 2017. Who will be entitled to the above dividend? [RTP May 2018, MTP Oct 2021, MTP Nov. 2018, May 2019]

Sol.(i) The given problem is based on the proviso provided in the section 127(d) of the Companies Act, 2013.

As per the law where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case no offence shall be deemed to have been committed where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder.

As per the facts given in the question, Mr. A is holding equity shares of face value of 10 Lakhs and has not paid an amount of 1 lakh towards call money on shares.

Referring to the above provision, Mr. A is eligible to get ₹1.20 lakh towards dividend, out of which an amount of 1 lakh can be adjusted towards call money due on his shares. ₹20,000 can be paid to him in cash or by cheque or in any electronic mode.

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

(ii) According to section 123(5), dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.

Facts in the given case state that Ms. N, the holder of equity shares transferred the shares to Mr. R whose name has been registered on 20th May 2017.

Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2017, so, Mr. Raj will be entitled to the dividend.

12. Sun Light Limited was incorporated on 22nd January 2019 with the objects of providing software services. The Company adopted its first financial year as from 22nd January 2019 to 31st March 2020. The financial statement for the said period, after providing for depreciation in accordance with Schedule II of the Companies Act, 2013 revealed net profit. The Board of Directors declared 20% interim dividend at their meeting held on 7th July 2020, before holding its first Annual General Meeting. In the light of the provisions of the Companies Act, 2013 and Rules made thereunder:

(i) Whether the Company has complied due diligence in declaring interim dividend? [Nov 2020]

Sol. **According to section 123(3)** of the Companies Act, 2013, the Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend.

In the instant case, Sun Light Limited has complied due diligence in declaring interim dividend as the Interim Dividend was declared by Board of Directors at their meeting held on 7th July, 2020 before holding its first Annual General Meeting.

Also, the financial statement revealed net profit so the interim dividend can be paid out of profits of the financial year ending 31st March, 2020.

13. ASR Limited declared dividend at its Annual General Meeting held on 31-12-2020. The dividend warrants to Mr. A, a shareholder was posted on 22nd January, 2021. Due to postal delay Mr. A received the warrant on 5th February, 2021 and encashed it subsequently. Can Mr. A initiate action against the company for failure to distribute the dividend within 30 days of declaration under the provisions of the Companies Act, 2013? [July 2021]

Sol. **Section 127** of the Companies Act, 2013, requires that the declared dividend must be paid to the entitled shareholders within the prescribed time limit of thirty days from the date of declaration of dividend.

In case dividend is paid by issuing dividend warrants, such warrants must be posted at the registered addresses within the prescribed time.

Once posted, it is immaterial whether the same are received within thirty days by the shareholders or not. In the given question, the dividend was declared on 31.12.2020 and the dividend warrant was posted within 30 days from date of declaration of dividend (posted on 22nd January, 2021). It is immaterial if Mr. A has received it on 5th February 2021 (i.e., post 30 days from 31.12.2020). Hence, Mr. A cannot initiate action against the company for failure to distribute the dividend within 30 days of declaration.

14. Vishal Limited has paid dividend consistently every year at the rate of 10% on its equity share capital in the last 5 years (2015-2016 to 2019-2020). The company has incurred loss in the current financial year (FY 2020-2021). It still wants to declare dividend for the FY 2020-2021. Whether the company can do so? Explain. [RTP MAY 22]

Sol. **As per the second proviso to Section 123**(1) of the Companies Act, 2013 read with Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014, where in any year there is the absence of profit or there are no adequate profits for declaring dividend, the company may declare dividend out of the profits of any previous year transferred by it to the free reserves, only in accordance with the procedure laid down

CHAPTER- 9

ACCOUNTS OF COMPANIES

PRACTICE QUESTIONS

1. The registered office of the Bharat Ltd. is situated in a classified backward area of Maharashtra. The Board wants to keep its books of account at its corporate office in Mumbai which is conveniently located. The Board seeks your advice about the feasibility of maintaining the accounting records at a place other than the registered office of the company. Advice.

[ICAI MODULE]

Sol. According to section 128(1) of the Companies Act, 2013, every company is required to prepare and keep the books of accounts and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices, if any, and explain the transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting.

The proviso to section 128(1) further provides that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the Board of Directors may decide and where such a decision is taken, the company shall, within seven days thereof, file with the Registrar a notice in writing giving the full address of that other place. Further company may keep such books of account or other relevant papers in electronic mode as per the Rule 3 of the Companies (Accounts) Rules, 2014. Therefore, the Board of Bharat Ltd. can keep its books of account at its corporate office in Mumbai by following the above-mentioned procedure.

2. The Board of Directors of Vishwakarma Electronics Limited consists of Mr. Ghanshyam (Director), Mr. Hyder (Director) and Mr. Indersen (Managing Director). The company has also employed a Company Secretary. The financial statements of the company were signed by Mr. Ghanshyam and Mr. Hyder. Examine whether the authentication of financial statements of the company was in accordance with the provisions of the Companies Act, 2013? **[ICAI MODULE]**

Sol. According to section 134(1) of the Companies Act, 2013, the financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorized by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon.

In the instant case, the Balance Sheet and Profit and Loss Account have been signed only by Mr. Ghanshyam and Mr. Hyder, the directors. In view of Section 134(1) of the Companies Act, 2013, Mr. Indersen, the Managing Director should be one of the two signing directors. Since, the company has also employed a Company Secretary, he should also sign the financial statements.

3. (i) Ravi Limited maintained its books of accounts under Single Entry System of Accounting. Is it permitted under the provisions of the Companies Act, 2013?

(ii) State the person responsible for complying with the provisions regarding maintenance of Books of Accounts of a Company.

(iii) Whether a Company can keep books of Accounts in electronic mode accessible only outside India. **[ICAI MODULE]**

Sol. (i) According to Section 128(1) of the Companies Act, 2013, every company shall prepare "books of account" and other relevant books and papers and financial statement for every financial year. These books of accounts should give a true and fair view of the state of the affairs of the company, including that of its branch office(s). These books of accounts must be kept on accrual basis and according to the double entry system of accounting. Hence, maintenance of books of account under Singly Entry System of Accounting by Ravi Limited is not permitted.

(ii) Persons responsible to maintain books: As per Section 128(6) of the Companies Act, 2013, the person responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts etc. shall be:

(a) Managing Director,

(b) Whole-Time Director, in charge of finance

(c) Chief Financial Officer

(d) Any other person of a company charged by the Board with duty of complying with provisions of section 128.

(iii) A Company have has the option of keeping such books of account or other relevant papers in electronic mode as per Rule 3 of the Companies (Accounts) Rules, 2014. According to such Rule,

(a) such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India, at all times so as to be usable for subsequent reference.

(b) There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law.

(c) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a daily basis. Hence, a company cannot keep books of Account in electronic mode accessible only outside India.

4. The Income Tax Authorities in the current financial year 2019-20 observed, during the assessment proceedings, a need to re-open the accounts of Chetan Ltd. for the financial year 2008-09 and, therefore, filed an application before the National Company Law Tribunal (NCLT) to issue the order to Chetan Ltd. for re- opening of its accounts and recasting the financial statements for the financial year 2008-09. Examine the validity of the application filed by the Income Tax Authorities to NCLT. **[ICAI MODULE]**

Sol. As per Section 130 of the Companies Act, 2013, a company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by the Central Government, the Income- tax authorities, the Securities and Exchange Board, any other statutory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that:

(i) the relevant earlier accounts were prepared in a fraudulent manner; or

(ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements.

However, no order shall be made in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year. In the given instance, an application was filed for re-opening and re-casting of the financial statements of Chetan Ltd. for the financial year 2008-2009. Though application filed by the Income Tax Authorities to NCLT is valid, its recommendation for reopening and recasting of financial statements for the period earlier than eight financial years immediately preceding the current financial year i.e. 2019-2020, is invalid.

5. The directors of Element Ltd. want to voluntary revise the Financial statements of the company. They have approached you to state to them the provisions of the Companies Act, 2013 regarding voluntary revision of financial statements. **[MTP March 2018]**

Sol. (1) Preparation of revised financial statement or revised report on the approval of Tribunal: If it appears to the directors of a company that:

(a) the financial statement of the company; or

(b) the report of the Board,

Do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar.

***Tribunal to serve the notice*:** Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section:

***Number of times of revision and recast*:** Provided further that such revised financial statement or report shall not be prepared or filed *more than once in a financial year*.

Reason for revision to be disclosed: Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in Board's report in the relevant financial year in which such revision is being made.

(2) **Limits of revisions:** Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to:

(a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and

(b) the making of any necessary consequential alternation.

(3) **Framing of rules by the Central Government in relation to revised financial statement or director's report:** The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular:

(a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;

(b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report;

(c) require the directors to take such steps as may be prescribed.

6. Explain the following in brief with reference to Companies Act 2013: National Financial Reporting Authority (NFRA). **[Nov 20, Jan. 2021]**

Sol. National Financial Reporting Authority (NFRA): According to section 132 of the Companies Act, 2013, the Central Government may, by notification, constitute the National Financial Reporting Authority (NFRA) to provide for matters relating to accounting and auditing standards under this Act.

Notwithstanding anything contained in any other law for the time being in force, the NFRA shall:

(a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;

(b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;

(c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and

(d) perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.

7. Altar Limited has on its Board, four Directors viz. W, X, Y and Z. In addition, the company has Mr. D as the Managing Director. The company also has a full time Company Secretary, Mr. Wise, on its rolls. The financial statements of the company for the year ended 31st March, 2017 were authenticated by two of the directors, Mr. X and Y under their signatures. Referring to the provisions of the Companies Act, 2013:

(i) Examine the validity of the authentication of the Balance Sheet and Statement of Profit & Loss and the Board's Report.

(ii) What would be your answer in case the company is a One Person Company (OPC) and has only one Director, who has authenticated the Balance Sheet and Statement of Profit & Loss and the Board's Report? **[RTP May 2018, MTP May 2020]**

Sol. In accordance with the provisions of the Companies Act, 2013, as contained under section 134 (1), the financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:

(1) The Chairperson of the company where he is authorized by the Board; or

(2) Two directors out of which one shall be the managing director and other the Chief Executive Officer, if he is a director in the company

(3) The Chief Financial Officer and the Company Secretary of the company, wherever they are appointed. In case of a One Person Company, the financial statements shall be signed by only one director, for submission to the auditor for his report thereon.

The Board's report and annexures thereto shall be signed by its Chairperson of the company, if he is authorized by the Board and where he is not so authorized, shall be signed by at least two directors one of whom shall be a managing director or by the director where there is one director.

(i) In the given case, the Balance Sheet and Profit & Loss Account have been signed by Mr. X and Mr. Y, the directors. In view of the provisions of Section 134(1), the Managing Director Mr. D should be one of the two signatories. Since, the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit & Loss Account. Therefore, authentication done by two directors is not valid.

(ii) In case of OPC, the financial statements should be signed by one director and hence, the authentication is in order.

8. The Companies Act, 2013 has prescribed an additional duty on the Board of Directors to include in the Board's Report a 'Directors' Responsibility Statement'. Explain briefly the details to be furnished in the said statement. **[MTP Aug 2018, May 2018]**

Sol. Section 134(3)(c) of the Companies Act, 2013 provides that there shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include a number of statements as prescribed in the sub section including Directors' Responsibility Statement.

Further **section 134(5)** states that the Directors Responsibility Statement shall state that:

(i) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

(ii) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit or loss of the company for that period;

(iii) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities;

(iv) that the directors had prepared the annual accounts on a going concern basis;

(v) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively; and

(vi) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

9. The statutory auditors of a company were required to issue a certificate on the net worth of the company as per the requirement of the management as on 30th September 2020 computed as per the provision of section 2(57) of the Companies Act, 2013.

The company had fair valued its property, plant and equipment in the current year which was mistakenly taken into retained earnings of the company in its books of accounts. Please advise whether this fair valuation would be covered in the net worth of the company as per the legal requirements. **[RTP Nov. 2021]**

Sol. As per **section 2(57)** of the Companies Act 2013, any reserves created out of revaluation of assets doesn't form part of net worth. The company fair valued its property, plant and equipment and took that to retained earnings.

Even if the company has taken the fair valuation to the retained earnings in its books of accounts, the resultant credit in reserves (by whatever name called) would be in the category of 'reserves created out of revaluation of assets' which is specifically excluded in the definition of 'net worth' in section 2(57) and hence should be excluded by the company.

Further the auditors should also consider the matter related to accounting of this reserve separately at the time of audit of books of accounts of the company.

10. Tirupati Limited, a listed company has made the following profits, the profits reflect eligible profits under the relevant section of the Companies Act, 2013:

Financial year	Amount (` in crores)
2012-13	20
2013-14	40
2014-15	30
2015-16	70
2016-17	50

(i) Calculate the amount that the company has to spend towards CSR for the financial year 2017-18.

(ii) State the composition of the CSR committee unlisted company and a private company.

[RTP May 2018]

Sol. Section 135 read with Companies (Corporate Social Responsibility Policy) Rules, 2014 of the Companies Act, 2013 deals with the provisions related to the Corporate Social Responsibility. As per the given facts, following are the answers in the given situations:

(i) ***Amount that Company has to spend towards CSR:*** According to section 135 of the Companies Act, 2013, the Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy. Accordingly, net profits of Tirupati Ltd. for three immediately preceding financial years is 150 crores (30 + 70 + 50) and 2% of the average net profits of the company made during these three immediately preceding financial years will constitute 1 crore, can be spent towards CSR in financial year 2017-2018.

(ii) ***Composition of CSR Committee:*** The CSR Committee shall be consisting of 3 or more directors, out of which at least one director shall be an independent director.

(a) An unlisted public company or a private company covered under section 135(1) which is not required to appoint an independent director, shall have its CSR Committee without such director;

(b) A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

11. Mary Ltd is a listed company having turnover of `1200 crores during the financial year 2016-17. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. The company finalised the project under its CSR initiatives which require funds @ 5 % of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advise the company.

[RTP Nov 2018]

Sol. In terms of **Section 135(5)** of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every Financial year at least 2 per cent of average net profits of the company made during the 3 immediately preceding financial years, in pursuance of its CSR policy.

As per Rule 4: CSR Expenditure: Where a company spends an amount in excess of requirement provided under sub-section (5) of section 135, such excess amount may be set off against the requirement to spend under sub-section (5) of section 135 up to immediate succeeding three financial years subject to the conditions that:

(i) the excess amount available for set off shall not include the surplus arising out of the CSR activities, if any, in pursuance of sub-rule (2) of this rule;

(ii) the Board of the company shall pass a resolution to that effect. Hence, such excess expense can be set off in immediately succeeding 3 financial years subject to above conditions

12. The balances extracted from the financial statement of ABC Limited are as below:

S.No	Particulars	Balance as on 31-03-2020 As per Audited	Balance as on 30-09-2020 No.
1.	Net Worth	100	100
2.	Turnover	500	1000
3.	Net Profit	1	5

Explaining the provisions of the Companies Act, 2013, you are requested to examine whether ABC Limited is required to constitute 'Corporate Social Responsibility Committee' (CSR Committee) during the second half of the financial year 2020-21.

Sol. According to Section 135(1) of the Companies Act, 2013, every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

In the given question, the company does not fulfill any of the given criteria (net worth/turnover/ net profit) for the immediately preceding financial year (i.e., 1.4.2019 to 31.3.2020).

Hence, ABC Limited is not required to constitute Corporate Social Responsibility Committee for the financial year 2020-21.

13. A Housing Finance Ltd. is a housing finance company having a paid up Share Capital of `11 crores and a turnover of `145 crores during the Financial Year 2017-18. Explain with reference to the relevant provisions and rules, whether it is necessary for A Housing Finance Ltd. to file its financial statements in XBRL mode. **[ICAI MODULE]**

Sol. Filing of financial statements in XBRL Mode: As per Rule 3 of the Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015, the following class of companies shall file their financial statements and other documents under section 137 of the Act with the Registrar in e-form AOC-4 XBRL as per Annexure-I of this Rule:

(i) Companies listed with stock exchanges in India and their Indian subsidiaries.

(ii) Companies having paid up capital of five crore rupees or above.

(iii) Companies having turnover of one hundred crore rupees or above.

However, Non-banking finance companies, housing finance companies and companies engaged in banking and insurance sector are exempted.

Therefore, A housing Finance Ltd., being a housing finance company, is exempted from filing its financial statements in XBRL Mode.

