

**MOST IMPORTANT QUESTIONS FOR CA INTER
CORPORATE & OTHER LAWS**

**CHAPTER 11 – COMPANIES INCORPORATED OUTSIDE
INDIA**

**FOREIGN COMPANY | IMPROPER DESCRIPTION AS
FOREIGN COMPANY**

Question 1A

Trans Asia Limited is registered as a public company u/s 4 (7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Trans Asia Limited carries on business in India describing itself as a foreign company. Can it do so? State the actions that can be taken against the company for improper use or description as foreign company under the provisions of the Companies Act, 2013.

Answer

Section 2(42): Definition of Foreign Company

"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.

Rule 12: Action for Improper Use or Description as Foreign Company

If any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person.

In the instant case, Trans Asia Limited is registered as a public company u/s 4(7) of the erstwhile Companies Act, 1956 which is a subsidiary of Galilio Limited, a foreign company. Though Trans Asia Limited is a subsidiary of a foreign company but since it is registered in India, it is not a foreign company. Hence, it **cannot describe itself as a foreign company**.

Hence, it shall be liable for **investigation under section 210** of the Act and **action** consequent upon that investigation shall be taken against that person.

FOREIGN COMPANY

Question 1B

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 and does not conduct any business activity 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.

Answer

Definition of foreign company: Same as above

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

Answer (i)

As per the facts, a company is registered in Moscow, Russia and has installed its main server in Moscow for maintaining office automation software by Cloud Computing for its client in India. Thus, it can be said that this company has a place of business in India through electronic mode and is conducting business activity in India. Hence, the above company is a foreign company.

Answer (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 and conducts any business activity in India. Since, the company though employed agent in India but have no place of business in India and does not conduct any business activity in India, **so it CANNOT be termed as foreign company.**

Answer (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.**

Answer (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.

FOREIGN COMPANY & ELECTRONIC MODE – SECTION 2(42)

Question 1C

In the light of the provisions of the Companies Act, 2013, examine whether the following Companies can be considered as a 'Foreign Company':

- (i) 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) Xen 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.

Answer

Definition of foreign company: Same as above

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.

Whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

(i) In the given situation, 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, Xen 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 Xen Limited Liability Company

has a place of business in India through electronic mode and is conducting business activity in India. Hence, Xen Limited Liability Company is a foreign company as per the Companies Act, 2013.

FOREIGN COMPANY | INDIANS OWNED FOREIGN COMPANY

Question 1D

Kids Toys Limited, a company incorporated in Japan, has established its branch office in Mumbai for business to be conducted in India. The structure of paid-up share capital of Kids Toys Limited as at 31.03.2020 is as below:

Preference share capital held by Jiyalal, an Indian citizen:	10 %
Equity share capital held by Ramlal, an Indian Citizen:	20 %
Equity share capital held by Smart Toys Limited, Indian National company:	20 %

You are being a Chartered Accountant is requested to explain with reference to the provisions of the Companies Act, 2013: -

- (1) whether Kids Toys Limited shall be deemed to be a foreign Company or an Indian Company for the business carried on by it in India and
- (2) whether for such Indian business, will it be required to comply with the relevant provisions of the companies Act, 2013 as if it is an Indian Company.

Answer

Definition of foreign company: Same as above

Answer 1

Accordingly, Kids Toys Limited, a Japanese Company has established a place of business in India (branch office in Mumbai) and also carries on the business in India. Hence, this Company shall be deemed to be a Foreign Company.

Section 379(2): Indians owned Foreign Company

Where not less than 50% of the paid-up share capital, whether

1. equity or
 2. preference or
 3. partly equity and partly preference,
- of a foreign company is held by :-

(A) one or more citizens of India or by

(B) one or more companies or bodies corporate incorporated in India, or by

(C) 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.

Answer 2

Accordingly, preference share capital held by Jiyalal and equity share capital held by Ramlal, both being Indian citizens, besides equity share capital held by Smart Toys Limited, an Indian Company, in Kids Toys Limited (Company incorporated in Japan) are 10%, 20% and 20% respectively. In aggregate, Jiyalal, Ramial and Smart Toys Limited are holding 50% of the paid-up share capital of a foreign Company.

Thus, Kids Toys Limited, 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.

Documents, etc., to be delivered to Registrar by foreign companies – Section 380

Question 2A

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

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

Answer i

CS LLM ARJUN CHHABRA

The Companies Act, 2013 vide section 380 state that every foreign company is required to deliver to the Registrar for registration, within 30 days of the establishment of office in India, documents which have been specified therein.

According to the Companies (Registration of Foreign Companies) Rules, 2014, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

Answer ii - Section 392: Punishment for contravention

Fine to Company	Office in default
Min: 100000 Max: 300000 Continuing offence: Additional fine max 50000/day.	Min: 25000 Max: 500000

TRANSLATED COPY OF INSTRUMENT – SECTION 380 (1)

Question 2B

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.

Answer

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.

Alteration in documents to be delivered to ROC – Section 380 (3)

Question 2C

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.

Answer

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.

Question 2D

DEJY is a Company Limited incorporated in Singapore desires to establish a branch office at Mumbai. You being a practicing Chartered Accountant have been appointed by the company as a liaison officer for compliance of legal formalities on behalf of the company. Examining the provisions of the Companies Act, 2013, answer the following:

- (i) Whether branch office will be considered as a company incorporated outside India.
- (ii) If yes, state the documents you are required to furnish on behalf of the company, establishment of a branch office at Mumbai.

Answer

- (i) Section 2 (42): Same as above

Further, **branch offices are generally considered as reflection of the Parent Company' office**. Thus, branch offices of a company incorporated outside India are considered as a place of business for conducting business activity in India and will be required to follow provisions of this chapter and such other provisions as may be specified elsewhere under Companies Act, 2013.

- (ii) Under section 380(1) of the Companies Act, 2013 every foreign company shall, **within 30 days of the establishment of place of business in India**, deliver to the Registrar for registration the following documents:

- (a) a **certified copy** of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instruments are **not in the English language**, a certified **translation** thereof in the **English language**;
- (b) the **full address** of the registered or principal office of the company;
- (c) a **list of the directors** and **secretary** of the company containing such particulars as may be prescribed;

- (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 or 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.

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.

ACCOUNTS OF FOREIGN COMPANY – SECTION 381

Question 3

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

Answer

According to section 381 of the Companies Act, 2013:

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

- (a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and
- (b) deliver a copy of those documents to the Registrar.

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

- 1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.
 - 2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.
- (ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) of section 381(1) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf.
- (iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]
- (iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

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)

(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.

DISPLAY OF NAME, ETC., OF FOREIGN COMPANY - SECTION 382

Question 4

The liability of members of Style Limited, a company incorporated in Singapore, is limited. The company plans to start a place of business in Mumbai from 1st Dec. 2016. It has taken an office space in Andheri (West), Mumbai for that purpose. The person who is to take charge of Mumbai Office seeks your advice regarding the provisions of the Companies Act, 2013, in respect of displaying of the company's name etc., at its Mumbai office as well as in its business letters and other documents. Advise him with reference to the provisions of the Companies Act, 2013 governing foreign companies.

Answer

Section 382: Display of Name, etc., of Foreign Company

Display outside office of name and country

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

Display on the business letter, billheads, etc.

Every foreign company shall cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, billheads and letter paper, and in all notices, and other official publications of the company; and

Display of Limited Liability status

Every foreign company shall if the liability of the members of the company is limited, cause notice of that fact—

1. 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

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

In the given case the person who is to taken charge of Mumbai Office of Style Limited may follow the above provisions in respect of displaying of the company's name etc. at its Mumbai office as well as in its business.

SERVICE ON FOREIGN COMPANY - SECTION 383

Question 5

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

Answer

Section 383: Service on Foreign Company

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 u/s 380 or at the address of the place of business in India and

- (i) left at (Hand delivery), or
- (ii) sent by Post or
- (iii) by electronic mode (email/fax).

The VAT Officer may serve the show cause notice by following the above provisions.

