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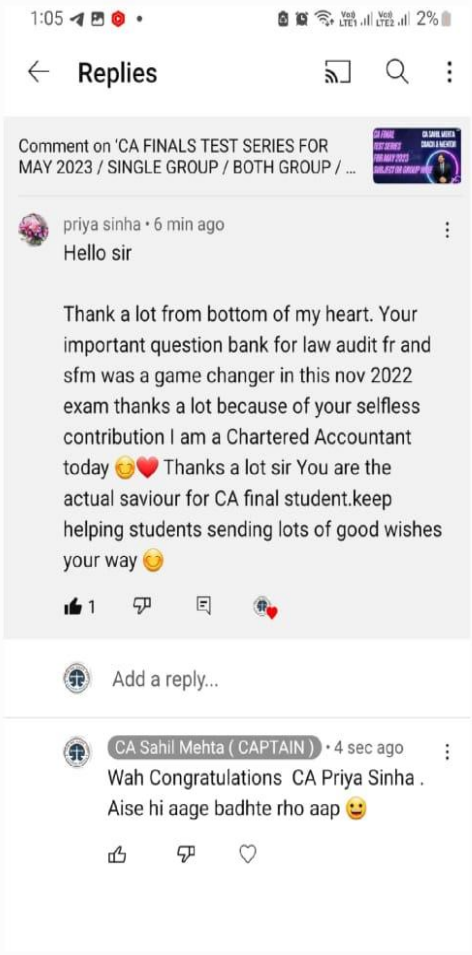

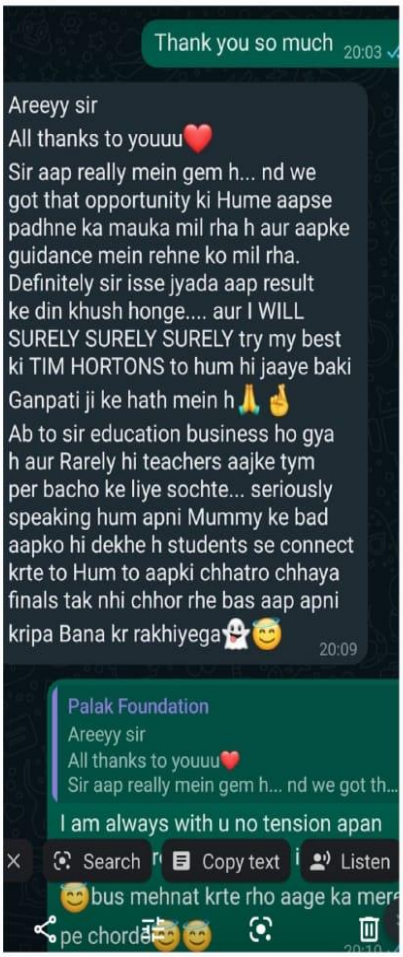

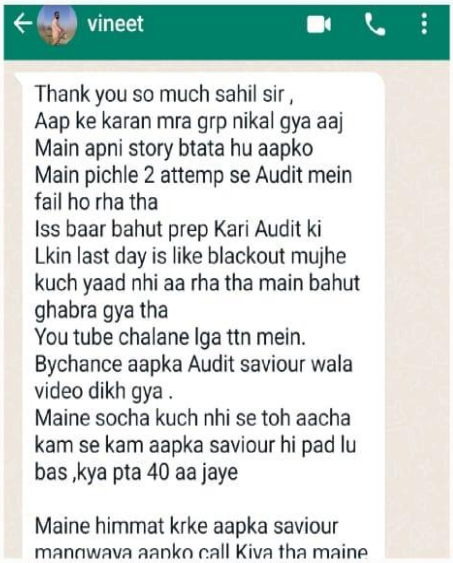

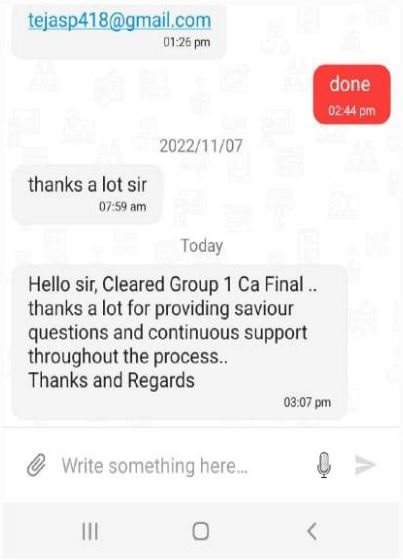

DEDICATIONS & ACKNOWLEDGEMENTS

I would like to dedicate this book to **My Grandfather** who has always taught me to follow the right direction.

I would like to dedicate this book to all my friends, especially on YouTube and Telegram Student's.

I am grateful to my esteemed colleagues, friends, and students who have contributed to this book by advising me and giving me constant feedback.

I would like to show my appreciation towards **Rishu Bharti, Purushottam Raj** For the successful completion of this book.

I would like to acknowledge help of Team Law on your Tips who have been helped in drafting the basic draft this book.

"Har darr ka hata de kohraTaaqat tu ban mohraHar lakshya ko bhed ke dikhla deArjun ki kahaani dohra "

“Bande ki mehnat ko qismat ka sadar pranam hai pyaare”

I hope this book serves the purpose of its readers. Their value suggestions and constructive feedback will be greatly acknowledged. Please feel free to e-mail your feedback, problem and suggestions to me on **lawonyourtips@gmail.com**.

CHAPTER INDEX

NOTE: SARFAESI & PRODUCER COMPANY ARE NOT IN SYLLABUS.

PAGE FOR STUDENT NOTES

Chapter 1
Appointment & Qualification of Director

Part A: Multiple Choice Questions

1. (APRIL 2022 MTP)

A public company should have minimum of:

a) 3 Members and 3 Directors
b) 3 Members and 7 Directors
c) 7 Members and 3 Directors
d) 7 Members and 7 Directors

Answer: C

2. (SEPT 2022 MTP)

Mr. Q, a Director of PQR Limited, is proceeding on a foreign tour covering entire Europe for four months. He proposes to appoint Mr. Y as an alternate Director to act on his behalf during his absence. The Articles of Association of PQR Limited provide for the appointment of alternate Directors. Mr. Q claims that he has a right to appoint alternate Director of his choice. Which of the following options is applicable in the given situation:

a) Claim made by Mr. Q to appoint Mr. Y as alternate Director is valid as the Articles of Association of PQR Limited provide for such appointment.

b) Claim made by Mr. Q to appoint Mr. Y as alternate Director is not valid as the authority to appoint alternate Director has been vested in the Board of Directors only and that too subject to empowerment by the Articles of Association.

c) Mr. Y cannot be appointed as an alternate Director in place of Mr. Q since Mr. Q is proceeding on a foreign tour covering entire Europe for four months only which is less than the required absence of minimum six months.

d) Mr. Y cannot be appointed as an alternate Director in place of Mr. Q since Mr. Q is proceeding on a foreign tour covering entire Europe for four months which is more than the required absence of maximum three months.

Answer: B

3. Comfort Mechanical Products Limited, with Registered Office in Rajender Nagar, New Delhi, has three directors, namely, Mr. First, Mr. Second and Ms. Third, who often visit foreign countries in order to develop and secure business opportunities for the company on sustainable basis. One of the legal requirements for an Indian company is that at least one of its directors must stay in India for a specified period. To reckon as 'resident director' for the Financial Year 2021-22, advise the company by selecting the correct option as to which period spent in India by any one of its directors shall count towards statutory period.

a) Period spent in India during the previous Financial Year 2020- 21.

b) Total of fifty percent of the period spent in India during the Financial Year 2019-20 and another fifty percent of the period spent in India during the Financial Year 2020-21.

c) Total of fifty percent of the period spent in India during the Financial Year 2020-21 and another fifty percent of the period spent in India during the Financial Year 2021-22.

d) **Period spent in India during the Financial Year 2021-22.**

Answer: D

4. May 2019 RTP

All the three directors of Cygnus Wires Limited generally remain out of India for developing connections and securing business opportunities on behalf of the company. However, the company must strictly follow the legal requirement that at least one of its directors must stay for the specified statutory period in India. To reckon as 'resident director' for the financial year 2018-19, advise the company as to which period spent in India shall count towards the statutory period.

a) **Period spent in India during the previous financial year 2017-18.**

b) **Total of fifty percent each of the period spent in India during the financial year 2016- 17 and 2017-18.**

c) **Period spent in India during the financial year 2018-19.**

d) **Total of fifty percent each of the period spent in India during the financial year 2017 - 18 and 2018-19.**

Answer: Option C

5. RTP May 2019

Mr. Nagar a director, decided to resign from MGT Private Limited due to preoccupation. He sent his resignation letter dated 12th June 2018 to the Company stating that he will resign w.e.f. 15th June 2018. Due to non-receipt of any communication from the Company, he dropped a mail on 17th June 2018, to confirm whether Company has received his letter. Finally, Company received his letter on 25th June 2018. In this case, from which date his resignation will be effective?

(a) 12th June 2018

(b) 15th June 2018

(c) 17th June 2018

(d) 25th June 2018

Answer: Option D

6. MTP Apr 2019

Mr. Raman is a managing director of SLR Ltd. He was proposed to be appointed as a director in the same company. Mr. Raman got the better opportunity and joined the other company "Alternate Ltd.". He left the office of managing director of SLR Limited. State the correct legal position as to the holding of offices of Mr. Raman in the companies-

a) **he will hold directorship both in SLR Ltd and Alternate Ltd.**

b) He cannot hold office in Alternate Ltd. being employed as managing director in SLR Ltd.

c) He will validly hold all the designated offices in both SLR and Alternative Ltd.

d) He can hold directorship only in Alternate Ltd.

Answer: Option D

Part B- Descriptive Questions

1) (NOV 2022 RTP)

ABC Limited (wholly owned government company), failed to file its financial statements for the financial years 2018-2019, 2019-2020 and 2020-2021 with the ROC. However the annual returns for the financial years 2018-2019 and 2019-2020 have been filed by the company. The company appointed Mr. Pratham as its non-executive director with effect from 1st May 2021. In the meantime, Mr. Pratham received an offer of directorship from AK Ltd. in the month of September, 2021 which he is willing to accept. Referring to the provisions of the Companies Act, 2013, examine whether Mr. Pratham is qualified to be appointed as director in AK Ltd.

Answer:

Section 164(2) of the Companies Act, 2013, prescribes dis-qualifications which get attached to a person, if he is or has been a director of a Company which has committed default, as under.

(i) his Company has not filed financial statements or annual returns for any continuous period of 3 financial years; or

(ii)his Company has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for 1 year or more.

In both the cases of default, the director concerned shall not be eligible to be re -appointed as a director of such defaulting Company or appointed in some other Company for a period of 5 years from the date on which the said Company has committed default.

However, in case a person is appointed as a director of a Company which has committed default as per clause (i) or (ii) above, he shall not incur the dis-qualification for a period of six months.

Further in the light of the Notification No. GSR 582 (E), dated 13th June, 2017, Section 164(2) of the Act is not applicable to a Government Company provided it has not committed a default in filing its Financial Statements under Section 137 or Annual Return under Section 92 of the Act with the Registrar.

Conclusion: In the given problem, ABC Limited, a wholly owned Government Company, has not filed its financial statements for a continuous period of three financial years and hence, it is not entitled for an exemption under Section 164 (2) of the Act. Mr. Pratham, who is appointed as a Non-Executive Director in the defaulting Company shall not incur dis-qualification for a period of six months from the date of his appointment. The six month period will expire on 31.10.2021.

Hence, he is qualified to be appointed as a Director of AK Limited in the month of September, 2021.

2. (RTP 2022 MAY)

Vibhuti Mechanics Limited, having Registered office at Rajendra Place, New Delhi, was incorporated on 17 February, 2016 with five directors who are responsible for managing the affairs of the company. Harshit, one of the directors, looks after the marketing function but his understanding with the other four directors is dwindling day by day. Other four directors i.e. Nipun, Lakshita, Shreyas and Vidur are also suspecting that Harshit is involved in some illegal activities which may cause a huge loss to the company in future. Now they are contemplating removal of Harshit from the office of directorship before the expiry of his term.

Analyse the following statements with reasons quoting relevant provisions of the Companies Act, 2013:

(a) Keeping in view his illegal activities, Nipun, Lakshita, Shreyas and Vidur can remove Harshit by passing Board Resolution.

(b) Harshit can be removed only by passing a Special Resolution.

(c) Nipun wants to appoint Dishant, an employee of the company but is very close to him, as director in place of Harshit after his removal as director.

Answer:

In respect of removal of director, a reference to Section 169 of the Companies Act, 2013 is to be made.

Sub-section (1) states a company may, by ordinary resolution, remove a director, not being a director appointed by the Tribunal under section 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard:

Provided that an independent director re-appointed for second term under sub- section (10) of section 149 shall be removed by the company only by passing a special resolution and after giving him a reasonable opportunity of being heard:

Provided further that nothing contained in this sub-section shall apply where the company has availed itself of the option given to it under section 163 to appoint not less than two-thirds of the total number of directors according to the principle of proportional representation.

Sub-section (2) states that a special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.

Sub-section (3) requires that on receipt of notice of a resolution to remove a director under this section, the company shall forthwith send a copy thereof to the director concerned, and the director, whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting.

According to Sub-section (4), where notice has been given of a resolution to remove a director under this section and the director concerned makes with respect thereto representation in writing to the company and requests its notification to members of the company, the company shall, if the time permits it to do so,--

in any notice of the resolution given to members of the company, state the fact of the representation having been made; and

send a copy of the representation to every member of the company to whom notice of the meeting is sent (whether before or after receipt of the representation by the company), and if a copy of the representation is not sent as aforesaid due to insufficient time or for the company's default, the director may without prejudice to his right to be heard orally require that the representation shall be read out at the meeting:

Provided that copy of the representation need not be sent out and the representation need not be read out at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by this sub-section are being abused to secure needless publicity for defamatory matter; and the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it.

A vacancy created by the removal of a director under this section may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given under sub- section (2).

A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed.

Note: Provisions regarding special notice are contained in Section 115. Further, Rule 23 of the Companies (Management and Administration) Rules, 2014 also specifies the provisions in respect of special notice.

In view of the above provisions, the given statements can be analysed as under:

(a) The other directors of Vibhuti Mechanics Limited i.e. Nipun, Lakshita, Shreyas and Vidur cannot remove Harshit by passing a Board Resolution.

For the purpose of removal of a director from the office of directorship, an ordinary resolution needs to be passed. In other words, only the shareholders of the company are empowered to remove a director.

Further, there is requirement of special notice when a director is to be removed. In case, a notice of a resolution to remove a director is received by the company, a copy of the notice shall be sent forthwith to the director concerned. In this case, Harshit is entitled to receive a copy of the special notice. Harshit is also entitled to be heard on the resolution to be passed for his removal at the meeting.

In case, Harshit makes a representation in writing to the company and requests its notification to members of the company, the company shall be obliged to do so if the time permits. In case a copy of the representation cannot be sent due to insufficient time or for the company's default, the director (i.e. Harshit in this case) may, without prejudice to his right to be heard orally, require that the representation shall be read out at the meeting.

There is a cushion for the company in respect of representation if it is suspected that the rights regarding representation conferred on the 'director to be removed' are being abused to secure needless publicity for defamatory matter. The cushion is in the form of proviso. Thus, it is provided that there is no need to send a copy of the representation and also there is no need to read out the representation at the meeting if, on the application either of the company or of any other person who claims to be aggrieved, the Tribunal is satisfied that the rights conferred by sub-section (4) are being abused to secure needless publicity for defamatory matter.

In addition, the Tribunal may order the company's costs on the application to be paid in whole or in part by the director notwithstanding that he is not a party to it. Thus, Harshit can be deprived of his right in respect of representation if the Tribunal passes an order.

(b)The statement that 'Harshit can be removed only by passing a Special Resolution' is not correct. As noticed in answer (a) above, an ordinary resolution needs to be passed for removal of a director and there is no need to pass a special resolution for this purpose. The procedure as stated in answer (a) is required to be followed for passing an ordinary resolution for the removal of a director before the expiry of the period of his office after giving him a reasonable opportunity of being heard.

(c) Yes. Nipun can get appointed Dishant, an employee of the company who is very close to him, as director in place of Harshit after his removal as director.

As regards appointment of another director, Sub-section (5) stipulates that a vacancy created by the removal of a director under Section 169 may, if he had been appointed by the company in general meeting or by the Board, be filled by the appointment of another director in his place at the meeting at which he is removed, provided special notice of the intended appointment has been given under sub-section (2).

To get Dishant appointed as director in place of Harshit, Nipun has to ensure that the company receives a special notice of the intended appointment of Dishant as required by Sub-section (2).

If Dishant is so appointed, he shall hold office till the date up to which his predecessor Harshit would have held office if he had not been removed.

3. (OCT 2022 MTP)

Atlanto Tyres Ltd (ATL) is engaged in the business of manufacturing of tyres of all types of vehicles. The company have 6 directors. Recently the company has acquired a foreign company in UK which was engaged in manufacturing of tyres. The company thought that the merger will be beneficial for it. In order to take care of the operations and networking of the merged foreign entity, the directors of ATL travelled to UK on and often. Due to frequent travelling to UK, it was observed that all the directors in the FY 2020-21 could not stayed in India for a minimum period as prescribed in the Act. Examine the given situation in the light of the related law as in case if the same is not in compliance.

Answer:

In terms of Section 149(3) of the Companies Act, 2013, every company shall have at leastone director who has stayed in India for a total period of not less than 182 during the financial year.

In the given case, out of 6 directors, none of the directors could have stayed in India for a minimum period of 182 days in the FY 2020-21.

Therefore, the requirement of said section 149(3), is not met with. Therefore, ATL is liable under section 172 of the Companies Act, 2013.

In case of contravention: Further Section 172 of the Act, provides that if a company is in default in complying with any of the provisions of Chapter XI (i.e. with respect to the appointment and qualifications of directors) and for which no specific penalty or punishment is provided therein, in that case following is the penalties levied on:

(i) the company, and
(ii) (ii) every officer of the company who is in default- shall be liable to a penalty of 50,000 rupees.

In case of continuing failure, with a further penalty of 500 rupees for each day during which such failure continues, subject to a maximum of three lakh rupees in case of a company and one lakh rupees in case of an officer who is in default.

4. (MARCH MTP 22)

A conscientious and meticulous person, Anuj Sharma is MBA (Finance) from Indian Institute of Foreign Trade (IIFT), New Delhi. Currently, he is holding directorships in four companies, namely Sigma Software Limited (SSL), Singha Medical Instruments Limited (SMIL), Vishwa Stationers (Pvt.) Limited (VSPL) and Simla Locomotives Limited (SLL). Of the four, he is unable to maintain good relations with the other five directors of Singha Medical Instruments Limited. As is his nature, he is performing his duties as Director (Operations) with utmost integrity and honesty but the atmosphere in the top-rung of this company is not so healthy and co-operative. The other five directors were not even hesitant of making personal gains at the cost of the company. Sensing this unhealthy atmosphere, Anuj is contemplating to quit directorship and the company; and therefore, he

revealed his plans to the other parallel directors who, as was very natural, objected his intention to resign. The directors were quite unhappy with his decision since they wanted to attain their selfish desires through Anuj by making him scapegoat. Anuj sent his resignation notice dated 16thJuly, 2021 through registered post which was received by the company on 18th July, 2021. The other five directors did not accept his resignation citing that the Registrar of Companies (RoC) was not informed in advance regarding submission of resignation and therefore, Anuj shall have to continue with his directorship till the next Annual General Meeting (AGM).

(i)Analyse the contention of the directors of SMIL regarding non-acceptance of resignation of Anuj Sharma keeping in view the applicable provisions of the Companies Act, 2013.

(ii)Had SMIL been a private company, what would have happened to the resignation of Anuj Sharma keeping in view his indispensability, as was perceived by the other directors, in the company?

Answer:

The given issue to be dealt with Section 168 of the Companies Act, 2013 read with Rules 15 and 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014, which deals with the resignation of a director.

According to Section 168 (1) a director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar in such manner, within such time and in such form as may be prescribed and shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company:

Provided that a director may also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within thirty days of resignation in such manner as may be prescribed.

Note (a): Rule 15 requires the company to intimate the Registrar within 30 days from the date of receipt of notice of resignation from a director in Form DIR-12 and post the information on its website, if any.

Note (b): Rule 16 states that where a director resigns from his office, he may within a period of thirty days from the date of resignation, forward to the Registrar a copy of his resignation along with reasons for the resignation in Form DIR-11along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.

Effective date of resignation: Section 168 (2) states that the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later:

Provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

In view of the above provisions, we can analyse the cited situations as under:

(i)Sub-section (1) of Section 168 permits a director to resign from his office by giving a notice in writing to the company and the same can be done any time at the discretion of the director who intends to resign. Neither there is requirement of acceptance of resignation by the Board or other directors nor the resignation can be postponed to any other date.

Thus, the directors of SMIL cannot compel Anuj Sharma to continue as director citing that the Registrar of Companies (RoC) was not informed in advance regarding submission of resignation.

It is the responsibility of SMIL, after the receipt of resignation from Anuj Sharma on 18th July, 2021, to intimate the Registrar in Form DIR-12 within 30 days. In fact, as per sub- section (2), the effective date of resignation shall be 18th July since Anuj Sharma has not mentioned any other date in his resignation notice to be the date from which the resignation will take effect.

Keeping in view provisions of Rule 16, Anuj Sharma may within a period of thirty days from the date of resignation, forward to the Registrar a copy of his resignation notice along with reasons for resigning from the company in Form DIR-11, duly paying the requisite fee. This Rule, in no way authorises the company or the Board of Directors not to accept the resignation or postpone its effectiveness to some other date.

(ii)The provisions of Section 168 of the Companies Act, 2013 [read with Rules 15 and 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014] are equally applicable to a private company. Thus, resignation of Anuj Sharma would have taken effect from 18th July 2021 i.e. the date on which resignation notice was received by SMIL even if it was a private company; and there would have been no possibility of refusal or postponement of resignation by the Board of Directors or SMIL just because SMIL was a private company and the directors could take their own decisions.

5. **(APRIL 2022 MTP)**

Anusuya is a political person and holds the position of Chairperson in Nagar Nigam. Recently, she was involved in taking bribe in connection with passing of pending bills of a contractor and was caught red handed by the Anti-corruption Bureau (ACB). A charge sheet was filed in the competent court and the matter was sub-judice in the court of law. Vikrant Cosmetics Ltd. (VCL) is a listed entity having 15 directors in its Board. One woman director in the Board resigned from the company due to personal reasons on June 30, 2021. The intermittent vacancy of woman director is to be filled and the name of Anusuya was placed before the Board of the company.

There are 3 independent directors in the Board. The company wants to increase the number of directors in the Board from 15 to 17. The Board meeting of the company was held on 17th September, 2021 to consider the following agenda items:

a) Anusuya to be inducted in the Board of the company, as woman director.
b) Increase the number of directors from 15 to 17.
c) Since Anusuya is not having any pecuniary relations with the company or with its promoters, hence she may be put in the category on Independent-Woman Director.
d) The independent directors opposed to the proposal for the appointment of Anusuya as Woman / Independent Director.

Based on the stated facts, answer the following questions in terms of the Companies Act, 2013:

i. How and within what period the intermittent casual vacancy of a woman director can be filled up?
ii. The Companies Act, 2013 provides the maximum number of directors as 15. Is it possible to increase the number from 15 to 17?
iii. Whether Anusuya can be inducted in the Board of the Company, being a political persons and that too charged by the ACB?
iv. The Companies Act, 2013 have provisions to have at least one woman director in the Board by every listed company. If an office of a woman director is coloured as Independent Director, whether the office of woman director shall be treated as vacant?