14. The Government of India is holding 51% of the paid-up equity share capital of Sun Ltd. The Audited financial statements of Sun Ltd. for the financial year 2017-18 were placed at its annual general meeting held on 31st August, 2018. However, pending the comments of the Comptroller and Auditor General of India (CAG) on the said accounts the meeting was adjourned without adoption of the accounts. On receipt of CAG comments on the accounts, the adjourned annual general meeting was held on 15th October, 2018 whereat the accounts were adopted. Thereafter,

Sun Ltd. filed its financial statements relevant to the financial year 2017-18 with the Registrar of Companies on 12th November, 2018. Examine, with reference to the applicable provisions of the Companies Act, 2013, whether Sun Ltd. has complied with the statutory requirement regarding filing of accounts with the Registrar? **[ICAI MODULE]**

Sol. According to first proviso to section **137(1)** of the Companies Act, 2013, where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose. According to second proviso to section **137**(1) of the Companies Act, 2013, financial statements adopted in the adjourned AGM shall be filed with the Registrar within thirty days of the date of such adjourned AGM with such fees or such additional fees as may be prescribed.

In the instant case, the accounts of Sun Ltd. were adopted at the adjourned AGM held on 15th October, 2018 and filing of financial statements with Registrar was done on 12th November, 2018 i.e. within 30 days of the date of adjourned AGM.

Hence, Sun Ltd. has not complied with the statutory requirement regarding filing of unadopted accounts with the Registrar, but has certainly complied with the provisions by filing of adopted accounts within the due date with the Registrar.

15. Natraj Limited is an unlisted Public company having paid up share capital of `80 crores during the preceding financial year 2016-17. The turnover of the company was `110 crores for the same period. Referring to the provisions of the Companies Act, 2013, discuss the answer to the following:

(i) Is it mandatory for the above company to appoint an internal auditor for the financial year 2017-18?

(ii) What are the qualifications of the Internal Auditor? **[MTP March 2018]**

Sol. (i) **Class of companies required to appoint Internal Auditor: Section 138** of the Companies Act, 2013 and the Companies (Accounts) Rules, 2014 prescribes the class of companies required to appoint Internal Auditor.

According to it, following class of companies shall be required to appoint an internal auditor or a firm of internal auditors which may be either an individual or a partnership firm or a body corporate, namely:

1. Every listed company;
2. Every unlisted public company having:
   (a) paid up share capital of 50 crore rupees or more during the preceding financial year; or
   (b) turnover of 200 crore rupees or more during the preceding financial year; or

(c) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; or

(d) outstanding deposits of 25 crore rupees or more at any point of time during the preceding financial year; and

3. Every private company having:

(a) Turnover of 200 crore rupees or more during the preceding financial year; or

(b) Outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

As per the facts given in the question, Natraj Limited is an unlisted public company with the paid up share capital of `80 cores during the preceding financial year with the turnover of `110 crores. Since, Natraj Limited fulfils one of the criteria with paid up share capital of more than 50 crore rupees during the preceding financial year, it is mandatory for the Natraj Limited to appoint an internal auditor for the financial year 2017-18.

(ii) **Qualifications of Internal Auditor:**

(a) Internal Auditor shall either be a chartered accountant or a cost accountant or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. Here, the term "Chartered Accountant" or "Cost Accountant" shall mean a "Chartered Accountant" or a "Cost Accountant", as the case may be, whether engaged in practice or not.

(b) The internal auditor may or may not be an employee of the company.

16. Kim Private Limited was incorporated on 30th September 2016. It has a paid up share capital of `45 crore. The company had a turnover of `250 crore for the financial year 2019-20. The accounts manager of the company has intimated to the company that they are not required to appoint internal auditor for the financial year 2020-21. The management of the company have approached you to advise them about the appointment of internal auditor. Advise them as per the provisions of the Companies Act, 2013 **[RTP Nov. 2021]**

Sol. According to **section 138** read along with Rules of the Companies Act, 2013, every private company having:

(a) turnover of 200 crore rupees or more during the preceding financial year; or

(b) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

Shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate.

In the given question, the company has a paid up capital of `45 crore and turnover of `250 crore for the financial year 2019-20.

Since, the company is fulfilling the criteria of turnover (i.e. more than `200 crore), hence, it is required to appoint an internal auditor for the financial year 2020-21.

17. X Ltd. is a listed company having a paid-up share capital of `25 crore as at 31st March, 2019 and turnover of `100 crore during the financial year 2018-19. The Company Secretary has advised the Board of Directors that X Ltd. is not required to appoint 'Internal Auditor' as the company's paid up share capital and turnover are less than the threshold limit prescribed under the Companies Act, 2013. Do you agree with the advice of the Company Secretary? Explain your view referring to the provisions of the Companies Act, 2013 **[Jan. 2021]**

Sol. According to the provisions of **Section 138** of the Companies Act, 2013, read with Rule 13 of the Companies (Accounts) Rules, 2014, the following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate, namely:

(1) every listed company;

(2) every unlisted public company having:

(A) paid up share capital of 50 crore rupees or more during the preceding financial year; or

(B) turnover of 200 crore rupees or more during the preceding financial year;

(C) outstanding loans or borrowings from banks or financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; or

(D) outstanding deposits of 25 crore rupees or more at any point of time during the preceding financial year.

Besides, some private companies are also required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate.

Thus, X limited (which is a listed company) is required to appoint an internal auditor, irrespective of its paid-up share capital or turnover (as the limit of paid-up share capital or turnover is applicable for unlisted public company).

Hence, the advice of the Company Secretary is not correct.

18. Dhiman Limited, is a company incorporated in India. Dhiman Limited is a leading manufacturer of sports shoes. It has many subsidiaries, one of them being Best Shoes Limited which is based in Morocco. Dhiman Limited is in the process of finalization of the consolidated financial statements of the company for the year ended 31 March 2022. The accounts section of Dhiman Limited has requested the management of Best Shoes Limited to provide its standalone financial statements to Dhiman Limited. The subsidiary company prepares its financial statements in the local language of the country and the same is provided to the Indian parent company. Further, audit of financial statement is not required by the Best Shoes Limited under the Moroccan laws **[RTP Nov. 22]**

Sol. According to fourth proviso to section 137(1) of the Companies Act, 2013, a company shall, along with its financial statements to be filed with the Registrar, attach the accounts of its subsidiary or

subsidiaries which have been incorporated outside India and which have not established their place of business in India.

Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.

It has also been clarified vide General Circular no. 11/2015 dated 21 July 2015 that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian company may place or file such unaudited accounts to comply with requirements of section 136(1) and 137(1) as applicable. These, however, would need to be translated in English, if the original accounts are not in English. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

Hence, Dhiman Limited. would have to get the standalone financial statements of Best Shoes Limited translated in English language and also get those aligned as per the its accounting policies for the purpose of consolidation.

Further Dhiman Limited would need to file such unaudited financial statement of Best Shoes Limited along with a declaration to this effect along with a translated copy of the financial statement in English.

Further the format of accounts of Moroccan subsidiary company should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

19. State the persons responsible for complying with the provisions regarding maintenance of Books of Accounts of a company. Support with the help of relevant provisions of the Companies Act, 2013. **[RTP Nov. 22]**

Sol. Persons responsible to maintain books: As per Section 128 (6) of the Companies Act, 2013, the person responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of account etc. shall be:

(a) Managing Director,

(b) Whole-Time Director, in charge of finance

(c) Chief Financial Officer

Any other person of a company charged by the Board with duty of complying with provisions of section 128.

20. Yellow Ltd. received a communication from Central Government for preparation of periodical financial results and complete audit or limited review of such periodical financial results. The Board of Directors have raised an objection on the ground that as it is an unlisted company, periodical financial results need not to be prepared. Examine, referring the provisions of the Companies Act, 2013, in this regard. **[RTP May 23]**

Sol. Periodical Financial Results [Section 129A of the Companies Act, 2013] The Central Government may, require such class or classes of unlisted companies, as may be prescribed,—

(a) to prepare the financial results of the company on periodical basis and in prescribed form

(b) to obtain approval of the Board of Directors and complete audit or limited rev iew of such periodical financial results in the prescribed manner; and

(c) file a copy with the Registrar within a period of thirty days of completion of the relevant period with such fees as may be prescribed.

Therefore, the objection of the Board of Directors on the ground that as Yellow Ltd. is an unlisted company, periodical financial results need not be prepared, is not correct. Section 129A clearly specifies that even unlisted company has to prepare Periodical Financial Results.

21. Upkaar Nidhi Ltd., was about to hold an AGM on 25th August, 2022, for which the notice of AGM along with relevant documents, as prescribed, was sent to all its members including the following:- **[RTP May 23]**

S.No	Particulars
1.	A member individually holding shares with face value of `800 which amounted to 0.16% of the total paid-up share capital.
2.	Two members jointly holding shares with face value of `1,600 which amounted to 0.32% of the total paid-up share capital.
3.	Forty-two members each holding individually shares with face value of `600 which amounted to holding 0.12% of the total paid-up share capital for each such member.
4.	All the remaining members holding individually more than 1.2% of the total paid- up share capital of the company.

In the AGM held on 25th August, 2022, the members were not provided with the facility to vote by electronic means.

In the context of aforesaid case-scenario, please answer whether Upkaar Nidhi Ltd. was required to send the notice of AGM along with relevant documents to all its members as aforesaid?

Sol. In case of Nidhi company –

Section 136 (1) of the Companies Act, 2013, shall apply, subject to the modification that, in the case of members who do not individually or jointly hold shares of more than one thousand rupees in face value or more than one per cent, of the total paid-up share capital, whichever is less, it shall be sufficient compliance with the provisions of the section if an intimation is sent by public notice

in newspaper circulated in the district in which the Registered Office of the company is situated stating the date, time and venue of AGM and the financial statement with its enclosures can be inspected at the registered office of the company and the financial statement with enclosures are affixed in the notice board of the company and a member is entitled to vote either in person or through proxy.

Here, Upkaar Nidhi Ltd. was only required to send such notice of AGM and other relevant documents to members who individually or jointly hold shares of more than ` 1,000 in face value or more than 1%, of the total paid-up share capital, whichever is less. Accordingly, Upkaar Nidhi Ltd. would have send notice and other relevant documents to only following category of members:-

(i) Two members jointly holding shares with face value of ` 1,600 which amounted to 0.32% of the total paid-up share capital

(ii) All the remaining members holding individually more than 1.2% of the total paid -up share capital of the company.

For the category of members mentioned in Sr. no. 1 & 3, of the aforesaid table given in case scenario, it would have been sufficient compliance if an intimation for the AGM was sent in the newspaper as per the provisions, as aforesaid, and there was no need to send the notice of AGM along with relevant documents to such category of members personally.

22. Red Limited (the Company) was incorporated on 01.04.2020. The balances extracted from its audited financial statement are as given below:

Financial Year (FY)	Net Profit before tax	Net profit after tax (Ignore Income Tax Computation)
2020-21	`5.00 crore	`3.75 crore
2021-22	`7.00 crore	`5.25 crore

The Company proposes to allocate the minimum required amount for CSR Activities to be undertaken during FY 2022-23, if it is mandatory. You are requested to advice the Company in this regard and compute the minimum amount to be allocated, if so required, taking into account the relevant provisions of the Companies Act, 2013 **[RTP May 23]**

Sol. According to section 135(1) of the Companies Act, 2013, every company having a net worth of rupees five hundred crore or more, or a turnover of rupees one thousand crores or more, or a net profit of rupees five crores or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility Committee of the Board.

Further, according to section 135(5), the Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two percent. of the average net profits of the company made during the three immediately preceding financial years or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

Here, the "Net Profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198. In the instant case,

1. Net Profit before tax of Red Limited for the FY 2021-22 is `7 crore, hence, Red Limited is required to constitute a CSR committee during FY 2022-23 as the Net profit before tax for the FY exceeds `5 crore.
2. Minimum contribution towards CSR will be: 2% of average net profits since incorporation (Red Limited was incorporated on 1.04.2020.) Average Net Profit since incorporation: (`5 crore + `7 crore)/ 2 = `6 crore Minimum contribution towards CSR will be: 2% of `6 crore = `0.12 crore or `12 Lacs.

CHAPTER- 10

AUDIT AND AUTIDORS

PRACTICE QUESTIONS

1. Explain how the auditor will be appointed in the following cases:

(i) A Government Company **[ICAI MODULE]**

(ii) The Auditor of the company (other than government company) has resigned on 31st December, 2016, while the Financial year of the company ends on 31st March, 2017.

[MTP Oct. 2019, Oct. 2021]

Sol. (i) The appointment and re-appointment of auditor of a *Government Company* or a government controlled company is governed by the provisions of section 139 of the Companies Act, 2013 which are summarized as under:

The *first auditor* shall be appointed by the Comptroller and Auditor General of India *within 60 days* from the date of incorporation and in case of failure to do so, *the Board* shall appoint auditor within *next 30 days* and on failure to do so by Board of Directors, it shall *inform* the members, who shall appoint the auditor *within 60 days at* an extraordinary general meeting (EGM), such auditor shall hold office till conclusion of first Annual General Meeting.

In case of *subsequent auditor* for existing government companies, the Comptroller & Auditor General of India shall appoint the auditor within a period of *180 days* from the commencement of the financial year and the auditor so appointed shall hold his position till the *conclusion of the Annual General Meeting*.

(ii) The situation as stated in the question relates to the creation of a *casual vacancy* in the office of an auditor due to *resignation* of the auditor before the ASM in case of a company other government company. Under *section 139 (8)(i)* any casual vacancy in the office of an auditor arising as a *result of* his resignation, such vacancy can be filled by the Board of Directors within 30 days thereof and in addition the appointment of the new auditor shall also be *approved* by the company at a general meeting convened *within 3 months* of the recommendation of the Board and he shall hold the office till the *conclusion of the next annual general meeting*.

2. Lemon &. Company, Chartered Accountants a Limited Liability Partnership firm with CA. L, CA. M and CA. N as partners, is the statutory auditor of a listed company M/s Big Limited for past 6 years as on 01,04.2014. CA. M is also a partner in other Chartered Accountant firm Dew &. Company, Chartered Accountants. Advise under the provisions of the Companies Act, 2013:

(1) Upto how many years can Lemon & Company continue as statutory auditors of M/s Big Limited?

(2) What shall be the cooling-off period for Lemon & Company with respect to M/s Big Limited?

(3) Can Dew & Company; be appointed as statutory auditors of M/s Big Limited and it's another listed subsidiary M/s Dark Limited during such cooling-off period?

(4) Can Lemon & Company be appointed as internal auditors of M/s Big Limited and it's another listed subsidiary M/s Dark Limited, during such cooling-off period? **[RTP Nov. 2018]**

Sol. According to **Section 139(2)** of the Companies Act, 2013,

(i) *Listed companies* and other *prescribed* class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint an audit firm as auditor for more than two terms of *5 consecutive years*.

(*ii*) An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re-appointment as auditor in the same company *for five years* from the completion of such term.

(*iii*) Further, as on the date of appointment no audit firm having a *common partner* or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as an auditor of the same company for a period of five years.

(*iv*) For the purpose of the *rotation of auditors*, in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of 5 consecutive years or 10 consecutive years, as the case may be.

Applying the above provisions,

1. Lemon &, Company *can continue as statutory auditors* of M/s Big Limited for 4 more years from 1.4.2014, i.e. they can continue in office only till 31.3.2018.
2. The cooling-off period shall be of 5 years.
3. Dew & Company cannot be appointed as a statutory auditor of M/s Big Limited during the cooling-off period of Lemon & Company, as CA. M is the common partner in both Lemon & Company and Dew & Company. However, Dew & Company can be appointed as a statutory auditor of M/s Dark Limited (a listed subsidiary of M/s Big Limited), during the cooling-off period.
4. As per **Section 138 (1)** of the Companies Act, 2013, every listed company and other prescribed class of companies, shall be required to appoint an internal auditor, who shall either be a chartered accountant or a cost accountant, or such other professional (which may be either an individual or a partnership firm or a body corporate) as may be decided by the Board to conduct internal audit of the functions and activities of the company.

Accordingly, *M/s Lemon & Company can be appointed as an internal auditors* of M/s Big Limited and in its subsidiary M/S Dark Limited {a listed company). The provision of cooling off period as given under Section 139 of the Companies Act, 2013, shall not be applicable on the Internal auditors.

3. Rupa Limited, a listed company appointed M/s. VG & Associates an audit firm as Company's auditor in the Annual General Meeting held on 30 -09-2017. Explain the provisions of the Companies Act, 2013 relating to the appointment or reappointment of an auditor in relation to the tenure of an auditor. **[May 2018]**

Sol. Tenure of Auditor: Section 139(2) of the Companies Act, 2013, provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint:

1. an individual as auditor for more than one term of five consecutive years; and
2. an audit firm as auditor for more than two terms of five consecutive years.

Cooling-off Period:

1. An individual auditor who has completed his term (i.e. one term of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;
2. An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

In terms of the above provisions, Rupa Limited, which is a listed company, can appoint M/S VG & Associates an audit firm, for a term of 5 years, i.e. from the conclusion of the AGM held on 30.09.2017 to the conclusion of the AGM to be held in the year 2022. Now, in terms of Section 139(2), since M/S VG & Associates is an audit firm, it can be re-appointed as auditor for one more term of five years, i.e., upto the conclusion of the ASM to be held in 2027.