DATING OF PROSPECTS AND PARTICULARS TO BE CONTAINED THEREIN SECTION 387

Question 6

Blue Berry Ltd. is a Company incorporated outside India. 50% of its preference share capital and 20% of its equity share capital are held by Companies incorporated in India. It issued prospectus inviting subscriptions in India for its shares but did not state the Country in which it is incorporated. Examine in the light of the provisions of the Companies Act, 2013 whether the issue of prospectus by the Company is valid.

Answer

Section 387(1): Prospectus to contain prescribed particulars

No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and contains particulars with respect to the date on which and the COUNTRY in which the company would be or was incorporated.

It is irrelevant that more than 50% Share Capital of the Company incorporated outside India is owned by Indian Companies.

In the instant case, issue of prospectus by Blue Berry Limited is not valid as it did not state the Country in which it is incorporated.

REGISTRATION OF PROSPECTUS – SECTION 389

Question 7

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.

Answer

Section 389: Registration of Prospectus

Company incorporated outside India/Foreign company shall file the Prospectus with ROC, New Delhi.

A company incorporated outside India (CIOI) shall NOT issue, circulate or distribute in India any prospectus offering for subscription of its securities, unless the following conditions are satisfied: -

- (1) The prospectus is approved by the Board of Directors.
- (2) The prospectus is certified by the Chairperson and 2 other Directors.
- (3) It has been delivered for registration to the Registrar.
- (4) The prospectus states on the face of it that a copy has been delivered to ROC.
- (5) The prospectus contains the prescribed annexures below.

Documents to be Annexed to Prospectus

- (a) Expert's Consent.
- (b) MD's Appointment Contract.
- (c) Other Material Contract.
- (d) Underwriting Agreement.
- (e) Power of Attorney.

DEFINITION [2(42)] | INDIAN OWNED FC (379) | IDR (390)

Question 8

Examine in the light of the provisions of the Companies Act, 2013 whether the following companies can be considered as "Foreign Companies". Assume all of them have a place of business in India & conduct business In India.

- (i) A company incorporated outside India having shareholders who are all Indian citizens.
- (ii) A company incorporated in India but all the shares are held by foreigners.
- (iii) Also examine whether the above companies can issue Indian Depository Receipts under the provisions of the Companies Act, 2013?

Answer

Section 2(42): Definition of Foreign Company

"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.

Section 379(2): Indians owned Foreign Company

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:-

- (A) one or more citizens of India or by
- (B) one or more companies or bodies corporate incorporated in India, or by

(C) 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.

Sec 390: Offer of Indian Depository Receipts

Company, which is incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India may make an issue of Indian Depository Receipts (IDRs) by complying with the conditions mentioned under this rule, in addition to the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009.

Answer

Type of Company	Foreign Company?	IDR issue?
A company incorporated outside India having shareholders who are all Indian citizens.	It is a Foreign Company.	It can issue IDR.
A company incorporated in India but all the shares are held by foreigners.	It is NOT a Foreign Company.	It cannot issue IDR.

COMPANY'S FAILURE TO COMPLY WITH PROVISIONS OF THIS CHAPTER NOT TO AFFECT VALIDITY OF CONTRACTS, ETC. – SECTION 393

Question 9

Z Limited, a Foreign Company, incorporated in Japan has a branch office in Hyderabad in India. Mr. Bhartiya, the Indian Citizen holds preference shares of Z Limited which comprises 10% of the paid-up share capital of the company. Deshi Limited, a company incorporated in India holds equity shares of Z Limited which comprises 45% of the paid-up share capital of the company. During the financial year 2019-20, there has been alteration in the particulars of the documents mentioned under section 380 of the Act and the company has failed to submit the alterations to the Registrar within 30 days. Analyse in the light of the applicable laws the consequences of failure on the validity of any contracts entered into by the foreign company?

Answer

Section 379(2): Indians owned Foreign Company

Same as above

Section 393: Company's Failure to Comply not to affect Validity of Contracts, etc.

Any failure by a company to comply with the provisions of this Chapter shall NOT affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof.

However, the company shall not be entitled to: -

- (i) bring any suit,
- (ii) claim any set-off,
- (iii) make any counter-claim or

(iv) institute any legal proceeding in respect of any such contract, dealing or transaction, **until** the company has complied with the provisions of this Act applicable to it.

In the above question, 55% of the paid-up share capital of the company are held by an Indian citizen and Indian company.

Hence, the 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.

There has been non-compliance of section 380 of the Act by Z Limited. So as per section 393 of the Act, the validity of any contract entered into by the foreign company shall not be affected.

However, the company may be sued in respect of such contract but shall not be entitled to bring any suit in respect of such contract until the company has complied with the provisions of this Act applicable to it.

AUDIT OF FS (381), VALIDITY OF CONTRACTS (393) & ANNUAL RETURN (384)

Question 10

Phil Heath Systems Incorporated (PHSI), is a foreign Company registered in Australia and has established a place of business in India. The financial statements pertaining to the Indian business operations for the year ended 31st March, 2020 were prepared by the Company. Referring to the provisions of the Companies Act, 2013, advise the Company on the following matters:

- (i) Whether the accounts of the Company pertaining to Indian business operations shall be audited? If yes, by whom?
- (ii) What is the due date for filing the audited financial statements with the Registrar of Companies (RoC)?
- (iii) What is the effect of the contracts entered by an Indian Company with PHSI in case PHSI has not filed financial statements with the RoC?
- (iv) In which e-form and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies?

Answer

Phil Health Systems Incorporated (PHSI), a foreign company, is registered outside India and has a place of business in India. As it has prepared financial statements pertaining to the Indian business operations, it reflects conducts of business activity in India. Therefore, provisions related to companies incorporated outside India shall be applicable to it. Following are the answer in line with said nature of the company.

Answer (i): Sec 381: Audit of FS

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. The Provisions of Audit Chapter shall apply mutatis mutandis on the Foreign Company as well.

Answer (ii) Sec 381: Due date for filing FS

PHSI shall deliver a copy of audited financial statements of Indian business operations to the Registrar, New Delhi in Form FC-3, within a period of 6 months of the close of the financial year of the foreign company to which the documents relate. 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 3 months.

Answer (iii): Sec 393: Company's Failure to Comply not to affect Validity of Contracts

In the instant case, non-filing of financial statements by PHSI 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.

However, the company shall not be entitled to :-

- (i) bring any suit,
- (ii) claim any set-off,
- (iii) make any counter-claim or
- (iv) institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of this Act applicable to it.

Answer (iv) Section 384(2): Annual Return

PHSI shall prepare and file, within a period of 60 days from the last day of its financial year, to the Registrar, New Delhi; Annual Return in Form FC-4 along containing the particulars as they stood on the close of the financial year.

CHAPTER – 12: The Limited Liability Partnership, 2008

Introduction/Background

The Partnership Act was enacted during the year 1932.

The Partnership Act, 1932 suffers from **certain disadvantages**, as detailed below:

- The **liability** of each partner is **unlimited**;
- The partners are **jointly and severally** liable for the debts and liabilities of the firm to the risk of the personal assets of the partners;
- The partner is **not having right to transfer his holding** in the partnership unless he retires from partnership and other partners agree to admit the same;
- The **number of members is limited** by which more investments will not be there which results inhibiting the growth of the business.

A **need** has been felt for a long time to provide for a business format that would **combine** the **flexibility of a partnership** and the **advantages of the limited liability of the company** at a **low compliance cost**.

During the financial crisis of the late **1980s** and early **1990s** hundreds of US saving and loan firms were declared insolvent. As a result of the collapse many accountancy and legal firms faced legal claims instigated by the US government. Successful claims could have resulted in all partners, including those who were not responsible for the failure of the savings and loan firms, being liable to repay millions of dollars in compensation. **In 1991** Texas introduced the concept of a limited liability partnership (LLP). The concept was popular and the majority of US states eventually passed LLP legislation.