Answer:

(i)The second proviso to Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that any intermittent vacancy of a woman director shall be filled-up by the Board at the

earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.
As per the facts, the intermittent vacancy of a woman director was caused on June 30, 2021.
The Board meeting of the company was held on 17th September, 2021. Therefore, vacancy of woman director can be filled up latest by 30th September 2021 i.e, three months from the date of such vacancy.

(ii)Section 149(1)(b) of the Companies Act, 2013 provides that every company shall have a Board of Directors consisting of individuals as directors and shall have a maximum of 15 directors. However, the first proviso to this section further provides that a company may appoint more than 15 directors after passing a special resolution in the general meeting of the shareholders. Accordingly, it is possible to increase number of directors from 15 to 17 in the Board of Directors of Vikrant Cosmetics Ltd.

(iii)Section 164 of the Companies Act, 2013 deals with the disqualifications for appointment of director. Section 164(1)(d) & (e) provides as under:

(d)he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence:
Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e)an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force.
In the above case, the ACB has only Anusuya who is red handed and charge sheet has been submitted in the court. The matter is sub-judice with the court and no final order has been passed yet. So if the provisions of sub-clause (d) and (e) of section 164(1) is interpreted, Anusuya has not been convicted by the court of any offence, so she may be treated as eligible for appointment as director. Further section 178(3) provides that the Nomination and Remuneration Committee shall formulate the criteria for determining qualifications, positive attributes and independence of a director and recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees.

Thus, in light of the provisions of section 178(3) the Nomination Committee shall formulate a policy for inducting any person as director in the Board. If such policy contains that even if a person has been alleged of any offence (although not ordered by any court), he is disqualified for appointment as director, then that person should not be so appointed.

(iv)The second proviso to Section 149(1) read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules 2014 provides that every listed shall have at least one woman director.
Section 149(4) provides that every listed public company shall have at least one-third of the total number of directors as independent directors and the Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.
Section 149(8) provides that the company and independent directors shall abide by the provisions specified in Schedule IV.

No where in the said provisions, it is mentioned that a woman director cannot be an Independent Director (ID). If a person is fulfilling the criteria of appointment as an Independent director, whether man or woman,

he or she can be appointed so. Further, if the ID is a woman and the company is required to appoint at least one woman director, both the purposes are fulfilled.

Here, in this case, Anusuya has been charge sheeted by the ACB and the matter is under trial / sub-judice with the court of law, however if any Policy is framed by the Remuneration Committee not to include any such person, against whom, there is any charge of offence (though not proved by ordered of any court), such person shall not be entitled to be in the Board.

6. (MAY 2022 EXAM)

A, B and C are independent directors of X Limited. A was appointed independent director for a period of 3 years, B was appointed for a period of 5 years and C was appointed for a second term of 5 years.

The period /term of all the independent directors will be over on 30th September, 2022. X Limited is planning to consider reappointment of the above independent directors. You are requested to advice whether A, B and C can be reappointed as independent directors as per the provisions of the Companies Act, 2013?

Answer:

According to Section 149(10) & (11) of the Companies Act, 2013:

Term: an independent director shall hold office for a term up to 5 consecutive years on the Board of a company.

Eligibility for Re-appointment: He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

Limit on holding of office: An independent director shall not hold office for more than 2 consecutive terms.

Cooling period for appointment: However, he shall be eligible for appointment after the expiration of 3 years of ceasing to be an independent director.

Appointment of A

In the instant case, A was appointed Independent Director for a period of 3 years, therefore he can be re-appointed after complying the above provisions.

Appointment of B and C

B was appointed for a period of 5 years, therefore he can also be re-appointed after complying the above provisions.

C was appointed for a second term of 5 years, he cannot be reappointed as Independent Director for consecutive third term. However, he shall be eligible for appointment after the expiration of 3 years of ceasing to be an independent director.

7. March 2018

Mr. fortune is holding directorship in the following types of companies:

a. **4 Public companies**
b. **10 private companies**
c. **2 companies registered under section 8 of the Companies Act, 2013.**

Mr. Fortune further received offers from 7 public companies, 6 private companies, and 2 companies registered under section 8 of the Companies Act, 2013. He wants to take up maximum permissible directorship. His order of preference is as follows:

a. **Public companies**

b. Private companies (not being holding or subsidiary of any public company) and
c. Companies registered under section 8 of the Companies Act, 2013
Decide the number of companies in which Mr. Fortune can hold the directorship.

Answer:

Section 165 of the Companies Act, 2013 provides for the maximum permissible number of directorships that a person can hold. According to this section:

No person, after the commencement of this Act, shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. [Section 165(1)]

Provided that out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]

However, the limit of directorship of 20 companies shall not include the directorship in a dormant company: as also in a section 8 company.

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

The MCA vide Notification No. 466(E) dated 5th June 2015, has clarified that section 165(1) of the Companies Act, 2013, shall not apply to section 8 companies.

Based on the above provisions, Mr. Fortune can hold the directorship as follows:

i. 6 Public companies. Since the maximum number of public companies in which one can be a director is 10 only.
ii. No more private company. Since his total holding has already reached the maximum of 20 companies (All-inclusive of public and private companies)
iii. 2 more companies registered under section 8 of the companies Act, 2013. Since there is no restriction on the number of directorships, a person can hold in the companies registered under section 8 of the Companies Act, 2013.

8. RTP May 2018

The composition of the Board of Directors of a listed company as on 31-03-2017 comprised of

(i) Mr. A, Director,
(ii) Mr. B, Director
(iii) Mr. C, Director
(iv) Mr.· D, Director,
(v) Mrs. E, Independent Director,
(vi) Mr. F, Independent Director and
(vii) Mr. G, Independent Director.

You are required to examine with reference to the provisions of the Companies Act, 2013 the vacations of the offices of Mr. D & Mrs. E and discuss the course of action that can be taken up by the Company in this regard?

Discuss the legal position in the given situations with reference to the provisions of the Companies Act, 2013:

a) Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of his resignation in e-form DIR-11 to the Registrar of Companies (RoC) within the prescribed

time. Besides, the company fails to intimate about the resignation of Mr. Arthav to RoC.

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

Answer:

The provision of the Companies Act, 2013 governing the appointment of Women Director and Independent Directors are as under:

(a) The second proviso to section 149(1) of the Companies Act, 2013 provides that such class or classes of companies as may be prescribed, shall have at least one women director. Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 provides that the following class of companies shall appoint at least one women director –

(1) **every listed company.**

(2) every other public company having-

- paid-up share capital of one hundred crore rupees or more; or
- turnover of three hundred crore rupees or more:

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

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

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

As per the facts stated in the question, the composition of the board of directors of the listed company as of 31-3-2017 comprised of a total of 7 directors. Out of which 4 were directors and 3 were independent directors. Later Mr. D (Director) and Mrs. E (Independent Director) vacated their offices of director on 15 -4-2017.

So accordingly, the listed company as stated above shall have at least one women director and one-third of the total number of directors as independent directors in the Board. However, on 15-4-2017, the total number of directors left was 5 due to the vacation of Mr. D and Mrs. E. Further, Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014, provides that if there is an intermittent vacancy of a women director, it shall be filled up by the Board at the earliest but not later than the immediate next board meeting or three months from the date of such vacancy whichever is later.

As per the requirement of the above sections, there is the compliance of section 149(4) as 1/3rd of the total number of directors comprises of (1/3x5) 1.6 rounded off as 2, which complies with the minimum requirement of 2 independent directors in the board, however, pertaining to women director, Board has to fill up the intermittent vacancy at the earliest but not later than immediate next board meeting or three months from the date of such vacancy whichever is later.

(ii) (a) Resignation of Director (Section 168 of the Companies Act, 2013)

A director may resign from his office by giving a notice in writing to the company. The Board shall on receipt of such notice take note of the same. The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in Form DIR -12 and post the information on its website if any.

Such a director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in Form DIR-11 along with the prescribed fee. The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later. In the present case, Mr. Arthav, a director resigns after giving due notice to the company and he forwards a copy of his resignation in e-form DIR-11 to the RoC within the prescribed time.

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

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

The Articles of Association of Superwood Limited do not confer upon the Board of Directors any such power. Hence, the Board cannot appoint Mr. Ramakant as a nominee director even at the request of a bank that has extended long-term financial assistance to the company.

9. Aug 2018

Mr. Single, a director of XYZ Ltd. Goes to Singapore, for a period of 6 months. Board appoints Mr. Replacement, in his place as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd. Identify the nature of the appointment of Mr. Replacement in XYZ Ltd as an alternate director.

Answer:

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

In the given question, Board appoints Mr. Replacement, in the place of Mr. Single as an alternate director. Mr. Replacement was also holding directorship in XYZ Ltd.

So, as the per above provision, Mr. Replacement shall not be appointed as an alternate director due to his holding of a directorship in the same company in which he is appointed as an alternate director. So, his appointment is invalid.

10. Aug 2018

ABC Ltd. is a listed company having 50,00,000 equity shares of Rs. 100 each as its paid-up capital. Of the total shareholders of the company, there are 20000 shareholders who are holding shares of the nominal value of not more than Rs. 20000 each. A group of shareholders who had applied for these shares at the time of issue of such shares by the company by issuing a prospectus and been allotted these shares wants to appoint a small shareholder's director to safeguard their interest and to get a

proper representation in the company. A total number of 1500 such small shareholders decided to propose Mr. X as their candidate for this post. In the light of the Companies Act, 2013 on the basis of the facts provided, determine the following situations—

(1) What procedure should be followed by a group of shareholders to have Mr. X, a small shareholder director in the Board of Directors of the company?

(2) What are the provisions related to his (Mr. X) status as an independent director and what exceptions are available to him in relation to his appointment as a director?

Answer:

As per the provisions given in Section 151 of the Companies Act, 2013, a listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as prescribed in Rule 7 of the Companies (Appointment and Qualification of Directors) Rules, 2014. "Small Shareholders" means a shareholder holding shares of the nominal value of not more than Rs. 20000/- or such other sum as may be prescribed.

(1) The Companies (Appointment and Qualification of Directors) Rules, 2014 provides for the procedure for appointment of small shareholders' director according to which:

(A) A listed company, may upon notice of not less than

a) one thousand small shareholders; or
b) one-tenth of the total number of such shareholders,

Whichever is lower; have a small shareholders director elected by the small shareholder.

However, a listed company may opt suomoto, to have a director representing small shareholders and in such case, the provisions stated in point (B) shall not apply for the appointment of such director.

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

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

(C) The notice shall be accompanied by a statement signed by the person whose name is being proposed for the post of small shareholder's director stating-

a) his Director Identification Number;
b) that he is not disqualified to become a director under the Act; and
c) his consent to act as a director of the company.

(d) A person shall not be appointed as small shareholder's director of a company, if he is not eligible for appointment as a director as per the provisions of the Companies Act, 2013. In compliance with the said provisions, Mr. X can be appointed as the small shareholder by the group of shareholders in the Board of Directors of ABC Ltd.

(2) Such small shareholders' director shall be considered as an independent director if he fulfills all the conditions prerequisite to become an independent director as mentioned in Section 149(6) and gives a

declaration of his independence in accordance with the provisions of section 149(7) of the Companies Act, 2013.

The appointment of a small shareholder's director i.e. Mr. X shall be as per the provisions of Companies Act, 2013, except that—

a. such director shall not be liable to retire by rotation;
b. such director's tenure as small shareholder's director shall not exceed **a period of three consecutive years**; and
c. on the expiry of the tenure, such a director **shall not be eligible for re-appointment**.

11. RTP Nov 2018

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

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

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

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

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

Answer:

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

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

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

(a) According to Section 152(6)(c) of the Companies Act, 2013, 1/3rd of such of the Directors for the time being as are liable to retire by rotation, or their number is neither three nor a multiple of three, then, the number nearest to the 1/3rd shall retire from office. Therefore the Directors liable to retire by rotation are 11*2/3 i.e.7.3 or 8.

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

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

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

(C) According to Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than 15 directors, it can do so after passing a special resolution. Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.

But, these appointments cannot be done through a single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement. A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved. [Section 162 of the Act].

12. Study material

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

Answer:

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

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

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

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

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

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

13. MTP-II- July 2021

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

They came for the legal counselling against their holding of disqualifications as directors in order to challenge before the Tribunal. Following were the position of the petitioners: One of the petitioner, Mr. X, was also holding directorship in GPS Ltd. and CDM Ltd. Whereas the petitioner, Mr. Y was

appointed one month before in NPP Ltd.. Whereas Petitioner, Mr. Z, was within a year of commission of default, offered directorship by RSM Ltd.

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

(a) On the validity of attracting of disqualification of Petitioners in NPP Ltd. and vacation of their directorship.

(b) What will be consequences of default caused in NPP Ltd. on the holding of Mr. X's directorship in GPS Ltd. and CDM Ltd.

(c) On the validity of offered directorship to Mr. Z by RSM Ltd.

(d) Legal position of Mr. Y who was appointed one month before, in NPP Ltd. (8 Marks)

ANSWER:

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

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

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

Provided that where a person is appointed as a director of a company which is in default of clause (a) or clause (b), he shall not incur the disqualification for a period of six months from the date of his appointment. Further section 167 (1) of the Companies Act, 2013 states that the office of a director shall become vacant in case he incurs any of the disqualifications specified in section 164. Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default.

Accordingly following are the answers to the questions:

(a) In the given case, the petitioners have incurred disqualification under sub-section (2) of section 164, and falling under section 167, whereby the office of the directors shall become vacant in all the companies, except in the defaulted company. The petitioners, being disqualified under section 164(2) have to vacate the directorship in all the other companies except in NPP Ltd.

(b) On the basis of the section 167(1), Mr. X has to vacate directorship in GPS Ltd. and CDM Ltd.

(c) Offer of directorship to Mr. Z by RSM Ltd. was within a year of commission of default, so it's not valid. As per section 164(2), disqualified director shall not be eligible to be appointed in other company for a period of five years from the date on which the said company committed the default.

(d) Petitioner, Mr. Y was appointed one month before in NPP Ltd. which is in default, he shall not incur the disqualification for a period of six months from the date of his appointment as he is freshly appointed.

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Chapter 2
Appointment & Remuneration of Managerial Personnel

Part A: Multiple Choice Questions

1. (APRIL 2022 MTP)

Due to non-compliance of certain requirements under the Companies Act, 2013 not amounting to fraud, Super-Market Limited was required to re-state its financial statements for the financial year 2017-18 during the current year. After the financial statements were restated, it was found that Mr. Kumar, the Managing Director (MD) of that period, who is now retired, was paid excess remuneration to the extent of Rs. 5,00,000. In the given situation, choose the correct option out of those given below, which indicates whether such excess remuneration paid to ex-MD Mr. Kumar is recoverable or not.

(a) **Excess remuneration of Rs. 5,00,000 paid to Mr. Kumar, ex-MD of Super-Market Limited, cannot be recovered since such recovery after retirement is invalid.**

(b) **Excess remuneration of Rs. 5,00,000 paid to Mr. Kumar, ex-MD of Super-Market Limited, shall be recovered irrespective of his retirement from the company.**

(c) **Only Rs. 2,50,000, being 50% of excess remuneration of Rs. 5,00,000, paid to Mr. Kumar, ex-MD of Super-Market Limited, is validly recoverable because no fraud implicating him is involved.**

(d) **Only Rs. 1,25,000, being 25% of excess remuneration of Rs. 5,00,000, paid to Mr. Kumar, ex-MD of Super-Market Limited, is validly recoverable because no fraud implicating him is involved.**

ANSWER : (B)

2. (APRIL 2022 MTP)

Every listed company shall disclose in the Board's report, the ratio of the remuneration of each director to the employee's remuneration.

(a) mean

(b) Median

(c) Highest

(d) Not required to be disclosed(1 Mark)

ANSWER : (B)

3. (SEPT 2022 MTP)

On June, 20, 2017, Mr. Anil Mehra was appointed as Manager of PQR Music Systems Limited for a period of five years. Considering his performance and dedication towards the company, the management of PQR Music Systems Limited decided to re-appoint him as Manager before the completion of his tenure. Out of the following four options, choose the one which indicates the date on which his re-appointment will be considered valid?

(a) June 24, 2021.

(b) February 1, 2021.

(c) March 12, 2020.

(d) September 10, 2020.

ANSWER :(A)

4. (OCT 2022 MTP)

Shrenik Ltd. is a listed entity and comes under the top 2000 listed entities (as of 1st April, 2020). The Board consists of 10 directors. Abhijit, one of the directors of the company has celebrated his 75th Birthday on 10th June 2022. By virtue of his rich qualifications and experiences, the company want to continue him. What procedure is to be followed by the company:

a) The Company has to pass a special resolution to this effect.
b) The Company has to pass a resolution in its Board's Meeting.
c) The requirement of passing a special resolution is only in case of Managing Director and not for the any other Director.
d) A person can continue to hold the directorship, as far as he is of good health and have willingness to continue.

ANSWER : (A)

5. Board of Directors of Centra Tech Limited desires to appoint Nipun, aged 22 years as the Managing Director of the company. Nipun is currently a director and the son of Ramesh, the immediate Managing Director who expired in a car accident. State whether Nipun can be appointed as Managing Director.

a) Yes; since he is above the age of 21 years

b) No; since he has not attained the age of 25 years

c) Since he has not attained the age of 25 years, permission of Registrar of Companies is to be obtained for his appointment as MD

d) Since he has not attained the age of 25 years, permission of Central Government is to be obtained for his appointment as MD

Answer: a) Section 196(3) of the Companies Act, 2013 me yue baate bataie gai hai .

Answer: a) chalo kuch aur baata deta hu Women director and independent director ka sitting fees other directors se less nahi hoga.

6. In addition to a listed company which other public company is required to have whole time key managerial personnel?

a) which has paid-up share capital of Rs. 2 crores

b) which has paid-up share capital of Rs. 3 crores

c) which has paid-up share capital of Rs. 4 crores

d) which has paid-up share capital of Rs. 10 crores

Answer: d) Hint: Section 197(5) of the Companies Act, 2013 along with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014

Part B- Descriptive Questions

1. (SEPT 2022 MTP)

Examine the following situations in the light of the relevant provision of the Companies Act, 2013:

(1) The Board of Director of ABC Ltd. declared interim dividend for the current financial year 2020-2021. The proposal of dividend declaration was accepted at the meeting and dividend was declared. However, due to some reasons, the company failed to pay the dividend to the shareholders within prescribed period. Mr. futuristic, a director on the board of this company, had offer of appointment in other company PQR Ltd. He wishes to take up the post in the appointed company. Discuss on the appointment of Mr. Futuristic in PQR Ltd.

(2)Mr. Talented was a director in a holding company and also in its subsidiary company. He was drawing his managerial remuneration from both the companies in his capacity as a director. It was brought to the attention of the company that he cannot draw remuneration from both the companies because of virtue of relationship as a holding and subsidiary company. Discuss on the legality of drawing managerial remuneration by Mr. Talented from both the companies.

ANSWER :

(1)Section 164 talks about the disqualifications of directors under the Companies Act, 2013. In specific, sub-section (2)(b) of the said section, no person who is or has been a director of a company which has failed to pay any dividend declared and such failure continues for one year or more, shall not be eligible to be re-appointed as a director of that company or appointed in other company for a period of 5 years from the date on which the defaulted company fails to do so. Mr. futuristic, a director on the board of ABC Ltd., had offer of appointment in other company PQR Ltd. He wishes to take up the post in the other company. In view of above stated provision, since Mr. futuristic was a director in a company which failed to pay dividend even after 1 year of declaration and so was a defaulted company. Therefore, he cannot be appointed in PQR Ltd.

(2) Any director who is in receipt of any commission from the company and who is managing or Whole time director of the company shall not be disqualified from receiving any remuneration of commission from any holding or subsidiary company of such company subject to its disclosure by the company in the Board's report as per section 197(14) of the Companies Act. However subject to the provisions of sections I to IV of

schedule V of the Companies Act, 2013, a managerial person shall draw remuneration from one/both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is managerial person. Accordingly, Mr. Talented is advised to check that it does not exceed the higher maximum limit admissible in any of the companies i.e. either holding or subsidiary.

2. (SEPT 2022 MTP)

In Crystal Limited, the following directors are getting sitting fees.

Director's Name	Sitting fees (INR)
Mr. X (Non-Executive Independent Director)	**INR70,000**
Mrs. Y (Non-Executive Woman Director)	**INR80,000**
Mr. Z (Non- Executive Director)	**INR60,000**
Mr. L (Non-Executive Director)	**INR 50,000**

The Boards of Directors of Crystal Limited increased the sitting fees of Mr. Z and Mr. L to one lakh rupees each and continued the sitting fees of Mr. X and Mrs. Y at the old fees stated above. Referring to the provisions of the Companies Act, 2013, examine whether the decision of the Board of Directors to increase the sitting fees of few directors and maintaining the same sitting fees for remaining directors shall be deemed to be valid.

ANSWER :

Sitting Fees to Directors [Section 197(5) of the Companies Act, 2013]

A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board subject to the conditions imposed by Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 as under: -

The sitting fees shall not exceed one lakh rupees per meeting of the Board or committee thereof. (As per Rule 4)

The sitting fee payable to the Independent Directors and Women Directors shall not be less than that payable to other directors. (As per Proviso to Rule 4)

Accordingly, increasing the sitting fees of Mr. Z and Mr. L is within the limit prescribed under the said Rule 4. However, maintaining the same sitting fees for the Mr. X and Mrs. Y is not valid in line with the requirement to the stated provision i.e., it shall not be less than that payable to Mr. Z and Mr. L.

Therefore, the decision of the Board of Directors to increase the sitting fees of few directors and maintaining the same sitting fees for remaining directors shall be deemed to be invalid.

3. (OCT 2022 MTP)

The following particulars are extracted from the statement of profit and loss of Sunlight Limited for the year ended 31st March 2022:

Sr. No	Particulars	Amount
1	Gross Profit	60,00,000
2	Profit on sale of building (Cost RS 10,00,000 and written down value RS 6,00,000)	5,00,000
3	Salaries & wages	2,50,000
4	Sundry Repairs to Fixed Assets	1,00,000
5	Subsidy from the government	3,00,000
6	Compensation for breach of contract	1,00,000
7	Depreciation	1,40,000
8	Loss on sale of investments	2,00,000
9	Interest on unsecured loans	30,000
10	Interest on debentures issued by the company	1,00,000
11	Repair Expenses to fixed assets (Capital in nature)	2,00,000
12	Net Profit	13,00,000

You are required to calculate the overall managerial remuneration payable under section 197 of the Companies Act, 2013 subject to the provisions under Schedule V.

Answer:

The managerial remuneration shall be computed in accordance with the provisions laid down in section 198 of the Companies Act 2013.

Particulars	Amount
Net profit	13,00,000
Less: Capital profits on sale of building (Note 1)	1,00,000
Salaries & Wages (Note 2)	-
Sundry repairs to fixed Assets (Note 2)	-
Subsidy from the government (Note 3)	-
Compensation from breach of contract (Note 2)	-
Depreciation (Note 2)	-
Loss on Sale of Investments (Note 4)	-
Interest on unsecured loans (Note 2)	-
Interest on debentures (Note 2)	-
Add: Repair expenses to fixed assets (Capital in Nature) (Note 5)	2,00,000
Net profits as per section 198	14,00,000

Therefore, the overall maximum managerial remuneration shall be 11% of the Net profits computed in accordance with section 198 i.e. 11% x 14,00,000 = Rs.1,54,000. It is assumed that the net profit given in the question is arrived after giving effect to all the line items given therein.

Notes:

As per section 198(3), credit shall not be given for profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of theundertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets; provided that where the amount for which any fixed asset is sold exceeds the written- down value

thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written- down value.

Accordingly, the calculation of capital profit is computed as under:

Profit = Selling Price – Written down value

5,00,000 = Selling Price – 6,00,000.