4. PKC Ltd., wants to appoint Mr. Praveen Kumar, a practicing Chartered Accountant as the statutory auditor of the company and asked the proposed auditor to give a certificate in this regard. What are the contents of the certificate to be issued in accordance with the Companies (*Audit & Auditors Rules, 2014*)? **[May 2018]**

Sol. As per proviso to **section 139(1)** of the Companies Act, 2013, before the appointment is made, a *written consent* of the auditor to such appointment, and a *certificate* from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained.

Certificate by Auditor: The Companies (Audit and Auditors) Rules, 2014 provides the content of the Certificate. According to this, the auditor appointed shall submit a certificate that:

(a) the individual or the firm, as the case may be, is *eligible* for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;

(b) the proposed appointment is as per the *term* provided under the Act;

(c) the proposed appointment is within the *limits* laid down by or under the authority of the Act;

(d) the list of *proceedings* against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

The certificate shall also indicate whether the auditor *satisfies* the criteria provided *in section 141*. Mr. Praveen Kumar, the proposed auditor has to give the above certificate to the company before accepting the appointment as the auditor of PKC Ltd.

5. One-fourth of the subscribed capital of AMC Limited was held by the Government of Rajasthan. Mr. Vikas, a Chartered Accountant, was appointed as an auditor of the Company at the Annual General Meeting held on 30th April, 2020 by an ordinary resolution. Mr. Mukesh, a shareholder of the Company, objects to the manner of appointment of Mr. Vikas on the ground of violation of the Companies Act, 2013. Decide whether the objection of Mr, Mukesh is tenable? Also examine the consequences of the above appointment under the said Act. **[ICAI MODULE]**

Sol. As per the **Section 2(45)** of the Companies Act, 2013, the holding of 25% shares of AMC Ltd. by the Government of Rajasthan does not make it a government company. Hence, it will be *treated as a non-government company*.

Under **Section 139** of the Companies Act, 2013, the appointment of an auditor by a company vests generally with the members of the company except in the case of the first auditors and in the filling up of the casual vacancy not caused by the resignation of the auditor, in which case, the power to appoint the auditor vests with the Board of Directors. The appointment by the members is by way of an ordinary resolution only and no exceptions have been made in the Act whereby a special resolution is required for the appointment of the auditors.

Therefore, the contention of Mr. Mukesh is not tenable. The appointment is valid under the Companies Act, 2013.

6. The Board of Directors of Moon Light Limited, a listed company appointed Mr, Tel, Chartered Accountant as its first auditor within 30 days of the date of registration of the Company to hold office from the date of incorporation to conclusion of the first Annual General Meeting (AGM). At the first AGM, Mr. Tel was re-appointed to hold office from the conclusion of its first AGM till the conclusion of 6th AGM. In the light of the provisions of the Companies Act, 2013, examine the validity of appointment/reappointment in the following cases:

(i) Appointment of Mr. Tel by the Board of Directors.

(ii) Re-appointment of Mr. Tel at the first AGM in the above situation.

In case Mr. Bell, Chartered Accountant, was appointed as auditor at the first AGM to hold office from the conclusion of its first AGM till the conclusion of 5th AGM. i.e., 4 years tenure. **[Nov. 2020]**

Sol. As per **Section 139(6)** of the Companies Act, 2013, the *first auditor* of a company, other than a Government company, shall be appointed by the Board of Directors within thirty days from the date of registration of the company and such auditor shall hold office till the conclusion of the first annual general meeting.

Whereas **Section 139(1)** of the Companies Act, 2013 states that every company shall, at the first annual general meeting (AGM), appoint an individual or a firm as an auditor of the company who shall hold office from the conclusion of 1st AGM till the conclusion of its 6th AGM and thereafter till the conclusion of every sixth AGM.

As per **Section 139(2)**, no listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint an individual as auditor for more than one term of five consecutive years.

As per the given provisions following are the answers:

(i) Appointment of Mr. Tel by the Board of Directors is valid as per the provisions of section 139(6).

(ii) Appointment of Mr. Tel at the first Annual General Meeting is valid due to the fact that the appointment of the first auditor made by the Board of Directors is a separate appointment and the period of such appointment is not to be considered, while Mr. Tel is appointed in the first Annual General Meeting, which is for the period from the conclusion of the first Annual General Meeting to the conclusion of the sixth Annual General Meeting.

(iii) As per law, auditor appointed shall hold office from the conclusion of 1st AGM till the conclusion of its 6th AGM i.e., for 5 years. Accordingly, here appointment of Mr. Bell, which is for 4 years, is not in compliance with the said legal provision, so his appointment is not valid.

7. Shiv Limited is incorporated on 3.10.2020. The company is having a paid-up share capital of `5 crores. Following are key shareholders of the company:

Name of the Party holding shares	Amount (in `)
Central Government	1.50
Punjab Government	1.23
Others	2.27

The first auditor of the company has been appointed by the Board of Directors on 31.10.2020. The members of the company have objected to such an appointment by the Board of Directors. According to the members its only the members who can appoint the first auditor.

Advise the company on the validity of such appointment as per the provisions of the Companies Act, 2013. Also, advise whether the contention of members of the company is correct.

[MTP April 2021]

Sol. According to **Section 2(45)** of the Companies Act, 2013, "*Government company*" means any company in which not less than 51% 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.

As per **section 139(7)**, in the case of a Government company or any other company owned or controlled, directly or indirectly, 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, *the first auditor* shall be appointed by the Comptroller and Auditor-General of India *within 60 days* from the date of registration of the company and in case the Comptroller and Auditor-General of India does not appoint such auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next 30 days; and in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

In the given question, *Shiv Limited is a government company* as 54.6% [(1.5 + 1.23)/5 = 54.6%] of the share capital is held by Central government and State Government (Punjab Government).

Thus, the first auditor of Shiv Limited shall be appointed by the *Comptroller and Auditor-General of India* within 60 days from the date of registration.

Thus, the appointment of first auditor by Board of Directors on 31.10.2020 is *not valid*. The Board of Directors can appoint the first auditor in case the Comptroller and Auditor-General of India does not appoint such auditor within the said period of period 60 days. The Board of Directors of the company shall appoint such auditor within the next 30 days.

In the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

Thus, *the contention of members that its only the members who can appoint the first auditor of the Government company, is not correct.*

8. Maya Limited is a public company, Maharashtra Bank (a nationalized bank) is a shareholder holding 18% of the subscribed capital of the company. Explain how the following shall be appointed: (i) First auditor (ii) Subsequent auditor. **[July 2021]**

Sol. According to **Section 2(45)** of the Companies Act, 2013, "Government company" means any company in which not less than 51% 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.

In the given case, the total shareholding of the Maharashtra Bank in Maya Limited, is just 18% of the subscribed capital of the company. Hence, *Maya Limited is not a government company*. Hence, the provisions applicable to non-government companies in relation to the appointment of auditors shall apply.

The auditor shall be appointed as follows:

(*i*) According to **section 139(6)** of the Companies Act, 2013, the *first auditor* of a company, other than a Government company, shall be appointed by the *Board* of Directors *within 30 days* from the date of registration of the company and in the case of *failure* of the Board to appoint such auditor, it shall *inform* the *members* of the company, who shall *within 90 days* at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting.

(*ii*) The company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall *hold office* from the conclusion of that meeting *till the conclusion of its sixth* annual general meeting and thereafter till the conclusion of every sixth meeting.

Before such appointment of auditor is made, the *written consent* of the auditor to such appointment, and a *certificate* from him or firm of auditors that the appointment, if made, shall be obtained from the auditor:

Further, the company shall *inform* the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar *within 15 days* of the meeting in which the auditor is appointed (Form ADT-1).

9. Mr. Suresh, a Chartered Accountant, was appointed by the Board of Directors of AB Limited as the First Auditor, The company in General Meeting removed Mr. Suresh without seeking the approval of the Central Government and appointed Mr. Gupta as Auditor in his place? **[MTP Aug. 2018]**

Sol. Section 140(1) stipulates that any auditor appointed under section 139 may be removed from office before the expiry of his term by passing special resolution in general meeting, after obtaining the previous approval of the Central Government in that behalf.

Provided that before taking any action under subsection (1) of Section 140, the auditor concerned shall be given a reasonable opportunity of being heard.

The first auditors appointed by Board of Directors can be removed in accordance with the provision of Section 140(1) of the Companies Act, 2013. Hence, the removal of the first auditor appointed by the Board *without seeking approval of the Central Government is invalid*. The company contravened the provision of the Act.

10. Mr. Honest, an auditor of MM company ltd. has colluded with the company for a fraud. The Central Government has applied to Tribunal about the said fraud by Mr. Honest. State the provisions of the Companies Act, 2013 regarding the steps that can be taken by Tribunal when it finds that the auditor of a company has acted in a fraudulent manner. **[MTP Aug. 2018]**

Sol. Auditor acts in a fraudulent manner or abetted or colluded in any fraud [**Section 140(5)** of the Companies Act. 2013]:

(i) **On satisfaction of Tribunal that the auditor of a company has acted in a fraudulent manner etc.:** Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either suo moto or on an application made to it by the Central Government or by any person concerned, if it is satisfied that the auditor of a company has, whether directly or indirectly, acted in a *fraudulent* manner or abetted or colluded in any fraud by, or in relation to, the company or its directors or officers, it may, by order, direct the company to *change its auditors*.

(ii) **Requirement for change of auditor:** If the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall *within fifteen days* of receipt of such application, make an order that *he shall not function* as an auditor *and the Central Government may appoint* another auditor in his place.

11. AB &, Associates, a firm of Chartered Accountants was re-appointed as auditors at the Annual General Meeting of X Ltd, held on 30.09.2019. However, the Board of Directors recommended to remove them before expiry of their term by passing a resolution in the Board Meeting held on 31.03.2020, Subsequently, having given consideration to the Board recommendation, AB & Associates were removed at the general meeting held on 25.05.2020 by passing a special resolution subject to approval of the Central Government. Explaining the provisions for removal of second and subsequent auditors, examine the validity of removal of AB & Associates by X Ltd. under the provisions of the Companies Act, 2013. **[July 2021]**

Sol. Section 140 of the Companies Act, 2013 prescribes procedure for removal of auditors. Under section 140(1) the auditor appointed under section 139 may be removed from his office before

the expiry of his term only by a special resolution of the company, after obtaining the previous approval of the Central Government in that behalf in the prescribed manner.

From this sub section it is *clear* that the approval of the *Central Government shall be taken first* and *thereafter the special resolution* of the company should be passed.

Provided that before taking any action under this sub-section, the auditor concerned shall be given a *reasonable opportunity of being heard*.

Therefore, in terms of section 140(1) of the Companies Act, 2013 read with Rule 7 of the Companies (Audit & Auditors) Rules, 2014, the following steps should be taken for the removal of an auditor before the completion of his term:

- The application to the Central Government for removal of auditor shall be made in **Form ADT-2** and accompanied with fees as provided for this purpose under the Companies (Registration Offices and Fees) Rules, 2014.
- The application shall be made to the Central Government *within thirty days* of the resolution passed by the Board.
- The company shall hold *the general meeting within sixty days* of receipt of approval of the Central Government for passing the special resolution.

Hence, in the instant case, the decision of X Ltd. to remove AB &. Associates, auditors of the company at the general meeting held on 25.5.2020 *subject to approval of Central Government is not valid*. The Approval of the Central Government shall be taken before passing the special resolution in the general meeting.

12. Gajendra Ltd, was incorporated in 1995 in the town of Alwar. Its main business is manufacturing tiles. It is in the process of appointing statutory auditors for the financial year 2021-22. Advise whether the following persons are qualified to be appointed as statutory auditor of the Gajendra.

(i) Maninder, a qualified Chartered Accountant, holds equity shares of nominal value of `2,00,000 of Narender Ltd., which is an associate company of Gajendra Ltd.

(ii) Dinesh, a qualified Chartered Accountant, whose son owes Gajendra Ltd. a sum of `99,000.

(iii) Rajender, a qualified Chartered Accountant, who has been convicted in the year 2005 by a Court for an offence involving fraud. **[MTP April 2022]**

Sol. (i) As per **Section 141(3)(*d*)(*i*)** of the Companies Act, 2013, read with Rule 10 of the Companies (Audit and Auditors) Rules, 2014, a person is disqualified to be appointed as an auditor if *he, or his relative or partner* holding any *security of or interest* in the company or its subsidiary, or of its holding or *associate* company or a subsidiary of such holding company.

Hence, *Maninder* is *disqualified* to be appointed as an auditor in Gajendra Ltd. as he holds securities in the Narender Ltd. (associate company of Gajendra Ltd.)

(ii) As per **Section 141(3)(*d*)(*ii*)** a person is disqualified to be appointed as an auditor if he, or his relative or partner is *indebted* to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of `5 Lacs.

Hence, *Dinesh is not disqualified* as the limit of indebtedness for the auditor or his relative is exceeding `5,00,000 and in this case Dinesh's son owes only `99,000.

(iii) As per **Section 141(3)(*h*)**, a person who has been convicted by a court of an offence involving fraud and a *period of 10 years* has not elapsed from the *date of such conviction*, shall not be qualified to be appointed as an auditor of a company.

Though *Rajender* was convicted by a court for an offence involving fraud but as a period of 10 years have elapsed, hence, *Rajender is qualified* to be appointed as statutory auditor of Gajendra Ltd.

13. Examine the following situations in the light of the Companies Act, 2013:

(*i*) Mr, Ayush, a Chartered accountant has been appointed as an auditor of X Ltd. in the Annual General Meeting of the company held in September, 2018, in which he accepted the assignment. Subsequently, in January, 2019 he joined B, as a partner for the consultancy firm of Mr. B. Mr. B is working also working as a Finance Executive of X Ltd.

(*ii*) "Mr. Abhi", a practicing Chartered Accountant, is holding securities of "Abhiman Ltd." having face value of `1000. Whether Mr. Abhi is qualified for appointment as an Auditor of Abhiman Ltd."? **[ICAI MODULE]**

Sol. (i) **Provisions and Explanation: Section 141(3)(*c*)** of the Companies Act, 2013 prescribes that any person who is a *partner* or in employment of an *officer or employee of the company* will be *disqualified* to act as an auditor of a company. Sub-section (4) of Section 141 provides that an auditor who becomes subject, *after his appointment*, to any of the disqualifications specified in sub-sections (3) of Section 141, he shall be deemed to have *vacated* his office, as an auditor.

Conclusion: In the present case, Ayush, an auditor of X Ltd., joined as partner with B, who is Finance executive of X Ltd., has attracted clause (3)(*c*) of Section 141 and, therefore, he shall be deemed to have vacated office of the auditor of X Limited.

(*ii*) As per section 141(3)(*d*)(*i*) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company.

In **the present case**, Mr. Abhi. is holding security of `1000 in the Abhiman Ltd., therefore *he is not eligible* for appointment as an Auditor of "Abhiman Ltd."

14. New Limited appointed an individual firm, Naresh & Company, Chartered Accountants, as Auditors of the company at the Annual General Meeting held on 30th September 2019. Mrs. Reena, wife of Mr. Naresh, invested in the equity shares face value of `1 lakh of New Limited on 15th October 2019. But Naresh & Company continues to function as statutory auditors of the company. Advice, Naresh & Company on the continuation of such appointment, as per provisions of the Companies Act, 2013. **[ICAI MODULE]**

Sol. Disqualification of auditor: According to **Section 141(3)(*d*)(*i*)** of the Companies Act, 2013, a person who, or his relative or partner holds any security of the company or its subsidiary or of its holding or associate company or a subsidiary of such holding company, which carries voting rights, such person cannot be appointed as auditor of the company. Provided that the relative of

such person may hold security or interest in the company of *face value not exceeding 1 lakh rupees* as prescribed under the Companies (Audit and Auditors) Rules, 2014.

In the case Mr. Naresh, Chartered Accountants, *did not hold any such security*. But, Mrs. Reena, his wife held equity shares of New Limited of *face value `1 lakh, which is within the specified limit*.

Further **Section 141(4)** provides that if an *auditor* becomes subject, after his appointment, to any of the disqualifications specified in sub-section 3 of section 141, he shall be *deemed to have vacated* his office of auditor. Hence, Naresh & Company can *continue to function* as auditors of the Company even after 15th October 2019 i.e. after the investment made by his wife in the equity shares of New Limited.

15. Three chartered accountants, Mr. Robert, Mr. Ram and Mrs. Rohini, formed a Limited Liability Partnership under the Limited Liability Partnership Act, 2008 in the name of 'R & Associates LLP', practicing chartered accountants. SR Ltd. intends to appoint 'R & Associates LLP' as auditors of the company.

Examine the validity of the proposal of SR Ltd. to appoint 'R & Associates LLP', a body corporate, as an auditor of the company as per the provisions of the Companies Act, 2013. **[Jan. 2021]**

Sol. As per the provisions of **Section 141(3)** of the Companies Act, 2013 read with Rule 10 of Companies (Audit and Auditors) Rule 2014, *a body corporate other than a limited liability partnership* registered under the Limited Liability Partnership Act, 2008 *shall not be qualified* for appointment as auditor of a company.