The LLP structure is available in countries like United Kingdom, United States of America, various Gulf countries, Australia and Singapore. **In India** on the advice of experts who have studied LLP legislations in various countries, the **LLP Act is broadly based on UK LLP Act 2000 and Singapore LLP Act 2005**. Both these Acts allow creation of LLPs in a body corporate form i.e. as a separate legal entity, separate from its partners/members.

Question 1 "LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership". Explain. [May 19, 5 Marks] [July 21 – 5 Marks] [MTP Oct 20 – 5 Marks] [MTP Oct 21 – 5 Marks] [RTP May 22 - Marks] CS LLM Arjun Chhabra

Answer:

LLP is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership

Limited Liability: Every partner of an 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 itself 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.

Body Corporate [(Section 2(d))]: It means a company as defined in clause (20) of section 2 of the Companies Act, 2013 and includes

- (i) a limited liability partnership registered under this Act;
- (ii) a limited liability partnership 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, 2013 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.

Business [Section 2(e)]: “Business” includes every trade, profession, service and occupation except any activity which the Central Government may, by notification, exclude.

Question 2

What is Small Limited Liability Partnership as per Limited Liability Partnership (Amendment) Act, 2021?[RTP Nov 22 - 5 Marks] [RTP June 23]

Answer:

“Small Limited Liability Partnership [Section 2(ta) of the Limited Liability Partnership Act, 2008]: It means a Limited Liability Partnership—

- (i) the contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and
- (ii) the turnover of which, as per the Statement of Accounts and Solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount, not exceeding fifty crore rupees, as may be prescribed; or
- (iii) which meets such other requirements as may be prescribed and fulfils such terms and conditions as may be prescribed.

Question 3 Who are the individuals which shall not be capable of becoming a partner of a Limited Liability Partnership? [RTP Nov 19] CS LLM Arjun Chhabra

Answer:

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.

For knowledge: An Undischarged Insolvent or Undischarged Bankrupt is a person who has submitted a bankruptcy petition to the court of law and whose debts are still being assessed by the court. The court will allow the person to submit all the persons assets and liabilities, list of creditors, list of debtors and will evaluate the persons ability to pay off, which creditors to pay, how much to pay etc.

Until the court decides all of the above, the person is an undischarged bankrupt or insolvent. Once the court passes appropriate orders - the bankruptcy petition is disposed off and the person will be discharged by a court. Once this is done, the person becomes a discharged bankrupt or discharged insolvent.

Related Question: 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. [Module Question]

Partners (Section 5 of Limited Liability Partnership Act, 2008): Same as above

Body Corporate [(Section 2(d)]: Same as above

Therefore, HUF is not covered in the definition of body corporate and cannot be partner in LLP.

Question 4

What do you mean by Designated Partner? Whether it is mandatory to appoint Designated partner in a LLP? [MTP Oct 19, 5 Marks] [RTP Nov 20] [RTP May 21] [MTP Nov 21 – 5 Marks]

Answer:

Designated partners (Section 7)

(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**

(b) 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;

(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.

(6) 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.

Related Question: 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?

Question 5

Explain the incorporation by registration of a Limited Liability Partnership and its essential elements under the LLP Act, 2008. [May 22- 5 Marks]

Explain the essential elements to incorporate a Limited Liability Partnership and the steps involved therein under the LLP Act, 2008. [Nov 18, 5 Marks] CS LLM Arjun Chhabra

Related Question: What are the essential elements to form a LLP in India as per the LLP Act, 2008? [May 18, 5 Marks] [RTP Nov 18]

Related Question: State the meaning of Limited Liability Partnership (LLP). What are the relevant steps to incorporate LLP? [MTP March 18, 5 Marks] [MTP Oct 18, 5 marks] [MTP April 19, 5 Marks]

Answer:

Meaning: 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.

Incorporation by registration (Section 12 of LLP Act, 2008):

(1) When the requirements imposed by clauses (b) and (c) of sub-section (1) of section 11 have been complied with, the Registrar shall retain the incorporation document and, unless the requirement

imposed by clause (a) of that sub-section has not been complied with, he shall, within a period of 14 days—

- (a) register the incorporation document; and
 - (b) give a certificate that the LLP is incorporated by the name specified therein.
- (2) The Registrar may accept the statement delivered under clause (c) of sub-section (1) of section 11 as sufficient evidence that the requirement imposed by clause (a) of that sub section has been complied with.
- (3) The certificate issued under clause (b) of sub-section (1) shall be signed by the Registrar and authenticated by his official seal.
- (4) The certificate shall be conclusive evidence that the LLP is incorporated by the name specified therein.

Essential elements to incorporate Limited Liability Partnership (LLP)- 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 Ministry of Corporate Affairs.
- (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.**

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 30 days of incorporation of LLP.

Question 6

What do you mean by Limited Liability Partnership (LLP)? What are the advantages for forming a LLP for doing business? [RTP May 18] [RTP May 19] CS LLM Arjun Chhabra

Answer:

Meaning- Same as above.

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 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. In other words, creditors of LLP shall be the creditors of LLP alone.
4. **Mutual Agency:** 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. **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. **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.

6. **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.
7. **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.
8. **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.
9. **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.
10. **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.

Advantages of LLP form- LLP form is a form of business model which:

- is organized and operates on the basis of an agreement.
- Provide flexibility without imposing detailed legal and procedural requirements.
- Easy to form
- All partners enjoy limited liability
- Flexible capital structure
- Easy to dissolve

Question 7

State the rules regarding the registered office of a Limited Liability Partnership (LLP) and change therein as per provisions of the Limited Liability Partnership Act, 2008. [Dec 21 – 5 Marks]

Answer:

Registered office of LLP and change therein (Section 13):

1. Every limited liability partnership 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 limited liability partnership 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 limited liability partnership for the purpose in such form and manner as may be prescribed.

3. A limited liability partnership 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.

Question 8

What are the effects of registration of LLP? [RTP Nov 19] CS LLM Arjun Chhabra

Answer:

Effect of registration (Section 14 of Limited Liability Partnership Act, 2008):

On registration, a LLP shall, by its name, be capable of—

- (a) suing and being sued;
- (b) acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible;
- (c) having a common seal, if it decides to have one; and
- (d) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

Name (Section 15):

- (1) Every limited liability partnership shall have either the words limited liability partnership or the acronym LLP as the last words of its name.
- (2) No limited liability partnership 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 limited liability partnership or a company or a registered trade mark of any other person under the Trade Marks Act, 1999.

Reservation of name (Section 16):

1. A person may apply in such form and manner and accompanied by such fee as may be prescribed to the Registrar for the reservation of a name set out in the application as-
 - a) the name of a proposed LP; or
 - b) the name to which a LLP proposes to change its name
2. Upon receipt of an application under sub-section (1) and on payment of the prescribed fee, the Registrar may, if he is satisfied, subject to the rules prescribed by the Central Government in the matter, that the name to be reserved is not one which may be rejected on any ground referred to in sub-section (2) of section 15, reserve the name for a period of 3 months from the date of intimation by the Registrar.

Question 9

What is the procedure for changing the name of Limited Liability Partnership (LLP) under the LLP Act, 2008? [RTP May 20] CS LLM Arjun Chhabra

Answer:

Change of name of LLP (Section 17):

(1) Notwithstanding 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 trade marks 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 sub-section (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 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.

Question 10

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?

Answer

Section 15: Same as above

Section 17: Same as above

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 case 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.

Question 11

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?

Answer

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.

Registration of changes in partners (Section 25):

- (1) Every partner shall inform the limited liability partnership of any change in his name or address within a period of fifteen days of such change.
- (2) A limited liability partnership shall
 - (a) where a person becomes or ceases to be a partner, file a notice with the Registrar within thirty days from the date he becomes or ceases to be a partner; and
 - (b) where there is any change in the name or address of a partner, file a notice with the Registrar within thirty days of such change.