Therefore, Selling Price = 11,00,000.

Capital profit= 11,00,000 – 10,00,000 (original cost)= 1,00,000

According to section 198 (4), the following sums shall be deducted:

a) All the usual working charges – salaries and wages are considered as usual workingcharges

b) expenses on repairs, whether to immovable or to movable property, provided the repairs are not of a capital nature

c) any compensation or damages to be paid in virtue of any legal liability including a liabilityarising from a breach of contract

d) interest on debentures issued by the company

e) interest on unsecured loans and advances

f) depreciation to the extent specified in section 123

4. Aug 2018 (VVI)

Mr. Xavier, a Director of Mac Ltd., was appointed on 1st April, 2017. One of the terms of appointment was that if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31 st March, 2018, the company suffered heavy losses. The company was not in a position to pay any remuneration but he was paid Rs. 60 lacs for the year, as paid to other directors. The effective capital of the company is Rs.100 crores.

Besides, Mr. Young was appointed as Managing Director in the Company. He was appointed for the term of 5 years with effect from 1.4.2014 on a salary of Rs. 12 lakh per annum. The Board of Directors of the company on coming to know of certain questionable transactions, terminated the services of the Mr. Young from 1.3.2018. Mr. Young termed his removal as illegal and claimed compensation from the company.

Integrating the given facts in terms of the relevant provisions of the Companies Act, 2013, Examine the following situations: Validity of the payment of remuneration to Mr. Xavier. Compensation paid, if any, to Mr. Young.

Answer:

(i)Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding Rs. 120 Lakh in the year in case the effective capital of the company is Rs. 100 crore to 250 crore. The limit will be

doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of Rs. 60 Lac in the year as remuneration to Mr. Xavier is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of Rs. 120 Lakh in the year.

(ii) According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing, Whole-time Director or Manager. The amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired **term of his office or for 3 years whichever is shorter**. No compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

In light of the above provisions of law, the company is not liable to pay any compensation to Mr. Young, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. But, it is not proper on the part of the company to withhold the payment of compensation on the basis mere allegations. The compensation payable by the company to Mr. Young would be Rs. 13 Lacs calculated at the rate of Rs. 12 Lacs per annum for an unexpired term of 13 months.

5. (MAY 2022 EXAM)

Mr. Jack, a young and energetic 24 years old American Citizen came to India in the month of January, 2021 for taking up employment. He has been hunting for the job and stayed in India. M/s NS Software Solutions Limited is a listed company engaged in developing customized software package for automobile manufacture. This company appointed Mr. Jack as its Managing Director at the Annual General Meeting held on 11th November, 2021, upon certain terms & conditions. Based on the above information, you are requested to validate the following referring to the provisions of the Companies Act, 2013 read with Schedule V of the Act:

(i) Eligibility of Mr. Jack for being appointed as a managing director.

Will your answer differ in case the company is located in Special Economic Zone. (SEZ)?

Answer:

Additional eligibility conditions for appointment as per Schedule V:

Part I of Schedule V to the Companies Act, 2013, has prescribed additional eligibility conditions for appointment as Managing Director or whole-time director or a manager without seeking approval from the Central Government. According to condition (4), the person to be appointed shall be resident of India.

Explanation I clarifies that resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India, -

(a) for taking up employment in India; or

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

Explanation II clarifies that the condition above shall not apply to the companies in Special Economic Zones (SEZ).

(i) **Eligibility of Mr. Jack for being appointed as the MD**

In the instant case, Mr. Jack, an American Citizen came to India in the month of January, 2021 for taking up employment. He has been appointed as Managing Director in NS Software Solutions Limited on 11th November, 2021.

Since, Mr. Jack has not stayed in India for a continuous period of twelve months immediately preceding 11th November, 2021, he is not eligible for being appointed as the Managing Director.

(ii) **If the Company is located in SEZ**

In case the Company is located in Special Economic Zone (SEZ), the above condition shall not apply and Mr. Jack is eligible for being appointed as a Managing Director.

6. Nov 2018 GOOD QUESTION FOR SECTION 202 VVI.

Mr. Gopi is the Managing Director of LGB Limited. The Company wants to vacate the post of Managing Director on March 31, 2018 and appoint Mr. Lakshmikant in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr. Gopi is upto 30th June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the Company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:

Financial Year	*Remuneration (Rs. in Lakhs)*
2013-14	*30*
2014-15	*35*
2015-16	*40*
2016-17	*45*
2017-18	*50*

Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited, as per the provisions' of the Companies Act, 2013. Advise.

What will be your answer if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the Company?

Answer:

Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

(i) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

(ii) The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, calculated on the basis of the average remuneration earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

In the light of the provisions as stated above, the following will be taken into consideration while calculating the amount of compensation to be paid to Mr. Gopi:

Average remuneration earned by Mr. Gopi during a period of 3 years (i.e. 2015-16, 2016-17 and 2017-18) immediately preceding the date on which he ceased to hold office: [(40+45+50)/3] = Rs. 45 Lakhs.

Remainder time period left to be served in office has Mr. Gopi not been removed, 1st April, 2018 to 30th June, 2022, 4 years.

Thus, Mr. Gopi will be paid compensation for Maximum 3 years.

Amount of Compensation: The maximum amount of compensation that Mr. Gopi will be eligible to get from LGB Limited is Rs.45 lakhs for 3 years = Rs. 135 lakhs.

In case of an ordinary director: Further, if a person is only an ordinary director but neither the Managing Director nor a whole time director nor a manager of the company, he shall not be eligible to get compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

7. (RTP-NOV 2018)

Mr. AMIT is the Managing Director of ANJ Limited, which is a non-government public company. The directors of CHH Limited decided to appoint Mr. AMIT as the Managing Director of the company, even though Mr. AMIT decided not to vacate his place of office of Managing Director of ANJ Limited. A notice for a Board meeting specifying a resolution containing the proposal of appointment of Mr. AMIT was served to all the eligible directors of CHH Limited. Out of eight directors of the company, six directors attended the meeting and out of them four directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of Directors seek your opinion whether Mr. AMIT can be appointed as the Managing Director, of the company in this situation. Referring to the applicable provisions of the Companies Act, 2013, advise them.

ANSWER:

Appointment of Key Managerial Personnel

As per Section 203(3) of the Companies Act, 2013, a whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time. However, the above sub-Section (3), shall not disentitle a key managerial personnel from being a director of any company with the permission of the Board.

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India. In the given case, unanimous consent of all the directors present at the meeting was lacking. Hence, Mr. Amit cannot be appointed as a Managing Director of CHH Limited.

8. Advise Super Specialties Ltd. in respect of the following proposals under consideration of its Board of Directors: VVI

(i) Appointment of Managing Director who is above the age of 70 years;

(ii) Payment of commission of 4% of the net profits per annum to the directors of the company;

(iii) Payment of remuneration of Rs. 40,000 per month to the whole-time director of the company which is running in loss and having an effective capital of Rs. 95.00 lacs.

Answer:

Under the proviso to section 196 (3) of the Companies Act, 2013, a person who has attained the age of seventy years may be employed as managing director, whole-time director or manager by the approval of the members by a special resolution passed by the company in the general meeting and the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

However, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

In the given situation, Super Specialties Ltd. can employ a person who is above the age of 70 years as its Managing Director, if the above-mentioned legal procedure is followed. Thus, the appointment can be regularized by passing a special resolution and if that is not done but the votes cast in favour of the motion exceed the votes, if any, cast against the motion, the approval of Central Government is required to be obtained.

(ii) Under section 197 (1) the limit of total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven percent of the net profits of that company for that financial year computed in the manner laid down in section 198. Further, the third proviso to section 197 (1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed one percent. of the net profits of the company, if there is a managing or whole-time director or manager; or three percent of the net profits in any other case.

Therefore, in the given case, the commission of 4% is beyond the limit specified, and the same should be approved by the members by passing a special resolution.

(iii) If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including managing or whole time director or manager, any remuneration exclusive of any fees payable to directors except in accordance with the provisions of Schedule V. Section II of Part II of schedule V provides that where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may pay remuneration to the managerial person not exceeding Rs. 60 lacs for the year if the effective capital of the company is negative or up to Rs. 5 crores.

In the given situation, the proposed remuneration of Rs. 40,000 per month (i.e.4,80,000 per annum) can be paid to the whole-time director of the company which is running in loss because the remuneration is less than permissible Rs. 60 lacs

9. (Past exam Jan 2021) VVI "(ALL CONCEPT AT ONE PLACE)

You are a leading Chartered Accountant advising corporates covering various aspects inter alia on Corporate and Economic Laws, Corporate Tax and related matters with excellent articulation skills and is a much sought after professional on the Board of many reputed Companies. Recently, you have been approached by Dash Board Ltd., a loss making company seeking your advice on the validity of the appointment of Mr. 'X', a turnaround specialist, as the Whole Time Director of the Company w.e.f. 01.01.2020 on which date he would be above 70 years of age. You were further informed that at the extra-ordinary general meeting of the Company held on 15.03.2020, the shareholders have not passed a special resolution with regard to the appointment of Mr. 'X' but the votes cast in favour of the motion exceeded the votes cast against the motion. The Company has provided you the following inputs extracted from the latest audited Balance Sheet as at 31st March, 2020.

On the basis of the above facts and figures, Dash Board Ltd. seeks your advice in respect of the following under the provisions of the Companies Act, 2013.

S. No.	Particular	Amount (Rs. In Crores)
1.	Authorized Equity Share Capital	1,560
2.	Paid Up Equity Share Capital	860
3.	Share Application Money Account (Company is in process of Issue (FPO)) Follow on Public	60
4.	Reserves and Surplus (including General Reserve - 600 & Revaluation Reserve - 80)	680
5.	Long Term Borrowings	800
6.	Investments	160
7.	Accumulated Losses	40

(i) Validity of the appointment of Mr. 'X' as Whole Time Director.

(ii) Compute the effective capital for payment of managerial remuneration.

(iii) As the Company is running in losses, state the maximum amount of remuneration that can be paid on yearly basis to each Managerial person other than a managerial personnel functioning in a professional capacity.

(iv) How is the remuneration payable to a Whole Time Director determined? (8 Marks)

Answer:

(i) As per section 196(3) of the Companies Act, 2013, no company shall appoint or continue the employment of any person as Managing Director, Whole-Time Director or Manager who is below the age of

21 years or has attained the age of 70 years. However, where a person has attained the age of seventy years, he may still be appointed to such office if a special resolution is passed in this respect. In such a case, the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

Further, where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made.

In the given question, the appointment of Mr. X is not valid as special resolution was not passed. However, it could have been regularized (since the votes cast in favour exceeded votes cast against the motion of appointment of Mr. X as Whole Time Director) by seeking approval of the Central Government, which, if satisfied, can accord such approval.

(ii) As per Explanation 1 to Section II of Part II of Schedule V "effective capital" means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

The effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Calculation of Effective Capital:

Particulars	Amount (Rs. in crores)
Paid up Capital (excluding share application money)	860
Add: Reserves and surplus excluding revaluation reserve	600
Add: Long term borrowings	800
Less: Investments	160
Less: Accumulated Losses	40
Effective Capital	**2,060**

(iii) Section II of Part II of Schedule V states that where the effective capital is Rs. 250 crore and above, the remuneration payable shall not exceed Rs. 120 lakh plus 0.01% of the effective capital in excess of Rs. 250 crore (i.e., 1.20 cr. + 0.181 cr. = 1.381 crore). Accordingly, the total managerial remuneration payable by Dash Limited to each Managerial person other than a managerial personnel functioning in a professional capacity shall be paid Rs. 1.381 crore remuneration. Provided that the remuneration in excess of the above limits may be paid if the resolution passed by the shareholders is a special resolution. Further, it has been clarified by an explanation that if the managerial personnel is employed for a period less than one year, the remuneration payable to him shall be pro-rated.

(iv) In terms of section 197(4) of the Companies Act, 2013, the remuneration payable to the directors of a company including any Managing or Whole Time Director or Manager, shall be determined in accordance of this section, either:

(i) By the articles of the company

(ii) By a resolution or

(iii) If the articles so require by special resolution, passed by the company in general meeting.

10. (MAY 22 EXAM)

PCR Limited has appointed Mr. Vivek, a person resident in India, as a Managing Director who has taken a charge of the post on 1st June, 2021. The remuneration package sanctioned to him is as below:

Sr. No.	Particulars	RS
1	Salary	60,00,000
2	Rent free accommodation	6,00,000
3	Children education allowance	3,00,000
4	Leave Travel Concession Package	3,00,000
5	Premium in respect of insurance taken for indemnification	5,00,000

It has, further, been informed that-

(a) **Mr. Vivek has availed the Leave Travel Concession Package which will not be pro-rated for 2021-22.**

(b) **Mr. Vivek is not proved guilty during the financial year 2021-22 with respect to the above insurance policy.**

(c) **The company has not passed a special resolution for payment of remuneration in excess of the limit prescribed by schedule V to the Companies Act, 2013.**

(d) **The company has incurred losses during the financial year 2020-21 and 2021-22.**

(e) **The effective capital of the company as at 31st March, 2021 is in negative.**

Based on the above details and referring to the provisions of the Companies Act, 2013, you are requested to analysis and answer the following:

Compute the amount that would constitute the yearly remuneration for Mr. Vivek.

(i)Compute the amount that would constitute the yearly remuneration for Mr. Vivek.

(ii)Compute the excess remuneration paid to Mr. Vivek, if any, and discuss the prospects of recovery thereof.

ANSWER :

(i)Computation of the amount that would constitute the yearly remuneration forMr. Vivek

As per Section 2(78) of the Companies Act, 2013, (the Act) the term "Remuneration "means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income Tax Act, 1961.

Further, as per Section 197(13) of the Act, where any indemnification insurance is taken by a Company on behalf of Managing Director or other managerial personnel, the premium therefor paid by the Company shall not form part of the remuneration payable to any such personnel, if that person is proved not to be guilty during the year of insurance coverage.

In the light of the provided information in the problem and as per Section 197 read with Schedule V to the Companies Act, 2013, the computation of the amount that would constitute the yearly remuneration of Mr. Vivek in PCR Limited for the FY 2021-2022 will be as under:

Sl. No.	Particulars	In RS (proportionate to 10 months as the MD has taken charge of the post w.e.f. 01.06.2021)
1.	Salary	50,00,000
2.	Rent Free Accommodation	5,00,000
3.	Children Education Allowance	2,50,000
4	Leave Travel Concession Package (not pro-rated for 2021-22 as per the question)	3,00,000
	Total yearly remuneration of Mr. Vivek	60,50,000

NOTE: Premium in respect of insurance taken for indemnification is not considered, as Mr. Vivek is not proved guilty during FY 2021-2022.

(ii) Computation of excess Remuneration paid to Mr. Vivek

It is provided that the Company has suffered losses during the FY 2020-2021 and 2021-2022 and the effective capital of the Company as at 31st March, 2021 is in negative. So, as per the Act read with Schedule V, the maximum yearly managerial remuneration payable to Mr. Vivek shall be RS 60 Lakhs including perquisites.

From the above table of computation, the total yearly remuneration of Mr. Vivek is arrived 60,50,000 (pro-rated) and whereas, for the year 2021-2022, Mr. Vivek will be entitled for maximum remuneration payable not exceeding RS 50 lakhs per annum (pro- rated for 10 months).

Thus the excess remuneration paid to Mr. Vivek is RS10,50,000/- [i.e.RS60,50,000 (-) 50,00,000].

Prospects of Recovery thereof:

As per Sections 197(9) and 197(10) of the Companies Act, 2013, where the remuneration received by any director is in excess of the limit it shall be refunded to the Company by such director and till that time he holds it in trust for the Company.

The Company shall not waive the recovery of any sum which is refundable to it unless the waiver is approved by a Special Resolution passed by the Company within two years from the date the sum becomes refundable.

In the given case, as the remuneration package sanctioned to him of RS 10,50,000/- isin excess of the prescribed limit and as provided in the question, that no special resolution is passed for payment of remuneration in excess of the limit prescribed by Schedule V to the Act.

Therefore, the Company can recover the excess amount.

Chapter 3
Meeting of Board and its powers

Part A- Multiple Choice Questions

1. (MARCH 2022 MTP)

In order to make Robotics Toys Private Limited as its subsidiary, Golden Rays Robots Limited raised its investment in Robotics Toys from 40% to 60% of its paid-up capital. From the options given below, choose the one which correctly indicates as to when the Robotics Toys shall be considered as the undertaking of Golden Rays Robots Limited.

(a) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 10% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 10% of the total income of Golden Rays during the previous Financial Year

(b) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 20% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 20% of the total income of Golden Rays during the previous Financial Year

(c) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 25% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 25% of the total income of Golden Rays during the previous Financial Year.

(d) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 30% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 30% of the total income of Golden Rays during the previous Financial Year.

Answer: B

2. (APRIL 2022 MTP)

Who can be appointed as Secretarial Auditor?

(a) Any person, who have the audit experience, can be appointed as Secretarial Auditor.

(b) Any person who is a member of the Institute of Chartered Accountants of India and holding a certificate of practice, can be appointed as Secretarial Auditor.

(c) Any person who is a member of the Institute of Company Secretaries of India and holding acertificate of practice, can be appointed as Secretarial Auditor.

(d) Any person who is a member of the Institute of Cost Accountants of India and holding a certificateof practice, can be appointed as Secretarial Auditor.

Answer: C

3. (APRIL 2022 MTP)

One of the director, who is actually residing at Nagpur, but his address as recorded with the company and in the DIN is of Mumbai. The director wish to receive the notice / agenda papers at Nagpur. At which address the notice for Board meeting and agenda papers may be sent?

a. The notice/ agenda papers be sent as per the wish of the concerned director.

b. The notice / agenda papers se sent at Nagpur address.

c. The notice / agenda papers be sent at Mumbai address.

d. The notice/ agenda papers be sent at both the addresses i.e. at Nagpur as well as at Mumbai.

ANSWER : C

4. The provision regarding conducting of four Board meetings every year is not applicable to:

(a) One Person Company (OPC), small company and dormant company

(b) One Person Company (OPC), dormant company and associate company

(c) Small company and dormant company

(d) One Person Company (OPC) and small company

Answer: (a)

5. A Board resolution cannot be passed by circulation when at least ---------- of the total members require it to be decided at a meeting of the Board.

(a) 1/2

(b) 1/3

(c) 1/4

(d) 1/5

Answer: b)

6. A Board meeting needs to be called by at least ---------- days' notice in writing sent to all the directors at their addresses registered with the company.

a) 7

b) 5

c) 3

d) None of the above

Answer: a)

7. Where at any time the number of interested directors exceeds or is equal to ---- of the total strength of the Board of Directors, the quorum shall be the number of non-interested directors who are present at the meeting and not less than two.

(a) 1/2

(b) 2/3

(c) 1/3

(d) None of the above

Answer: b) Hint: Section 174(3) of the Companies Act, 2013

8. In case of a company where minimum ---------- per cent members (in number) are relatives of promoters or are related parties, they are not precluded from voting on a resolution for approving any related party transaction.

(a) 80

(b) 85

(c) 90

(d) 95

Answer: c) Hint: Section 188 of the Companies Act, 2013

9. Under normal circumstances, a company is not permitted to make investment through more than layer(s) of investment companies.

a) One

b) Two

c) Three

d) Four

Answer: b) Hint: Section 186 of the Companies Act, 2013

10. Out of the total strength of six directors of SQ Ltd, five are attending a Board meeting to consider the investment of funds of the company. The resolution relating to investment shall be taken as passed in which of the following cases:

a) When all the five directors attending the meeting consent to it

b) When any four directors out of five consent to it

c) When any three directors out of five consent to it

d) Investment proposal must be consented to by the total strength of directors (six directors in this case)

Answer: a) Hint: Section 186(5) of the Companies Act, 2013

11. In case of a Board meeting which is conducted through the means of video conferencing, the draft minutes shall be circulated among all the directors within days of the meeting either in writing or in electronic mode as may be decided by the Board.

(a) 5

(b) 10

(c) 15

(d) 20

Answer: c) Hint: Rule 3 of the Companies (Meetings of Board and its powers) Rules, 2014

12. MTP Mar 2019

Sona Sweets Private Limited was incorporated on 5th November, 2018 with an authorised capital of Rs.10.00 lacs. Advise regarding the latest date by which the first meeting of the Board of Directors is required to take place.

(a) Latest by 15th November, 2018.

(b) Latest by 20th November, 2018.

(c) Latest by 5th December,2018.

(d) Latest by 20th December,2018.

Answer: Option C

13. RTP Nov 2019

Beauti Fashion Garments Limited has three independent directors besides eight others of its own. Due to the urgency of transacting certain important business, a Board Meeting was called by giving a shorter notice than the legally required. However, none of the independent directors was present at the Meeting to deliberate upon the motion related to that business. Despite absence of all the independent directors, a board resolution was passed for operationalizing the business by the directors personally present at that Meeting who were much more than the required quorum. Advise, whether the resolution passed at the Board Meeting called at a shorter notice was valid.

(a) The resolution so passed is valid, for it was passed at the Board Meeting where the required quorum was present.

(b) To be valid the resolution so passed needs to be circulated to all the directors and further, it is required to be ratified by all the three independent directors.

(c) To be valid the resolution so passed needs to be circulated to all the directors and further, it is required to be ratified by at least two independent directors.

(d) To be valid the resolution so passed needs to be circulated to all the directors and further, it is required to be ratified by at least one independent director.

Answer :(d)

14. MTP Mar 2019

Jupiter Shopping Mall Limited was incorporated on 3rd December, 2016. As on 31st March 2018, it had free reserves of Rs. 50.00 lacs and its Securities Premium Account showed a balance of Rs. 7.50 lacs. One of its directors Raha has a leaning towards a particular political party in which his other family members are actively involved. Raha convinced the other two directors of the company i.e. Promila and Rana to contribute a sum of Rs. 10.00 lacs to this political party. Accordingly, the Board of Directors held a meeting on 16th December, 2018 and passed a resolution to contribute the decided amount. Advise the company as to how much amount they can contribute to a political party in the FY 2018-19.

(a) The company cannot contribute any amount to a political party in the FY 2018-19.

(b) The company can contribute maximum Rs. 2.50 lacs in the FY 2018-19.

(c) The company can contribute maximum Rs. 3.75 lacs in the FY 2018-19.

(d) The company can contribute maximum Rs. 5.00 lacs in the FY 2018-19.

Answer: Option a

15. SEPT 2022 MTP)

Chetan Motorboats Limited, incorporated on 25th June, 2021 is desirous of making donations to a reputed political party. Out of the following options, choose the one which correctly depicts as to when Chetan Motorboats Limited shall be eligible to make such donations to a political party:

a) Chetan Motorboats Limited shall be eligible to make donations to a political party after one yearfrom the date of its incorporation.
b) Chetan Motorboats Limited shall be eligible to make donations to a political party after two years from the date of its incorporation.
c) Chetan Motorboats Limited shall be eligible to make donations to a political party after three years from the date of its incorporation.
d) Chetan Motorboats Limited shall be eligible to make donations to a political party after five years from the date of its incorporation.

Answer: C

16. April 2019

Ruby Diamonds Limited is required to establish 'Vigil Mechanism' though it is neither a listed company nor a company which has accepted deposits from the public. Name the third criterion because of which it is necessitated that the company needs to create 'Vigil Mechanism'.

a) As per the last audited statements, the subscribed capital of the company is in excess of Rs. 50 crores.

b) As per the last audited statements, the paid up capital of the company is in excess of Rs. 50 crores

c) As per the last audited statements, the turnover of the company is in excess of Rs. 50 crores

d) None of the above answer

Answer: Option D

Part B- Descriptive Answer

1. (MAY 2022 RTP)

Clause 36 of the Articles of Association of Swasth Medical Pharmacy Limited (SMPL) states the dates on which the Board Meetings shall be held every year and therefore, if Board Meetings are held as scheduled, there is no need to send notice of such meeting to every director. The notice of the meeting shall be sent to every director only if a particular Board Meeting is held on a date which is otherwise than that mentioned in Clause 36. Raghav, one of the directors of the company, feels that it is mandatory to send notice of every Board Meeting to all the directors otherwise it shall be violative of the relevant provisions of the Companies Act, 2013.