In the given case, proposal of SR Ltd. to appoint 'R & Associates LLP' as auditors of the company is valid as the *restriction marked for appointment as auditor for a body corporate is not applicable to Limited Liability Partnership.*

16. State the provisions of the Companies Act, 2013 regarding the *signing* of the Audit report by the Auditors of the company **[MTP March 2018]**

Sol. Section 145 of the Companies Act, 2013 provides for auditors to sign audit reports, etc. According to this section:

(i) The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of subsection (2) of section 141 (i.e. in case of firm including LLP, only Chartered Accountants are authorised to act and sign).

(ii) The *qualifications*, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be *open to inspection* by any member of the company.

17. What are the rights of the auditor of a company in respect of attending the General Meeting.

[MTP Oct. 2018]

Sol. Section 146 of the Companies Act, 2013 provides for auditors to attend general meeting. According to this section:

(i) All notices of, and other communications relating to, any general meeting shall be *forwarded* to the auditor of the company,

(ii) The auditor shall, unless otherwise exempted by the company, *attend either by himself* or through his *authorised representative*, who shall also be qualified to be an auditor, any general meeting.

(iii) The auditor shall have *right to be heard* at such meeting on any part of the business which concerns him as the auditor.

18. The Board of Directors of A Ltd. requested its Statutory Auditor to accept the assignment of designing and implementation of suitable financial information system to strengthen the internal control mechanism of the Company. How will you approach to this proposal, as an Statutory Auditor of A Ltd., taking into account the consequences, if any, of accepting this proposal?

[ICAI MODULE]

Sol. According to **Section 144** of the Companies Act, 2013, an auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services *shall not include designing* and implementation of any financial information system.

In the said instance, the Board of directors of A Ltd. requested its Statutory Auditor to accept the assignment of designing and implementation of suitable financial information system to strengthen the internal control mechanism of the company. As per the above provision said service is *strictly prohibited*.

In case the Statutory Auditor accepts the assignment, he will *attract the penal provisions* as specified in **Section 147** of the Companies Act, 2013.

In the light of the as above provisions, we shall advise the Statutory Auditor not to take up the above stated assignment.

19. Abhiyogic Ltd. having 1,000 members with paid-up capital of `1 crore, decided to hold its Annual General Meeting (AGM) on 21st August, 2022, and it received a notice on 2nd July, 2022, from its 60 members holding paid-up capital of `7 lakhs, in aggregate, for a resolution to be passed at the AGM for appointing Vedya & Co., as its auditor from F.Y. 2022-23 onwards, instead of its existing auditor, Chepal & Co. which was originally appointed for 5 years term and had completed its 4 years term.

Such a notice for resolution was forthwith sent by the company to Chepal & Co. which gave its representation in writing to the company along with a request for its notification to the members of the company, but it was received too late (3 days before the meeting) by the company.

In the context of aforesaid facts, please answer to the following question(s):-

(a) Whether the said notice was given by adequate number of members within the prescribed time limit to Abhiyogic Ltd.?

(b) Whether the company was bound to send to its members such representation made by Chepal & Co. and if it could not have been send, then in such case, what was the responsibility(ies) of the company? **[RTP May 22]**

Sol. (a) As per section 140(4) of the Companies Act, 2013, resolution for appointment of an auditor other than the retiring auditor at an Annual General Meeting requires special notice. As per Section 115 of the Companies Act, 2013, read with rule 23 of Companies (Management and Administration) Rules, 2014:-

Where, by any provision contained in this Act or in the Articles of Association of a company, special notice is required for passing any resolution, then the notice of the intention to move such resolution shall be given to the company by such number of members holding not less than 1% of the total voting power, or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up.

The afore-mentioned notice shall be sent by members to the company not earlier than 3 months but at least 14 days before the date of meeting at which the resolution is to be moved, exclusive of the day on which the notice is given and the day of the meeting.

Here, Abhiyogic Ltd. is having 1,000 members with paid-up capital of `1 crore, and it received a notice from its 60 members holding paid-up capital of `7 lakhs, in aggregate, on 2nd July, 2022 for a resolution to be passed at the AGM to be held on 21st August, 2022.

As the members who gave the notice hold more than `5 lakhs in the paid-up capital of the company, they were eligible to give such notice.

Further, the notice should have been given not earlier than 3 months but at least 14 days before the date of meeting - 21st August, 2022, and the notice was given on 2nd July, 2022 i.e. within the prescribed time limit. Thus, it can be said that the said notice was made by adequate number of members within the prescribed time limit to Abhiyogic Ltd.

(b) As per Section 140(4) of the Companies Act, 2013: Where notice is given of a resolution appointing as auditor a person other than a retiring auditor and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,—

1. in any notice of the resolution given to members of the company, state the fact of the representation having been made; and
2. send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company.

However, in the present case, Abhiyogic Ltd. received the representation made by Chepal & Co. too late and accordingly it was not bound to send such representation to its members even though it was requested by Chepal & Co. to do so.

Further, as per Section 140(4) of the Companies Act, 2013, if a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that

the representation shall be read out at the meeting such a copy of representation thereof shall be filed with the Registrar.

Accordingly, Abhiyogic Ltd., apart from giving to right to be heard orally to Chepal & Co. shall also made the representation read out at the AGM, if so required by Chepal & Co., and shall also file such representation with the Registrar, respectively.

20. Mr. Govind Ram is a partner and in- charge (and certifies financial statements) of P & Associates. The firm is appointed as an auditor firm of Kanha Limited (listed company). Mr. Govind Ram retires from P & Associates and after some time join Gupta & Gupta firm as a partner, on 20/05/22. In the general meeting of Kanha Limited held on 15/06/22, the company appointed Gupta & Gupta firm as next auditor of the company. Advise Kanha Limited, whether the company has adhered to the provision of the Company Act, 2013, by appointing Gupta & Gupta as auditor for the company?

[RTP Nov. 22]

Sol. According to Section 139(2) of the Companies Act, 2013, no listed company or a company belonging to such class or classes of companies as may be prescribed, shall appoint or re-appoint—

(a) an individual as auditor for more than one term of five consecutive years; and

(b) an audit firm as auditor for more than two terms of five consecutive years.

Provided that –

(i) an individual auditor who has completed his term under clause (a) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(ii) an audit firm which has completed its term under clause (b), shall not be eligible for re-appointment as auditor in the same company for five years from the completion of such term.

Provided further that as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

As per Explanation II in Rule 6(3) of the Companies (Audit and Auditors) Rules, 2014, if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years Here, Mr. Govind Ram has retired from P & Associates and joined Gupta & Gupta Firm. Mr. Govind Ram was a partner, in- charge Associates (and certifies the financial statement of the company) in P & Associates. He retires from P & Associates and joins Gupta & Gupta firm.

As per the facts of the question and provisions of law, Gupta & Gupta Firm will also be ineligible, to be appointed as auditor of Kanha Limited (listed company) for a period of 5 years.

COMPANIES INCORPORATED OUTSIDE INDIA

1. (i) As per provisions of the Companies Act, 2013, define the status of Hillways Ltd., a Company incorporated in London, which has a share transfer office at Mumbai?

(ii) LMP Paper 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. Explain whether it will be treated as a Foreign Company under the Companies Act, 2013?

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

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

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

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

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

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

- As per Section 2(42) read with the Companies (Registration of Foreign Companies) Rules, 2014 of the Companies Act, 2013, 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; and conducts any business activity in India in any other manner is a foreign company. Further the above said rules states the meaning of "electronic mode". It means carrying out electronically based, whether main server is installed in India or not, including, but not limited to –

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

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

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

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

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

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

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

2. X Inc, a foreign 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, registrar having jurisdiction, intends to serve show cause notice on the Foreign Company.

As Standing Counsel for the department, advise the registrar on valid service of notice

Sol. 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 registrar may serve the show cause notice by following the above provisions.

3. DEJY Company 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.

Sol. 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 of 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;

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

(1) Personal name and surname in full;

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

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

(4) Date of birth;

(5) Residential address;

(6) Nationality;

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

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

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

(10) Occupation, if any;

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

(12) Other directorship or directorships held by him;

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

(14) E-mail ID.

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and 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.

4. 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 and 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.

Sol. 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.

(i) 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.

(ii) 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.

(iii) 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.

5. As per provisions of the Companies Act, 2013, what is the status of XYZ Ltd., a Company incorporated in London, U.K., which has a share transfer office at Mumbai?

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

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

(b) Conducts any business activity in India in any other manner According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), "Place of business" includes a share transfer or registration office.

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

6. 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. Advise, ABC Ltd. as to submission of desired documents to ROC.

Sol. The Companies Act, 2013 vide section 380 provides 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.

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

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

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

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

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

(b) Conducts any business activity in India in any other manner. According to section 386 of the Companies Act, 2013, for the purposes of Chapter XXII of the Companies Act, 2013

(Companies incorporated outside India), expression "Place of business" includes a share transfer or registration office.

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

(a) it must be incorporated outside India; and

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

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

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

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

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

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

Sol. According to 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; and 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–

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

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

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

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

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

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

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

Sol. Preparation and filing of financial statements by a foreign company:

According to section 381 of the Companies Act, 2013:

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

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

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

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

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

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

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

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

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.

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.

10. Radix Ltd. is a company registered in Thailand. Although, it has no place of business established in India, yet it is engaged in online business through remote delivery of healthcare services in India. State the legal position as to the nature of the Radix Ltd. as a foreign company in the light of the Companies Act, 2013.

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

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

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

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

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

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

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

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

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

In view of the above provisions, Radix Ltd., will be treated as foreign company for being involved in business activity through telemedicine

11. 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-forrn and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies?

Sol. 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

12. Analyse 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.

Sol. (A)

(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.

13. 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 Malaysia
2.	Dubai	Dubai	No place of business in India but employs agents in india
3.	California	Calfornia	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

Sol. 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 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 model. 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	Calfornia		Mere holding of meeting in India cannot be termed as conducting business activity in India. Hence not a foreign company.
4.	Australia	Australia		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		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 cannot be called as a Foreign Company.
6.	Germany	Germany		As per the provision, 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.

14. A company incorporated in France, with limited liability, established an office in Baroda, and started conducting business activity from its place of business. In compliance of Section 382 of the Companies Act, 2013, it conspicuously exhibited a name board outside its office, with the name of the company in English in big block letters.

In three days, the company received a notice from the Registrar stating that it had not properly complied with the requirements of Section 382 of the Companies Act, 2013. Mention the areas of lapses of the foreign company, which would be mentioned in the notice.

Sol. According to Section 382 of the Companies Act, 2013, every foreign company shall conspicuously exhibit on the outside of every office or place where it carries onbusiness in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters,

and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

if the liability of the members of the company is limited, cause notice of that fact—

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

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

After taking into account the provisions of Section 382 of the Companies Act, 2013, the following are the lapses by the company:

(i) The company has exhibited the name of the company in English but it has not displayed the name of the Country where it was incorporated, name of the country. Further, it has not displayed both the facts in the local language or one of the languages in general use in the locality in which the office or place is situated. i.e. Baroda.

(ii) Further the company is one where the liability of members is limited. The fact that the members liability is limited has not been conspicuously exhibited on the outside of every office or place i.e. in Baroda, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality i.e. Baroda The above lapses would have given rise to the notice from the Registrar.

15. (i) Elegant Educations Ltd. is a UK based company, engaged in the business of providing online education. It has introduced some certificate courses having duration of 4 to 6 months and any person can enrol in the courses. The education is provided through on-line classes, webinars and study materials are supplied through e-mails to the registered candidates. The company is not having any place of business in India. It is mentioned that all the candidates who have enrolled in the course are the Indian Citizens residing in India. Based on the above facts of procuring 100% business from India, whether the company will be treated as foreign company or an Indian company.

(*ii*) What will be your answer if in the above question, more that 55% of that foreign company's paid-up share capital is held by Indian Companies or Indian Citizens.

Sol. (i) In terms of 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.

Further Rule 2(1)(*c*)(iv) of the Companies (Registration of Foreign Companies) Rules, 2014 provides that 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 online services such as telemarketing, telecommuting, telemedicine, education and information research.

Thus, from the above provisions the company is treated as foreign company irrespective of the fact that its 100% business comes from India.

(*ii*) Section 379(2) provides 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
- one or more companies; or
- bodies corporate incorporated in India;
- 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 Chapter XXII 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.

Thus, in the given case, if more that 50% of the paid-up share capital is held by Indian Companies / Citizen it shall be treated as a company incorporate in India and such company shall abide by the provisions of Section 380 to 386 (both inclusive) and Section 392 and 393 shall be applicable.

16. (i) Tokyo Ferro Alloys Limited, a company registered in Japan, started its operations in India by establishing a Marketing Division in Mumbai on 1st April, 2021. Recently, the Company decided to issue certain securities in India and therefore, is planning to circulate in India, a prospectus offering for subscription in securities of the Company. Assuming that all the other formalities in this respect have been complied with, advise the person in-charge of Indian operations regarding the other documents required to be annexed to the prospectus in order to registered the same, referring to the relevant provisions of the Companies Act, 2013 and the rules made thereunder,

(*ii*) Vibav Pte, a company incorporated in Singapore is having a liaison office in Delhi. The Liaison office seeks your advice regarding the documents to be filed with the Registrar along with the financial statement under the Companies Act, 2013 read with the Companies (Registration of Foreign Companies) Rules, 2014.

Sol. (i) According to this Section 389 of the Companies Act, 2013 read with Rule 11 of the Companies (Registration of Foreign Companies) Rules, 2014,

The Following documents shall be annexed to the prospectus, namely:

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

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

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

(d) A copy of underwriting agreement; and Companies Incorporated Outside India

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

Accordingly, the person in charge of the Indian operations shall be advised in accordance with the above provisions.

(*ii*) According to Rule 4 of the Foreign Companies (Registration of Foreign Companies) Rules, 2014, 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 statement shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.

17. RFC Limited has been incorporated in Singapore and has a business place in Mumbai. The company has issued 5,00,000 shares of USD 100 each, consisting of 4,00,000 equity shares and 1,00,000 preference shares. The issued share capital is fully paid up except 5,000 preference shares where USD 50 per share is unpaid.

RJW, an Indian citizen is holding 26,000 preference shares which include 1100 partly paid- up shares and Ronte Limited incorporated in New-Delhi (India) is holding 2,23,500 equity shares in RFC Limited.

The Registrar of Companies issued notice under Section 379 of the Companies Act, 2013 addressed to the person whose name and address has been delivered to the Registrar byRFC Limited for compliance under the Companies Act, 2013 for foreign companies.

The above notice was Delivered at the address which was given by RFC Limited to the Registrar of Companies.

Answer the following, referring to the provisions of the Companies Act, 2013:

(i) Whether RFC Limited is a foreign company?

(ii) Whether service of notice by the Registrar of companies is valid?

Sol. (i) Whether RFC Limited is a Foreign Company ? Definition of a Foreign Company

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; and conducts any business activity in India.

Provision of Section 379(2): Requirement of holding of paid up share capital of Foreign Company:

Further, in the light of the inputs given in the problem, where not less than 50% of the paidup share capital, whether equity or preference or partly equity and partly preference, of a foreign company incorporated outside India is held 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 foreign company shall also comply with the provisions of Chapter XXII 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. [Section 379(2)]

In the given case, RFC Limited, incorporated in Singapore has a business place in Mumbai. The Company has issued 5,00,000 shares of USD 100 each i.e. of USD 5,00,00,000 comprising of USD 4,00,00,000 equity share capital (i.e. 4 lac* USD 100) and USD 1,00,00,000 preference share capital (i.e,1 lac * USD 100).

As the issued capital was fully paid up except 5,000 preferences shares (i..e, 5000* 50= USD 2,50,000), so, total paid up share capital of the RFC limited is:

Equity Share Capital	USD 4,00,00,000
Preference Share Capital (Full Paid)	USD 95,00,000
Preference Share Capital (Partly Paid)	USD 2,50,000
Total Paid up Share Capital	USD 4,97,50,000

As per facts, shareholding by RJW, an Indian citizen is USD 25,45,000 preference share capitaI (i.e. 26,000 shares *USD 100- 1100 shares * USD 50) and Ronte Limited incorporated in New-Delhi (India) is holding USD 2,23,50,000 equity share capital (i.e., 2,23,500 *USD 100) in RFC Limited.

Aggregate shareholding is USD 2,48,95,000.

As per requirement of Section 379(2), RJW, an Indian citizen and Ronte Limited incorporated (an Indian Company) were holding more than 50% of the shareholding (i.e. 50%* USD 4,97,50,000 = 2,48,75,000) in RFC Limited.

Therefore, RFC Ltd. is not only a foreign company as per Section 2(42) but shall also be complying with the provisions of Chapter XXII and other provisions of this Act with regard to the business carried on by it in India, as if it were a company incorporated in India as per Section 397(2) .