- (3) A notice filed with the Registrar under sub-section (2)
- (a) shall be in such form and accompanied by such fees as may be prescribed;
 - (b) shall be signed by the designated partner of the limited liability partnership and authenticated in a manner as may be prescribed; and
 - (c) if it relates to an incoming partner, shall contain a statement by such partner that he consents to becoming a partner, signed by him and authenticated in the manner as may be prescribed.
- (4) If the limited liability partnership contravenes the provisions of sub-section (2), the limited liability partnership and its every designated partner shall be liable to a penalty of ten thousand rupees.
- (5) If the contravention referred to in sub-section (1) is made by any partner of the limited liability partnership, such partner shall be liable to a penalty of ten thousand rupees.
- (6) Any person who ceases to be a partner of a limited liability partnership may himself file with the Registrar the notice referred to in sub-section (3) if he has reasonable cause to believe that the limited liability partnership may not file the notice with the Registrar and in case of any such notice filed by a partner, the Registrar shall obtain a confirmation to this effect from the limited liability partnership unless the limited liability partnership has also filed such notice: Provided that where no confirmation is given by the limited liability partnership within fifteen days, the Registrar shall register the notice made by a person ceasing to be a partner under this section.

Question 12

Discuss the conditions under which LLP will be liable and not liable for the acts of the partner. [Nov 19, 5 Marks] [RTP Dec 23]

Answer:

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.

Question 13

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?

Answer

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 & 3,00,000 from the partners of Devi Ram Food Circle LLP.

Question 14

State the circumstances under which a LLP and its partners may face unlimited liability under the Limited Liability Partnership Act, 2008. [Jan 21 – 5 Marks]

Discuss the liabilities of Limited Liability Partnership (LLP) and its partners in case of fraud as per the provisions of the Limited Liability Partnership Act, 2008. [June 23 - 5 Marks]

CS LLM ARJUN CHHABRA

Answer:

Unlimited liability in case of fraud (Section 30 of the Limited Liability Partnership Act, 2008):

(1) In case of fraud:

- In the event of an act carried out by a limited liability partnership, or any of its partners,
- with **intent to defraud creditors** of the limited liability partnership or any other person, or for any **fraudulent purpose**,
- the **liability** of the limited liability partnership 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 limited liability partnership:

Provided that in case any such act is carried out by a partner, the limited liability partnership is liable to the same extent as the partner unless it is established by the limited liability partnership that such act was without the knowledge or the authority of the limited liability partnership.

(2) **Punishment:** Where any business is carried on with such intent or for such purpose as mentioned in sub-section (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 five years** and with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

(3) **Compensations on commission of fraud:** Where a limited liability partnership or any partner or designated partner or employee of such limited liability partnership has conducted the affairs of the limited liability partnership in a fraudulent manner, then **without prejudice to any criminal proceedings** which may arise under any law for the time being in force, the limited liability partnership 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:

Provided that such limited liability partnership shall not be liable if any such partner or designated partner or employee has acted fraudulently without knowledge of the limited liability partnership.

Question 15

What is the procedure for maintenance of books of account, other records and audit of Limited Liability Partnership under LLP Act, 2008? [RTP Nov 22]

Answer:

Maintenance of books of account, other records and audit, etc. (Section 34):

(1) The limited liability partnership shall maintain such **proper books of account** as may be prescribed relating to its affairs for **each year** of its existence on **cash basis or accrual basis** and

according to **double entry system** of accounting and shall maintain the same at its **registered office** for such period as may be prescribed.

(2) Every limited liability partnership shall, **within a period of six months** from the end of each financial year, prepare a **Statement of Account and Solvency** for the said financial year as at the last day of the said financial year in such form as may be prescribed, and such statement shall be signed by the designated partners of the limited liability partnership.

(3) Every limited liability partnership shall **file** within the prescribed time, the Statement of Account and Solvency prepared pursuant to sub-section (2) with the **Registrar every year** in such form and manner and accompanied by such fees as may be prescribed.

(4) The accounts of limited liability partnerships shall be **audited** in accordance with such rules as may be prescribed:

Provided that the **Central Government may**, by notification in the Official Gazette, **exempt** any class or classes of limited liability partnerships from the requirements of this sub-section.

(5) Any limited liability partnership which fails to comply with the provisions of sub-section (3), such limited liability partnership and its designated partners shall be liable to a **penalty of one hundred rupees for each day** during which such failure continues, subject to a **maximum of one lakh rupees for the limited liability partnership and fifty thousand rupees for every designated partner.**

(6) Any limited liability partnership which fails to comply with the provisions of sub-section (1), sub-section (2) and sub-section (4), such limited liability partnership shall be **punishable with fine which shall not be less than twenty-five thousand rupees, but may extend to five lakh rupees and every designated partner of such limited liability partnership shall be punishable with fine which shall not be less than ten thousand rupees, but may extend to one lakh rupees.**

Question 16

List the differences between the Limited Liability Partnership and the Limited Liability Company.

[RTP May 18] [MTP March 19] CS LLM Arjun Chhabra

Related Question: "A LLP (Limited Liability Partnership) is a type of partnership in which participants' liability is fixed to the amount of money they invest whereas a LLC (Limited Liability Private/Public Company) is a tightly held business entity that incorporates the qualities of a corporation and a partnership".

In line of above statement clearly elaborate the difference between LLP and LLC. [Nov 22- 5 Marks]

Answer:

	Basis	LLP	Limited Liability Company (LLC)
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 structure	The internal governance 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 members Public company: Minimum – 7 members Maximum – No such limit on the members. Members can be organizations, trusts, another business form or individuals.
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

Question 17

Differentiate between a LLP and a partnership firm? [RTP Nov 18] [RTP Nov 21] CS LLM Arjun Chhabra

Answer:

	Basis	LLP	Partnership firm
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 registration under the LLP Act, 2008.	It is created by an agreement between the partners.
5.	Registration	Registration is mandatory. LLP can sue and be sued in its own name.	Registration is voluntary. Only the registered partnership firm can sue 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 upto 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	There is no provision for such partners under the Indian partnership Act, 1932.

Question 18

Explain the circumstances in which LLP may be wound up by Tribunal under the LLP Act, 2008. [RTP May 20] [Dec-20 5-Marks]

Answer:

Circumstances in which LLP may be wound up by Tribunal (Section 64 of the LLP Act, 2008): A LLP may be wound up by the Tribunal:

- (a) if the LLP decides that LLP be wound up by the Tribunal;
- (b) if, for a period of more than six months, the number of partners of the LLP is reduced below two;
- (c) if the LLP is unable to pay its debts;
- (d) if the LLP has acted against the interests of the sovereignty and integrity of India, the security of the State or public order;
- (e) 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
- (f) if the Tribunal is of the opinion that it is just and equitable that the LLP be wound up.

CS LLM ARJUN CHHABRA

MOST IMPORTANT QUESTIONS OF OTHER LAWS

CHAPTER 1 -The General Clauses Act,1897

DEFINITIONS

FINANCIAL YEAR

Question 1

A confusion, regarding the meaning of 'financial year' arose among the financial executive and accountant of a company. Both were having different arguments regarding the meaning of financial year & calendar year. What is the correct meaning of financial year under the provision of the General Clauses Act, 1897? How it is different from calendar year?

Answer

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 the General Clauses Act, 1897, 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.

OFFICIAL GAZETTE

Question 2

What is the meaning of 'Official Gazette' as per the provisions of the General Clauses Act, 1897?

Answer

"Official Gazette" [Section 3(39) of the General Clauses Act, 1897]: 'Official Gazette' or 'Gazette' shall mean:

- (i) The Gazette of India, or
- ii) The Official Gazette of a state.

The Gazette of India is a **public journal and an authorised legal document of the Government of India**, published weekly by the Department of Publication, Ministry of Housing and Urban Affairs.

As a public journal, the Gazette prints official notices from the government. It is authentic in content, accurate and strictly in accordance with the Government policies and decisions. The gazette is printed by the Government of India Press.

RULE/OATH/PERSON

Question 3

Give the definition of the following as per the General Clauses Act, 1897:

- (i) "Rule"
- (ii)"Oath"
- (iii)"Person"

Answer

- (i) **Rule:** As per section 3(51) of the General Clauses Act, 1897, 'Rule' shall mean a rule made in exercise of a power conferred by any enactment, and shall include a Regulation made as a rule under any enactment.