Analyse the contention of Raghav with reference to the applicable provisions of the Companies Act, 2013.

Answer:

The contention of Raghav that the notice of every Board Meeting is to be mandatorily sent to all the directors of the company is to be analysed with reference to Section 173 of the Companies Act, 2013 which deals with 'Meetings of Board'.

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

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

Provided further that in case of absence of independent directors from such a meeting of the Board, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Section 173 (4) prescribes that every officer of the company whose duty is to give notice under Section 173 and who fails to do so shall be liable to a penalty of twenty-five thousand rupees.

It is worth noting that Section 173 (3) makes it mandatory to send written notice of a Board Meeting to every director. It states that a meeting of the Board shall be called by giving not less than seven days' notice in writing to

every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

In view of the above provisions, the contention of Raghav that the notice of every Board Meeting is to be mandatorily sent to all the directors of the company is valid. If the Board Meeting is held on a date prescribed by Clause 36 of the Articles of Association of Swasth Medical Pharmacy Limited and no notice is sent to the directors of the company, it shall be violative of Section 173 (3)of the Companies Act, 2013.

Even Sub-section (4) of Section 173 imposes a penalty of ` 25,000 on every officer of the company whose duty is to give notice under Section 173 and who fails to do so. Thus, notice of the Board Meeting must be sent as per the provisions of Section 173 (3) irrespective of what is contained in the Articles otherwise, the officer who is required to send notice but fails to fulfill his duty i.e. does not send notice, shall be liable to a penalty of ` twenty-five thousand.

2. MAY 2022 EXAM)

ABC Limited put forth the following matters for your examination. The meeting of the Board of Directors of the company was convened on 15th July, 2021. While one Director attended the Board Meeting physically all other five Directors of the Company attended the meeting through Video conferencing /other Audio-visual means and approved the Annual Financial Statements ending 31st March, 2021. Referring to the provisions of the Companies Act, 2013 you are requested to validate the followings:

(i) Compliance requirement of quorum for the said meeting.
(ii) Approval of the Financial Statements for the year ending 31st March, 2021.

Answer:

According to Section 174(1) of the Companies Act, 2013, the quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.

Also, Section 173(2) of the Act allows the directors of a Company to attend Board meetings in the following manner:

- in person
- through video conferencing
- other Companies audio-visual (Meetings means of as prescribed Board and under its Rule 3 Powers) of the Rules, 2014

(i**) Quorum Compliance**

In the instant case, since there are total 6 directors in ABC Limited, the quorum shall be 2 (1/3rd of 6 or 2, whichever is higher). Since, one director attended the meeting physically and all other five directors attended through Video conferencing/ Audio visual means, it implies that all the directors attended the meeting and quorum compliance is there.

(ii) **Approval of Financial Statements:**

Since the quorum of the Board meeting is complied with the presence of all the six directors, therefore, approval of Financial Statement in the Board Meeting held on 15th July, 2021 is valid.

Further, according to Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014, certain matters including the approval of Annual Financial Statements cannot be dealt with in a meeting through Video Conferencing / Other Audio visual means. However, vide Notification GSR Powers) Rules, 2014, through enforcement of the Companies (Meeting of Board and its Powers) Rules, 2014, Rule 4 dealing with matters to be dealt with in a meeting through video conferencing or other audio visual means was omitted. Therefore, the Company has compiled with the provisions of the Companies Act, 2013 approving the Annual Financial Statements at the Board Meeting held on 15th July, 2021.

3. (MAY 2022 EXAM)

Green Developers Limited proposes to acquire a land owned by its Director, Mr. Manoj at a fair market value of Rs 10.00 Crores to execute a project of developing a commercial and residential complex on that land. In consideration, the company will allot certain flats of equivalent value to Mr. Manoj on completion of the project. Referring to the provisions of the Companies Act, 2013, advise the Board of Directors of the company whether Green Developers Limited can enter into the proposed arrangement and what will happen, if compliance requirement is contravened?

Answer:

Restriction on acquiring assets for consideration other than cash:

According to Section 192 (1) of the Companies Act, 2013, no company shall enter into an arrangement by which-

(a) a director of the Company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the Company; or

(b) the Company acquires or is to acquire assets for consideration other than cash, from such director or person so connected. Relaxation of Restriction:

The above restriction shall be relaxed i.e. the company may enter into an arrangement involving non• cash transactions as stated above, if prior approval for such arrangement is accorded by a resolution of the Company in general meeting.

Advise to the Board:

Hence, in view of the above provisions of law, the Board of Directors of Green Developers Limited shall be advised that the proposed arrangement cannot be entered into by the Company. However, the proposed arrangement may be executed, if prior approval of the Company by way of an ordinary resolution is accorded thereto failing which the contract shall be voidable at the option of the Company.

Further, where the director or the connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

What happens if Section 192 is contravened?

Any arrangement entered into by a Company or its holding company in contravention of the provisions of Section 192 shall be voidable at the instance of the Company.

The arrangement shall not be voidable;

(a) if the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the Company has been indemnified by any other person for any loss or damage caused to it; or

(b) if any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section (i.e. Section 192) by any other person.

Hence, the Board of Directors of Green Developers Limited can enter into the proposed arrangement by taking into account the above provisions.

4. SEPT 2022 MTP)

The following balances are extracted from the audited financial statement of B Private Limited forthe financial year ending the 31st March, 2021:

	Rs. in crore
Paid-up share capital	20
Balance in Profit and Loss Account	6
Borrowing from banks and financial institutions	49
Current Liabilities and Provisions	8

No other body corporate has invested any money in the share capital of B Private Limited. The Company has no default in repayment of the above borrowings subsisting at the proposed time of making the above transaction. The Company has also not committed a default in filing its financial statements or Annual Return with the Registrar.

The Company proposes to provide a loan of Rs. 50 lakh to its director Mr. B, who is in dire need of funds for financing his daughter's education. Another Director Mr. L contended that the loan should not be provided by the Company to Mr. B due to the restrictions imposed by the provisions of the Companies Act, 2013. Mr. B, on the other hand, is of the opinion that the Company being a Private Company, the restrictions are not applicable to the Company. Analysing and referring to the relevant provisions of the Companies Act, 2013 and the relevant notifications issued by the MCA, examine the validity of the proposal of B Private Limited to provide the loan to its Director, Mr. B.

Answer:

Section 185 of the Companies Act, 2013 contains provisions which impose restrictions on the loans, etc. being given to directors, etc.

Accordingly, a company is not permitted directly or indirectly to advance any loan to

(a) any director of the company or of a company which is its holding company or any partner or relative of any director or

(b) any firm in which director or relative is a partner.

As per the Notification No. G.S.R 464(E), dated 5th June 2015 as amended by Notification No. G.S.R 583(E), dated 13th June 2017, Section 185 shall not apply to a private company which means that loan to directors may be provided subject to following conditions:

(a) In whose share capital no other body corporate has invested any money;

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

(c) Such company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.

The above exemption is applicable to a private company if it has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar.

Here in the given case, requirement given in clause(a), and no commission of default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar, are met with, However, as per clause (b), borrowings of B Private Limited from banks or financial institutions is Rs. 49 crore which is more than twice of its paid-up share capital (i.e. Rs. 20 core X 2 = Rs. 40 crore).

Hence, the contention of Mr. L that loan shall not be provided to Mr. B is correct. Accordingly, as the exemption is not applicable to B Private Limited, the proposal of providing a loan of Rs. 50 Lakh to its director Mr. B, by B Private Limited is invalid.

5. (OCT 2022 MTP)

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

(i) Mr. X , an interested Director of the company.

(ii) Mr. Y, a Director who has expressed his inability to attend a particular Board Meeting;

Answer:

Notice of Board meeting

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

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

Therefore, notice will be served on Mr. X and Mr. Y, in compliance with section 173(3) of the Companies Act, 2013.

6. (SEPT 2022 MTP)

Decide in the light of the Companies Act, 2013, on the following proposals of loans for consideration before the Truth Ltd.

(i) Loan to its director, Mr. A for construction of residential house as a personal loan.

(ii) Loan to Mr. B, its whole time Director.

(iii) Loan to X Ltd. in the ordinary course of business and the rate prescribed is not less than bank rate prescribed by the reserve bank.

Answer:

Section 185 of the Companies Act, 2013 contains provisions which impose restrictions on the loans, etc. being given to directors, etc. According to the provision:

As per sub-section (1), a company is not permitted to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by,—

(i) any director of company, or of a company which is its holding company or any partner or relative of any such director; or

(ii) any firm in which any such director or relative is a partner.

Further sub-section (3) states that above provision shall not apply:

(a) where any loan is given to a managing or whole-time director—

(i) as a part of the conditions of service extended by the company to all its employees; or

(ii) pursuant to any such scheme which is approved by the members by a special resolution.

(b) where a company in the ordinary course of its business:

- provides loans or gives guarantees or securities for the due repayment of any loan; and
- in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan.

Accordingly, following are the answers to the stated problems:

(i) In the first case it would violate the section 185(1) of the Companies Act, 2013. Truth Ltd. is not permitted, to advance any loan, or to give any guarantee or provide any security in connection with any loan taken by Mr. A (director) of the company.

(ii) In the second case, as per section 185(3), restrictions imposed in section185(1), will not apply to giving of loan to Mr. B, the whole time director if its given as a part of the conditions of service extended by the company to all its employees.

(iii) In third case, if it is loan given to a company in the ordinary Course of business for due repayment of any loan and lending rate is not less than the bank rate prescribed by the Reserve bank, the restriction imposed under section 185(1) will not apply to such transactions.

7. (APRIL 2022 MTP)

The following figures were extracted from the books of Supreme Ltd (audited).

Paid up share capital	Rs. 100 Lakh
Reserve & Surplus	Rs. 50 Lakh
General Reserve	Rs. 25 Lakh
Security Premium Account	Rs. 25 Lakh
Re-valuation Reserve	
Total	Rs. 200 Lakh
Long Term Borrowings	Rs. 125 Lakh
Short Term Borrowings (Cash Credit Loan)	Rs. 50 Lakh
Temporary Loan for construction of Building Total	Rs. 25 Lakh
	Rs. 200 Lakh

The Board of Directors further want to borrow a sum of Rs. 50 Lakh as Long Term Loan without obtaining the consent of the members in general meeting by special resolution. In the given instant, advice the Board about the validity of this proposal. What will be your answer if it is a Private Limited company?

Answer:

As per section 180(1)(c) of the Companies Act,2013, the Board of Directors of a company with the consent of the company by a special resolution shall borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business. Temporary loans means loans repayable on demand or within six months from the date of the loan such as short-term,cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature.

In view of the above provision the eligible amount which can be borrowed by the Board is given below:

Paid up share capital	Rs. 100 Lakh
Reserve & Surplus	
□ General Reserve	Rs. 50 Lakh
□ Security Premium Account	Rs. 25 Lakh
Total	Rs. **175 Lakh**

Re-valuation Reserve is not treated as free reserve as per Section 2(43). The total borrowing of the company for the purpose of this sub section is –

Long Term Borrowings	Rs. 125 Lakh
Temporary Loan for construction of Building	Rs. 25 Lakh
Total	Rs. **150 Lakh**

Short Term Borrowings (Cash Credit Loan) of Rs. 50 Lakhs is considered as temporary loan and loan for construction of building in not consider as temporary loan as per the explanation for temporary loan mentioned above.

Therefore, Supreme Limited can borrow a further sum upto Rs. 25 Lakh without seeking the approval from the members. Therefore, the proposal of the Board to borrow a sum of Rs. 50 Lakhs as Long Term Loan without obtaining the consent of the members in general meeting by special resolution, is invalid.

In case of private company the provision of section 180 does not apply vide exemption notification dated 05th June, 2015. If a Supreme Ltd. is a Private Limited Company, the Board can borrow a sum of Rs. 50 Lakhs as Long Term Loan, without approval.

8. May 2018 (VVI)

When does a Director required to disclose his / her interest to the Company as per Section 184 of the Companies Act, 2013? What are the consequences of non- disclosure?

Answer:

According to Section 184(1) of the Companies Act, 2013 every Director shall disclose his concern or interest in any Company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as may be prescribed in Rule 9 of the companies (Meetings of Board and its Powers):

When to Make general disclosure of Interest: Every director shall disclose his interest

(a) At the First meeting of the Board in which he participates as a director, and

(b) Thereafter, at the first meeting of the Board in every financial year, or

(c) Whenever there is any change in the disclosures already made, then at the first Board meeting held after such change.

Consequences of non-disclosure [Section 184(3) and 184(4)]:

(a) **Voidable at the option of company:** A contract or arrangement entered into by the company without disclosing or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.

(b) Penalty: If a director of the company contravenes the provisions of section 184, such director shall be punishable

- with imprisonment for a term which may extend to one year or
- with fine which may extend to one lakh rupees,
- or with both.

9. May 2018 VVI

Queen Construction Company Ltd. acquired 60 % of the equity paid up share capital of ABC Ltd. Queen Construction Ltd. has planned to expand its operation for which additional fund is required. The Board of Directors decided to avail additional exposure ofRs. 10 crore from the Bank.

The following data is furnished as on 30th June, 2017.

Particulars	Rs. In crores
Authorised Equity Share Capital	25
Issued and Subscribed Equity Share Capital	22
Paid up Equity Share Capital	20
Capital Reserve	2
Revaluation Reserve	1
General Reserve	3
Open cash credit Limit (for working Capital requirement) with the Bank repayable in 3 months	5
Loan obtained under the Hire Purchase agreement for acquiring vehicles.	1
Long term Borrowing from Banks and other parties	15

ABC Ltd. approached Queen Construction Ltd. to grant a loan of Rs. 25 Lakhs and stand as guarantor for repayment of loan Rs. 10 Lakhs to be sanctioned by a Bank.

The two loans (25 Lakhs plus 10 Lakhs) will be utilized by ABC Ltd. for its principal business activities.

You being the Financial Advisor of the company, advise the Board of Directors about the procedure to be followed to avail additional exposure of Rs. 10 Crore from the Bank. Also evaluate whether the loan guarantee given by Queen construction Ltd. to ABC Ltd. is valid according to Section 185 of the Companies Act, 2013.

Answer:

Borrowing by the Company (Section 180 of the Companies Act, 2013) As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a Company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves and Securities premium. Such borrowing shall not include temporary loans obtained from the company's bankers in the ordinary course of business.

Here Free reserves shall not include the reserves set apart for specific purpose.

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

Particulars	Rs. In Crores
Paid up Equity Share Capital **(A)**	20
General Reserve (being free reserve) **(B)**	3
Capital Reserve (Not a free reserve)	-
Revaluation Reserve (Not a free reserve)	-
Aggregate of paid up capital and free reserve **(A)+(B)**	23
Total borrowing power of the Board of Directors of the company, i.e ., 100% of the aggregate of paid up capital and free reserves **(C)**	23
Less: Amount already borrowed as Long term loan **(D)**	16
Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. (C) – (D)	7

In the present case, the Directors of Queen Construction Limited by a resolution passed at its meeting decide to borrow an additional sum of Rs. 10 Crores from the bank. Hence, the borrowing will be beyond the powers of the Board of directors.

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

According to Section 185 of the Companies Act, 2013, no Company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

However, the above sub-section shall not apply to any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary Company. [Section 185(1)(c)]. It is also provided that the loans made under this clause are utilized by the subsidiary company for its principal business activities.

In the instant case, Queen Construction Ltd. acquired 60% of the equity paid up share capital of ABC Ltd. Hence, ABC Ltd. is a subsidiary company of Queen Construction Ltd. [as per Section 2(87)] Hence, as per Section 185(1)(c), granting of loan of Rs. 25 Lakhs by Queen Construction Ltd to ABC Ltd is not valid but providing of guarantee for repayment of loan of Rs. 10 lakhs to be sanctioned by bank is valid.

10. RTP May 2018 VVI

Examine the following aspect related to convening of board meeting with reference to the provisions of the Companies Act, 2013:

(i) The Chairman of Greenhouse Limited convened a board meeting and two weeks' notice was served on all directors of the company. Two of the independent directors on the board objected on the grounds that no proper agenda for the meeting was circulated.

(ii) Purple Florence Limited proposes to hold its board meeting at a shorter notice through video conferencing.

Answer:

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

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

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

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

(ii) According to section 173 of the Companies Act, 2013,

(a) The directors can participate in a meeting of the Board either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Further, Central Government may provide for matters which cannot be dealt in a meeting through video conferencing or other audio visual means.

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

Provided that a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. Further, in case the independent directors are not present at such a meeting of the Board, decisions taken at such a meeting

shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

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

11. Oct 2018 .

XYZ, Ltd. with the turnover of Rs. 500 crore entered into a contract of purchasing of raw material from a private company. XYZ Ltd. appointed Mr. Khurana, a director of the company, to act in this deal of transaction. Mr. Khurana is also a member of that private company. He settled the said transaction into 60 crore and entered into the contract. After few transactions made under the contract, XYZ Ltd. finds degradation in the quality of the product supplied. In the Board Meeting, this contract was challenged considering it as a related party transaction and in contravention to section 188(1). During this period, Mr. Khurana was appointed as a director in newly setup, PQR Ltd.

In the light of the given facts, examine the following situations as per the Companies Act, 2013.

(i) What is the legal position of the contract entered between XYZ Ltd through Mr. Khurana, and the private company?

(ii) Is there any contravention of section 188 (1)? if yes, then the liability of the wrong doer. Comment upon the appointment of Mr. Khurana as a director in PQR Ltd.

Answer:

As per the given facts, Mr. Khurana, a director of XYZ Ltd., was also a member of a private company with which he entered into contract for the purchase of the raw material. In terms of section 2(76) of the Companies Act, 2013, XYZ Ltd. is a related party to a such private company. However , as per section 188(1) of the Act, no company shall enter into any contract or arrangement with a related party with respect to the transaction related to the sale, purchase or supply of any goods or materials or made through an appointment of any agent for purchase or sale of goods, materials, services or property, except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as given in rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 .

However, no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as prescribed in Rule 15(3) of the Companies (Meetings of Board and its Powers) Rules, 2014 , shall be entered into except with the prior approval of the company by a resolution. [First proviso to section 188(1) A company shall not enter into transaction/s related sale, purchase or supply of any goods or materials, directly or through appointment of agent, where the transaction or transactions to be entered into is amounting to 10% or more of the turnover of the company or rupees 100 crore, whichever is lower, except with the prior approval of the company by a resolution.

Since in the given case, XYZ, Public Ltd. has turnover of Rs. 500 crore, here the transaction is amounting to more than 10% of the turnover i.e., 500 cr x 10/100 = 50 cr, but without seeking prior approval of the company by a resolution.

So, in terms of the above provision, this contract is of voidable nature at the option of the Board, or as the case may of the shareholders according to section 188(3) of the Companies Act, 2013.

(ii) In case of contravention of Section 188(1): Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting as required under section 186(1), and if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into. Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

Company may proceed to recover loss in contravention of the provisions of this section: Section 188 (4) provides that it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

Penalty: Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

(iii) Appointment of Director under Section 164: A person shall not be eligible for appointment as a director of a company, where he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years; In the given instance, he was not convicted, only levied with the penalty, against the offence dealt with related party transactions under section 188, so he eligible and can be appointed as a director in the PQR Ltd.

12. Oct 2018

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

(a) An interested Direct

(b) A director who has gone abroad less than 3 months.

Answer:

Notice of Board meeting

Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not.

(a) An Interested Director: Notice must be given to a director even though he is precluded from voting at the meeting on the business to be transacted.

(b) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad.

The Companies Act, 2013. allows delivery of notice of meeting by electronic means also. This is important because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio visual means.

13. RTP Nov-2018:

ASK Housing Finance Limited are prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited subject to the condition that the loans are guaranteed by M/s. NEWS Pharmacy Limited. M/s NEWS Pharmacy Limited is not a listed company and the company will be exceeding the limits prescribed under the Companies Act, 2013 by providing the guarantees. Advise the company

about this legal requirement under the Companies Act, 2013 to give effect to the above proposal. What would be your advice if the company was required to provide security instead of guarantee?

Answer:

(ii) As per Section 186(2) of the Companies Act, 2013, no company shall directly or indirectly

(a) give any loan to any person or other body corporate;

(b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and

(c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate, exceeding sixty per cent. of its paid-up share capital, free reserves and securities premium account or one hundred per cent. of its free reserves and securities premium account, whichever is more, except with the prior approval by means of a special resolution passed at a general meeting.

However, explanation provided in Section 186(2) of the Companies Act, 2013 states that for the purposes of this sub-Section, the word "person" does not include any individual who is in the employment of the Company.

As per the given facts, ASK Housing Finance Company Limited was prepared to give housing loans to the employees of M/s NEWS Pharmacy Limited on the condition that such loans are guaranteed by the M/s NEWS Pharmacy Limited exceeding the limits prescribed in the Companies Act, 2013.

Here, the loans are to be guaranteed by M/s. News Pharmacy Limited for its employees which falls within the purview of the explanations which includes guarantees given for the employees.

So, Section 186(2) shall not be applicable to it. Hence, it can give the guarantee without any condition on the limits imposed in the Section 186(2). Hence, there are no legal requirements to be fulfilled under the Companies Act, 2013 to give effect to the above proposal.

Answer will remain the same, even if the company provides security instead of guarantee as the provisions of the Section 186(2) are applicable for providing security also.

14. MTP Mar 2019 VVI (NUMBER HAI IMP HAI)

The last three years' Balance Sheet of PTL Ltd., contains the following information and figures:

Particulars	As at 31.03.2016 Rs.	As at 31.03.2017 Rs.	As at 31.03.2018 Rs.
Paid up capital	50,00,000	50,00,000	75,00,000
General Reserve	40,00,000	42,50,000	50,00,000
Credit Balance in	5,00,000	7,50,000	10,00,000
Profit & Loss Account			
Debenture Redemption Reserve	15,00,000	20,00,000	25,00,000
Securities Premium	2,00,000	2,00,000	2,00,000
Secured Loans	10,00,000	15,00,000	30,00,000

On going

Net Profit for the year (as calculated in accordance with the provisions of the Companies Act, 2013)	**12,50,000**	**19,00,000**	**34,50,000**

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

In the ensuing Board Meeting scheduled to be held on 5th November, 2018, among other items of agenda, following items are also appearing:

(i) To decide about borrowing from Financial institutions on long-term basis.

(ii) To decide about contributions to be made to Charitable funds.

Based on above information, you are required to find out as per the provisions of the Companies Act, 2013, the amount upto which the Board can borrow from Financial institution and the amount upto which the Board of Directors can contribute to Charitable funds during the financial year 2018 - 19 without seeking the approval in general meeting.

Answer:

Borrowing from Financial Institutions: As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow money including moneys already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company, free reserves and securities premium. Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Since the decision to borrow is to be taken in a meeting to be held on 5th November, 2018, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2018.