(ii) Whether service of notice by the RoC is valid?

Yes, the service of notice by the Registrar of Companies is valid in the light of Section 383 of the Companies Act, 2013. According to the provision 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 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

18. Blue Star Inc. is a company incorporated in USA, four years back and has no established place of business in India. The company has entered into following contracts:-

Particulars	Contract entered in the ordinary course of	Material Contracts

	business	
F.Y. 2017-18	4	2
F.Y. 2018-19	6	1
F.Y. 2019-20	5	3
F.Y. 2020-21	3	4

Apart from above, one contract has been entered into with its manager. The company intended to offer its securities in India. For that purpose, the secretary of the company, Mr. Berry Christan prepared the prospectus along with annexing the required documents and got it registered.

Expert's consent was issued in a separate statement, the reference of which was given in the prospectus.

Few application forms for securities of Blue Star Inc. were issued to prospective investors without the prospectus out of which one such form was issued in connection with bona fide invitation to the person to enter into an underwriting agreement with respect to securities of Blue Star Inc.

In the context of aforesaid case, please answer to the following questions:-

(i) Whether the expert's statement can be considered to be included in the prospectus?

(ii) What copy of contracts would have been annexed with the prospectus by Mr. Berry?

(iii) Whether it is valid on the part of Blue Star Inc. for issuing few application forms without prospectus?

Sol. (i) According to section 388(2) of the Companies Act, 2013, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

In the given case, the reference of expert's consent statement was given in the prospectus. Thus, the expert's statement shall be deemed to be included in a prospectus.

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

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

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

In the given case, during the preceding 2 years, i.e. F.Y. 2019 -20 and F.Y. 2020-21, respectively, the material contracts entered into by Blue Star Inc. are 3 + 4 = 7 and apart from it, one contract has been entered into with its manager. So, in total 8 copies of contracts would have been annexed with the prospectus by Mr. Berry.

(iii) According to section 387(3) of the Companies Act, 2013, no person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus

which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.

Blue Star Inc. has, thus, violated provisions of section 387(3) by issuing few application forms without prospectus. However, the application form issued in connection with bona fide invitation to the person to enter into an underwriting agreement with respect to securities of Blue Star Inc. can be considered as valid as such a case is covered by the exception to the said sub-section.

19. 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, advise on the procedure of such an issue of prospectus by Abroad Ltd.

Sol. 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 before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed 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 389 of the Act.

20. Jackson & Jackson LLC, incorporated in Germany, is proposing to establish a business in Mumbai, India. Its official documents are in German language. Whether Jackson & Jackson LLC can file the required documents with Registrar in the same language.

Sol. Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver the documents to the Registrar as per Section 380 of the Companies Act, 2013. Further, if the original instruments/ documents are not in the English language, a certified translation in the English language is required for the same and submitted to Registrar.

21. Swift Pharmaceuticals, a Company registered in Singapore, has started its business in India during the financial year 2016. The Company has submitted all the required documents with registrar within the due date. On March 1, 2023, Swift Pharmaceuticals has shifted its principal office in Singapore. Does the Company required to undertake any steps due to change in address of principal office.

Sol. Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The Companies (Registration of Foreign Companies) Rules, 2014, has prescribed

that the return containing the particulars of the alteration shall be filed in form FC-2 along with prescribed fees. Accordingly, Swift Pharmaceuticals is required to submit the full address of the new registered or principal office of the company by March 30, 2023.

CHAPTER -12

THE LIMIT LIABILITY PARTNERSHIP ACT. 2008

PRACTICE QUESTIONS

1. State the rules regarding registered office of a Limited Liability Partnership (LLP) and change therein as per provisions of the Limited Liability Partnership Act, 2008.

Sol. Registered office of LLP and change therein (Section 13):

(1) Every LLP shall have a registered office to which all communications and notices may be addressed and where they shall be received.

(2) A document may be served on a LLP or a partner or designated partner thereof by sending it by post under a certificate of posting or by registered post or by any other manner, as may be prescribed, at the registered office and any other address specifically declared by the LLP for the purpose in such form and manner as may be prescribed.

(3) A LLP may change the place of its registered office and file the notice of such change with the Registrar in such form and manner and subject to such conditions as may be prescribed and any such change shall take effect only upon such filing.

(4) If any default is made in complying with the requirements of this section, the limited liability partnership and its every partner shall be liable to a penalty of five hundred rupees for each day during which the default continues, subject to a maximum of fifty thousand rupees for the limited liability partnership and its every partner

2. State the circumstances under which a LLP and its partners may face unlimited liability under the Limited Liability Partnership Act, 2008.

Sol. Unlimited liability in case of fraud (Section 30):

(1) In case of fraud:

- ❖ In the event of an act carried out by a LLP, or any of its partners,
- ❖ with intent to defraud creditors of the LLP or any other person, or for any
- ❖ fraudulent purpose,
- ❖ the liability of the LLP and partners who acted with intent to defraud
- ❖ creditors or for any fraudulent purpose
- ❖ shall be unlimited for all or any of the debts or other liabilities of the LLP.

However, in case any such act is carried out by a partner, the LLP is liable to the same extent as the partner unless it is established by the LLP that such act was without the knowledge or the authority of the LLP.

(2) Where any business is carried on with such intent or for such purpose as mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with

- ❖ imprisonment for a term which may extend to 5 years and
- ❖ with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5 Lakhs.

(3) Where a LLP or any partner or designated partner or employee of such LLP has conducted the affairs of the LLP in a fraudulent manner, then without prejudice to any criminal proceedings which may arise under any law for the time being in force, the LLP and any such partner or designated partner or employee shall be liable to pay compensation to any person who has suffered any loss or damage by reason of such conduct.

However, such LLP shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the LLP.

3. Limited Liability Partnership (LLP) gives the benefits of limited liability of a company on one hand and the flexibility of a partnership on the other. Discuss.

Or

LLP gives the benefits of limited liability of a company and the flexibility of a partnership

Or

"LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership". Explain.

Sol. **Limited Liability:** Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section 26 of the LLP Act, 2008). The liability of the partners will be limited to their agreed contribution in the LLP, while the LLP it self will be liable for the full extent of its assets.

Flexibility of a partnership: The LLP allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form enables entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements.

Owing to flexibility in its structure and operation, the LLP is a suitable vehicle for small enterprises and for investment by venture capital.

4. What are the essential elements to form a LLP in India as per the LLP Act, 2008?

Essential elements to incorporate LLP-

Sol. Under the LLP Act, 2008, the following elements are very essential to form a LLP in India:

(*i*) To complete and submit incorporation document in the form prescribed with the Registrar electronically;

(*ii*) To have at least two partners for incorporation of LLP [Individual or body corporate];

(*iii*) To have registered office in India to which all communications will be made and received;

(*iv*) To appoint minimum two individuals as designated partners who will be responsible for number of duties including doing of all acts, matters and things as are required to be done by the LLP. Atleast one of them should be resident in India.

(*v*) A person or nominee of body corporate intending to be appointed as designated partner of LLP should hold a Designated Partner Identification Number (DPIN) allotted by MCA.

(*vi*) To execute a partnership agreement between the partners inter se or between the LLP and its partners. In the absence of any agreement the provisions as set out in First Schedule of LLP Act, 2008 will be applied.

(*vii*) LLP Name.

5. Explain the steps involved therein under the LLP Act, 2008.

Sol. Steps to incorporate LLP:

1.Name reservation:

- The first step to incorporate Limited Liability Partnership (LLP) is reservation of name of LLP.
- Applicant has to file e-Form 1, for ascertaining availability and reservation of the name of a LLP business.

2. Incorporate LLP:

- After reserving a name, user has to file e- Form 2 for incorporating a new Limited Liability Partnership (LLP).
- e-Form 2 contains the details of LLP proposed to be incorporated, partners'/ designated

partners' details and consent of the partners/designated partners to act as partners/ designated partners

3. LLP Agreement
   - ❖ Execution of LLP Agreement is mandatory as per Section 23 of the Act.
   - ❖ LLP Agreement is required to be filed with the registrar in e-Form 3 within 30days of incorporation of LLP.

6. Discuss the conditions under which LLP will be liable and not liable for the acts of the partner.

Sol. Conditions under which LLP will be liable [Section 27(2) of the LLP Act, 2008]
The LLP is liable if a partner of a LLP is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the LLP or with its authority.
Conditions under which LLP will not be liable [Section 27(1) of the LLP Act, 2008]
A LLP is not bound by anything done by a partner in dealing with a person if—
(*a*) the partner in fact has no authority to act for the LLP in doing a particular act; and
(*b*) the person knows that he has no authority or does not know or believe him to be a partner of the LLP.

Or

7. Explain the circumstances in which LLP may be wound up by Tribunal under the LLP Act, 2008.

Sol. Circumstances in which LLP may be wound up by Tribunal (Section 64): A LLP may be wound up by the Tribunal:
1. if the LLP decides that LLP be wound up by the Tribunal;
2. if, for a period of more than six months, the number of partners of the LLP is reduced below two;
3. if the LLP is unable to pay its debts;
   The Limited Liability Partnership Act, 2008
4. if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order;
5. if the LLP has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or
6. if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

8. What do you mean by Limited Liability Partnership (LLP)? What are the advantages for forming a LLP for doing business?

Sol. LLP: A LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that not only gives the benefits of limited liability at low compliance cost but allows its partners the flexibility of organising their internal structure as a traditional partnership.
The LLP is a separate legal entity and, while the LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited.
LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.
Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.

Advantages of LLP form:
(*a*) LLP is organized and operates on the basis of an agreement.
(*b*) It provides flexibility without imposing detailed legal and procedural requirements
(*c*) It enables professional/technical expertise and initiative to combine with financial risk taking capacity in an innovative and efficient manner.
(*d*) It is easy to form
(*e*) In LLP form, all partners enjoy limited liability
(*f*) Flexible capital structure is there in this form
(*g*) It is easy to dissolve

9. List the differences between the Limited Liability Partnership and the Limited Liability Company.
Sol.

	Basis	LLP	Limited Liability Company
1	Regulating Act	The LLP Act, 2008.	The Companies Act, 2013.
2	Members/Partners	The persons who contribute to LLP are known as partners of the LLP.	The persons who invest the money in the shares are known as members of the company.
3	Internal governance	The internal governance structure structure of a LLP is governed by contract agreement between the partners.	The internal governance structure of a company is regulated by statute (i.e., Companies Act, 2013).
4	Name	Name of the LLP to contain the word "Limited Liability partnership" or"LLP" as suffix.	Name of the public company to contain the word "limited" and Pvt. Co. to contain the word "Private limited" as suffix.
5	No. of members/partners	Minimum – 2 members Maximum – No such limit on the members in the Act. The members of the LLP can be individuals/ or body corporate through the nominees.	Private company: Minimum – 2 members Maximum – 200 Company: Minimum – 7 members Maximum – No such limit on the members.
6	Liability of members/ partners	Liability of a partners is limited to the extent of agreed contribution in case of intention is fraud.	Liability of a member is limited to the amount unpaid on the shares held by them.
7	Management	The business of the company managed by the partners including the designated partners authorized in the agreement.	The affairs of the company are managed by board of directors elected by the shareholders.
8	Minimum number of directors/ designated partners	Minimum 2 designated partners	Pvt. Co. – 2 directors Public co. – 3 directors

10. What is the meaning of the Limited Liability Partnership? State the various characteristics of it?
Sol. **Meaning of Limited Liability Partnership (LLP):** A LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that not only gives the benefits of limited liability at low compliance cost but allows its partners the flexibility of organizing their internal structure as a traditional partnership. The LLP is a separate legal entity and, while the LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited. LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.
Since LLP contains elements of both 'a corporate structure' as well as 'a partnership firm structure' LLP is called a hybrid between a company and a partnership.

Characteristic/Salient Features of LLP

1. **LLP is a body corporate:** Section 2(1)(d) of the LLP Act, 2008 provides that a LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners and shall have perpetual succession. Therefore, any change in the partners of a LLP shall not affect the existence, rights or liabilities of the LLP.

   Section 3 of LLP Act provides that a LLP is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners.

2. **Perpetual Succession:** The LLP can continue its existence irrespective of changes in partners. Death, insanity, retirement or insolvency of partners has no impact on the existence of LLP. It is capable of entering into contracts and holding property in its own name.

3. **Separate Legal Entity:** The LLP as a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP. In other words, creditors of LLP shall be the creditors of LLP alone.

4. **Mutual Agency:** No partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct. In other words, all partners will be the agents of the LLP alone. No one partner can bind the other partner by his acts.

5. **LLP Agreement:** Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners. The LLP Act, 2008 provides flexibility to partner to devise the agreement as per their choice. In the absence of any such agreement, the mutual rights and duties shall be governed by the provisions of the LLP Act, 2008.

6. **Artificial Legal Person:** A LLP is an artificial legal person because it is created by a legal process and is clothed with all rights of an individual. It can do everything which any natural person can do, except of course that, it cannot be sent to jail, cannot take an oath, cannot marry or get divorce nor can it practice a learned profession like CA or Medicine. A LLP is invisible, intangible, immortal (it can be dissolved by law alone) but not fictitious because it really exists.

7. **Common Seal:** A LLP being an artificial person can act through its partners and designated partners. LLP may have a common seal, if it decides to have one [Section 14(c)]. Thus, it is not mandatory for a LLP to have a common seal. It shall remain under the custody of some responsible official and it shall be affixed in the presence of at least 2 designated partners of the LLP.

8. **Limited Liability:** Every partner of a LLP is, for the purpose of the business of LLP, the agent of the LLP, but not of other partners (Section 26). The liability of the partners will be limited to their agreed contribution in the LLP. Such contribution may be of tangible or intangible nature or both.

   Example: The professionals like Engineering consultants, Legal Advisors and Accounting Professional are afraid of entering into business due to unlimited liability. Hence the LLP partnership Act provides an avenue for these professionals to Limited Liability Partnership firms which restricts their liability to the agreed amount. This has encouraged Professionals to form LLP.

9. **Management of Business:** The partners in the LLP are entitled to manage the business of LLP. But only the designated partners are responsible for legal compliances.

10. **Minimum and Maximum number of Partners:** Every LLP shall have least two partners and shall also have at least 2 individuals as designated partners, of whom at least one shall be resident in India. There is no maximum limit on the partners in LLP.

11. **Business for Profit Only:** The essential requirement for forming LLP is carrying on a lawful business with a view to earn profit. Thus, LLP cannot be formed for charitable or non-economic purpose.

12. **Investigation:** The Central Government shall have powers to investigate the affairs of an LLP by appointment of competence authority for the purpose.

13. **Compromise or Arrangement:** Any compromise or agreements including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act, 2008.

14. **Conversion into LLP:** A firm, private company or an unlisted public company would be allowed to be converted into LLP in accordance with the provisions of LLP Act, 2008.

15. **E-Filling of Documents:** Every form or application of document required to be filed or delivered under the act and rules made thereunder, shall be filed in computer readable electronic form on its website www.mca.gov.in and authenticated by a partner or designated partner of LLP by the use of electronic or digital signature.

16. **Foreign LLPs:** Section 2(1)(m) defines foreign limited liability partnership "as a limited liability partnership formed, incorporated, or registered outside India which established as place of business within India". Foreign LLP can become a partner in an Indian LLP

11. What is the procedure for changing the name of Limited Liability Partnership (LLP) under the LLP Act, 2008?

Sol. (1) Not with standing anything contained in sections 15 and 16, if through inadvertence or otherwise, a limited liability partnership, on its first registration or on its registration by a new body corporate, its registered name;">name, is registered by a name which is identical with or too nearly resembles to—

(*a*) that of any other limited liability partnership or a company; or

(*b*) a registered trade mark of a proprietor under the Trade Marks Act, 1999, as is likely to be mistaken for it, then on an application of such limited liability partnership or proprietor referred to in clauses (*a*) and (*b*) respectively or a company, the Central Government may direct that such limited liability partnership to change its name or new name within a period of three months from the date of issue of such direction:

Provided that an application of the proprietor of the registered trademarks shall be maintainable within a period of three years from the date of incorporation or registration or change of name of the limited liability partnership under this Act.

(2) Where a limited liability partnership changes its name or obtains a new name under subsection (1), it shall within a period of fifteen days from the date of such change, give notice of the change to Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and within thirty days of such change in the certificate of incorporation, such limited liability partnership shall change its name in the limited liability partnership agreement.

(3) If the limited liability partnership is in default in complying with any direction given under sub-section (1), the Central Government shall allot a new name to the limited liability The Limited Liability Partnership Act. 2008 partnership in such manner as may be prescribed and the Registrar shall enter the new name in the register of limited liability partnerships in place of the old name and issue a fresh certificate of incorporation with new name, which the limited liability partnership shall use thereafter:

Provided that nothing contained in this sub-section shall prevent a limited liability partnership from subsequently changing its name in accordance with the provisions of section 16.