- (ii) **Oath:** As per section 3(37) of the General Clauses Act, 1897, 'Oath' shall include affirmation and declaration in the case of persons by law allowed to affirm or declare instead of swearing.
- (iii) **Person:** As per section 3(42) of the General Clauses Act, 1897, "Person" shall include:
- any company, or
 - association, or
 - body of individuals, whether incorporated or not.

IMMOVABLE PROPERTY

Question 4

X owned a land with fifty tamarind trees. He sold his land and the (obtained after cutting the fifty trees) to Y. X wants to know whether the sale of timber tantamounts to sale of immovable property. Advise him with reference to provisions of "General Clauses Act, 1897".

Answer

"Immovable Property" [Section 3(26) of the General Clauses Act, 1897]: Immovable Property' shall include:

- Land,
- Benefits to arise out of land, and
- Things attached to the earth, or
- 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, X 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.

Question 5

Examine the validity of the following statements with reference to the General Clauses Act, 1897:

- Insurance Policies covering immovable property have been held to be immovable property.
- The word "bullocks" could be interpreted to include "cows".

Answer

- 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.
- 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'.

GOOD FAITH AND AFFIDAVIT

Question 6

Define the following terms with reference to the General Clauses Act, 1897:

- Good Faith
- Affidavit

Answer

- (i) **"Good Faith" [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 be determined with reference to the circumstances of each case. Thus, anything done with due care and attention, which is not malafide, whether it is done negligently or not is presumed to have been done in good faith.

- (ii) **"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.

GOVERNMENT

Question 7

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.

Answer

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.

Commencement

Question 8

Elucidate the term "Commencement as per the General Clauses Act, 1897.

Answer

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).

COMING INTO OPERATION OF ENACTMENTS -SECTION 5

Question 9

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 14 August. 2015 with effect from 1st January. 2016.

Answer

- 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.

EFFECT OF REPEAL – SECTION 7

Question 10

Explain briefly any four effects by repeal of an existing Act by central legislation enumerated in Section-6 of The General Clauses Act, 1897.

Answer

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:**

- **Revive** anything not enforced or prevailed during the period at which repeal is effected or;
- **Affect the prior management of any legislation** that is repealed or anything performed or undergone or;
- **Affect any claim, privilege, responsibility**, or debt obtained, ensued or sustained under any legislation so repealed or;
- **Affect any punishment, forfeiture or penalty** sustained with regard to any offence committed as opposed to any legislation or
- **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.

CONSTRUCTION OF REFERENCES TO REPEALED ENACTMENTS – SECTION 8

Question 11

Section 2(18) (aa) of the Income Tax Act, 1961, provides that a company is said to be a company in which the public are substantially interested, if it is a company which is registered under section 25 of the Companies Act, 1956. After the advent of Companies Act, 2013, the corresponding change

has not been made in section 2(18) of the Income tax Act, 1961. Explain, with reference to the provisions of the General Clauses Act 1897, how will the provisions of section 2(18) (aa) of the Income Tax Act, 1961, will be considered after the enactment of the Companies Act 2013?

Answer

According to section 8 of the General Clauses Act, 1897, where this Act or Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted.

Also, in Gauri **Shankar Gaur v. State of U.P.**, it was held that every Act has its own distinction. If a later Act merely makes a reference to a former Act or existing law, it is only by reference and all amendments, repeals new law subsequently made will have effect unless its operation is saved by the relevant provision of the section of the Act.

As per the facts of the question, even after the advent of the Companies Act 2013, no corresponding amendment was done in section 2(18) (aa) of the Income Tax Act, 1961, which provides that a company is said to be a company in which the public are substantially interested, if it is a company which is registered under section 25 of the Companies Act, 1956.

In the given situation, as per section 8 of the General Clauses Act, 1897 and the decision of case of Gauri Shankar Gaur v. State of U.P., for section 2(18) (aa) of the Income Tax Act, 1961, provisions of the Companies Act, 2013 will be applicable in place of the Companies Act, 1956.

COMMENCEMENT AND TERMINATION OF TIME – SECTION 9

Question 12

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?

Answer

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 dividend:** 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).

COMPUTATION OF TIME – SECTION 10

Question 13

Ajit was supposed to submit an appeal to High Court of Kolkata on 30th March, 2020, which was the last day on which such appeal could be submitted. Unfortunately, on that day High Court was closed due to total Lockdown all over India due to Covid-19 pandemic. Examine the remedy available to Ajit under the provisions of the General Clauses Act, 1897.

Answer

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 question, Ajit was supposed to submit an appeal to High Court on 30th March 2020, which was the last day of filing the same. On that day High Court was closed due to total lockdown all over India. **In line with said provision, Ajit can submit an appeal on the day on which the High Court is open.**

MEASUREMENT OF DISTANCES – SECTION 11

Question 14

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?

Answer

Measurement of Distances" [Section 11 of the General Clauses Act, 1897]: 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**.

GENDER V NUMBER – SECTION 13

Question 15

Mrs. Neelu Chandra was director in Laddoo Sweets Private Limited. Once while dealing with supplier of raw materials for company, she agreed to get some secret commission from supplier for making the deal. Afterwards, on finding the facts, the company has filed the suit against Mrs. Neelu Chandra. She contended that section 166 of the Companies Act, 2013, provides "A director of a company shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company." She contended that section 166 is applicable to male director only, she being female will not be liable.

In the light of the provisions of the General Clauses Act, 1897, decide whether she is bound by the provisions of section 166 of the Companies Act, 2013?

Answer

By virtue of provisions of section 13 of the General Clauses Act, 1897, in all Central Acts or Regulations, unless there is anything repugnant in the subject or context, words importing the masculine gender shall be taken to include females.

Mrs. Neelu Chandra, director in Laddoo Sweets Private Limited, made an undue gain in the form of commission (from supplier for making the deal) in dealing for Laddoo Sweets Private Limited but she denied accepting the liability by saying that the language of section 166 provides penalty only for male directors not for females.

On the basis of provisions of the General Clauses Act, 1897 and facts of the case, the provisions of section 166 of the Companies Act, 2013, are not only applicable to males but also to females. Therefore, Mrs. Neelu Chandra is bound to comply by section 166 of the Companies Act, 2013.

MAKING OF RULES OR BYE-LAWS AND ISSUING OF ORDERS BETWEEN PASSING AND COMMENCEMENT OF ENACTMENT – SECTION 22

Question 16

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.

Answer

“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.

PROVISIONS APPLICABLE TO MAKING OF RULES OR BYE-LAWS AFTER PREVIOUS PUBLICATION – SECTION 23

Question 17

The Ministry of Corporate Affairs (MCA) published in the Gazette of India, the proposed draft of Rules further to amend certain rules under the Companies Act, 2013. The MCA made some modifications in the draft Rules already published. In the light of the provisions of the General Clauses Act, 1897, answer the following:

- (i) Is it required for MCA to publish a draft of the proposed Rules?
- (ii) In case of any irregularities in the publication of the draft, can it be questioned?
- (iii) Is MCA entitled to make suitable changes in the draft?
- (iv) Is it necessary to re-publish the Rules in the amended form when the changes made are ancillary to the earlier draft?

Answer

The answer can be given in terms of section 23 of the General Clauses Act, 1897. Following shall be the answers in the light of the given information and the relevant legal provisions:

- (i) Yes, **MCA is required to publish a draft** of the proposed Rules for the information of persons likely to be affected thereby.

- (ii) **No, in case of any irregularities in the publication of the draft, it cannot be questioned.**
The publication in the Official Gazette of a rule or bye-law after previous publication, shall be conclusive proof that the rule or bye-laws has been duly made. It raises a conclusive presumption that after the publication of the rules in the Official Gazette, it is to be inferred that the procedure for making the rules had been followed. Any irregularities in the publication of the draft cannot therefore be questioned.
- (iii) **Yes, MCA is entitled to make suitable changes in the draft before finally publishing them.**
- (iv) **No, it is not necessary to re-publish the Rules** in the amended form when the changes made are ancillary to the earlier draft.