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

Particulars	*Rs.*
Paid up Capital	75,00,000
General Reserve (being free reserve)	50,00,000
Credit Balance in Profit & Loss Account (to be treated as freereserve)	10,00,000
Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption)	----
Securities Premium	2,00,000
Aggregate of paid up capital, free reserve and securitiespremium	137,00,000

Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid up capital, free reserves and securities premium	137,00,000
Less: Amount already borrowed as secured loans	30,00,000
Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting.	107,00,000

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

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

calculated in accordance with the provisions of the Companies Act, 2013):

15. May 2019 Qn no 6(a)(ii) 4 Marks

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

Particulars	*Rs.*
For the financial year ended 31.3.2016	12,50,000
For the financial year ended 31.3.2017	19,00,000
For the financial year ended 31.3.2018	34,50,000
TOTAL	66,00,000
Average of net profits during three preceding financial years	22,00,000
Five per cent thereof	1,10,000

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

(proposed)			
Total	**210**	**230**	**450**

ANSWER:

According to section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

(c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves and securities premium, apart from temporary loans obtained from the company's bankers in the ordinary course of business:

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

Particulars	**Case I (Rs. In crores)**	**Case II (Rs. In crores)**	**Case III (Rs. In crores)**
Total amount of Paid-up share capital, free reserves and securities premium	270	270	270
Hence, Total amount that the company can borrow without passing Special Resolution Amount (A)	270	270	270
Existing Working Capital Loan (Repayable on demand) from Sigma Capital Limited since it is not a banker	50	50	50
Total amount of Loan that Company needs is:	30	40	130
6 months loan for purchase of Plant & Machinery	10	20	150
24 months loan for purchase if Plant & Machinery	40	60	280
Amount (B)	90	110	330
Is Amount (A)> Amount (B), then SR need not be passed	SR not to be passed	SR not to be passed	R to be Passed

Working Notes:

1. Paid up share capital includes both equity share capital and Preference share capital

2. 'Cash credit limit from scheduled bank' are temporary loans as they are repayable on demand.

3. '6 months loan for purchase of Plant & Machinery' is not treated as a temporary loan as temporary loans does not include loans raised for the purpose of financial expenditure of a capital nature.

16. Discuss the following situations with respect to the quorum.
(a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant.

(b) There are total 15 directors in a company and during discussion on a particular item, 13 of the directors happen to be 'interested' within the meaning of section 184(2) of the Companies Act, 2013.

Answer:

(a)According to section 174(1) of the Companies Act, 2013, quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded of as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant, the total strength comes to seven. In this case 1/3 of 7 = 2 1/3 directors which will be rounded off as 3 which is higher than 2. Therefore, 3 directors would constitute the quorum for the Board meetings.

(b)Under section 174(3) of the Companies Act, 2013, if at any time the number of the interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of the directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum.

In the given situation, there are total 15 directors and the Board meeting commences with all of them. During the meeting, an item comes up for discussion in respect of which 13 directors happen to be 'interested directors'. In spite of the fact that the interested directors are more than two-thirds, minimum two non-interested directors who are present at the meeting shall constitute the quorum and they can validly transact that particular item of business in view of Section 174 (3).

17. A meeting of the Board of 'No Holiday Ltd' was held on a holiday on account of Ganesh Chaturthi. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting with the consent of the majority decided that the Board meeting be adjourned to next week on the same day. However, the date fixed for the adjourned meeting happened to be a Sunday. Whether the adjourned meeting of the Board can be held on a Sunday.
Answer:

When a board meeting is adjourned due to lack of quorum, then under section 174(4) the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.

Since Section 174(4) specifies exclusion of only a national holiday, any original/adjourned/committee meetings can be held on Sundays and other holidays. In view of this provision, the adjourned meeting of the Board of 'No Holiday Ltd' can be held on Sunday without involvement of any illegality.

18. The Board of Directors of Stepping Stones Publications Ltd. resolved to borrow a sum of 15 crores from a nationalized bank at a Board meeting held on 15.1.2019. One of the directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the borrowing powers of the Board. The Company seeks your advice and the following data is given for your information:
(i) Share Capital Rs. 5 crores

(ii) Reserves and Surplus Rs. 5 crores

(iii) Secured Loans Rs. 15 crores

Unsecured Loans Rs. 5 crores Advise the management of the company

Answer:

According to the provisions of Section 180(1)(c) of the Companies Act, 2013, the powers of the Board are not uncontrolled and there are restrictions on the borrowing powers to be exercised by the Board of Directors.

According to the said section, the borrowings should not exceed the aggregate of the paid-up share capital, free reserves and securities premium.

While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case, the proposed borrowing of Rs. 15 crore will exceed the limit calculated as per the given information. Thus, the proposed borrowings are beyond the powers of the Board of directors.

In view of the above position, the management of Stepping Stone Publications Ltd., should take steps to pass a special resolution authorising to borrow the proposed amount of Rs. 15.00 crores, so that the requirement of Section 180(1)(c) is satisfied. Only thereafter, the proposed borrowing can be availed of.

19. Mr. Mohan was appointed as director at the Annual General Meeting of a company held on 30th September, 2018 and he functioned in the capacity as director from then onwards. Subsequently, during the mid of August, 2019, it was noticed that there were certain irregularities in his appointment and therefore, on 31st August, 2019, his appointment was declared invalid. However, Mr. Mohan continued to act as director even after 31st August, 2019. Whether the subsequent acts done by him as director are valid and binding on the company?

Answer:

According to Section 176 of the Companies Act, 2013, any act done by a person as a director shall be deemed to be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

The Proviso to Section 176, however, states that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been noticed by the company to be invalid or to have terminated. In view of the above provisions of Section 176, the acts done by Mr. Mohan till the date of noticing irregularity in his appointment shall be deemed as valid and binding on the company.

Any act done by him after the date on which irregularity in his appointment was noticed by the company shall be invalid. Accordingly, acts done by Mr. Mohan after 31st August, 2019 shall be invalid and not binding upon the company.

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

Answer:

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

(a) To make calls on shareholders in respect of money unpaid on their shares;

(b) To authorise buy-back of securities under section 68;

(c) To issue securities, including debentures, whether in or outside India;

(d) To borrow monies;

(e) To invest the funds of the company;

(f) To grant loans or give guarantee or provide security in respect of loans;

(g) To approve financial statement and the Board's report;

(h) To diversify the business of the company;

(i) To approve amalgamation, merger or reconstruction;

(j) To take over a company or acquire a controlling or substantial stake in another company;

(k) Any other matter which may be prescribed.

Provided that the Board may, by a resolution passed at a meeting, delegate to any Committee of Directors, the Managing Director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify.

In respect of a company covered under Section 8 of the Companies Act, 2013, which has not committed a default in filing its financial statements under Section 137 or Annual Return under Section 92 with the Registrar, the matters referred to in clauses (d), (e), and (f) of Section 179 (3) may be decided by the Board by circulation instead of at a meeting. This modification is permitted by Notification No. GSR 466 (E), dated 5thJune, 2015 as amended by Notification No. GSR 584 (E), dated 13thJune, 2017.

From the foregoing provisions, it is clear that the Board of MN Limited shall be perfectly in order if it delegates the power to borrow monies under clause (d) of Section 173 (3) to the Managing Director or to the manager or any other principal officer.

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

(i) Buy-back, for the first time, the shares of the Company up to 10% of the paid-up equity share capital without passing a special resolution.

(ii) Delegation of power to the Managing Director so that he can invest surplus funds of the company in the shares of some other companies.

Answer:

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

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

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

(b) a special resolution has been passed at a general meeting of the company authorizing the buyback:

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

(1) the buy-back is, 10% or less of the total paid-up equity capital and free reserves of the company; and

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

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

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

The Board may, under the Proviso to Section 179(3), delegate the power to invest the funds of the company through a board resolution passed at a duly convened Board Meeting. However, the investment in shares of other companies will also be governed by a specific provision contained in Section 186(5), according which no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained.

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

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

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

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

Answer:

(a) According to Section 177(8) of the Companies Act, 2013, the Board's Report shall, under the provisions of Section 134 (3) which is laid before the general meeting where the financial statements of the company are placed before the members, disclose the composition of the Audit Committee and where the Board has not accepted any recommendations of the Audit Committee, the same shall also be disclosed along with the reasons therefor.

Hence, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and supported by legitimate reasons for non-acceptance.

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

23. MNC Ltd., a company, whose paid up capital was Rs. 8.00 Crores, has issued right shares in the ratio of 1:1. The said company is listed with Mumbai Stock Exchange. Whether the company is

required to appoint any Audit Committee and if yes, draft a suitable Board Resolution to appoint an Audit committee covering the aspects as provided in the Companies Act, 2013.

Answer:

Under section 177(1) of the Companies Act, 2013 the Board of Directors of every listed public company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee. Therefore, MNC Ltd being a listed company will be bound to constitute an audit committee under the Act.

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

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

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

1. Mr. A -- An Independent Director.

2. Mr. B -- An Independent Director

3. Mr. C – An Independent Director

4. Mr. D -- An Independent Director

5. Mr. FE -- Financial Executive

6. Mr. MD -- Managing Director

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

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

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

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

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

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

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

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

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

24. You are the CFO and in-charge of compliances of a listed entity. The Company is professionally managed and has earned a niche in the market for its robust management practices. Mr. Edward, an eminent American business man, currently living in Germany, joined the Company as an Executive Director. On assuming his mantle, he being a foreign director residing abroad, approached you to specifically understand the relevant provisions of the Companies Act, 2013 relating to participation of directors in Board Meetings conducted through Video Conferencing in respect of the following matters:

(i) What shall be the venue of Board Meeting through video conference?

(ii) How the statutory registers placed at the scheduled venue of the meeting shall deemed to have been signed by the directors participating through electronic mode?

(iii) Whether meetings can be convened through audio/teleconferencing i.e. without video facility?

You are required to provide correct legal-position to the above queries after examining and evaluating the provisions of the Companies Act, 2013. (6 Marks) (Past exam nov 2020)

Answer:

(i) As per Sub-rule (6) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules 2014, with respect to every meeting conducted through video conferencing or other audio visual means authorised under these rules, the scheduled venue of the meeting as set forth in the notice convening the meeting, shall be deemed to be the place of the said meeting and all recordings of the proceedings at the meeting shall be deemed to be made at such place.

(ii) Sub-rule (7) of Rule 3 of the Companies (Meetings of Board and its Powers) Rules 2014, provides that the statutory registers which are required to be placed in the Board Meeting as per the provisions of the Act, shall be placed at the scheduled venue of the meeting and where such registers are required to be signed by the directors, the same shall be deemed to have been signed by the directors participating through electronic mode, if they have given their consent to this effect, it is so recorded in the minutes of the meeting.

(iii) According to section 173(2) of the Companies Act, 2013, the participation of directors in a meeting of the Board may be either in person or through video conferencing or other audio visual means, as may be prescribed, which are capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time. Accordingly, meeting can be convened through audio visual means capable of recording and recognising the participation of the directors but not through audio teleconferencing i.e, without video facility.

25. Apex Ltd. is an unlisted Public Company and having 10 Directors on its Board. At a duly convened meeting of the Board of Directors of the Company held on 14th August, 2020, it was proposed to approve entering into contracts or arrangements with 'E Limited' and 'Q and Associates', a partnership firm. Mr. Y and his spouse hold 2 and 1 shareholding respectively in E Limited. Mrs. Z, spouse of Mr. Z is a partner in Q and Associates. Mr. Y and Mr. Z are the Directors of Apex Limited.

The board meeting was attended by five directors including Mr. Y and Mr. Z. All the directors participated in the discussions and voted in favor of the resolution except Mr. Y. The contracts were approved. However, Mr. Y and Mr. Z disclosed their respective interests in the contracts. The earlier Board Meeting was held on 25th May, 2020. In the light of the provisions of the Companies Act, 2013 (the Act), examine the following:

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

(ii) Under what circumstances any arrangement entered into by the Company in violation of Section 192 of the Companies Act, 2013 dealing with non-cash transactions involving directors shall not be held voidable? (6 Marks) . (past exam jan 2021)

ANSWER:

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

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

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

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

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

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

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

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

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

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

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

As per the question five directors including Mr. Y and Mr. Z (all uninterested) attended the board meeting which is more than 1/3rd of the strength. Thus this provision has been complied. Therefore, the meeting convened on 14-08-2020 is valid.

The provisions of section 184 of the Companies Act, 2013 are also complied with, and so the transactions of the meeting held on 14th August, 2020 are in order. However, in terms of section 188 of the Companies Act, 2013, no contract or arrangement, in case of a company having paid up share capital of not less than such amount or transactions not exceeding such sums, as may be prescribed shall be entered into except with the prior approval of the company by a resolution.

(ii) Where any arrangement entered into by the company in violation of the section 192(3) of the Companies Act, 2013 dealing with non cash transactions involving directors, shall not be voidable:

(a) If the restitution of any money or other consideration which is subject matter of the arrangement is no longer possible and the company has indemnified by any other person for any loss or damage caused to it or

(b) If any rights are acquired bonafide for value and without notice of the contravention of the provisions of this section by any other person.

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

(i) That the resolution was circulated bye-mail and not by hand delivery or post or courier as per the provisions of sub-section (1) of Section 175 of the Companies Act, 2013; and

(ii) Secondly, that more than l/3rd of the number of directors now require that the resolution must be decided at a meeting of the Board of Directors and not by circulation.

Referring to and analyzing the relevant provisions of the Companies Act, 2013 and Rules made there under, decide, whether the contention of the three directors is tenable. (4 Marks) (past exam jan 2021)

Answer:

As per section 175 of the Companies Act, 2013, no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be, at their addresses registered with the company in India by hand delivery or by post or by courier, or through such electronic means as may be prescribed and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014, provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include e-mail or fax. Provided that, not less than one-third of the total number of directors of the company for the time being require, that any resolution under circulation must be decided at a meeting of the Board.

In light of the stated provision, following are answers to the proposals on the basis of given ground.

(i) Contention of three directors with respect to opposing of resolution passed by email, is not valid in terms of stated Rule 5.

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

27. Atlantic Garments Ltd., is a company engaged in the business of manufacturing of garments for all seasons. The company have in all 14 directors.

The first meeting of the Board was held on 15th February, 2020. Thereafter, the subsequent meetings of the Board were held on 29th February, 2020, 25th March, 2020, 30th August, 2020 and 25th December, 2020.

In these meetings, the full strength of the Board was present except in the meeting of 25th March, 2020. In this meeting only 4 persons were present.

Decide whether the Board meeting held on 25th March 2020 is valid in compliance with the legal requirements under the Companies Act, 2013. What shall be date of the meeting in case where if meeting could not be held because of quorum. (RTP NOV 2021)

ANSWER:

As per given section 174(1) of the Companies Act, 2013 the quorum for a meeting of the Board of Directors of a company shall be one third of its total strength or two directors, whichever is higher, and the participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

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

Further explanation to section 174(4) provides that for the purposes of this section, (i) any fraction of a number shall be rounded off as one; (ii) "total strength" shall not include directors whose places are vacant.

Total Strength of directors =14

One-third of 14 = 4.67

Rounded off to = 5 (Five)

As in the meeting scheduled on 25th March 2020, only 4 persons were present, hence due to want of required minimum quorum, the meeting shall have to be adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

The meeting of the Board was not valid as the required quorum was not present in the meeting. In this case, the adjourned meeting was to be held on 1st April, 2020

28. (MTP-NOV 2021)

ABC Pvt Ltd. is chemical manufacturing company. Few directors and employees expressed some serious genuine concerns regarding their health issue due to emission of chemical wastes. Though ABC Pvt Ltd. has a vigil Mechanism in place, they are of the opinion that it shall not be mentioned in their website in order to avoid unnecessary cases. The company has borrowed Rupees 60 crore from a bank

(1) How should they address the issue? What are the requirements for companies having an audit committee and a company not having an audit committee with regard to Vigil Mechanism?

(2) Is the company's stand regarding the non-mentioning of the vigil mechanism on website, correct?

ANSWER:

According to Section 177(9) of the Companies Act, 2013, a vigil mechanism shall be formed by-

(a) Every listed Company and

(b) Prescribed classes of companies as per Rule 7 of the Companies (Meetings of Board and its Power) Rules 2014, which are –

(1) The companies which accepts deposits from public

(2) The companies which borrowed money from banks and public financial institutions in excess of 50 crore Rupees.

The main purpose of formation of a vigil mechanism is for directors & employees to address their genuine concerns.

(1) In the given case, ABC Pvt Ltd. has borrowed money from bank in excess of the prescribed limit of Rupees 50 crores (60 crores). Hence, they shall have a vigil mechanism in place as per Section 177(9). The directors & employees shall get their concerns regarding their health issues from chemical waste emissions addressed to the vigil mechanism in place. They shall ensure safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the audit committee appropriately.

In case of Companies with audit committee, the audit committee shall oversee the vigil mechanism through the audit committee and if any of the members have conflict of interest in a given case, they should rescue themselves and other members would deal the matter on hand.

In the case of companies without Audit committee, the Board of Directors shall nominate a director to play the role of audit committee for the purpose of Vigil Mechanism. Other directors & employees may report their concerns to such nominated director.

(2) Section 177 (10) of the Companies Act, 2013, states that it is imperative to disclose the details of establishment of Vigil Mechanism on the website of the company and in Board's report. In the given case, ABC Pvt Ltd. doesn't to want to include this information on its website fearing they might have to handle more cases.

This is not correct. If it fails to comply with the above provision, it shall be liable for punishment as per section 178(8) prescribing a penalty of five lakh rupees and every officer of the company who is in default shall be liable to a penalty of one lakh rupees.

29. MTP-NOV 2021)

Atlantic Garments Ltd., is a company engaged in the business of manufacturing of garments for all seasons. The company have in all 14 directors.

The first meeting of the Board was held on 15th February, 2020. Thereafter, the subsequent meetings of the Board were held on 29th February, 2020, 25th March, 2020, 30th August, 2020 and 25th December, 2020.

In these meetings, the full strength of the Board was present except in the meeting of 25th March, 2020. In this meeting only 4 persons were present.

Decide whether the Board meeting held on 25th March 2020 is valid in compliance with the legal requirements under the Companies Act, 2013. What shall be date of the meeting in case where if meeting could not be held because of quorum.

ANSWER:

As per given section 174(1) of the Companies Act, 2013 the quorum for a meeting of the Board of Directors of a company shall be one third of its total strength or two directors, whichever is higher, and the participation of the directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.

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

Further explanation to section 174(4) provides that for the purposes of this section, (i) any fraction of a number shall be rounded off as one; (ii) "total strength" shall not include directors whose places are vacant.

Total Strength of directors =14

One-third of 14 = 4.67

Rounded off to = 5 (Five)

As in the meeting scheduled on 25th March 2020, only 4 persons were present, hence due to want of required minimum quorum, the meeting shall have to be adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

The meeting of the Board was not valid as the required quorum was not present in the meeting. In this case, the adjourned meeting was to be held on 1st April, 2020.

30. (JULY 2021 PAPER)

The Board of Directors of Blackstone Ltd. (BL) made the following appointments at its meeting held on 1st January, 2021:

(i) Mr. Amir, a Director of its subsidiary Company, namely, Black Ruby Ltd., was appointed as General Manager on a consolidated salary of RS 1,75,000 per month with effect from 1st January, 2021.

(ii) Mr. Kumar was appointed as the Production Manager on a consolidated salary of RS 1,50,000 per month with effect from 1st January, 2021.

Mr. Pratap, a relative of Mr. Kumar was appointed as a Director of BL on 1st April 2021. In the light' of the provisions of the Companies Act, 2013, critically examine the following:

(A) Whether the appointment of Mr. Amir requires the approval of the shareholders of BL at a general meeting?

(B) Does the appointment of Mr. Pratap as a Director of BL affect the continuation of Mr. Kumar as the Production Manager?

ANSWER:

Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT). Here, as per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes any company which is holding, subsidiary or an associate company of such company. According to this section 188, except with consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as prescribed under rule 15(1) of the Companies (Meeting of Board and its Powers) Rules, 2014, no company shall enter into any contract or arrangement with a related party with respect to the such transaction where there is 154 a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company.

(i) In the given case, Mr. Amir, a director of Black Ruby Ltd., which is a subsidiary of Blackstone Ltd., was appointed as General Manager on salary of RS 1,75,000 per month. Accordingly, related party's appointment (i.e. of Mr. Amir) to an office or place of profit in Blackstone Ltd. will not require the approval of the members in a general meeting of the company as the monthly remuneration is not exceeding RS 2,50,000. Such transactions as to a related party's appointment to any office or place of profit in the company, its subsidiary company or associate company shall require consent of the Board of Directors given by a resolution at a meeting of the Board.

(ii) As per section 2(76) of the Companies Act, 2013, related party with reference to a company, includes a director or his relative. So, Mr. Pratap appointed as a director of Blackstone Ltd. on 1st April, 2021 was a relative of Mr. Kumar who was appointed as Production Manager in the Blackstone Ltd. This falls within the purview of section 188 of the Companies Act, 2013 which relates with the related party transactions with related party. Yes, the continuation of Mr. Kumar as a Production Manager will lead to conflict of interest and will affect the continuation unless ratified by the Board under section 188(3) of the Companies Act, 2013.

Chapter 4
Inspection, Inquiry and Investigations

Part A-Multiple Choice Questions

1. (OCT 2022 MTP)

Innovations Ltd. is a company engaged in the business of manufacturing and selling of electronic goods which are used for domestic purpose. The company is having its registered office at Mumbai with 500 members. Some of the members came to know that the business of the company is being

conducted with intent to defraud its members. The promoters of the company are actually enjoying with the public money, siphoned the shareholders capital in purchasing the real estate in the names of the promoters. During the course of the AGM of company in Mumbai, the members assembled there, planned to have an investigation of the affairs of its business.

In order to make an application to the National Company Law Tribunal, how many members are required?

(a)Not less than 50 members or members holding not less than one-fifth of the total voting power

(b)Not less than 100 members or members holding not less than one-tenth of the total voting power

(c)Not less than 150 members or members holding not less than one-tenth of the total voting power

(d)Not less than 200 members or members holding not less than one-tenth of the total voting power

Answer: B

2. (OCT 2022 MTP)

Accurate Arms and Ammunitions Ltd. is a company engaged in manufacturing of ultra-powered sophisticated guns. The company has tie-up arrangement of supply of 100% of its production to the Central Government. The production capacity and the actual number of guns manufactured is required to be shown to the Central Government. During the course of the audit, it was revealed that the company was actually manufacturing more guns whereas less quantity was being declared. The undeclared manufactured guns were being sold to a group of persons having connections with terrorist groups. On what ground the Central Government can make an application to the NCLT:

(a)The company has mis-reported the count of the manufactured guns

(b) The manufacturing of the guns is against the public policy and only he Government owned company can manufacture the guns

(c) The company has acted against the interests of the sovereignty and integrity of India

(d)The Company has supplied less number of guns to the Central Government.

Answer: C

3. (RTP NOV 2022)

Under the garb of cement business, some of the directors of Royal Cement Limited, a company incorporated in the year 2001 and having its factories at Rohtak and Bhiwani, were involved in several illegal activities. In such a situation, on receipt of a report of the Registrar of Companies or inspector under Section 208 or in the public interest or on request from any Department of the Central Government or a State Government, the Central Government may, by order, assign the investigation into the affairs of Royal Cement Limited to the Serious Fraud Investigation Office (SFIO). In addition to the above bases, there is one more basis which may prompt the Central Government to assign the investigation to the Serious Fraud Investigation Office (SFIO). From the following four options, choose such appropriate basis for assigning the investigation to the SFIO.

(a)On intimation through an Ordinary Resolution passed by the shareholders of Royal Cement Limited that the affairs of the company are required to be investigated.

(b) On intimation through a Special Resolution passed by the shareholders of Royal Cement Limited that the affairs of the company are required to be investigated.

(c) On an intimation received from certain senior employees of Royal Cement Limited that the affairs of the company are required to be investigated.

(d) On an intimation received from certain ex-directors of Royal Cement Limited that the affairs of the company are required to be investigated.