12. What do you mean by Designated Partner? Whether it is mandatory to appoint Designated partner in a LLP?

Sol. (1) Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India:
Provided that in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such bodies corporate shall act as designated partners.
Explanation: For the purposes of this section, the term resident in India means a person who has stayed in India for a period of not less than one hundred and twenty days during the financial year.

(2) Subject to the provisions of sub-section (1),
(*i*) if the incorporation document
(*a*) specifies who are to be designated partners, such persons shall be designated partners on incorporation; or states that each of the partners from time to time of limited liability partnership is to be designated partner, every partner shall be a designated partner;
(*ii*) any partner may become a designated partner by and in accordance with the limited liability partnership agreement and a partner may cease to be a designated partner in accordance with limited liability partnership agreement.

(3) An individual shall not become a designated partner in any limited liability partnership unless he has given his prior consent to act as such to the limited liability partnership in such form and manner as may be prescribed.

(4) Every limited liability partnership shall file with the Registrar the particulars of every individual who has given his consent to act as designated partner in such form and manner as may be prescribed within thirty days of his appointment.

(5) An individual eligible to be a designated partner shall satisfy such conditions and requirements as may be prescribed.

Every designated partner of a limited liability partnership shall obtain a Designated Partners Identification Number (DPIN) from the Central Government and the provisions of sections 153 to 159 (both inclusive) of the Companies Act, 2013 shall apply *mutatis mutandis* for the said purpose.

13. Differentiate between a LLP and a partnership firm?

Sol.

	Basis	LLP	Limited Liability Company
1	Regulating Act	The Limited Liability Partnership Act, 2008	The Indian Partnership Act, 1932.
2	Body corporate	It is a body corporate.	It is not a body corporate.
3	Separate legal entity	It is a legal entity separate from its members.	It is a group of persons with no separate legal entity.
4	Creation	It is created by a legal process called	It is created by an agreement between the partners.
5	Registration	registration under the LLP Act, 2008 Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can use the third parties.
6	Perpetual succession	The death, insanity, retirement or insolvency of the partner(s) does not affect its existence of LLP. Members may join or leave but its existence continues forever.	The death, insanity, retirement or insolvency of the partner(s) may affect its existence. It has no perpetual succession.
7	Name	Name of the LLP to contain the word limited liability partners (LLP) as suffix.	No guidelines. The partners can have any name as per their choice.
8	Liability	Liability of each partner limited to the extent to agreed contribution except in case of willful fraud.	Liability of each partner is unlimited. It can be extended up to the personal assets of the partners.
9	Mutual agency	Each partner can bind the LLP by his own acts but not the other partners.	Each partner can bind the firm as well as other partners by his own acts.
10	Designated partners	At least two designated partners and atleast one of them shall be resident in India.	There is no provision for such partners under the Partnership Act,1932.
11	Common seal	It may have its common seal as its official signatures.	There is no such concept in partnership.
12	Legal compliances	Only designated partners are responsible for all the compliances and penalties under this Act	All partners are responsible for all the compliances and penalties under the Act.
13	Annual filing of LLP	The Limited Liability Partnership Act. 2008 LLP is required to file: (iv) Annual statement of accounts (v) Statement of solvency (vi) Annual return with the registration of LLP every year.	Partnership firm is not required to file any annual document with the registrar of firms.

14	Foreign partnership	Foreign nationals can become a partner in a LLP.	Foreign nationals cannot become a partner in a partnership firm.
15	Minor as partner	Minor cannot be admitted to the benefits of LLP.	Minor can be admitted to the benefits of the partnership with the prior consent of the existing partners.

14. Who are the individuals which shall not be capable of becoming a partner of a Limited Liability Partnership?

Sol. **Partners (Section 5 of Limited Liability Partnership Act, 2008):** Any individual or body corporate may be a partner in a LLP.

However, an individual shall not be capable of becoming a partner of a LLP, if—

(*a*) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;

(*b*) he is an undischarged insolvent; or

(*c*) he has applied to be adjudicated as an insolvent and his application is pending.

15. What are the effects of registration of LLP?

Sol. **On registration of a LLP , by its name, it shall be capable of :- (Section 14):**

(1) Suing and being sued

(2) Acquiring, owning, holding and developing or property, whether movable or immovable, tangible or intangible

(3) Having a common seal, if it decided to have one

(4) Doing and suffering such other acts and things as bodies corporate may lawfully do and suffer

16. Examine the concept of LLP.

Sol. **Meaning –** A LLP is a new form of legal business entity with limited liability. It is an alternative corporate business vehicle that gives the benefits of limited liability but allows its partners the flexibility of organizing their internal structure as a traditional partnership. The LLP is a separate legal entity and, while the LLP itself will be liable for the full extent of its assets, the liability of the partners will be limited.

Concept of "limited liability partnership" :-

- The LLP can continue its existence irrespective of changes in partners. It is capable of entering into contracts and holding property in its own name.
- The LLP is a separate legal entity, is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.
- Further, no partner is liable on account of the independent or un-authorized actions of other partners, thus individual partners are shielded from joint liability created by another partner's wrongful business decisions or misconduct.
- Mutual rights and duties of the partners within a LLP are governed by an agreement between the partners or between the partners and the LLP as the case may be. The LLP, however, is not relieved of the liability for its other
- obligations as a separate entity.
- LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership.

17. Mr. Ankit Sharma wants to form a LLP taking him, his wife Mrs. Archika Sharma and One HUF as partners for that. Whether this LLP can be incorporated under LLP Act, 2008? Explain.

Sol. Section 5 of Limited Liability Partnership Act, 2008 provides any individual or body corporate may be a partner in an LLP. However, an individual shall not be capable of becoming a partner of a LLP, if—

(*a*) he has been found to be of unsound mind by a Court of competent jurisdiction and the finding is in force;

(*b*) he is an undischarged insolvent; or

(*c*) he has applied to be adjudicated as an insolvent and his application is pending.

Further, Section (2)(1)(*e*) provides that a Body Corporate it means a company as defined in 'clause

(20) of section 2 of the Companies Act, 2013 and includes—

(*i*) an LLP registered under this Act;

(*ii*) an LLP incorporated outside India; and

(*iii*) a company incorporated outside India, but does not include—

(*i*) a corporation sole;

(ii) a co-operative society registered under any law for the time being in force; and

(iii) any other body corporate (not being a company as defined in 'clause (20) of section 2 of the Companies Act, 20132' or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

Therefore, HUF is not covered in the definition of body corporate and cannot be partner in LLP.

18. There is an LLP by the name Ram Infra Development LLP which has 4 partners namely Mr. Rahul, Mr. Raheem, Mr. Kartar and Mr. Albert. Mr. Rahul and Mr. Albert are non – resident while other two are resident. LLP wants to take Mr. Rahul and Mr. Raheem as Designated Partner. Explain in the light of Limited Liability Partnership Act, 2008 whether LLP can do so?

The Limited Liability Partnership Act. 2008

Sol. According to Section 7 of LLP Act, 2008 every LLP shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. Further, explanation to the section provides, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred twenty days during the financial year. Hence, in the given problem, besides Mr. Ram and Mr. Raheem, Mr. Albert should also be designated partners.

19. Mr. Mudit is the creditor of Devi Ram Food Circle LLP. He has a claim of rs.10,00,000 against the LLP but the worth of the assets of LLP are only Rs. 7,00,000. Now Mr. Mudit wants to make the partners of LLP personally liable for the deficiency of Rs. 3,00,000. Whether by virtue of provisions of Limited Liability Act, 2008, Mr. Mudit can claim the deficiency from the partners of Devi Ram Food Circle LLP?

Sol. A limited liability partnership is a body corporate formed and incorporated under this Act and is a legal entity separate from that of its partners. The LLP itself will be liable for the full extent of its assets but the liability of the partners will be limited. Creditors of LLP shall be the creditors of LLP alone.

In other words, creditors of LLP cannot claim from partners. The liability of the partners will be limited to their agreed contribution in the LLP. Hence the creditors of Devi Ram Food Circle LLP are the creditors of Devi Ram Food Circle LLP only. Partners of LLP are not personally liable towards

creditors. Mr. Mudit can not claim his deficiency of Rs. 3,00,000 from the partners of Devi Ram Food Circle LLP

20. M/s Vardhman Steels LLP was incorporated on 01.09.2022. On 01.01.2023, one partner of a partnership firm named M/s Vardhimaan Steels is registered with Indian Partnership Act, 1932 since 01.01.2000 requested ROC that as the name of LLP is nearly resembles with the name of already registered partnership firm, the name of LLP should be changed. Explain whether M/s Vardhman Steels LLP is liable to change its name under the provisions of Limited Liability Act, 2008?

Sol. Section 15 of LLP Act, 2008 provides no LLP shall be registered by a name which, in the opinion of the Central Government is—

(*a*) undesirable; or

(*b*) identical or too nearly resembles to that of any other 'LLP or a company or a registered trade mark of any other person under the Trade Marks Act, 1999'.

Further, section 17 provides, if the name of LLP is identical with or too nearly resembles to-

(*a*) that of any other LLP or a company; or

(*b*) a registered trade mark of a proprietor under the Trade Marks Act, 1999 then on an application of such LLP or proprietor referred to in clauses (*a*) and (*b*) respectively or a company, the CG may direct that such LLP to change its name within a period of 3 months from the date of issue of such direction.

Following the above provisions, LLP need not change its name if its name resembles with the name of a partnership firm. These provisions are applicable only in cases where name is resembles with LLP, company or a registered trade mark of a proprietor.

Hence, M/s Vardhman Steels LLP need not change its name even it resembles with the name of partnership firm.

21. Kanik, Priyansh, Abhinav and Bhawna were partners in Singh Jain & Associates LLP. Abhinav resigned from the firm w.e.f. 01.11.2022 but this was not informed to ROC by LLP or Abhinav. Whether Abhinav will still be liable for the loss of firm of the transactions entered after 01.11.2022?

Sol. According to section 24(3), where a person has ceased to be a partner of a LLP (hereinafter referred to as "former partner"), the former partner is to be regarded (in relation to any person dealing with the LLP) as still being a partner of the LLP unless—

(*a*) the person has notice that the former partner has ceased to be a partner of the LLP; or

(*b*) notice that the former partner has ceased to be a partner of the LLP has been delivered to the Registrar.

Hence, by virtue of the above provisions, as no notice of resignation was given to ROC, Abhinav will still be liable for the loss of firm of the transactions entered after 01.11.2022.

CHAPTER- 13

THE GENERAL CLAUSES ACT, 1897

PRACTICE QUESTIONS

1. What is "Immovable Property" under the General Clauses Act, 1897? **[ICAI Module]**

Sol. According to Section 3(26) of the General Clauses Act, 1897, 'Immovable Property' shall include:

(*i*) Land,

(*ii*) Benefits to arise out of land, and

(*iii*) Things attached to the earth, or

(*iv*) Permanently fastened to anything attached to the earth.

For example, trees are immovable property because trees are benefits arise out of the land and attached to the earth. However, timber is not immovable property as the same are not permanently attached to the earth. In the same manner, buildings are immovable property.

2. 'Repeal' of provision is different from 'deletion' of provision. Explain as per the General Clauses Act, 1897. **[ICAI Module]**

Sol. In Navrangpura Gam Dharmada Milkat Trust v. Rmtuji Ramaji, AIR 1994 Guj75 case, it was decided that 'Repeal' of provision is in distinction from 'deletion' of provision. 'Repeal' ordinarily brings about complete obliteration (abolition) of the provision as if it never existed, thereby affecting all incoherent rights and all causes of action related to the 'repealed' provision while 'deletion' ordinarily takes effect from the date of legislature affecting the said deletion, never to effect total effecting or wiping out of the provision as if it never existed.

3. What is "Financial Year" under the General Clauses Act, 1897? **[ICAI Module]**

Sol. Financial Year: According to section 3(21) of the General Clauses Act, 1897, *financial year shall mean the year commencing on the first day of April*. The term Year has been defined under Section 3(66) as a year reckoned according to the British calendar. Thus, as per General Clauses Act, Year means calendar year which starts from January to December.

Difference between Financial Year and Calendar Year: *Financial year starts from first day of April but Calendar Year starts from first day of January.*

4. What is a Document as per the Indian Evidence Act, 1872?

Sol. As per Indian the Evidence Act, 1872: 'Document': Generally understood, a document is a paper or other material thing giving information, proof or evidence of anything. The Law define 'document' in a more technical form. As per Section 3 of the Indian Evidence Act, 1872, *'document' means any matter expressed* or *described upon any substance* by means of letters, figures or marks or by more than one of those means, *intended to be used*, or which may be used, *for the purpose of recording that matter*. For Example: A writing is a document, any words printed, photographed are documents.

5. Define the following term Affidavit with reference to the General Clauses Act, 1897 **[Nov. 2019, Nov. 2020]**

Sol. "Affidavit" [Section 3(3) of the General Clauses Act, 1897]: '*Affidavit' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing*. The above definition is inclusive in nature. It states that Affidavit shall include affirmation and declarations. This definition does not define affidavit. However, we can understand this term in general parlance. Affidavit is a *written statement confirmed by oath or affirmation for use as evidence in Court or before any authority.*

6. Mrs. K went to a Jewellary shop to purchase diamond ornaments. The owners of jewelry shop are notorious and indulging in smuggling activities. Mrs. K purchased diamond ornaments honestly without making proper enquiries. Was the purchase made in Good faith as per the provisions of the General Clauses Act, 1897 so as to convey good title? **[Nov. 2020]**

Sol. In the instant case, the purchase of diamond ornaments by Mrs. K from a Jewelry Shop, the owners of which are notorious and indulged in smuggling activities, made in good faith, will not convey good title. As per section 3 (22) of the General Clauses Act, 1897, a thing shall be deemed to be done in "good faith" where it is in fact *done honestly, whether it is done negligently or not*. The definition of good faith as is generally understood in the civil law and which may be taken as a practical guide in understanding the expression in the Indian Contract Act, 1872 is that *nothing is said to be done in good faith which is done without due care and attention as is expected with a man of ordinary prudence*. An honest purchase made carelessly without making proper enquiries cannot be said to have been made in good faith so as to convey good title.

7. "The act done negligently shall be deemed to be done in good faith." Comment with the help of the provisions of the General Clauses Act, 1897. **[Jan. 2021]**

Sol. In general, anything done with due care and attention, *which is not malafide is presumed to have been done in good faith*. But, according to section 3(22) of the General Clauses Act, 1897, a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not. The question of good faith under the General Clauses Act is one of fact. It is to determine with reference to the circumstances of each case. It is therefore understood that the General Clauses Act, 1897 considers *the honesty in doing the Act as a primary test to constitute the thing done in good faith* and therefore the act done honestly but with negligence may also be termed as done in good faith as per the General Clauses Act, 1897. The term "Good faith" has been defined differently in different enactments. This definition of the good faith does not apply to that enactment which contains a special definition of the term "good faith" and there the definition given in that particular enactment has to be followed. This definition may be applied only if there is nothing repugnant in subject or context, and if that is so, the definition is not applicable.

8. Income Tax Act, 1961 provides that the gratuity paid by the government to its employees is Fully exempt from tax. You are required to explain the scope of the term 'government' and clarify whether the exemption from gratuity income will be available to the State Government Employees? Give your answer in accordance with the provisions of the General Clauses Act, 1897. **[Jan. 2021]**

Sol. According to section 3(23) of the General Clauses Act, 1897, *'Government' or 'the Government' shall include both the Central Government and State Government*. Hence, wherever, the word 'Government' is used, it will include Central Government and State Government both. Thus, when the Income Tax Act, 1961, provides that gratuity paid by the government to its employees is fully exempt from tax, the exemption from gratuity income will be available to the State Government employees also.

9. Elucidate the term "Commencement" as per the General Clauses Act, 1897 **[MTP April 2021]**

Sol. Section 3(13) of the General Clauses Act, 1897, defines the term "Commencement". "Commencement" used with reference to an Act or Regulation, *shall mean the day on which the Act or Regulation comes into force.* Coming into force or entry into force (also called commencement) refers to *the process by which legislation, regulations, treaties and other legal instruments come to have a legal force and effect.* A law cannot be said to be in force unless it is *brought into operation by legislative enactment*, or by the exercise of authority by a delegate empowered to bring it into operation. The theory of a statute being "in operation in a constitutional sense" though it is not in fact in operation has no validity. (State of Orissa vs. Chandrasekhar Singh Bhai — AIR 1970 SC 398).

10. When does an enactment is said to have come into operation if the Act has not specified any particular date of its enforcement. Explain with help of an example as per provisions of the General Clauses Act, 1897 **[MTP March 2018]**

Sol. "Coming into operation of enactment": According to section 5 of the General Clauses Act, 1897, where any Central Act has *not specifically mentioned* a particular date to come into force, *it shall be implemented on the day on which it receives the assent of the Governor General* in case Central Acts made before the commencement of the Indian Constitution and/or, of the President in case of an Act of Parliament.