PROVISION AS TO OFFENCES PUNISHABLE UNDER TWO OR MORE ENACTMENTS – SECTION 26

Question 18

"No shall be prosecuted and punished for the same offence more than once." Explain in the light of provisions of section 26 of the General Clauses Act, 1897.

Answer

"Provision as to offence punishable under two or more enactments" [Section 26 of the General Clauses Act, 1897]:

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.

Even **Article 20(2)** of the Constitution states that no person shall be prosecuted and punished for the same offence more than once.

Provisions of section 26 of General Clauses Act, 1897 read with Article 20(2) of the Constitution apply only when the two offences which form the subject of prosecution is the same, i.e., the ingredients which constitute the two offences are the same. If the offences under the two enactments are distinct and not identical, none of these provisions will apply.

MEANING OF SERVICE BY POST – SECTION 27

Question 19

Mr. A (landlord) staying in Delhi, rented his flat of Bengaluru to Mr. B (tenant) for 220,000 per month to be paid annually. An agreement was made between them that during the tenancy period, if A requires his flat to be vacated, one-month prior notice is to be given to Mr. B. After eight months a notice was sent by Mr. A to Mr. B to vacate his flat by registered post which was refused to be accepted by Mrs. C (wife of Mr. B) and Mr. B denied to vacate the flat on ground of non-receipt of notice. Examine, as per the General Clauses Act, 1897, whether the notice is tenable?

Answer

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 affected by:

- (i) Properly addressing
- (ii) Pre-paying, and
- (iii) Posting by registered post.

Case Laws

In **Smt. Vandana Gulati Vs. Gurmeet Singh alias Mangal Singh**, it was held that where notice sent by registered post to person concerned at proper address is deemed to be served upon him in due course unless contrary is proved.

In **Jagdish Singh Vs. Nathu Singh**, it was held that 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. In other words, Endorsement 'not claimed/not met' is sufficient to prove deemed service of notice.

In the given question, Mr. A has served the notice to Mr. B by registered post which was refused to be accepted by Mrs. C (wife of Mr. B). However, Mr. B cannot deny to vacate the flat on ground of non- receipt of notice, since Mrs. C had refused to accept the notice served by Mr. A through registered post.

Hence, the notice served by Mr. A is tenable provided one- month prior notice given to Mr R

Question 19A

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.

Answer

According to section 27 of the General Clauses Act, 1897: Same as above

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.

MOST IMPORTANT QUESTIONS FOR CA INTER CORPORATE & OTHER LAWS

CHAPTER 3 – THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

RESIDENTIAL STATUS

Question 1A

'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?

Answer

Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)].

Section 2(u): Person

The definition of person includes any BRANCH, OFFICE or AGENCY owned or controlled by a person.

Section 2(v): Person Resident in India (PRI)

Person Resident in India (PRI) includes: -

- (i) Any person or body corporate registered or incorporated in India,
- (ii) A BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India,
- (iii) A BRANCH, OFFICE or AGENCY outside India owned or controlled by a person resident in India;

However, Dubai Branch though not owned is controlled by the Printer unit in Pune which is a person resident in India. Hence, the Dubai Branch is a person resident in India.

Question 1B

Mr. Ram had resided in India during the Financial Year 2020-2021 for less than 183 days. He again came to India on 1st May 2021 for higher studies and business and stayed upto 15th July, 2022. State under the FEMA, 1999.

- (i) If Mr. Ram can be considered 'person Resident in India' during the Financial year 2021-2022 and
- (ii) Is citizenship relevant for determining such a status?

Answer

Section 2(v): Person Resident in India (PRI)

A person residing in India for more than 182 days during the course of the preceding financial but does not include

- (A) a person who has gone out of India or who stays outside India, in either case:
- (a) for or on taking up employment outside India, or
 - (b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

(B) a person who has come to or stays in India, in either case, OTHERWISE THAN –

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

Answer (i)

Individual resides more than 182 days in India in the Previous Year.

(a) If he goes out of India for Employment, business vocation & uncertain period, then he will be considered as PRO from that date.

(b) If he comes to India otherwise than for Employment, business vocation & uncertain period, then he will be considered as PRO from that date.

Mr. Ram CANNOT be considered 'Person resident in India' during the financial year 2021-2022 notwithstanding the purpose or duration of his stay in India during 2021-2022. An individual has to be present in India for more than 182 days in the preceding financial year. Mr. Ram does not satisfy this condition for the financial year 2021-2022.

Answer (ii)

NO. Citizenship is no more relevant for determining the status.

Question 1C

Miss Diana is an airhostess with the British Airways. She flies for 12 days in a month and thereafter a break for 18 days. During the break, she is accommodated of 'base', which is normally the city where the airways are headquartered. However, for security considerations, she was based on Mumbai.

During the financial year, she was accommodated at Mumbai for more than 182 days. What would be her residential status under FEMA?

Answer

Section 2(v): Person Resident in India (PRI)

PRI is a person residing in India for more than 182 days during the course of the preceding financial year.

The word used is "resides" and not "stays" unlike the old FERA act. Resides indicates permanent place of living, whereas stay is temporary.

Miss Diana stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. The issue here is whether staying can be considered 'residing'. FEMA emphasises 'residing'. 'Stay' is temporary, while 'residing' denotes permanency.

Thus, while Miss Diana may have stayed in India for more than 182 days, it is doubtful whether she can be said to have 'resided' in India for more than 182 days

Further under section 2(v)(a), she would become resident only if she has come to or stayed in India for employment. It would be doubtful and debatable, whether by staying at Mumbai base during the break, Miss Diana can be said to have come to stay in India for or on taking up employment. **Hence Miss Diana would continue to be PROI [Person Resident outside India].**

Note: If, however she has been employed in Mumbai branch of British Airways, then she will be considered a Person Resident in India.

CURRENT ACCOUNT TRANSACTIONS

Question 2A

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.

Answer

Section 2(j): Current Account Transaction

It means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes-

1. Payments due in connection with foreign trade (Import-Export), other current business, services, and short-term banking and credit facilities [Buyer's Credit] in the ordinary course of business,
2. Payments due as interest on loans and as net income from investments,
3. Remittances for living expenses of parents, spouse and children residing abroad, and
4. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Section 5: Permissible Current Account Transaction

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 CG may, in public interest and in consultation with the RBI, impose reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

Section 6: Permissible Capital Account Transaction

Subject to the restrictions imposed under Sec 6(2) & 6(2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

CURRENT ACCOUNT TRANSACTIONS – PROHIBITED/PERMISSIBLE

Question 2B

An Indian National desire to obtain Foreign Exchange on current account transactions for the following purposes:

- a) He requires U.S. \$ 2,000 for payment related to call back services of telephones.
- b) Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw Foreign Exchange.

- c) Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company.
- d) Payment of US \$10,000 as commission on exports under Rupee State Credit Route.
- e) X, a Film Star, wants to perform alongwith 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.
- f) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?
- g) F wants to draw US \$ 30,000 for a business trip to U.K.
- h) He requires U.S. \$ 5,000 for Remittance of hiring charges of transponders.
- i) Mr. C wants US Dollar 10,000 for remitting as commission to his agent in U.S.A. for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. C by way of foreign currency inward remittance amounting to US Dollar 1,00,000.
- j) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.
- k) Mr. A wants to make a Remittance of US \$ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.
- l) Rohan wants to make a Gift Remittance abroad amounting US\$ 10,000.
- m) 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.
- n) Mr. B wants to make a Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.

Advise whether he/ they can obtain Foreign Exchange and, if so, under what conditions?

Answer

The Answers are based on: -

- (a) Section 5: Current Account Transaction and
- (b) FEM (Current Account Transaction) Rules, 2000

(a) Rule 3: Schedule I: Prohibited Transactions

Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, he cannot obtain US \$ 2,000 for the said purpose.

(b) Rule 3: Prohibited Transactions

Drawal of foreign exchange by any person is prohibited for a travel to Nepal or Bhutan. Hence Mr. Ramesh CANNOT withdraw Foreign Exchange for this purpose.