ANSWER : B

4. MTP Mar 2019

A group of creditors of X Limited makes a complaint to the Registrar of Companies. They asserted that the management of the company is indulged in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take an immediate steps to stop the management to tamper with the records. The complaint was received in the morning on 1st January 2019 and the ROC entered the premises within half an hour for the search. The course of action that can be taken by Registrar are:

(a) Registrar may enter and search the place where such books or papers are kept and seize them

(b) Registrar may enter and search the place where such books or papers are kept and can seize only after obtaining an order from the special court

(c) Registrar may enter and search the place where such books or papers are kept only on the order of the special court

(d) Registrar may enter and search the place where such books or papers are kept and give an opportunity to the company to represent why such documents may not be seized.

Answer: Option B

Descriptive Questions

1. May 2018 (VVI)

The business of Weak Fabrication Limited is conducted fraudulently and the management activities are not in the interests of the Company. The paid up capital of the company is One crore rupees. A group of shareholders numbering 110 members representing 1/9 of total voting power decided to approach Tribunal (NCL T) to carryout investigation into the Company's affairs under the provisions of the Companies Act, 2013. They seek your advice in the following matters, stating the relevant provisions of the Companies Act, 2013.

(1) Whether the group can make valid application?

(2) Other than member, can any other person make application?

(3) Are the applicants required to furnish security for payment of cost and expenses of Investigation?

(4) Whether the Group can make a valid application?

Answer:

According to Section 213(a)(i) of the Companies Act, 2013, the Tribunal may on an application made by not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a Company having a share capital, order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government.

In the instant case, the application by 110 members representing 1/9 of total voting power of Weak Fabrication Limited to carryout investigation into the company's affairs is valid.

2) Other than member, can any other member make an application?

According to Section 213(b)(i) of the Companies Act, 2013, the Tribunal may, on filling of an application by other person (not being a member of Company), if satisfied, that there are circumstances suggesting that the business of the Company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the Company was formed for any fraudulent or unlawful purpose, may order after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the Company ought to be investigated by an Inspector or Inspectors appointed by the Central Government and where such an Order is passed, the Central Government shall appoint one or more competent persons as Inspectors to investigate into the affairs of the Company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct.

Thus, any other person (other than a member) can also make an application.

3) Section 214 of the Companies Act, 2013 provides for security for payment of costs and expenses of investigation:

Where an investigation is ordered by the Central Government in pursuance of an order made by the Tribunal under Section 213, the Central Government may before appointing an Inspector under clause (b) of Section 213, require the applicant to give such security not exceeding 25,000 rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation. Such security shall be refunded to the applicant if the investigation results in prosecution.

2. Nov 2018

(i) The shareholders of Kumar Ltd. passed a special resolution that the affairs of the Company ought to be investigated. The Company submitted the special resolution to the Central Government. Examine, explaining the relevant provision of the Companies Act, 2013, whether the power of the Central Government to order an investigation is mandatory or discretionary?

(ii) Enumerate the procedures to be followed by the Serious Fraud Investigation Office to arrest a person who has been found guilty of an offence committed under Section 447 of the Companies Act, 2013.

Answer:

(i) Investigation in the opinion of Central Government [Section 210(1) of the Companies Act, 2013]: Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—

(a) on the receipt of a report of the Registrar or inspector under section 208;

(b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or

(c) in public interest, it may order an investigation into the affairs of the company. Hence, the power of the Central Government to order an investigation is discretionary.

(ii) As per section 212(6) of the Companies Act, 2013, offences covered under section 447 of this Act shall be cognizable as well as non-bailable. So, the person found guilty for commission of an offence under the said section, shall be liable to be arrested, by SFIO.

The Central Government by general or special order authorize the Director, Additional Director or Assistant Director of SFIO in this behalf, on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6) i.e. Section 447,to arrest such person and shall, as soon as may be, inform him of the grounds for such arrest. [Section 212(8)].

Immediately after arrest, they shall forward a copy of the order, along with the material in his possession, to the SFIO in a sealed envelope, in such manner as may be prescribed and the SFIO shall keep such order and material for such period as may be prescribed. [Sub section (9)] and present the person so arrested before the Judicial Magistrate or a Metropolitan Magistrate having jurisdiction within twenty-four hours.

The period twenty four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court. [Sub section (10)]. An Interim report is submitted, if so directed, to the Central Government, till the completion of the investigation. [Sub section (11)&(12)].

3. Nov 2018

An investigation was ordered by the Central Government under Section 216 of the Companies Act, 2016, against PKR Limited for determining the true membership of the Company. In connection with this investigation, it appears to the Tribunal that there is good reason to find out the relevant facts about 9% Redeemable Cumulative Preference Shares (RCPS) issued by the Company on 15.10.2017 and the Tribunal is of the opinion that unless restriction is imposed on further issue of such shares, the purpose cannot be solved. Accordingly, the Tribunal, by an Order dated 15.08.2018, directed the Company that the further issue of RCPS shall be subject to restrictions for a period of four years. Despite the Order of the Tribunal as above, PKR Limited proceeded with further issue of RCPS on 20.08.2018 in order to fund the working capital requirements for its expansion project.

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

(i) Can the Tribunal restrict further issue of RCPS? If yes, then to what period?

(ii) What are the penal provisions in case of contravention to the above Order?

Answer:

Imposition of Restrictions upon Securities (Section 222 of the Companies Act, 2013)
(i) Tribunal may by order put restrictions upon securities [sub-section (1)]: Where it appears to the Tribunal, in connection with any investigation under section 216 or on a complaint made by any person in this behalf, that there is good reason to find out the relevant facts about any securities issued or to be issued by a company and the Tribunal is of the opinion that such facts cannot be found out unless certain restrictions, as it may deem fit, are imposed, the Tribunal may, by order, direct that the securities shall be subject to such restrictions as it may deem fit for such period not exceeding three years as may be specified in the order.

In the instant case, the Tribunal can restrict the further issue of RCPS for **such period not exceeding three years.**

Punishment in case of contravention to an order: Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be

punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

4. **Oct 2018 (bahot less time exam me aaya hai but aacha concept hai)**

Origin paper Ltd. has been incurring business losses for past couple of years. The company therefore, passes a special resolution for voluntary winding up. Meanwhile, complaints were made to the tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as public.

In this situation advise whether investigation may be initiated against the company under the provision of the Companies Act, 2013. Further state whether application can be made to Tribunal for Relief in the above affairs of the company once the investigation is initiated against the company.

Answer:

According to section 226 of the Companies Act, 2013, an investigation may be initiated and no such investigation shall be stopped or suspended by reason only of, the fact that—

(i) an application has been made under section 241;

(ii) the company has passed a special resolution for voluntary winding up; or

(iii) any other proceeding for the winding up of the company is pending before the Tribunal.

In the instant case Origin Paper Ltd. has been incurring business losses for past couple of years. The company passed a special resolution for voluntary winding up. Meanwhile complaints were made to the Tribunal and to the Central Government about foul play of the directors of the company, which adversely affected the interests of shareholders of the company as well as the public.

As the company has passed a special resolution for voluntary winding up of the company, then also the investigation may be initiated against the company under section 226 of the Companies Act, 2013.

Yes, as per the above provision, though investigation was initiated against the company, it shall not bar members to file an application to Tribunal for Relief under section 241 of the companies Act, 2013.

According to the said section, any member of a company may apply to the Tribunal for an order on the complains that—

(1) the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company; or

(2) the material change taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members,

The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order.

Where any members of a company are entitled to make an application, any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

5. Shareholders of Hide and Seek Ltd. are not satisfied about performance of the company. It is suspected that some activities being run in the name of the company are not in the interest of the company or its members. 101 out of total 500 share holders of the company have made an application to the Central Government to appoint an inspector to carry out investigation and find out the true picture.

With reference to the provisions of the Companies Act, 2013, mention whether the shareholders' application will be accepted? Elaborate.

Answer:

The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors.

Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

6. (RTP JULY 2021)

Mr. Shariff who was a Key Managerial Personnel (Manager) of XYZ Ltd. retired on 12th May 2020. An examination of the final accounts of the company for the year ended on 31st March 2020, the Registrar of Companies found some serious irregularities in writing off of the hug amounts of bad debts and no satisfactory explanation was provided for the same from the company. In such a situation the Registrar of Companies wants some explanation from the company and Mr. Shariff. In the light of the Companies Act, 2013, examine the situation and advice on the act of Registrar seeking explanation from Mr. Shariff.

ANSWER:

As per the provisions of Section 206(2) of the Companies Act, 2013, the Registrar can call for any information or explanation or any other further documents related to the company from the company or any officer if the company, which he thinks, is necessary for deciding any matter of the company. Proviso to Section 206(2) provides that, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by the Registrar through a notice served on him, in writing, shall also furnish such information or explanation to the best of their knowledge. So, in the given case Mr. Shariff, the ex-manager of the company can be called upon for such information/explanation which was related to their period of service

7. (RTP JULY 2021)

Shri Hari Textiles Limited was incorporated in the year 2010. Its Registered Office is situated in Connaught Place, New Delhi. It filed its audited annual financial statements for the financial year 2019-20 well within time with the jurisdictional Registrar of Companies. The Registrar inspected the

statements and after reviewing them, felt the need to seek clarifications on certain matters. Accordingly, a written notice was sent by the Registrar to the company and its officials directing them to comply with the notice within thirty days of its receipt. However, the company and its officials failed to reply within the time specified in the notice.

The Registrar initiated the inquiry and proceeded further for inspecting all the documents of the company. While conducting the inquiry, the Registrar on prudent grounds believed that some of the documents and other vital information in relation to the company would be destroyed or altered by the official of the company. With a view to safeguard the documents, the Registrar obtained an order from the Special Court and thereafter, seized all such material.

While inspecting some of the documents the Registrar came to know that the Board of Directors had passed a resolution in a Board Meeting held on 10-04-2019 and thereby, increased the remuneration payable to the directors including two whole-time directors and Managing Director to 12% of the net profits of the company which was a sharp increase of 5% from the preceding financial year.

Prior to the inquiry, two directors of the company, namely, Mr. X and Mr. D got retired. The Registrar found from the inspection of the documents that they were involved in certain dealings which included selling of the assets of the company. On the basis of such information gathered from the inspected documents, the Registrar sought some clarifications from both of them regarding the dubious transactions. However, both Mr. X and Mr. D refused to appear before him showing their non-availability in the town and also represented through a common representative that they were no more a part of the Board of Directors of Shri Hari Textiles Limited.

After the completion of inspection and inquiry, the Registrar submitted a written report to the Central Government in respect of his findings against the company. The reports mentioned that there were major discrepancies in the assets and liabilities as well as profit and loss statements filed by the company.

On receipt of report from the Registrar, the Central Government considered it necessary to investigate the affairs of the company by the Serious Fraud Investigation Office (SFIO). Accordingly, by an order SFIO was directed to conduct the investigation of Shri Hari Textiles Limited and submit its report within the stipulated time. As instructed by the Central Government, SFIO authorised some of its inspectors to investigate the affairs of the company.

The team deputed by the SFIO included experts in the field of cost accounting, financial accounting, taxation, law and forensic auditing.

While inspecting the company, the team of SFIO came to know that the Income-tax authorities had already initiated investigation against Shri Hari Textiles Limited.

Chapter 5
Compromises, Arrangements and Amalgamations

Multiple Choice Questions

1. (MARCH MTP 2022)

Real Estate Developers Limited was demerged to B. Reality Constructions and Developers Limited and B. Real Estate Developers Limited. Choose the correct option from those given below as to what type of demerger is this:

(a)Total demerger.

(b)Partial demerger.

(c)Internal reconstruction.

(d)Demerger in the 'nature of purchase'.

Answer: B

2. (APRIL 2022 MTP)

The aggregate amount of dues to the secured creditors and workmen is ` 16,00,000 and collateral security given to the secured creditors is ` 4,00,000. The proportionate amount of workmen portion will be:

(a) 10%

(b) 20%

(c) 25%

(d) 30%

Answer: C

3. (SEPT 2022 MTP)

Who amongst the following may file an application for the restoration of the name of the company in the regiser of company and within the period of:

(a)The Company itself and within 2 years from the date of passing of the order dissolving the company

(b)The authorised officials of the company and within 2 years from the date of passing of the order dissolving the company

(c)NCLT and within 3 years from the date of passing of the order dissolving the company

(d)Registrar and within 3 years from the date of passing of the order dissolving the company

ANSWER (D)

4. (MAY 2022 RTP)

A-One Software Limited is facing continuous losses and financial crunch for the last four years or so. In order to save company from the impending liquidation, it proposed a scheme of compromise to its

creditors worth ` 1,50,00,000 and accordingly filed the said Scheme with the jurisdictional Tribunal. Minimum how many creditors in value must agree and confirm to the scheme of compromise so that Tribunal may dispense with calling of a meeting of the creditors:

(a)In order that the Tribunal may dispense with calling of a meeting of the creditors, it is required that creditors having value of minimum ` 1,35,00,000 must agree and confirm to the scheme of compromise.

(b)In order that the Tribunal may dispense with calling of a meeting of the creditors, it is required that creditors having value of minimum ` 1,20,00,000 must agree and confirm to the scheme of compromise.

(c)In order that the Tribunal may dispense with calling of a meeting of the creditors, it is required that creditors having value of minimum ` 1,27,50,000 must agree and confirm to the scheme of compromise.

(d)In order that the Tribunal may dispense with calling of a meeting of the creditors, it is required that creditors having value of minimum ` 1,42,50,000 must agree and confirm to the scheme of compromise.

ANSWER :

Option (a): In order that the Tribunal may dispense with calling of a meeting of the creditors, it is required that creditors having value of minimum ` 1,35,00,000 must agree and confirm to the scheme of compromise.

5. RTP Nov 2019

X Ltd. amalgamated with Y Ltd. The transferee company decided to dispose of the books and papers of the X Ltd. in order to come up with maintenance of revised book and papers under the name of the transferee company to bring all the financial details of the amalgamated company also in the records. State the correct statement as to decision of the transferee company on the disposal of the Books and papers of the X Ltd.

a) Decision of Transferee Company is invalid, as books and papers of the amalgamated company shall be maintained for at least three years.

b) Decision of Transferee Company is invalid, as books and papers of amalgamated company shall be maintained for at least eight years.

c) Decision of Transferee Company will be valid only on the sanction of the prior permission of the Central Government.

d) Decision of Transferee Company will be valid only after seeking prior permission of the requisite number of the creditors/shareholders of the amalgamated company

Answer: (c)

6. MTP Apr 2019

Which amongst the following is a restriction on Transferee Company in event of merger or amalgamation?

a) Hold any shares in its own name

b) Hold any shares in the name of any trust on its behalf

c) Hold any shares in the name of any trust on behalf of any of its subsidiary

d) All of the above

Answer: Option D

7. (MTP-NOV 2020)

Under what circumstances the meeting of the creditors may be dispensed by the NCLT? (1 Mark)

(a) if 70% of the creditors in value agree and confirm to the scheme by way of affidavit

(b) if 80% of the creditors in value agree and confirm to the scheme by way of affidavit

(c) if 90% of the creditors in value agree and confirm to the scheme by way of affidavit

(d) None of the above

ANSWER- c

Part B-Descriptive Questions

1. (OCT 2022 MTP)

A Ltd. (transferee) decides to acquire B Ltd. (transferor) by acquiring its shares via a process of takeover u/s 235 of the Companies Act, 2013. A Ltd. prepared a scheme by which an offer was made to the shareholders of B Ltd. The offer was made on 1st August, 2019. The offer remained open for 4 months. Such offer was approved by shareholders having 92% value of the shares. Subsequently A Ltd. gave a notice to the remaining shareholders that it desires to acquire their shares. Such notice was given on 5th January, 2019. Certain dissenting shareholders made an application to the tribunal that acquisition of their shares should not be permitted. Such application was dismissed by the tribunal. Hence A Ltd. acquired shares of 5% of the dissenting shareholders (out of balance 8%). The shareholding of balance 3% shareholders continued to remain with them. Comment on the validity of such a takeover by A Ltd.

ANSWER :

The basic requirements as to acquisition of shares mentioned in Section 235 of the Companies Act, 2013 are as follows:-

1.The scheme or contract involving the transfer of shares in a company (transferor company) to another company (transferee company) has been approved by the holders of not less than 9/10th(90%) in value of the shares whose transfer is involved.

2.The approval of 9/10th shareholders in value shall be received within 4 months after making of an offer in that behalf by the transferee company.

3.The transferee company shall express his desire to acquire the remaining shares of dissenting shareholder in 2 months after the expiry of the said 4 months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares.

The transferee company shall be entitled as well as bound to acquire the shares of the dissenting shareholders where no application is made by any dissenting shareholders to the tribunal in 1 month of

receipt of notice of acquisition of shares or where an application is made by any dissenting shareholder but such application is dismissed by the tribunal.

In the given case since application made by the dissenting shareholders has been dismissed by the tribunal hence A Ltd is entitled and bound to acquire all the shares of the dissenting shareholders i.e. entire 8% shareholding.

Since A Ltd only acquired 5% shareholding of the dissenting shareholders hence this is in contravention of Sec 235 of the Companies Act, 2013. Hence the takeover is invalid.

2. (MAY 2022 EXAM)

(a)STC Limited is a wholly owned subsidiary of HTC Limited. The 100% equity shares, fully paid-up, of STC Limited is held by HTC Limited including the shares held by 6 nominees of HTC Limited. In order to effectively utilise the resources, a proposal is under discussion in the board meeting of HTC Limited for merger of both the companies. The majority of the directors of HTC Limited opined in the board meeting that the merger has to be done through fast track mode as per the provisions of Section 233 of the Companies Act, 2013. However, the Company Secretary was of the view that the merger of both the companies cannot be done through fast track mode as they are public companies. Referring to the provisions of the Companies Act, 2013-

(i)Analyze the validity of merger of HTC Limited and STC Limited through fast track mode.

(ii) Examine, whether STC Limited can be merged with HTC Limited, if HTC Limited is a foreign company.

ANSWER :

(i)Companies who may enter into scheme of Merger or Amalgamation[Section 233 (1)]:

A scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or class or classes of companies as may be prescribed (i.e. between two or more start-up companies or one or more start• up company with one or more small company) if 100% of its share capital is held by the holding company, except theshares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187 of the Companies Act, 2013.

Validity of Merger of HTC Limited and STC Limited through Fast Track Mode.

In the instant case, the 100% equity shares of STC Limited is held by HTC Limited including the shares held by 6 nominees of HTC Limited.

Yes, proposal for the merger of HTC Limited and STC Limited opined by the Board of Directors through fast track mode will be valid subject to the following:-

(i) A notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company

(ii)The objections and suggestions received are to be considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares;

(iii) Each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(iv) The scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(iv) Contention of Company Secretary that the merger of both the companies cannot be done through fast track mode as they are public companies, is incorrect.

Merger of STC Limited with HTC Limited, a Foreign Company:

Section 234 of the Companies Act, 2013 makes provisions in respect of cross border mergers and amalgamations i.e. between Indian Company and a foreign body corporate. Procedure has been prescribed in Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. According to this Section, STC Ltd. can be merged with HTC Ltd. (if it's a foreign company) with RBI approval and after complying with provisions of Sections 230 to 232 of the Act and relevant Rules.

3. May 2018 (VVI)

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

Answer:

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

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

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

4. RTP May 2018 (VVI)

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

Answer:

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

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

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

In this case 300 members attended the meeting, but only 260 members voted at the meeting. As 120 members voted in favor of the scheme the requirement relating to majority in number (i.e. 131) is not satisfied. 260 members who participated in the meeting held 9,00,000 shares, three-fourth of which works out to 6,75,000 while 120 members who voted for the scheme held 7,00,000 shares. The majority representing three-fourths in value is satisfied.

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

5. (RTP MAY 2019)

Dragon Copper Limited was facing acute financial difficulty as operations were continuously disrupted due to (a) non-availability of raw material (b) successive drought in its marketing areas and loss of demand and (c) frequent breakdown due to non- replacement of old plant and machinery. On the verge of liquidation, the Management proposes one last arrangement between creditors and the company, whereby the creditors have to forego 50% of their dues to the company. This has evoked strong protest from some of the creditors who may block the arrangement. Examine the arrangement in the light of the Companies Act, 2013 and advise the course of action/procedure to be adopted by the company to implement the same.

Answer:

Scheme of Compromise or arrangement (Section 230 of the Companies Act, 2013): The scheme provides for sacrifice on the part of creditors as they have to forego 50% of their dues to the company. The company is sick and therefore it can be considered as a company liable to be wound up within the meaning of Section 230(a) of the Companies Act, 2013. The proposed scheme involves as a compromise or arrangement with creditors and it attracts section 230.

While the company or any creditor or member can make application to the Tribunal under section 230 (6)(1), it is usual for the company to make an application. On such application, the Tribunal may order that a meeting of creditors and/or members be called and held as per directions of the Tribunal.

Company must arrange to send notice of meeting to every creditor containing a statement setting forth the terms of compromise or arrangement explaining its effect. Material interest of directors, Managing Director, or manager of the company in the scheme and the effect of scheme on their interest should be fully disclosed [Section 230(1)(a). Advertisement issued by the company must comply with the requirements of section 230(2). At the meetings convened, as per directions of the Tribunal, majority in number representing at least

ninety percent in value of creditors present and voting (either in person or by proxy if allowed) must agree to compromise or arrangement.

Thereafter the company must present a petition to the Tribunal for confirmation of the compromise or arrangement. The notice of application made by the company will be served on the Central Government and the Tribunal will take into consideration representation, If, any made by the Central Government. The Tribunal will sanction the scheme, if it is satisfied that the company has disclosed all material facts relating to the company e.g. latest financial position, auditors report on accounts of the company, pendency of investigation of company, etc. Copy of Tribunal order must be filed with the Registrar of Companies and then only the order will come into effect. Copy of Tribunal order must be annexed to every Memorandum of Association issued thereafter.

If the Tribunal sanctions the scheme, it will be binding on all members and creditors even those who were dissenting. (Case Law: S. K. Gupta Vs. K. P. Jain, AlR 1979 SC 374)

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

Answer:

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

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

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

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

Chapter 6

Prevention of Oppression and Mismanagement

Part A-Multiple Choice Questions

1. With whom will the Central Government file an application if it is of the opinion that such a scheme is not in public interest or in the interest of the creditors?

a) Cannot move an application
b) it may file an application before the Tribunal
c) it may file an application before the Parliament
d) It may be through Special Petition before Supreme Court.

Answer: b)

2. "Allotment of shares by the directors of the company by which the existing majority is reduced to minority." As per provisions of the Companies Act, 2013, the above act of the company should be classified as……..? (1 Mark) (mtp-NOV 2020)

a) Oppression
b) Mismanagement
c) Material change in the company
d) All of the above

ANSWER- a

3. MTP Mar 2019

Astistav Private Limited is a company with ten shareholders. A member holding less than one-tenth of the share capital of the company apply to the Tribunal for relief against oppression and mismanagement. State whether a member have a right to apply to the tribunal in above situation:

a) A single Member cannot apply to the Tribunal for relief against oppression and mismanagement
b) A member cannot apply as he is holding less than one-tenth of the share capital of the company
c) A member can apply being one-tenth of the total number of members.
d) A member cannot apply as the requirement of atleast hundred members is not complied with.

Answer: Option C

Part B-Descriptive Questions

1. MARCH MTP 2022

Few preference shareholders of Lebtuk Ltd. had filed an application with the Tribunal (NCLT) for relief against oppression and mismanagement. The Tribunal observed that the Articles of Lebtuk Ltd. provided undue powers to the Board of Directors and accordingly, ordered for alteration of the Articles of the company so as to restrict the powers of Board to a certain extent. The company filed the certified copy of such order with the Registrar on 5th November, 2021 and amended its Articles as per the order on 22nd November, 2021. Afterwards, Mr. Ramesh Puri, CEO of Lebtuk Ltd. proposed a change to be made by the company in the Articles which appeared to be inconsistent with the order of Tribunal.