Example: The Companies Act, 2013 received assent of President of India on 29 th August, 2013 and was notified in official gazette on 30th August, 2013 with the enforcement of section 1 of the Act. Accordingly, the Companies Act, 2013 came into enforcement on the date of its publication in the Official Gazette.

11. Explain briefly any four effects by repeal of an existing Act by central legislation enumerated in Section- 6 of The General Clauses Act, 1897. **[May 2018]**

Sol. According to Section 6 of the General Clauses Act, 1897, *where any Central legislation or any regulation made after the commencement of this Act repeals* any Act made or yet to be made, unless another purpose exists, the repeal shall not:

(*i*) Revive anything not enforced or prevailed during the period at which repeal is effected or;

(*ii*) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(*iii*) Affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(*iv*) Affect any inquiry, litigation or remedy with regard to such claim, privilege, debt or responsibility or any inquiry, litigation or remedy may be initiated, continued or insisted.

12. As per the provisions of the Companies Act, 2013, a whole time Key Managerial Personnel (KMP) shall not hold office in more than one company except its subsidiary company at the same time. Referring to the Section 13 of the General Clauses Act, 1897, examine whether a whole time KMP can be appointed in more than one subsidiary company? **[ICAI Module]**

Sol. Section 203(3) of the Companies Act, 2013 provides that whole time *key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time*. With respect to the issue that whether a whole time KMP of holding company be appointed in more than one subsidiary companies or can be appointed in only one subsidiary company. It can be noted that Section 13 of General Clauses Act, 1897 provides that *the word 'singular' shall*

include the 'plural', unless there is anything repugnant to the subject or the context. Thus, a whole time key managerial personnel may hold office in more than one subsidiary company as per the present law.

13. Komal Ltd. declares a dividend for its shareholders in its AGM held on 27th September, 2018. Referring to provisions of the General Clauses Act, 1897 and Companies Act, 2013, advice:
(*i*) The dates during which Komal Ltd. is required to pay the dividend?
(*ii*) The dates during which Komal Ltd. is required to transfer the unpaid or unclaimed dividend to unpaid dividend account? **[ICAI Module]**

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

(*i*) ***Payment of dividend:*** In the given instance, Komal Ltd. declares dividend for its shareholder in its Annual General Meeting held on 27/09/2018. Under the provisions of Section 127 of the Companies Act, 2013, *a company is required to pay declared dividend within 30 days from the date of declaration*, i.e. from 28/09/2018 to 27/10/2018. In this series of 30 days, 27/09/2018 will be excluded and last 30th day i.e. 27/10/2018 will be included. *Accordingly*, Komal Ltd. will be required to pay dividend within 28/09/2018 and 27/10/2018 (both days inclusive)

(*ii*) ***Transfer of unpaid or unclaimed divided:*** As per the provisions of Section 124 of the Companies Act, 2013, where a dividend has been *declared* by a company *but has not been paid or claimed within 30 days* from the date of the declaration, to any shareholder entitled to the payment of the dividend, the company shall, *within 7 days from the date of expiry of the said period of 30 days*, transfer the total amount of dividend which remains *unpaid or unclaimed to a special account* to be opened by the company in that behalf in any scheduled bank to be called the *"Unpaid Dividend Account"* (*UDA*). Therefore, Komal Ltd. shall transfer the unpaid/unclaimed dividend to UDA within the period of 28th October, 2018 to 3rd November, 2018 (both days inclusive).

14. Referring to the provisions of the General Clauses Act, 1897, find out the day/ date on which the following Act/Regulation comes into force. Give reasons also,
(1) An Act of Parliament which has not specifically mentioned a particular date.
(2) The Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2015 was issued by SEBI vide Notification dated 14th August, 2015 with effect from 1st January, 2016. **[ICAI Module]**

Sol. (1) According to section 5 of the General Clauses Act, 1897, *where any Central Act has not specifically mentioned a particular date* to come into force, it shall be *implemented on the day* on which it *receives the assent of the President* in case of an Act of Parliament.
(2) If any specific date of enforcement is *prescribed in the Official Gazette*, the Act shall come into *enforcement from such date*. Thus, in the given question, the SEBI (Issue of Capital and Disclosure Requirements) (Fifth Amendment) Regulations, 2015 shall come into enforcement on 1st January, 2016 rather than the date of its notification in the gazette.

15. 'Repeal' of provision is different from 'deletion' of provision. Explain. **[ICAI Module]**

Sol. In Navrangpura Gam Dharmada Milkat Trust Vs. Rmtuji Ramaji, AIR 1994 Guj 75 case, it was decided that *'Repeal' of provision is in distinction from 'deletion' of provision*. *'Repeal'* ordinarily

brings about *complete obliteration* (*abolition*) *of the provision* as if it never existed, thereby affecting all incoherent rights and all causes of action related to the 'repealed' provision while 'deletion' ordinarily takes effect from the date of legislature affecting the said deletion, *never to effect total effecting or wiping* out of the provision as if it never existed.

16. There are two ways to reach city A from city B. The distance between the two cities by roadways is 100 kms and by water ways 80 kms. How is the distance measured for the purpose of any Central Act under the provisions of the General Clauses Act, 1897? **[Nov. 2020]**

Sol. "Measurement of Distances" [Section 11]: In the *measurement of any distance*, for the purposes of any Central Act or Regulation made after the commencement of this Act, that distance shall, *unless a different intention appears, be measured in a straight line on a horizontal plane.*

17. PK and VK had a long dispute regarding the ownership of a land for which a legal suit was pending in the court. The court fixed the date of hearing on 29.04.2018, which was announced to be a holiday subsequently by the Government. What will be the computation of time of the hearing in this case under the General Clauses Act, 1897? **[Jan. 2021]**

Sol. According to Section 10 of the General Clauses Act, 1897, where by any legislation or regulation, any act or *proceeding is directed or allowed to be done or taken in any court or office on a certain day* or within a prescribed period then, *if the Court or office is closed* on that day or last day of the prescribed period, the act or proceeding shall be *considered as done or taken in due time if* it is done or taken on the *next day afterwards* on which the Court or office is open.
In the given question, the court fixed the date of hearing of dispute between PK and VK, on 29.04.2018, which was subsequently announced to be a holiday.
Applying the above provisions we can conclude that the hearing date of 29.04.2018, shall be extended to the *next working day*.

18. Examine the validity of the following statements with reference to the General Clauses Act, 1897:
(*i*) Insurance Policies covering immovable property have been held to be immovable property.
(*ii*) The word "bullocks" could be interpreted to include "cows". **[July 2021]**

Sol. (*i*) Insurance Policies covering immovable property have been held to be immovable property:
This statement is not valid. *Insurance policy is a written document containing an agreement* between the insurer and insured. It includes a matter intended to be used or may be *used for the purpose or recording of the matter*. Hence, the insurance policies covering immovable property is not covered under the definition of immovable property.
(*ii*) The word 'bullocks' could be interpreted to include 'cows': This statement is not valid.
Where a word *connoting a common gender is available* but the word used *conveys a specific gender*, there is a *presumption that the provisions of General Clauses Act, 1897 do not apply*.
Thus, the word 'bullocks' could not be interpreted to include 'cows'.

19. Examine the validity of the following statements with reference to the General Clauses Act, 1897:
Board of Directors of Sabarwal Construction Private Limited authorised by passing resolution in board meeting Mr. Munim to appoint five employees for accounts department of company. Mr. Munim appointed five employees including Mr. Rupal who was relative of one of the director of company. After one month, Mr. Munim observed that Mr. Rupal was not performing his duties honestly. Mr. Munim issued the order of dismissal of Mr. Rupal with proper reasons. Mr. Rupal filed a petition in the court that his dismissal order is not valid as Board of Directors had authorized Mr. Munim only for appointment of employees not for dismissal. Whether is Mr. Rupal correct with his words? **[MTP April 2022]**

Sol. As per the provisions of section 16 of the General Clauses Act, 1897, the authority having for the time being *power to make the appointment* shall *also have power to suspend or dismiss any person appointed whether by itself or any other authority in exercise of that power.* Mr. Munim was appointed in board meeting of Sabarwal Construction Private Limited to appoint five employees for accounts department of company. Mr. Munim appointed five employees. After one month, he issued the order of dismissal to one of those five employees. That employee filed an application in the court challenging the validity of dismissal order with the words that Mr.Munim was authorised only for appointment of employees not for dismissal. On the basis of above provisions and facts of the case, Mr. Rupal was not correct with his words because as per the General Clauses Act, 1897, power to appoint includes power to suspend or dismiss. Hence, Mr. Munim has power to dismiss Mr. Rupal.

20. What is the effect on the implementation of the Rules that are issued between passing and commencement of enactment. Explain as per the provisions of the General Clauses Act, 1897. **[MTP Oct. 2018]**

Sol. "Making of rules or bye-laws and issuing of orders between passing and commencement of enactment" [Section 22] Where, by any Central Act or Regulation which is *not to come into force immediately*, on the passing thereof, *a power is conferred to make rules or bye-laws*, or to issue orders with respect to the application of the Act or Regulation or with respect to the establishment of any Court or the appointment of any Judge or officer thereunder, or with respect to the person by whom, or the time when, or the place where, or the manner in which, or the fees for which, anything is to be done under the Act or Regulation, *then that power may be exercised at any time after passing of the Act or Regulation*; but rules, bye-laws or orders so made or issued shall not take effect till the commencement of the Act or Regulation.

21. Explain various provisions applicable to rules or bye-laws being made after previous publications as enumerated in Section-23 of the General Clauses Act, 1897. **[Nov. 2018]**

Sol. Provisions applicable to making of rules or bye-laws after previous publications [Section 23 of the General Clauses Act, 1897]: Where, by any Central Act or Regulation, a power to make rules or bye-laws is expressed to be given *subject to the condition* of the rules or bye-laws being made after previous publication, then the following provisions shall apply, namely:

(*i*) ***Publish of proposed draft rules/bye-laws:*** The authority having power to make the rules or bye- laws shall, before making them, publish a draft of the proposed rules or bye-laws for the information of persons likely to be affected thereby;

(*ii*) ***To publish in the prescribed manner:*** The publication shall be made in such manner as that authority deems to be sufficient, or, if the condition with respect to previous publication so requires, in such manner as the Government concerned prescribes;

(*iii*) ***Notice annexed with the published draft:*** There shall be published with the draft a notice specifying a date on or after which the draft will be taken into consideration;

(*iv*) ***Consideration on suggestions/objections received from other authorities:*** The authority having power to make the rules or bye-laws, and, where the rules or bye- laws are to be made with the sanction, approval or concurrence of another authority, that *authority also shall consider any objection or suggestion* which may be received by the authority having power to make the rules or bye-laws from any person with respect to the draft before the date so specified;

(*v*) ***Notified in the official gazette:*** The publication in the Official Gazette of a rule or bye-law purporting to have been made in exercise of a power to make rules or bye- laws after previous publication shall be conclusive proof that the rule or bye-laws have been duly made.

22. Mr. Ram, an advocate has fraudulently deceived his client Mr. Shyam, who was taking his expert advise on taxation matters. Now, Mr. Ram is liable to a fine for acting fraudulently both under the Advocates Act, 1961 as well as the Income Tax Act, 1961. State the provision as to whether his offence is punishable under the both the Acts, as per the General Clauses Act, 1897.

[RTP Nov. 2018, MTP April 2021]

Sol. "Provision as to offence punishable under two or more enactments" [Section 26]: Where an act or omission *constitutes an offence under two or more enactments*, then the offender shall be *liable to be prosecuted and punished under either* or any of those enactments, but shall *not be punished twice* for the same offence. Thus, Mr. Ram shall be liable to punished under the Advocates Act, 1961 or the Income Tax Act, 1961, but shall not be punished twice for the same offence.

23. What is the meaning of service by post as per provisions of the General Clauses Act, 1897?

[ICAI Module]

Sol. **Meaning of Service by post:** According to section 27 of the General Clauses Act, 1897, where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:

- properly addressing pre-paying, and
- posting by registered post.

A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.

24. A notice when required under the Statutory rules to be sent by "registered post acknowledgment due" is instead sent by "registered post" only. Whether the protection of presumption regarding serving of notice by "registered post" under the General Clauses Act is tenable? Referring to the provisions of the General Clauses Act, 1897, examine the validity of such notice in this case.

[ICAI Module]

Sol. As per the provisions of Section 27 of the General Clauses Act, 1897, where any legislation or regulation requires any document to be *served by post, then unless a different intention appears*, the service shall be deemed to be effected by:

(*i*) properly addressing,
(*ii*) pre-paying, and
(*iii*) posting by registered post.

A letter containing the document to have been *effected at the time at which the letter would be delivered* in the ordinary course of post. Therefore, in view of the above provision, since, the statutory rules itself provides about the service of notice that a notice when required under said statutory rules to be sent by 'registered post *acknowledgement due', then, if notice was sent by 'registered post' only it will not be the compliance of said rules*. However, if such provision was *not provided by such statutory rules*, then service of notice if by registered post only shall be *deemed to be effected*. Furthermore, in similar case of In United Commercial Bank vs. Bhim Sain Makhija, AIR 1994 Del 181: A notice when required under the statutory rules to be sent by 'registered post acknowledgement due' is instead sent by 'registered post' only, the protection of presumption regarding serving of notice under 'registered post' under this section of the Act neither tenable not based upon sound exposition of law.

25. Mr. Mike has lent his house property to Mr. Wise at a monthly rent of `15,0000 per month. The yearly rent agreement was due to expire in near future. However, Mr. Mike does not intend to continue this agreement and he has sent a notice to Mr. Wise for the termination of the agreement. Mr. Wise on the other hand does not want to vacate the property and hence has returned the notice with an endorsement of refusal. Now, Mr. Wise has contended that the no notice was served to him and hence there is no need for him to vacate the property. As per the provisions of the General Clauses Act, 1897, discuss whether a notice was served to Mr. Wise. **[MTP Aug. 2018]**

Sol. As per section 27 of the General Clause Act, 1897, where any legislation or regulation requires any document to be served by post, then unless a different intention appears, *the service shall be deemed to be effected by:*
(*i*) properly addressing
(*ii*) pre-paying, and
(*iii*) posting by registered post.

A letter containing the document to have been effected at the time *at which the letter would be delivered in the ordinary course of post.* Thus, where a notice is sent by the landlord by registered post and the same is returned by the tenant with an endorsement of refusal, it will be presumed that the notice has been served. Hence, in the given situation, a notice was rightfully served to Mr. Wise.

26. A notice was served on Mr. P for appearing in the court. However, the notice could not be served on account of the fact that the house of the Mr. P was found locked. Thus, Mr. P. did not appear in the court at the said date. Examine the situation as per the provisions of the General Clauses Act, 1897 and determine whether Mr. P. will be liable in the given situation. **[MTP April 2019]**

Sol. According to section 27 of the General Clauses Act, 1897, where any legislation or regulation requires any document to be served by post, then unless a different intention appears, the service shall be deemed to be effected by:
(*i*) properly addressing
(*ii*) pre-paying, and
(*iii*) posting by registered post.
A letter containing the document to have been effected at the time at which the letter would be delivered in the ordinary course of post.
Hence, where the where the notice could not be served on account of the fact that the house of Mr P was found locked, it will be deemed that the notice was properly served as per the provisions of Section 27 of the General Clauses Act, and it would be for Mr. P to prove that it was not really served and that he was not responsible for such non- service.

27. Ayush and Vipul are good friends and pursuing CA course. While doing group studies for the paper of "Corporate and Other Law", they are confused about the provisions of section 3 of the Companies Act 2013. Section 3 provides "A company may be formed for any lawful purpose by……." Both Ayush and Vipul are in difficulty about the meaning of word "may". Whether it should be taken as mandatory or a directory? **[RTP May 22]**

Sol. The word 'shall' is used to raise a presumption of something which is mandatory or imperative while the word 'may' is used to connote something which is not mandatory but is only directory or enabling. However, sometimes Word 'may' has a mandatory force if directory force will defeat the object of the Act. However, sometimes the words "may and shall" can be interpreted interchangeably depending on the intention of the legislator. Ayush and Vipul, two CA students,

are confused with the language of the provisions of section 3 of the Companies Act 2013 that whether the word "may" used in section should be considered as mandatory or directory. In the given case, it can be said that the word "may" should be taken as mandatory force, because the law will never allow the formation of company with unlawful object. Here the word used "may" shall be read as "shall". Usage of word 'may' here makes it mandatory for a company for the compliance of section 3 for its formation.

28. M owned a land with fifty tamarind trees. He sold his land and the timber (obtained after cutting the fifty trees) to N. M wants to know whether the sale of timber tantamount to sale of immovable property. Advise him with reference to provisions of the General Clauses Act, 1897.**[ICAI Module]**

Sol. "Immovable Property" [Section 3(26) of the General Clauses Act, 1897]: 'Immovable Property' shall include:

(*i*) Land, (*ii*) Benefits to arise out of land, and

(*iii*) Things attached to the earth, or (*iv*) Permanently fastened to anything attached to the earth.