(c) Rule 3: Schedule I: Prohibited Transactions

Payment of Commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited. Thus, he cannot obtain the foreign exchange for commission on export for equity investment as it is prohibited.

(d) Rule 3: Schedule I: Prohibited Transactions

Payment of commission on exports under Rupee State Credit Route, is prohibited.

(e) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.

Foreign Exchange draws 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.

(f) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.

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 needed, if it is required by the Medical institute offering treatment.

Therefore, R can draw foreign exchange up to amount estimated by a medical institute offering treatment.

(g) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.

Foreign Exchange for business trip upto USD 2,50,000 can be obtained by any individual. If a person wants to exceed this limit, then prior permission of RBI is required.

As the amount required is less than US \$ 2,50,000, Mr. F can obtain the foreign exchange without obtaining the permission of RBI.

(h) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.

Drawal of foreign exchange for remittance of hiring charges of transponder by TV Channels, can be made with the prior approval of the Central Government (Ministry of Information and Broadcasting). However, approval will not be required if the payment is made out of funds held in Resident Foreign Currency Account or Exchange Earner's Foreign Currency Account of the remitter. He can obtain any amount of foreign exchange for hiring charges of transponder after prior approval of Central Government (Ministry of Information and Broadcasting).

(i) Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit.

RBI approval is needed if Commission to agents abroad for sale of residential flats or commercial plots in India exceeds Higher of: -

(a) USD 25,000 or

(b) 5% of the inward remittance. (5% of USD 1,00,000 = USD 5,000)

As the amount to be remitted is only USD 10,000 (Lower than USD 25,000), RBI approval is NOT needed.

(j) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.

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 studies abroad, no approval of the Reserve Bank of India is needed, if it is required by the educational institution.

Therefore, L can draw foreign exchange for pursuing a course in fashion design in Paris up to amount estimated by the institute offering the course.

(k) Rule 4: Schedule II: Permissible Commercial Transactions that require CG approval.

Remittance of prize money exceeding US\$ 1,00,000 for sports activity abroad other than International.

National or State level body will require the prior permission of the C.G. (Ministry of HRD - Department of Youth Affairs and Sports).

As the amount involved is more than US\$ 1,00,000 and Mr. A is not an International, National or State level body, he has to obtain the permission of the C.G. before remitting the prize money of US\$ 2.00,000.

(L) Rule 5: Schedule III: Permissible Personal Transactions that require RBI approval, if Drawal exceeds Prescribed Limit.

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 US \$10,000, there is no need for any permission from the RBI.

(m) Rule 3: Schedule I: Prohibited Transactions

Remittance out of lottery winnings is a prohibited transaction under Schedule 1.

Hence Mr. P cannot withdraw foreign exchange for this purpose.

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(n) Rule 3: Prohibited Transactions

Drawal of foreign exchange by any person is prohibited for a transaction with a person resident in Nepal or Bhutan.

Hence Mr. B CANNOT withdraw Foreign Exchange for this purpose.

Question 2C

ABC Limited hired the services of Mr. Taylor, a technician from Germany for the installation of a machinery. The company paid USD 40,000 for the services rendered by Mr. Taylor. Examine under the FEMA, 1999, whether payment of remuneration to foreign technician Mr. Taylor is a permissible transaction under the provisions of the said Act.

Answer

Section 5: Current Account Transaction

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 CG may, in public interest and in consultation with the RBI, impose reasonable restrictions for current account transactions as prescribed under the FEM (Current Account Transactions) Rules, 2000.

If the transaction is not listed in any of the above 3 schedules, it can be undertaken without any approval.

Hiring of foreign national as technicians is permissible without restriction. There is no ceiling on salary which can be paid as per contract. Their salary can be remitted abroad after-tax

deductions, contribution to provident fund and other deductions at source.

Question 2D

Under the auspices of the Foreign Exchange Management Act, 1999, (the Act) examine whether the given situations fall under "Current Account Transactions" or not as defined in the Act?

- (i) Mr. S, a resident in India, imports machinery from a vendor in UK for installing in his factory.
- (ii) An Indian resident, imports machinery from a vendor in US for installing in his factory on a credit period of 3 months.
- (iii) 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.

Answer

Section 2(j): Current Account Transaction

It means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes.

1. Payments due in connection with foreign trade (Import-Export), other current business, services, and short-term banking and credit facilities (Buyer's Credit) in the ordinary course of business,
2. Payments due as interest on loans and as net income from investments,
3. Remittances for living expenses of parents, spouse and children residing abroad, and
4. Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Answer (i)

An Indian resident imports machinery from a vendor in UK for installing in his factory. As per 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 it is a **Current Account Transaction**.

Answer (ii)

An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months. Under FEMA, it is a liability outside India. However, under definition of Current Account Transaction (Section 2), "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 a **Current Account Transaction**.

Answer (iii)

An Indian resident transfer US\$ 1,000 to his NRI brother in New York as "gift". The funds are from resident's Indian bank account to the NRI brother's bank account in New York. As per FEMA once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA transaction is over.

Hence it is a **Current Account Transaction**.

Question 2E

Lifesys Limited, a billion-dollar, Indian company wishes to create a chair in a reputed university in the U.S. This chair is for the department of computer science. The company wishes to obtain your advice in regard to the following with reference to the FEMA, 1999.

- (i) Is such "chair" creation permissible?
- (ii) What is the maximum amount that can be denoted for such chair?
- (iii) Any formalities to be complied with?

Answer

Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit

The following remittances exceeding the limits mentioned below shall require **prior approval of the RBI.**

Donations exceeding Lower of -

- (a) 1% of their foreign exchange earnings during the previous 3 financial years or
- (b) USD 5,000,000 for-
 - creation of Chairs (Paying faculty's salary) in reputed educational institutes,
 - contribution to funds (not being an investment fund) promoted by educational institutes; and
 - contribution to a technical institution or body or association in the field of activity of the donor Company.

Answer (i)

In the first case, "chair" creation for the department of computer science in reputed university in the U.S. is permissible.

Answer (ii)

Maximum amount that can be donated for such chair will be 1% of their foreign exchange earnings during the previous 3 financial years or USD 5,000,000, whichever is less without prior approval of the

Answer (iii)

In case where donations exceed 1% of their foreign exchange earnings during the previous 3 financial years or USD 5,000,000, it shall require prior approval of RBI.

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Question 3

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?

Answer

Residential Status:

According to section 2(v) of the Foreign Exchange Management Act, 1999, 'Person resident in India' means a person residing in India for **more than 182 days** during the course of preceding financial year [Section 2(v)(i)].

However, it **does not include** a person who has **gone out of India** or who stays outside India for employment outside India or for any other purpose in such circumstances as would **indicate his intention to stay outside India for an uncertain period.**

Generally, a student goes out of India for a certain period. In this case, Mr. Suresh who resided in India during the financial year 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 resident outside 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, **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.

CAPITAL ACCOUNT TRANSACTION

Question 4A

Explain the meaning of "Capital Account Transactions" under the Foreign Exchange Management Act, 1999. State its categories and also examine whether the following transactions are permissible or not under the above act as Capital Account transactions:

- (i) Investment by person resident in India in Foreign Securities.
- (i) Foreign currency loans raised in India and abroad by a person resident in India.
- (iii) Export, import and holding of currency/ currency notes.
- (iv) Investment in a Nidhi Company.

(v) Trading in transferable development rights.

Answer

Section 2(e): Capital Account Transaction

It means a transaction which alters:

- a. The contingent liabilities, outside India of Persons Resident in India [PRI]
- b. Assets or liabilities in India of Persons Resident Outside India [PROI].

FEM (Permissible Capital Account Transactions) Regulations, 2015

The Reserve Bank of India has formed the FEM (Permissible Capital Account Transactions) Regulations, 2015.

As per these regulations, capital account transactions may be classified under the following heads.