In the context of aforesaid scenario, please answer to the following questions:-

i. **What effect such amendment in Articles would be considered to have, and by what date, such order of Tribunal needs to be registered by the Registrar?**
ii. **Whether Lebtuk Ltd. can amend its Articles to incorporate the change proposed by Mr. Ramesh and what could be the consequences for the same?**

Answer

(i)As per section 242 of the Companies Act, 2013,the alterations made by the order in the Memorandum or Articles of a company shall have the same effect in all respects as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the Memorandum or Articles so altered.

A certified copy of every order altering, or giving leave to alter, a company's Memorandum or Articles, shall be filed by the company with the Registrar who shall register the same within 30 days after the making thereof.

In the instant case, the Tribunal ordered for alteration of the Articles of Lebtuk Ltd. so as to restrict the powers of Board to a certain extent and accordingly, the Articles were amended as per the order on 22nd November, 2021.

Conclusion: Accordingly, as per the aforesaid provisions, such alteration would have the same effect in all respects as if they had been duly made by the company in accordance with the provisions of the Companies Act, 2013, and the Registrar needs to register the same at the latest by 5th December, 2021 i.e. within 30 days of filing the order by the company on 5th November, 2021.

(ii) As per section 242 of Companies Act, 2013, where an order of the Tribunal makes any alteration in the Memorandum or Articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power (except to the extent, if any, permitted in the order) to make, any alteration whatsoever which is inconsistent with the order, either in the Memorandum or in the Articles without the leave of the Tribunal.

Here, Mr. Ramesh Puri, CEO of Lebtuk Ltd. proposed a change to be made by the company in the Articles which appeared to be inconsistent with the order of Tribunal and accordingly, such a change cannot be made without the leave of the Tribunal.

Conclusion: If the company makes such a change in the articles inconsistent with the order of Tribunal without the leave of the Tribunal, then the company and every officer in default would be liable for punishment as per sub-section (6) of section 242. According to which the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees

2. **The Central Government initiated a case against Mr. Sujay Bishoi, Managing Director of BSK Ltd.for causing damage to the interest of the financial industry by mismanaging the funds and referred the case to the Tribunal where the Tribunal passed an order on 20th June, 2021, holding that Mr. Sujay was not fit and proper person to hold such office.**

   Mr. Sujay vacated his office as on 21st June, 2021 and he demanded compensation, as per the contract with the company, for early termination. On 23rd January, 2025, Mr. Sujay was appointed as a non-executive director in one other company.

   In the light of the given facts, advise in the given legal situations :-

(i) Whether Mr. Sujay was entitled for such compensation?

(ii) Whether Mr. Sujay was entitled to be appointed as a non-executive director in such other company?

ANSWER :

The Tribunal had passed an order pursuant to subsection (4A) of section 242 of the Companies Act, 2013, as the case had been referred to it by the Central Government to decide whether Mr. Sujay was fit and proper person or not.

As per section sub-sections (1A) and (1B) of the 243 of the Companies Act, 2013, the person who is not a fit and proper person pursuant to subsection (4A) of section 242, shall not hold the office of a director or any other office connected with the conduct and management of the affairs of any company for a period of five years from the date of the said decision:

Provided that the Central Government may, with the leave of the Tribunal, permit such person to hold any such office before the expiry of the said period of five years.

Notwithstanding anything contained in any other provisions of this Act, or any other law for the time being in force, or any contract, memorandum or articles, on the removal of a person from the office of a director or any other office connected with the conduct and management of the affairs of the company, that person shall not be entitled to, or be paid, any compensation for the loss or termination of office.

Conclusion: Here, Mr. Sujay was not entitled for such compensation for early termination of his office, despite of the terms of the contract, as his termination was pursuant to order of Tribunal passed under subsection (4A) of section 242 of the Companies Act, 2013.

3. (OCT 2022 MTP)

Anurag is the Managing Director of ABC Ltd. His term was expired in the month of September 2022 inspite of this, he is continuing to hold the office of MD. No meeting of the Board was held for his re-appointment. Being a shareholder of the company, can you take any action and how it will be taken?

ANSWER :

Where the term of the Managing Director has expired and he continues in office without a meeting of the board being held for re-appointment, is considered as mis-management of the affairs of the company.

In such a situation an application to the NCLT for relief in case of Oppression and mis-management can be filed under section 241 read with section 244.

Section 241(1)(a) provides that any member of a company who complains that the affairs of the company have been or are being conducted in a manner prejudicial to public interest or in a manner prejudicial or oppressive to him or any other member or members or in a manner prejudicial to the interests of the company, may apply to the Tribunal.

Section 244(1)(a) provides that in the case of a company having a share capital, not less than 100 members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares, shall have the right to apply under section 241.

A shareholder of the company, in compliance with above procedure, can file an application for relief on mismanagement before the NCLT.

4. (MAY 2022 EXAM)

SOPS Limited is in the field of manufacturing of toys. The company has Authorised Share Capital of ` 50 Lakhs consisting of 40,000 equity shares of ` 100 each and 10,000 preference shares of ` 100 each. The company has issued 32,000 equity shares and 8,000 preference shares of which 24,000 equity shares and 6,000 preference shares are subscribed and fully paid-up. The company has 650 members holding equity shares and 200 members holding preference shares. A petition was submitted before the Tribunal signed by 90 members holding 3,100 equity shares of the company alleging various acts of oppression and mismanagement on the part of the company. During pendency of the petition, 10 petitioner-members holding 1,000 equity shares disassociated from the petition. Referring to the provisions of the Companies Act, 2013, answer the following:

Whether the petition will be admitted?

Whether the petition will be maintainable after disassociation of the stated members?

ANSWER :

Right to apply for Oppression and Mis-management:

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

- 100 members; or
- 1/10th of the total number of members; or
- Members holding not less than 1/10th of the issued share capital of the company.

Provided that the applicant or applicants has or have paid all calls and other sums due on his or their shares.

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

40,00,000 issued share capital (equity and preference) held by 850 members

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

(i) No. of members making the petition - 90 members holding 3100 equity shares of 100/- each.

(ii) Amount of share capital held by members making the petition - ` 3,10,000 The petition shall be valid if it has been made by the lowest of the following:

- 100 members; or
- 85 members (being 1/10t h of 850); or
- Members holding ` 4,00,000 share capital (being 1/10th of `40,00,000)

(i) Whether the Petition is maintainable?

As it is evident, the petition made by 90 members meets the eligibility criteria specified under Section 244 of the Companies Act, 2013 as it exceeds the minimum requirement of 85 members in this case. Therefore, the petition is maintainable.

(ii) Whether the petition is maintainable even after disassociation of the stated members?

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

Hence, the petition will be maintainable even after disassociation of the stated members i.e. by 10 petitioner members holding 1,000 equity shares.

5. May 2019

A group of shareholders consisting of 30 members decide to file a petition before the Tribunal for relief against oppression and mismanagement by the Board of Directors of M/s. Aravalli Manufacturing Company Limited having a paid up Share Capital of Rs. 1 crore.

The company has a total of 500 members and the group of 30 members holds one-tenth of the total paid-up share capital accounting for one- fifteenth of the issued share capital. The grievance of the group is that due to the mismanagement by the Board of Directors, the company is incurring losses and has not declared any dividend for the past five years. In the light of the provisions of the Companies. Act, 2013, please advise the group of shareholders regarding the admission of the petition and the relief thereof.

Answer*:*

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

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

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

As per the facts, a group of 30 members decided to file a petition. Total number of members are 500 & one tenth of 500 will be 50 and lower of above is 50. Thus, the group of shareholders who decides to file the petition are less than 50. However, the group of 30 members holds one fifteenth of the issued share capital which is less than the required one tenth of the issued share capital. In view of this, the group is not having requisite number of shares and shareholding for being eligible to approach the Tribunal for relief.

Also, the shareholders may not succeed in getting any relief from the tribunal as continuous losses cannot, by itself, be regarded as oppression (*Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth*). Similarly, the failure to declare dividend or payment of low dividends also does not amount to oppression. (*Thomas VeddonV.J. Vs. Kuttanad Rubber Co. Ltd.*)

6. Nov 2018

MNC Private Ltd. is a Company in which there are six shareholders. Mr. Srinath, who is a director and also the legal representative of a deceased shareholder holding less than one tenth of the share capital the Company made a petition to the Tribunal for relief against oppression and mismanagement. Examine under the provisions of the Companies Act, 2013
whether the petition made by Mr. Srinath valid and maintainable?

Answer:

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

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

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

2. Legal heir of the deceased shareholder with minority status is entitled to file the petition.

In the given case, there are six shareholders. As per the condition (a) above, 10% of 6 i.e. 1 (round off 0.6) satisfies the condition. Therefore, in the light of the provisions of the Act, a single member (even the legal representative of a deceased shareholder) can present a petition to the Tribunal, regardless of the fact that he holds less than one-tenth of the company's share capital.
Thus, the petition made by Mr. Srinath is valid and maintainable.

7. (mtp-II- july 2021)

B, S, and D hold 33%, 33% and 34% of equity shares of BSD Private Limited respectively. S and D are directors and D is looking after the whole of the management and administration of the company without being formally appointed as a Managing Director. Since from last three years the company is incurring heavy losses and could not declare a dividend. Being aggrieved, B filed a complaint before the Tribunal on the grounds of oppression and mismanagement of the company such as running of a company continuously in losses, non-declaration of dividend and managing the affairs of the company by a director who has not been formally appointed as a managing director. The complaint is thereby made soliciting the directors for payment of compensation by way of salary to him as like other directors and such other direction as may be deemed suitable by the Tribunal to remove oppression and mismanagement of the Company. Examine the maintainability of his complaint in law in the light of the provisions of the Companies Act, 2013.

ANSWER

Mr. B has filed a complaint before the Tribunal on the grounds of oppression and mismanagement of the BSD Private Limited on the following issues:

(i) Running of Company continuously in losses:
As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).

(ii) Non declaration of dividend:
Failure to declare dividends or payment of low dividends also does not amount to oppression. (Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd).

(iii) Managing the affairs of the Company by a director who has not been formally appointed as a Managing Director:
Where a person without being so appointed, was acting as a Managing Director and was discharging his functions as such, whether with or without the knowledge of the members, a member cannot claim that it was an act of oppression, by filing an application with the Tribunal.

(iv) Payment of Compensation by way of Salary
Mr. B has filed a complaint soliciting the direction for payment of compensation by way of salary to him as like other directors and such other directions as may be deemed suitable by the Tribunal to remove oppression and mismanagement of the Company. But as per decided case laws, shareholders can share the

dividend of the Company, if it is declared but cannot seek directions to be compensated. The payment of salary is a question that concerns the Board of Directors and not the Tribunal.

Hence, Mr. B neither may succeed in getting any relief from Tribunal nor getting any compensation by way of salary.

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8. (RTP JULY 2021)

Mr. M, a member of XYZ Ltd. filed an application before the Tribunal complaining of oppression and mismanagement w.r.t. an agreement entered by XYZ Ltd. effecting the interest of the company. Vide order passed by the Tribunal under section 242 of the Companies Act, 2013, terminated the said agreement. The agreement was entered by Mr. H and Mr. G who was managing director and the executive director of the XYZ Ltd. Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement. Also state the legal position of Mr. H and Mr. G holding their place of office in the said situation. Examine the given facts and address the issues in terms of the relevant provisions of Companies Act, 2013.

ANSWER

As per section 243 of the Companies Act, 2013 , where an order made under section 242 terminates, sets aside or modifies an agreement which was entered by the company, were in a manner prejudicial to the interests of the company,—

(a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;
(b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

Accordingly, Mr. Rasik, with whom the XYZ Ltd entered the agreement, filed a petition claiming the loss caused due to termination of the said agreement, is not viable. Further, Mr. H and Mr. G, managing director and the executive director of the XYZ Ltd. who entered agreement with Mr. Rasik which was ordered to be terminated by the Tribunal, shall not act as the managing director or other director or manager of the company, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal.

Chapter 7 – Winding Up

Multiple Choice Questions

1. (RTP JULY 2021)

What is the periodicity of submission of report by company liquidator with respect to the progress of winding up of the company to the Tribunal:

(a) Monthly
(b) Bi-monthly
(c) Quarterly
(d) Half yearly

ANSWER- c

2. When can a winding up order not be called a notice of discharge?

(a) when the business of the company is continued
(b) when the business of the company is closed since 2 years.
(c) On the discretion of the management
(d) Till the appointment of a provisional liquidator

Answer: Option A

3. MTP April 2019

Who shall make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company Liquidator in carrying out the function?

a) No application required
b) Company Liquidator
c) Management
d) Members

Answer: Option B

Part B- Descriptive Answer

1. SEPT 2022 MTP

i. Simar Limited was in the process of liquidation. It had some correspondence with its auditor, which was in the company's letter head. The auditor observed that the letter head was not in compliance with Section 344, as it did not mention the fact that the company was being wound up. He immediately called up one of the directors and advised him about the provisions of Section 344 and the consequences of non-compliance. State, the provisions and consequences regarding which the auditor would have advised.

ii. Covid 19 pandemic has badly affected the business of travel ticket booking agent company. Restrictions & frequent lockdowns led to the permanent closure of the company's operations. The secured creditors of the company of value ` 50 Lakhs filed a winding up petition with the High

court & subsequently the HC passes a winding up order. The workers of the company were not favoring this and hence filed an appeal against the winding up order. The workmen's dues were ` 30 Lakhs. The secured creditors were against this defending that their dues were more than the workmen's & hence not valid. Is the creditor's statement correct? Enumerate in the light of the Companies Act, 2013?

ANSWER :

Statement that Company is in Liquidation [Section 344 of the Companies Act, 2013]

(1) Statement of winding up: Where a Company is being wound up, whether by

- the Tribunal or
- voluntarily,

every invoice, order for goods or business letter issued-

- by or on behalf of the Company or
- by a Company Liquidator of the Company, or by a
- receiver or
- by the manager of the property of the Company,

being a document on or in which the name of the Company appears, shall contain a statement that the Company is being wound up.

(2)If a company contravenes the above provisions, the company and every officer of the Company, the Company Liquidator and any receiver or manager, who willfully authorises or permits the non-compliance, shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees.
In the instant case, the Auditor would have advised accordingly.

(ii)According to section 279 of the Companies Act, 2013, when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose:
Provided that any application to the Tribunal seeking leave under this section shall be disposed off by the Tribunal within sixty days.

Nothing as stated above, shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.
According to Section 325,326,327 of the Companies Act, 2013, in case of winding up of a company, the workmen's dues shall be paid in priority to all other debts ranking Pari passu with the secured creditors.

As per the facts of the case, the High court has already passed a winding up order of the company. Hence, the workmen can appeal against the winding up order but only with the leave of Tribunal and subject to the terms imposed by the Tribunal. Further, the dues / interests of the workmen shall be protected in priority as workmen's dues shall be paid in priority to all debts ranking Pari passu with secured creditors.

Hence, even though the dues of secured creditors are more than workmen's dues, priority is given to workmen's dues as per provisions of the Act.

2. (OCT 2022 MTP)

The Registrar of Company (RoC), Mumbai has observed that Ronak Enterprises Ltd. have not filed its financial statements and annual returns for the last immediately preceding 5 consecutive years. What course of action is available before the RoC in the given case in line with the requisite compliance on the presentation of petition?

ANSWER :

Section 272(1)(d) of the Companies Act, 2013, states that a petition to the Tribunal for the winding up of a company can be presented by the Registrar. Sub-section (3) provides that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

Section 271 (d) provides that a company may, on a petition under section 272, be wound up by the Tribunal, if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years.

A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.

A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

3. (MAY 2022 EXAM)

Green Rose Limited is regularly filing its annual financial statements with the Registrar of Companies (RoC). The Company is suffering losses continuously for the past 5 years. The annual financial statements disclosed that the liabilities are ten times of its assets as per the latest audited financial statements. Based on the financial position revealed by the financial statements filed with his office, the RoC came to the conclusion that the Company should be wound up in the public interest being unable to pay its debts. The RoC filed a petition before the Tribunal [NCLT] under Section 272 of the Companies Act, 2013 for winding up of the Company without obtaining previous approval therefor. Referring to the provisions of the Companies Act, 2013.

(i) Enumerate the circumstances in which a company may be wound up by the Tribunal.

(ii) Examine the validity of the petition filed by the RoC.

ANSWER :

(i) Circumstances in which company may be wound up by Tribunal:

According to Section 271 of the Companies Act, 2013, a company may be wound up by the Tribunal in the following circumstances, where-

a) the company has, by special resolution, resolved that the company be wound up by the Tribunal;
b) the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
c) on an application made by the Registrar or any other person authorised by the Central Government. The Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner/ formed for fraudulent and unlawful purpose / the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
d) the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or
e) the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

(ii) Validity of the petition filed by the RoC

According to Section 272 of the Companies Act, 2013, the Registrar of Company is entitled to present a petition for winding up under section 271 except on the grounds specified in clause (a) of that Section.

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition. The Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

Here in the given instance, RoC filed a petition before the Tribunal for winding up without obtaining previous approval of the Central Government.
Therefore, the petition filed by the RoC is invalid.

4. (NOV 2022 EXAM)

The Tribunal has made an order for winding-up of LTR Private Limited Consequently, considering the report of the Liquidator stating that Mr. Tejas has committed the fraud in formation of the company, the Tribunal directed him to present himself for examination. However, Mr. Tejas defended the order on the ground that he was never a promoter, director, officer or employee of the Company, Examine the tenability of the stand taken by Mr. Tejas to defend the order of the Tribunal and enlighten him of the rights available to the person to be examined in light of the provisions of the Companies Act, 2013.
ANSWER :

Power of the Tribunal to order the person to attend and be examined before the Tribunal:

As per Section 300 of the Companies Act, 2013 (the Act) where an order has been made for the winding up of a Company by the Tribunal, and the Company Liquidator has made a report to the Tribunal under this Act, stating that, in his opinion, a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the Company since its formation, the Tribunal may, after considering the report, direct that-

i. such person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and
ii. be examined as to promotion or formation or the conduct of the business of the Company or as to his conduct, and
iii. dealings as an officer thereof.

Hence, Mr. Tejas is bound to appear before the Tribunal for examination even if he was not a promoter, director, officer or employee of the Company as the Tribunal has powers to direct any person to appear for examination. Hence, his stand is not tenable,
Rights available to the person to be examined:

A person ordered to be examined under this Section:

(i) shall, before his examination, be furnished at his own cost with a copy of the report of the Company Liquidator; and
(ii) may at his own cost employ Chartered Accountants or Company Secretaries or Cost Accountants or legal practitioners entitled to appear before the Tribunal under Section 432 of the Act, who shall be at liberty to put to him such questions as the Tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him. He may exercise the rights conferred on him as above.

5. RTP May 2018

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

(i) Decide validity to the opinion made by the liquidator and penalty that can be imposed on the liquidator for contravention of the provision as per the Companies Act, 2013.
(ii) Discuss, if the Paramount Limited is a non-government company?

Answer:
Section 348 of the Companies Act, 2013 states that, if the winding up of a company is not concluded within one year after its commencement then the Company Liquidator shall file a statement in such form containing

such particulars as may be prescribed. Such statement shall be filled within two months of the expiry of such year and it shall be filled continuously thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals as may be prescribed. The statement shall be duly audited, by a person qualified to act as auditor of the company and position of with respect to the proceedings in the liquidation.

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

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

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

Paramount Limited is a Government Company

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

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

Paramount Limited is a Non-Government Company

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

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

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

Answer:

Validity of RoC's action

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

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

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

7. May 2019

Info-tech Overtrading Ltd. was ordered to be compulsory wound up by an order dated 10th March, 2019 by the Tribunal. The official liquidator who has taken control of the assets and other records of the company has noticed that :

***(i)* One of the contributory whose calls are pending to be paid is about to leave India for evading payment of calls and;**

***(ii)* A person having books of accounts of the company his possession may abscond to avoid examination of books of accounts in respect of the affairs of the company.**
Apprehending such possibilities, Tribunal detained such contributory for next 6 month disallowing him to leave India as well as arrest & seized books of accounts from the person which may possibly abscond to avoid examination of the affairs of the company.

Referring to the provisions of Companies Act, 2013, answer the following in current scenario:
What is the validity of Tribunal's order for detention of contributory disallowing him to leave India?
Is it correct from Tribunal's part to arrest and seize books of accounts from the person planning to abscond to avoid examination of books of accounts in respect of the affairs of the company?

Answer:
According to section 301 of the Companies Act, 2013, at any time either before or after passing a winding up order, if the Tribunal is satisfied that

- a contributory or
- a person having property, accounts or papers of the company in his possession

is about to leave India or otherwise to abscond, or is about to remove or conceal any of his property, for the purpose of evading payment of calls or of avoiding examination respecting the affairs of the company, the Tribunal may cause—
(a) the contributory to be detained until such time as the Tribunal may order; and
(b) his books and papers and movable property to be seized and safely kept until such time as the Tribunal may order.
In the instant case, by taking into account the above provisions:
(i) The Tribunal's order for detention of contributory for next 6 months disallowing him to leave India, is valid.
(ii) It is correct from Tribunal's part to arrest and seize books of accounts from the person planning to abscond to avoid examination of books of accounts in respect of the affairs of the company. Section 245(3)(ii) is fulfilled.

8. RTP May 2019 VVI

(ii) IJK Limited was wound up with effect from 15th March 2018 by an order of the Court. Mr. A, who ceased to be a member of the company from 1st June 2017, has received a notice from the liquidator that he should deposit a sum of Rs. 5000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called as a contributory, whether he can be made liable and whether there is any limitation on his liability.

Answer

Contributory: According to section 285 of the Companies Act, 2013, as soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall settle a list of contributories. While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves.

Liability of the contributory: a person who has been a member shall not be liable to contribute if he has ceased to be a member for the preceding one year or more before the commencement of the winding up.
In the given case, M/s, IJK Ltd. was wound up on 15th March 2018. Whereas Mr. A ceased to be a member of the company from 1st June, 2017. So, according to the above provision, Mr. A will be a contributory and be liable to contribute as the time period of one year from the commencement of winding up has not elapsed.

So Mr. A is liable to deposit Rs. 5000 (if any unpaid on the shares in respect of which he is liable as member [Section 285 (3) (d)]) as his contribution towards the liability on the shares previously held by him.

9. Nov 2019 4 Marks

Due to an unprecedented flood, all the fixed assets of a Company were damaged extensively beyond renovation or repair. The cost of replacement of assets were huge and the sum insured on the fixed assets did not cover all the assets. Therefore, the operations of the Company were permanently discontinued. Meanwhile, based on a winding-up petition filed by the secured creditors, the High Court passed a winding-up order. The workers of the Company opposed to the winding-up petition and also filed an appeal against the winding up order. The workers are not sure whether their appeal would be heard in the winding-up proceedings. Examine, under the provisions of the Companies Act, 2013, whether the appeal
filed by the workers would succeed and their dues / interest will be protected in priority?

Answer:

According to section 279 of the Companies Act, 2013, when a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose.
It is further provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.
However, the above provision shall not apply to any proceeding pending in appeal before the Supreme Court or a High Court.

According to section 325/326/327 of the Companies Act, 2013, in the winding up of a company under this Act, the workmen's dues shall be paid in priority to all other debts ranking pari passu with secured creditors.
As per the facts of the question, the High Court has already passed a winding up order of the company. Hence, the workmen can appeal against the winding up order but only with the leave of the Tribunal and subject to such terms as the Tribunal may impose. Further, the dues/ interest of the workmen will be protected in priority as workmen's dues shall be paid in priority to all other debts ranking pari passu with secured creditors.

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

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

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

Answer:

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

Amount Realied*Workman's Dues

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

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

Workman's Share to Secured Assets=80,00,000 Amount available to secured creditor is Rs. 400 Lakhs – 80 Lakhs = 320 Lakhs
Hence, no amount is available for payment of government dues and unsecured creditors.