It is an inclusive definition. It contains four elements: land, benefits to arise out of land, things attached to the earth and things permanently fastened to anything attached to the earth. Where, in any enactment, the definition of immovable property is in the negative and not exhaustive, the definition as given in the General Clauses Act will apply to the expression given in that enactment. In the instant case, M sold Land along with timber (obtained after cutting trees) of fifty tamarind trees of his land. According to the above definition, Land is immovable property; however, timber cannot be immovable property since the same are not attached to the earth.

CHAPTER- 14

INTERPRETATION OF STATUES

PRACTICE QUESTIONS

1. Explain the rule in 'Heydon's Case' while interpreting the statutes quoting an example.

Sol. Where the language used in a statute is capable of more than one interpretation, the most firmly established rule for construction is the principle laid down in the Heydon's case. This rule enables, consideration of four matters in constituting an act:

(1) what was the law before making of the Act,
(2) what was the mischief or defect for which the law did not provide,
(3) what is the remedy that the Act has provided, and
(4) what is the reason for the remedy.

The rule then directs that the courts must adopt that construction which 'shall suppress the mischief and advance the remedy'. Therefore, even in a case where the usual meaning of the language used falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, provided they are fairly susceptible of it. If the object of any enactment is public safety, then its working must be interpreted widely to give effect to that object. Thus, in the case of Workmen's Compensation Act, 1923 the main object being provision of compensation to workmen, it was held that the Act ought to be so construed, as far as possible, so as to give effect to its primary provisions.

However, it has been emphasized by the Supreme Court that the rule inHeydon's case is applicable only when the words used are ambiguous and are reasonably capable of more than one meaning [CIT vs. Sodra Devi (1957) 32 ITR 615 (SC)].

2. Explain the principles of "Grammatical Interpretation" and "Logical Interpretation" of a Statute. What are the duties of a court in this regard?

Sol. Principles of Grammatical Interpretation and Logical Interpretation: In order to ascertain the meaning of any law/ statute the principles of Grammatical and Logical Interpretation is applied to conclude the real meaning of the law and the intention of the legislature behind enacting it.

Meaning: Grammatical interpretation concerns itself exclusively with the verbal expression of law. It does not go beyond the letter of the law, whereas Logical interpretation on the other hand, seeks more satisfactory evidence of the true intention of the legislature.

Application of the principles in the court: In all ordinary cases, the grammatical interpretation is the sole form allowable. The court cannot delete or add to modify the letter of the law. However, where the letter of the law is logically defective on account of ambiguity, inconsistency or CHAPTER Interpretation of Statutes 14 174 Corporate and Other Laws incompleteness, the court is under a duty to travel beyond the letter of law so as to determine the true intentions of the legislature. So that a statute is enforceable at law, however, unreasonable it may be. The duty of the court is to administer the law as it stands rather it is just or unreasonable. However, if there are two possible constructions of a clause, the courts may prefer the logical construction which

emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also the words used therein.

3. (i) What is the effect of proviso? Does it qualify the main provisions of an Enactment?

(ii) Does an explanation added to a section widen the ambit of a section?

Sol. (i) Normally a Proviso is added to a section of an Act to except something or qualify something stated in that particular section to which it is added. A proviso should not be, ordinarily, interpreted as a general rule. A proviso to a particular section carves out an exception to the main provision to which it has been enacted as a Proviso and to no other provision. [Ram Narian Sons Ltd. vs. Commissioner of Sales Tax AIR (1955) S.C. 765]

(ii) Sometimes an explanation is added to a section of an Act for the purpose of explaining the main provisions contained in that section. If there is some ambiguity in the provisions of the main section, the explanation is inserted to harmonise and clear up and ambiguity in the main section. Something may added be to or something may be excluded from the main provision by insertion of an explanation. But the explanation should not be construed to widen the ambit of the section.

4. Gaurav Textile Company Limited has entered into a contract with a Company. You are invited to read and interpret the document of contract. What rules of interpretation of deeds and documents would you apply while doing so?

Sol. The rules regarding interpretation of deeds and documents are as follows: First and the foremost point that has to be borne in mind is that one has to find out what reasonable man, who has taken care to inform himself of the surrounding circumstances of a deed or a document, and of its scope and intendments, would understand by the words used in that deed or document.

It is inexpedient to construe the terms of one deed by reference to the terms of another. Further, it is well established that the same word cannot have two different meanings in the same documents, unless the context compels the adoption of such a rule.

The Golden Rule is to ascertain the intention of the parties of the instrument after considering all the words in the documents/deed concerned in their ordinary, natural sense. For this purpose, the relevant portions of the document have to be considered as a whole. The circumstances in which the particular words have been used have also to be taken into account. Very often, the status and training of the parties using the words have also to be taken into account as the same words maybe used by an ordinary person in one sense and by a trained person or a specialist in quite another sense and a special sense. It has also to be considered that very many words are used in more than one sense. It may happen that the same word understood in one sense will give effect to all the clauses in the deed while taken in another sense might render one or more of the clauses ineffective. In such a case the word should be understood in the former and not in the latter sense.

It may also happen that there is a conflict between two or more clauses of the same documents. An effect must be made to resolve the conflict by interpreting the clauses so that all the clauses are given effect. If, however, it is not possible to give effect of all of them, then it is the earlier clause that will override the latter one.

5. Differentiate Mandatory Provision from a Directory Provision. What factors decide whether a provision is directory or mandatory?

Sol. Practically speaking, the distinction between a provision which is 'mandatory' and one which is 'directory' is that when itis mandatory, it must be strictly observed; when itis 'directory' it would be sufficient that it is substantially complied with. However, we have to look to the substance and not merely the form, an enactment in mandatory form might substantially be directory and, conversely, a statute in directory form may in substance be mandatory. Hence, it is the substance that counts and must take precedence over mere form. If a provision gives a power coupled with a duty, it is mandatory: whether it is or is not so would depend on such consideration as:

- the nature of the thing empowered to be done,
- the object for which it is done, and
- the person for whose benefit the power is to be exercised.

6. Define Grammatical Interpretation. What are the exceptions to grammatical interpretation?

Sol. Grammatical Interpretation and its exceptions: 'Grammatical interpretation' concerns itself exclusively with the verbal expression of the law, it does not go beyond the letter of the law. In all ordinary cases, 'grammatical interpretation' is the sole form allowable. The Court cannot take from or add to modify the letter of the law.

This rule, however, is subject to some exceptions:

(i) Where the letter of the law is logically defective on account of ambiguity, inconsistency or incompleteness. As regard the defect to ambiguity, the Court is under a duty to travel beyond the letter of the law so as to determine from the other sources the true intention of the legislature.In the case ofthe statutory expression being defective on account of inconsistency, the court must ascertain the spirit of the law.

(ii) If the text leads to a result which is so unreasonable that it is self-evident that the legislature could not mean what it says, the court may resolve such impasse by inferring logically the intention of the legislature.

7. Explain how 'Dictionary Definitions' can be of great help in interpreting/constructing an Act when the statute is ambiguous.

Sol. Dictionary Definitions: First we refer the Act in question to find out if any particular word or expression is defined in it. Where we find that a word is not defined in the Act itself, we may refer to dictionaries to find out the general sense in which that word is commonly understood. However, in selecting one out of the several meanings of a word, we must always take into consideration the context in which it is used in the Act. It is the fundamental rule that the meanings of words and expressions used in an Act must take their colour from the context in which they appear. Further, judicial decisions laying down the meaning of words in construing statutes in pari materia will have greater weight than the meaning furnished by dictionaries. However, for technical terms, reference may be made to technical dictionaries.

8. Preamble does not over-ride the plain provision of the Act. Comment. Also give suitable example.

Sol. Preamble: The Preamble expresses the scope, object and purpose of the Act more comprehensively. The Preamble of a Statute is a part of the enactment and can legitimately be used as an internal aid for construing it. However, the Preamble does not over-ride the plain provision of the Act. But if the wording of the statute gives rise to doubts as to its proper construction, for example, where the words or phrase has more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, the Preamble can and ought to be referred to in order to arrive at the proper construction.

In short, the Preamble to an Act discloses the primary intention of the legislature but can only be brought in as an aid to construction if the language of the statute is not clear. However, it cannot override the provisions of the enactment.

Example: Use of the word 'may' in section 5 of the Hindu Marriage Act, 1955 provides that "a marriage may be solemnized between two Hindus….." has been construed to be mandatory in the sense that both parties to the marriage must be Hindus as defined in section 2 of the Act. It was held that a marriage between a Christian male and a Hindu female solemnized under the Hindu Marriage Act was void. This result was reached also having regard to the preamble of the Act which reads: 'An Act to amend and codify the law relating to marriage among Hindus" [Gullipoli Sowria Raj vs. Bandaru Pavani, (2009)1 SCC714].

9. At the time of interpreting a statutes what will be the effect of 'Usage' or 'customs and Practices'?

Sol. Effect of usage: Usage or practice developed under the statute is indicative of the meaning recognized to its words by contemporary opinion. A uniform notorious practice continued under an old statute and inaction of the Legislature to amend the same are important factors to show that the practice so followed was based on correct understanding of the law. When the usage or practice receives judicial or legislative approval it gains additional weight. In this connection, we have to bear in mind two Latin maxims:

(i) 'Optima Legum interpres est consuetude' (the custom is the best interpreter of the law); and (ii) 'Contemporanea Expositio est optima et fortissinia in lege' (the best way to interpret a document is to read it as it would have been read when made).

Therefore, the best interpretation/construction of a statute or any other document is that which has been made by the contemporary authority. Simply stated, old statutes and documents should be interpreted as they would have been at the time when they were enacted/written.

Contemporary official statements throwing light on the construction of a statute and statutory instruments made under it have been used as contemporanea expositio to interpret not only ancient but even recent statutes in India.

10. When can the Preamble be used as an aid to the interpretation of a statute?

Sol. While the Preamble can be used to know the aims and objects of the legislation it cannot be used to control or qualify the precise and unambiguous language of an enactment. The preamble is the key to the mind of the maker of the law, but it cannot override in order to enlarge or restrict the enacting provision of the Act. A provision contained in the Act cannot be considered as invalid because they do not accord with the preamble, which is only a brief summary of legislative

objectives behind the Act, and if there is any conflict between the preamble and any provision of an Act, the provision prevails.

The preamble merely affords help in the matter of construction if there is any ambiguity. Where the language of the Act is clear, the court is bound to give it effect.

When will courts refer to the preamble as an aid to construction?

Situation 1: Where there is any ambiguity in the words of an enactment the assistance of the preamble may be taken to resolve the conflict

Situation 2: Where the words of an enactment appear to be too general in scope or application then courts may resort to the preamble to determine the scope or limited application for which the words are meant

11. How will you interpret the definitions in a statute, if the following words are used in a statute?

(i) Means

(ii) Includes

Give one illustration for each of the above from statutes you are familiar with.

Sol. Interpretation of the words "Means" and "Includes" in the definitions- The definition of a word or expression in the definition section may either be restricting of its ordinary meaning or may be extensive of the same.

When a word is defined to 'mean' such and such, the definition is 'prima facie' restrictive and exhaustive, we must restrict the meaning of the word to that given in the definition section.

But where the word is defined to 'include' such and such, the definition is 'prima facie' extensive, here the word defined is not restricted to the meaning assigned to it but has extensive meaning which also includes the meaning assigned to it in the definition section.

Example— Definition of Director [Section 2(34) of the Companies Act, 2013] — Director means a director appointed to the board of a company. The word "means" suggests exhaustive definition.

Definition of Whole time director [Section 2(94) of the Companies Act, 2013] — Whole time director includes a director in the whole time employment of the company. The word "includes" suggests extensive definition. Other directors may be included in the category of the whole time director

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?

Sol. 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, andhence 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.

2. Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:

(i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.

(ii) 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?

Sol. 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.

(i) 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.

(ii) 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 Authorized Person as defined in Section 2(*c*).

3. 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?

Sol. **Approval to the following transactions under FEMA, 1999:**

(i) Foreign Exchange drawals 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, 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.

4. 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.

Sol. 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,

(iii) 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.

(iv) 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.

5. Suresh resided in India during the Financial Year 2020-2021. He left India on 15th July 2021 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 2021-2022 and 2022-2023? 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?

Sol. **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 2020-2021 left on 15.7.2021 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 be treated as person resident in India for Financial Year 2021- 2022 till 16th July 2021 and from 17th July 2021, he will be considered as person resident outside India. However, during the Financial Year 2022-2023, Mr. Suresh will be considered as person residentoutside India as he left India on 15th July 2021.
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.

6. (*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.

Sol. 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 residingin 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 permissionor 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.

7. Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

(A) US$ 120,000 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)?

Sol. (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.

8. Explain the meaning of "Capital Account Transactions" under the Foreign Exchange Management Act, 1999. Examine whether an Investment by person resident in India in Foreign Securities is permissible or not under the above Act as Capital Account transactions.

Sol. Meaning of Capital Account Transaction: It 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 a person resident outside India, and includes transactions referred to in sub- section (3) of section 6 of FEMA Act, 1999.

The Reserve Bank of India has formed the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

As per these regulations, capital account transactions may be classified under the following heads.

(1) Permissible capital account transaction of persons resident in India (schedule 1)

(2) Permissible Capital transactions of persons resident outside India (schedule II).

(3) Prohibited capital account transactions.

A person resident in India may enter into any of the following capital account transactions provided the regulations specified by the Reserve Bank of India in respect of such capital account transactions are complied with.

In view of the above, an Investment by person resident in India in Foreign Securities is permissible capital account transaction.

9. Mr. Manthan, is deputed to India by his company to develop a software programme for a period of 3 years from 1st January, 2016. He is paid salary to his Indian bank account. On 1st May, 2018 he wants to remit his entire salaries ended till 30th April, 2018 to his home country USA. State

in the light of relevant provision, the way the remittance of the salary may be done as per the Foreign Exchange of Management Act, 1999.

Sol. As per Schedule III of the FEM (Current Account Transactions) Rules, 2000, a person who is resident but not permanently resident in India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary, after deduction of taxes, contribution to provident fund and other deductions. Accordingly, Mr. Manthan can remit the salary after payment of taxes and contributions related to social security schemes.

10. 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 .

Sol. The term "current account transaction" is defined in section 2(j) of Foreign Exchange Management Act, 1999. It means a transaction other than a capital account transaction and 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.

According to Section 5 of FEMA, 1999 any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction. Provided that the 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.

Further, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction subject to the provisions of section 6(2).

11. Mr. Daksh, an Indian National desires to obtain foreign exchange for the following purposes:

(i) Payment to be made for securing health insurance from a company abroad.

(ii) Payment of commission on exports under Rupee State Credit Route. Advise whether he can get foreign exchange and if so, under what condition?

Sol. Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. 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 prohibitions and restrictions on the drawal of foreign exchange for certain purposes. In the light of provisions of these rules, the answer to the given problem is as follows:

(i) Drawl of foreign exchange for securing health insurance from a company abroad does not fall under any of the Schedules I, II, or Ill. Therefore, such a transaction is permitted without any restriction or condition.

(ii) Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits payment of commission on exports under Rupees State Credit Route

(except commission upto 10% of invoice value of exports of tea and tobacco). 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 the invoice value of exports.

12. Enumerate the given situations in the light of the term defined as Current Account Transaction under FEMA.

(a) An Indian resident imports machinery from a vendor in UK for installing in his factory.

(b) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.

(c) An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.

Sol. (1) An Indian resident imports machinery from a vendor in UK for installing in his factory.

As per accounts and income-tax law, machinery is a "capital expenditure". However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence, the said transaction, is a Current Account Transaction.

(2) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.

As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(*j*)(*i*)], "short-term banking and credit facilities in the ordinary course of business" are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.

(3) An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.

Under accounts and income-tax law, gift is a "capital receipt". However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

13. Milap Limited, a company incorporated in India, has obtained consultancy services from an entity based in France for setting up the software programme in their company. The consideration for such services is required to be paid in foreign currency. The compliance officer of Milap Limited requires your advice regarding threshold limit of remittance that can be made without prior approval of RBI. You as a qualified Chartered Accountant are required to advise the compliance officer considering the provisions of Foreign Exchange Management Act, 1999 and regulations thereunder:

Sol. As per the Foreign Exchange Management Act, 1999 read with Schedule III of the FEM(Current Account Transactions) Rules, 2000, thereunder, there are various facilities for persons other than individuals which requires the prior approval of RBI for drawl of foreign exchange. One of such facility is remittances exceeding USD 1,000,000 per project for other consultancy services procured from outside India. In the given case, the person (i.e., Milap Limited) obtaining such

service from outside India is a body corporate, other than individual and accordingly to above provisions , where the remittances is exceeding the prescribed threshold, there Milap Limited will require to seek prior approval of RBI for drawl of such foreign exchange

14. 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?

Sol. 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 personin, 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

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