- (1) Permissible capital account transaction of PRI (Persons Resident in India) (Reg. 3 - Schedule I)
- (2) Permissible Capital transactions of PROI (Persons Resident Outside India) (Reg. 3 - Schedule II)
- (3) Prohibited capital account transactions. (Reg. 4)

- (i) Investment by person resident in India in Foreign Securities is permitted transaction.
- (ii) Foreign currency loans raised in India and abroad by a person resident in India is permitted transaction.
- (iii) Export, import and holding of currency / currency notes is permitted transaction.
- (iv) Investment in a Nidhi Company is Prohibited transaction.
- (v) Trading in transferable development rights is Prohibited transaction.

Question 4B

Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2020. Mr. Ram purchased a flat at New Delhi for 795 lakhs in September 2021. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2021 for 795 lakhs. Mr. Gopal's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram. Examine with reference to the provisions of the FEMA, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible.

Answer

Section 2(e): Capital Account Transaction

It means a transaction which alters:

- a) The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]
- b) Assets or liabilities in India of Persons Resident Outside India [PROI].

Schedule II of FEM (Permissible Capital Account Transactions) Regulations 2015 permits the following Capital Account Transactions of a PROI "Guarantee by a person resident outside India in favour of, or on behalf of, a person resident in India."

Section 6: Permissible Capital Account Transaction

Subject to the provisions of Sec 6(2) & 6(2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

In the given case, there are 2 Capital Account Transactions and both of them are Permissible.

(A) Purchase of immovable property in India by Mr. Ram [PROI].

(B) Giving of Guarantee by Mr. Ram [PROI] on behalf of Mr. Gopal [PRI] to the Housing Finance Company.

Question 4C

Explain the meaning of "Capital Account Transaction" under the FEMA, 1999. State whether there are any restrictions in respect of the following transactions:

- (i) Drawal of Foreign Exchange for payments due on account of amortisation of loans in ordinary course of business.
- (ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.

Answer

Section 2(e): Capital Account Transaction

It means a transaction which alters:

a. The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]

or

b. Assets or liabilities in India of Persons Resident Outside India [PROI].

Section 6(2): Restrictions imposed by RBI

The RBI or the CG shall not impose any restrictions on the drawal of foreign exchange:-

1. For Amortisation of Loan [repayments of loan instalments] and
2. For Depreciation of Direct Investments in Ordinary Course of Business.

Hence this transaction is permissible without any restrictions.

Reg. 4 of FEM (Permissible Capital Account Transactions) Regulations 2015

A PROI (person resident outside India) is prohibited from making investment in India, in any form, in any Company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage in agricultural or plantation activities.

Hence, it is not possible for a person resident outside India to invest in the shares of a plantation company as such investment is prohibited.

Question 4D

A Company incorporated in United Kingdom established a branch at Chennai. What is the residential status of the Chennai branch? The Chennai branch proposes the purchase some immovable property at Chennai for the purpose of its business. Is it a 'Capital Account Transaction' within the meaning of Section 2(e) of the FEMA, 1999? Are there any restrictions under the FEMA, 1999 in respect of such acquisition?

Answer

Section 2(v): Person Resident in India (PRI)

Person Resident in India (PRI) includes: -

- (i) Any person or body corporate registered or incorporated in India,
- (ii) A BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India,
- (iii) A BRANCH, OFFICE or AGENCY outside India owned or controlled by a person resident in India;

Section 2(e): Capital Account Transaction

It means a transaction which alters:

a. The assets or liabilities, including contingent liabilities, outside India of Persons Resident in India [PRI]

or

b. Assets or liabilities in India of Persons Resident Outside India [PROI].

- (i) Company incorporated in United Kingdom is a PROI since it is incorporated outside India.
- (ii) Chennai Branch is a PRI because it is a BRANCH, OFFICE or AGENCY in India owned or controlled by a person resident outside India.
- (iii) The Chennai branch (PRI) acquires immovable property at Chennai (India). Hence this acquisition is not a "capital account transaction" within the meaning of Section 2(e) of FEMA. Therefore, there is no restriction in acquisition of immovable property in India by Chennai branch.

CAPITAL ACCOUNT TRANSACTIONS [SEC 6(4)]

Question 4E

Examine with reference to the provisions of the FEMA, 1999 whether there is any restriction if a person, who is resident of U.S.A. for several years, is planning to return to India permanently. Can he continue to hold the investment made by him in the securities issued by the companies in U.S.A.

Answer

Section 6 (4): PROI returns back and settles in India

A PRI may hold, own, transfer or invest in :-

- foreign currency,
- foreign security or
- immovable property situated outside India

if such currency, security or property was acquired, held or owned by such PRI:-

- (1) when he was resident outside India or
- (2) inherited from a PROI.

Examples [Clarification on Section 6(4)]

Income earned through employment or business or vocation outside India, or Income from investments made, or Income from gift or inheritance received when he was resident outside India,

In view of this, the person who returned to India permanently can continue to hold the foreign security acquired by him when he was resident in U.S.A.

Capital Account Transactions (Sec 6 & FEMA (CAPAT) Regulations, 2015], Current Account Transactions [FEMA (CAT) Rules, 2000]

Question 4F

Mr. Janak, a PROI (person resident outside India) i.e. USA has invested in 5 residential immovable properties under construction in Mumbai.

Each property was negotiated at Rs. 1.50 crores with the companies owned by builders. This amount was to be paid in two instalments i.e. 50% on immediate basis on booking and the balance on possession of properties. The above transaction was done by the companies owned by builders through 2 brokers from USA on commission basis.

Mr. Janak as per term and conditions remitted 50% of the amount of all 6 immovable properties directly to the Builders.

Answer the following explaining the provision of the Foreign Exchange Management Act, 1999:

A. Whether investment by Mr. Janak and payment of commission on this transaction is permissible?

B. How much in maximum amount of commission can be paid to each broker?

Answer

Sec 6: Permissible capital account transaction.

Subject to the provisions of sub-section (2) & (2A), any person may sell or draw foreign exchange to or from an Authorized person for a capital account transaction.

Schedule II of the FEM (Permissible Capital Account Transaction) Regulations, 2015: Capital account transactions of PROI

Acquisition and transfer of immovable property in India by a PROI is a Permissible capital account transaction.

Rule 5: Schedule III: Permissible Personal Transactions/Drawals that require RBI approval, if Drawal exceeds Prescribed Limit.

RBI approval is needed if Commission to agents abroad for sale of residential flats or commercial plots in

India exceeds Higher of: -

- (a) USD 25,000 or
- (b) 5% of the inward remittance.

Conclusion

1. Yes, the investment by Mr. Janak and payment of commission on this transaction is permissible.
2. The maximum amount of commission payable to each broker shall be:
= (No. of properties X Price X % of inward remittance X Commission %) = No. of brokers
= (5X1,50,00,000 X 50% X 5%) ÷ 2
= 18,75,000 ÷ 2
= 7 9,37,500 to each broker.

Question 4G

Mr. Bandha, a software Engineer, Indian Origin took employment in USA. He is a resident of India for a long time. He desires

- (i) to acquire a farmhouse in Munnar (Kerala).
- (ii) to make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.
- (iii) to make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township.

Answer

Regulation 4 of the FEM (Permissible Capital Account Transaction) Regulations, 2015: Prohibited Investments by PROI

No person resident outside India shall make investment in India, in any form, in any company or partnership firm or proprietary concern or any entity, whether incorporated or not, which is engaged or proposes to engage-

- (a) in the business of chit fund.
- (b) as Nidhi Company.
- (c) in agricultural or plantation activities.
- (d) in real estate business, or construction of farmhouses.
- (e) in trading in Transferable Development Rights (TDRs).

For the purpose of this regulation, "real estate business" shall not include development of townships, construction of residential / commercial premises, roads or bridges and Real Estate Investment Trusts (REITs).

- (i) Mr. Bandha, **cannot** acquire a farmhouse in Munnar (Kerala).
- (ii) Mr. Bandha **cannot** make investment in KLJ (Nidhi) Ltd.
- (ji) Mr. Bandha **can** make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township because "real estate business" shall not include development of townships.