ANSWER

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

Amount available to secured creditor is Rs. 400 Lakhs – 80 Lakhs = 320 Lakhs
Hence, no amount is available for payment of government dues and unsecured creditors.

Chapter 8

Companies Incorporated Outside India

Part A- MCQ

1. (MTP-II- July 2021)

X Ltd., a foreign company along with the financial statement of FY 2020-2021 of its Indian business operations have to file statement of related party transactions, repatriation of profits and statement of transfer of funds with the Registrar latest by:

(a) April 30,2021
(b) June 30,2021
(c) September 30, 2021
(d) December 31, 2021 (1 Marks)

ANSWER- c

Part B- Descriptive

1. (SEPT 2022 MTP)

A company incorporated in France, with limited liability, established an office in Baroda, and started conducting business activity from its place of business. In compliance of Section 382 of the Companies Act, 2013, it conspicuously exhibited a name board outside its office, with the name of the company in English in big block letters.

In three days, the company received a notice from the Registrar stating that it had not properly complied with the requirements of Section 382 of the Companies Act, 2013. Mention the areas of lapses of the foreign company, which would be mentioned in the notice.

ANSWER

According to Section 382 of the Companies Act, 2013,

every foreign company shall conspicuously exhibit on the outside of every office or place where it carries 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;

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

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

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

After taking into account the provisions of Section 382 of the Companies Act, 2013, the following are the lapses by the company:

(i) The company has exhibited the name of the company in English but it has not displayed the name of the Country where it was incorporated, name of the country. Further, it has not displayed both the facts in the local language or one of the languages in general use in the locality in which the office or place is situated. i.e. Baroda.

(ii) Further the company is one where the liability of members is limited. The fact that the members liability is limited has not been conspicuously exhibited on the outside of every office or place i.e. in Baroda, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality i.e. Baroda

The above lapses would have given rise to the notice from the Registrar.

2. (OCT 2022 MTP)

(i) Elegant Educations Ltd. is a UK based company, engaged in the business of providing on-line education. It has introduced some certificate courses having duration of 4 to 6 months and any person can enrol in the courses. The education is provided through on-line classes, webinars and study materials are supplied through e-mails to the registered candidates. The company is not having any place of business in India. It is mentioned that all the candidates who have enrolled in the course are the Indian Citizens residing in India. Based on the above facts of procuring 100% business from India, whether the company will be treated as foreign company or an Indian company.

(ii) What will be your answer if in the above question, more that 55% of that foreign company's paid-up share capital is held by Indian Companies or Indian Citizens.

ANSWER :

(i) In terms of Section 2(42) "Foreign Company" means any company or body corporate incorporated outside India which—

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

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

Further Rule 2(1)(c)(iv) of the Companies (Registration of Foreign Companies) Rules, 2014 provides that for the purposes of clause (42) of section 2 of the Act, "electronic mode" means carrying out electronically based, whether main server is installed in India or not, including, but not limited to online services such as telemarketing, telecommuting, telemedicine, education and information research.

Thus, from the above provisions the company is treated as foreign company irrespective of the fact that its 100% business comes from India.

(ii) Section 379(2) provides that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by-

- one or more citizens of India; or
- one or more companies; or
- bodies corporate incorporated in India;
- one or more citizens of India and one or more companies or bodies corporate incorporated in India,

whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Thus, in the given case, if more that 50% of the paid-up share capital is held by Indian Companies / Citizen it shall be treated as a company incorporate in India and such company shall abide by the provisions of Section 380 to 386 (both inclusive) and Section 392 and 393 shall be applicable.

3. (MAY 2022 EXAM)

RFC Limited has been incorporated in Singapore and has a business place in Mumbai. The company has issued 5,00,000 shares of USD 100 each, consisting of 4,00,000 equity shares and 1,00,000 preference shares. The issued share capital is fully paid up except 5,000 preference shares where USD 50 per share is unpaid.

RJW, an Indian citizen is holding 26,000 preference shares which include 1100 partly paid- up shares and Ronte Limited incorporated in New-Delhi (India) is holding 2,23,500 equity shares in RFC Limited.

The Registrar of Companies issued notice under Section 379 of the Companies Act, 2013 addressed to the person whose name and address has been delivered to the Registrar byRFC Limited for compliance under the Companies Act, 2013 for foreign companies.

The above notice was Delivered at the address which was given by RFC Limited to the Registrar of Companies.

Answer the following, referring to the provisions of the Companies Act, 2013:

(i) Whether RFC Limited is a foreign company?

(ii) Whether service of notice by the Registrar of companies is valid?

ANSWER :

(i) Whether RFC Limited is a Foreign Company ?

Definition of a Foreign Company

As per Section 2(42) of the Companies Act, 2013, "Foreign Company" means any company or body corporate incorporated outside India which has a place of business in India whether by itself or through an agent, physically or through electronic mode; and conducts any business activity in India.

Provision of Section 379(2): Requirement of holding of paid up share capital of Foreign Company:

Further, in the light of the inputs given in the problem, where not less than 50% of the paid- up share capital, whether equity or preference or partly equity and partly preference, of a foreign company incorporated

outside India is held by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such foreign company shall also comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India. [Section 379(2)]

In the given case, RFC Limited, incorporated in Singapore has a business place in Mumbai. The Company has issued 5,00,000 shares of USD 100 each i.e. of USD 5,00,00,000 comprising of USD 4,00,00,000 equity share capital (i.e. 4 lac* USD 100) and USD 1,00,00,000 preference share capital (i.e,1 lac * USD 100).

As the issued capital was fully paid up except 5,000 preferences shares (i..e, 5000* 50= USD 2,50,000), so, total paid up share capital of the RFC limited is:

Equity Share Capital	USD 4,00,00,000
Preference Share Capital (Full Paid)	USD 95,00,000
Preference Share Capital (Partly Paid)	USD 2,50,000
Total Paid up Share Capital	USD 4,97,50,000

As per facts, shareholding by RJW, an Indian citizen is USD 25,45,000 preference share capitaI (i.e. 26,000 shares *USD 100- 1100 shares * USD 50) and Ronte Limited incorporated in New-Delhi (India) is holding USD 2,23,50,000 equity share capital (i.e., 2,23,500 *USD 100) in RFC Limited. Aggregate shareholding is USD 2,48,95,000.

As per requirement of Section 379(2), RJW, an Indian citizen and Ronte Limited incorporated (an Indian Company) were holding more than 50% of the shareholding (i.e. 50%* USD 4,97,50,000 = 2,48,75,000) in RFC Limited.

Therefore, RFC Ltd. is not only a foreign company as per Section 2(42) but shall also be complying with the provisions of Chapter XXII and other provisions of this Act with regard to the business carried on by it in India, as if it were a company incorporated in India as per Section 397(2) .

(ii) Whether service of notice by the RoC is valid?

Yes, the service of notice by the Registrar of Companies is valid in the light of Section 383 of the Companies Act, 2013. According to the provision any process, notice, or other document required to be served on a foreign company, shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

4. (MAY 2022 RTP)

Blue Star Inc. is a company incorporated in USA, four years back and has no established place of business in India. The company has entered into following contracts:-

Particulars	Contracts entered inthe ordinary course of business	Material Contracts
F.Y. 2017-18	4	2
F.Y. 2018-19	6	1
F.Y. 2019-20	5	3

F.Y. 2020-21	**3**	**4**

Apart from above, one contract has been entered into with its manager. The company intended to offer its securities in India. For that purpose, the secretary of the company, Mr. Berry Christan prepared the prospectus along with annexing the required documents and got it registered.

Expert's consent was issued in a separate statement, the reference of which was given in the prospectus.

Few application forms for securities of Blue Star Inc. were issued to prospective investors without the prospectus out of which one such form was issued in connection with bona fide invitation to the person to enter into an underwriting agreement with respect to securities of Blue Star Inc.

In the context of aforesaid case, please answer to the following questions:-

(i) Whether the expert's statement can be considered to be included

in the prospectus?

(ii) What copy of contracts would have been annexed with the prospectus by Mr. Berry?

(ii) Whether it is valid on the part of Blue Star Inc. for issuing few application forms without prospectus?

ANSWER :

(i) According to section 388(2) of the Companies Act, 2013, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

In the given case, the reference of expert's consent statement was given in the prospectus. Thus, the expert's statement shall be deemed to be included in a prospectus.

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

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

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

In the given case, during the preceding 2 years, i.e. F.Y. 2019 -20 and

F.Y. 2020-21, respectively, the material contracts entered into by Blue Star Inc. are 3 + 4 = 7 and apart from it, one contract has been entered into with its manager. So, in total 8 copies of contracts would have been annexed with the prospectus by Mr. Berry.

(iii) According to section 387(3) of the Companies Act, 2013, no person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to securities.

Blue Star Inc. has, thus, violated provisions of section 387(3) by issuing few application forms without prospectus. However, the application form issued in connection with bona fide invitation to the person to enter into an underwriting agreement with respect to securities of Blue Star Inc. can be considered as valid as such a case is covered by the exception to the said sub-section.

5. May 2018

Qinghai Huading Industrial Company Ltd., incorporated in China established a place of business at Mumbai. The Charter / Documents constituting the Company is in Mandarian Chinese (Chinese local language). It is required inter alia to file a certified translation of above documents with the Registrar of Companies in India. Who can authenticate the translated charter/ documents as per the provisions of the Companies Act, 2013 and Rules made there under governing foreign companies in case such translation is made at Mumbai?(VVI)

Answer:
According to Rule 10 of the *Companies (Registration of Foreign Companies) Rules, 2014,*
(i) All the documents required to be filed with the Registrar by the foreign companies shall be in English language and where any such document is not in English language, there shall be attached a translation thereof in English language duly certified to be correct in the manner given in these rules.
(ii) Where such translation is made within India, it shall be authenticated by-
(a) an advocate, attorney or pleader entitled to appear before any High Court; or
(b) an affidavit, of a competent person having, in the opinion of the Registrar, an adequate knowledge of the language of the original and of English.
In the instant case, Qinghai Huading Industrial company Ltd. can translate the related documents within India and they shall be authenticated by the persons mentioned under the above Rules.

6. Aug 2018

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

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

7. RTP Nov-18:

Examine and state whether the following Companies can be considered as 'Foreign Company' under the Companies Act, 2013:
(i) A company which is incorporated outside India employs agents in India but has no place of business in India.
(ii) A company incorporated outside India having shareholders who are all Indian citizens.
(iii) A company incorporated in India but all the shares are held by foreigners.
(iv) A company which has no place of business established in India, yet, is doing online business through telemarketing in India.

Answer:

As per Section 2(42) of the Companies Act, 2013, a foreign company means any company or body corporate incorporated outside India which-
(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
(b) conducts any business activity in India in any other manner.

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

(i) A company incorporated outside India, will not be deemed to be a Foreign Company even though all the shareholders are Indian citizens, unless it has a place of business in India.
(ii) A company incorporated In India but having all foreign shareholders will be deemed to be an Indian Company as it is not incorporated outside India though it has a place of business in India.
(iii) According to the *Companies (Registration of Foreign Companies) Rules, 2014*, "electronic mode" means carrying out electronically based, whether main server is installed in India or not,
including, but not limited to:

(a) Business to business and business to consumer transactions, data inter-change and other digital supply transactions
(b) Offering to accept deposits or inviting deposits or accepting deposits or subscriptions in India or from citizens of India
(c) Financial settlements, web-based marketing, advisory and transactional services, data based services and products and supply chain management,
(d) Online services such as telemarketing, telecommuting, telemedicine, education and information research.
(e) All related data communication services whether conducted by e-mail, mobile devices, social media, cloud computing, data management, voice or data transmission or otherwise.

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

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

Answer
Preparation and filing of financial statements by a foreign company:
According to section 381 of the Companies Act, 2013:
(i) Every foreign company shall, in every calendar year,—
(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and

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

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

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

According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall file with the Registrar, along with the financial statement, in Form FC-3 with such fee as provided under Companies (Registration Offices and Fees) Rules, 2014 a list of all the places of business established by the foreign company in India as on the date of balance sheet.
According to the Companies (Registration of Foreign Companies) Rules, 2014, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.
(v) According to the Companies (Registration of Foreign Companies) Rules, 2014,
(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-
(1) Statement of related party transaction
(2) Statement of repatriation of profits
(3) Statement of transfer of funds (including dividends, if any)
The above statements shall include such other particulars as are prescribed in the Companies (Registration of Foreign Companies) Rules, 2014.
(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

9. (past exam jan 2021)

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

i. **Whether the accounts of the Company pertaining to Indian business operations shall be audited ? If yes, by whom ?**
ii. **What is the due date for filing the audited financial statements with the Registrar of Companies (RoC) ?**
iii. **What is the effect of the contracts entered by an Indian Company with PHSI in case PHSI has not filed financial statements with the RoC?**
iv. **In which e-forrn and within what period, the annual return of the Indian operations of the foreign company shall be filed with the Registrar of Companies? (4 Marks)**

ANSWER

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

(i) According to the Companies (Registration of Foreign Companies) Rules, 2014, PHSI shall get its accounts, pertaining to the Indian business operations, audited by a practicing Chartered Accountant in India or a Firm or Limited Liability Partnership of practicing Chartered Accountants.

(ii) The audited financial statements of Indian business operations of PHSI shall be delivered to the Registrar within a period of six months of the close of the financial year of the foreign company to which the documents relate i.e., latest by 30th September 2020.
Provided that the Registrar may, for any special reason, and on application made in writing by the foreign company concerned, extend the said period by a period not exceeding three months i.e. latest by 31st December 2020.

(iii) According to Section 393 of the Companies Act, 2013, any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013 (chapter XXII deals with 'Companies incorporated Outside India'), shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof.
In the instant case, non-filing of financial statements by PHSI shall not invalidate the contracts entered by Indian companies with PHSI.
However, PHSI shall not be entitled to bring in any suit, claim any set off, make any counter claim or institute any legal proceeding in respect of any such contract until the company has filed the financial statements.

(iv) According to the Companies (Registration of Foreign Companies) Rules, 2014, every foreign company shall prepare and file an annual return in Form FC-4 along with prescribed fees, within a period of 60 days from the last day of its financial year i.e. by 30th May 2020, to the Registrar containing the particulars as they stood on the close of the financial year

10. (RTP NOV 2021)

Tokushia Motors Ltd. was incorporated in Japan. Its share capital is held by the following persons-
Citizens of India – 10%
Indian Companies– 40%

The company has opened its representative office in Mumbai on 15th January, 2021, in order to receive orders from the Indian Market and make available the delivery of Japanese luxury cars to the Indian purchasers.
The company was not aware of the Indian Company Law, hence could not file the required documents to the Registrar. The company could file all the required documents only on 28th February, 2021.
Based on the above facts, answer the following questions:

(i) Whether the provisions of Chapter XXII of the Companies Act, 2013 are applicable on Tokushia Motors Ltd?
(ii) What documents are required to be filed by Tokushia Motors Ltd to the Registrar of Companies?
(iii) By what time all the requisite documents shall be filed?

ANSWER
(i) Section 379(2) of the Companies Act, 2013, provides that where not less than fifty per cent of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India,

or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall
comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.
In the given case, although the company was incorporated in Japan, however its share capital of not less than 50% is held by the Indian citizens and Indian companies, hence in terms of section 379(2) all the provisions pertaining to Chapter XXII of the Companies Act, 2013, shall be applicable on it.

(ii) In terms of section 380(1) every foreign company shall, within **thirty days** of the establishment of its place of business in India, deliver to the Registrar for registration—
(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;
(b) the full address of the registered or principal office of the company;
(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;
(d) the name and address or the names and 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 inIndia or abroad; and
(h) any other information as may be prescribed.
Further its sub-section (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under this section, the foreign company shall, within thirty days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form.

(iii) In the given, case the company had established its representative office in India on 15.01.2021, it was required to file the documents latest by 14.02.2021 with the Registrar.

Chapter 9

Miscellaneous Provisions

Multiple Choice Questions

1. (APRIL 2022 MTP)

The cooling period for re-appointment of a registered valuer for a company is-

(a) 1 year
(b) 2 year
(c) 3 years
(d) No period has been prescribed in section 247 of the Companies Act, 2013.

ANSWER :(B)

2. (APRIL 2022 MTP)
Which among the following is NOT the eligibility criteria for appointment of a registered valuer:
(a)The person has passed the valuation examination conducted by the IBBI
(b)The person is a valuer member of Registered Valuers Organisation (RVO)
(c)The person has been recommended by the RVO for registration as a valuer
(d) The person has been levied a penalty under section 271J of the Income-tax Act, 1961. (1 Mark)

ANSWER : D

3. MTP Mar 2019

Aakaar Solar Energy Private Limited was allowed the status of a 'dormant company' after a certificate to this effect was issued on 1st July 2018 by the Registrar of Companies, Delhi and Haryana. Mention the latest date after which the Registrar is empowered to initiate the process of striking off the name of the company if Aakaar Solar Energy continues to remain as a dormant company.

(a) After 30th June, 2023.
(b) After 30th June, 2019.

(c) After 30th June, 2020.
(d) After 30th June, 2021.

Answer: Option A (5 YEAR MAX)

4. MTP Mar 2019

Nanny Marcons Private Limited was incorporated on 9th June, 2017. For the financial year 2017-2018, it did not file its financial statements and annual returns. For the time being the company desires to be treated as 'inactive company' since it does not intend to carry on any business permitted by its Memorandum.
As to when ROC can issue certificate of status of dormant company to 'Nanny Marcons' on the basis of non-submission of financial statements if the company makes an application to the Registrar in this respect.

a) After non-submission of financial statements for the two financial years i.e. 2018-19 and 2019- 20.
b) After non-submission of financial statements for the next financial year i.e. 2018-19.
c) After non-submission of financial statements for the three financial years i.e. 2018-19, 2019-20 and 2020-21.
d) After non-submission of financial statements for the four financial years i.e. 2018-19, 2019-20, 2020-21 and 2021-22.

Answer: Option B

5. MTP Mar 2019
In case a Valuer becomes interested in any property, stock etc of the company, he may be appointed as Registered Valuer of the company after a cooling off period of:

(a) 3 years
(b) 5 years
(c) 1 year
(d) He will never be appointed as Registered Valuer of the company

Answer: Option A

6. MTP April 2019

Where the Registrar has reasonable cause to believe, he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send relevant details within a period of ---------days from the date of the notice.

a) 15
b) 30
c) 45
d) 21

Answer: Option B

7. (MTP-I- July 2021)

A valuer in a company will be appointed by the ---------- or in its absence, by the -------- ----of that company. (1 Mark)

(a) Board of directors, Shareholders

(b) Board of Directors, Audit committee
(c) Shareholders, Audit committee
(d) Audit Committee, Board of Directors

ANSWER-d

Part B- Descriptive Answer

1. March 2018, RTP May 2020, (MTP-NOV 2019) VVI

Eminence Ltd. after passing special resolution filed an application to the registrar for removal of the name of company from the register of companies. On the complaint of certain members, Registrar came to know that already an application is pending before the Tribunal for the sanctioning of a compromise or arrangement proposal. The application was filed by the Eminence Ltd. two months before the filing of this application to the Registrar.
Determine the given situations in the lights of the given facts as per the Companies Act, 2013:
(i) Legality of filing an application by Eminence Ltd. before the registrar.
(ii) Consequences if Eminence Ltd. files an application in the above given situation.
In case registrar notifies eminence Ltd as dissolved under section 248 in compliances to the required provisions, what remedy will be available to the aggrieved party?

Answer:
According to the Section 248(2) of the Companies Act, 2013, a company may, after extinguishing all its liabilities, by a special resolution, or consent of seventy-five per cent members in terms of paid-up share capital, file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner.
Further Section 249 provides restrictions on making application under section 248 .
An application under section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company—

(a) has changed its name or shifted its registered office from one State to another;
(b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;
(c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;
(d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or
(e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.
Violation of above conditions on filing of application: If a company files an application in violation of restriction given above, it shall be punishable with fine which may extend to one lakh rupees.

Rights of registrar on non-compliance of conditions by the company: An application filed under above circumstances, shall be withdrawn by the company or rejected by the Registrar as soon as conditions are brought to his notice.

Aggrieved person to file an appeal against the order of registrar: As per section 252(1),any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies. However, a reasonable opportunity is given to the company and all the persons concerned.

According to the above provisions, following are the answers:

(i) As per the restrictions marked in the Section 249(d) stating that an application under section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded.

As per the facts application to the registrar for removal of the name of company from the register of companies, was filed by the Eminence Ltd. within three months to the filing of an application to the Tribunal for approval of compromise or arrangement proposal. Therefore, filing of such an application by Eminence Ltd is not valid.

(i) If a company files an application in above situation, it shall be punishable with fine which may extend to one lakh rupees. An application so filed, shall be withdrawn by the company or rejected by the Registrar as soon as conditions are brought to his notice.

(ii) According to the provision given in section 252(1), a person aggrieved by an order of the Registrar, notifying Eminence Ltd. as dissolved under section 248, may:

- file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar, and
- if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the Eminence Ltd. in the register of companies.
- A reasonable opportunity is given to the Eminence Ltd. and all the persons concerned.

2. May 2018

All offences under the Companies Act, 2013 are non-cognizable except offences of fraud covered under Section 447 of the Act. Explain the validity of the statement.

Answer:

Offences to be Non-cognizable: As per Section 439 (1) of the Companies Act, 2013, every offence under the Companies Act, 2013, except the offences referred to in section 212(6), shall be deemed to be non-cognizable under the Code of Criminal Procedure.

As per Section 212(6), offence covered under Section 447 of this Act shall be cognizable. The given statement in the question is valid.

* The offences covered under Section 7(5) & (6), Section 34, Section 36, sub- section 38(1), Section 46(5), Section 56(7), Section 66(10), Section 140(5), Section 206(4), Section 213, Section 229, Section 251(1), Section 339 (3) and Section 448 attract the punishment for fraud provided in section 447.

3. (MARCH MTP 2022)

WNDS Ltd. appointed Mr. Rajil Veta, a CA, as its registered valuer for carrying on valuation of animmovable property as per the provisions of the Companies Act, 2013. The valuation was made by Mr. Rajil on 3rd May, 2021, for which he was paid a remuneration of Rs 88,000 by WNDS Ltd.

It was later found that Mr. Rajil was levied penalty under the Income Tax Act, 1961, by the Commissioner (Appeals) for furnishing incorrect information in one valuation report issued by him to one another company, as a registered valuer, for which he had filed an appeal with the Appellate Tribunal (ITAT) and the ITAT had confirmed the said penalty levied by the Commissioner (Appeals) and passed its order on 24th September, 2017.
In the context of aforesaid case-scenario, examine the given situation:-

i. **Mr. Rajil by accepting appointment as a registered valuer of WNDS Ltd., can be considered to have contravened the law.**
ii. **What could be the consequences for the same?**

ANSWER :
(i)As per the Companies (Registered Valuers and Valuation) Rules, 2017, a person shall be eligible to be a registered valuer if, inter-alia, he has not been levied a penalty under section 271J of Income-tax Act, 1961 and time limit for filing appeal before Commissioner of Income- tax (Appeals) or Income-tax Appellate Tribunal, as the case may be has expired, or such penalty has been confirmed by Income-tax Appellate Tribunal, and 5 years have not elapsed after levy of such penalty.

In the instant case, Mr. Rajil was levied a penalty by the Commissioner (Appeals) for furnishing incorrect information in one report and a certificate issued by him to one another company, relating to valuation i.e. under section 271J of the Income Tax Act, 1961.
In the appeal, the ITAT had confirmed the said penalty levied by the Commissioner (Appeals) and passed its order on 20th November, 2018.

Here, 5 years from levy of such penalty had not elapsed and so, Mr. Rajil can be considered to have contravened the law by accepting appointment as a registered valuer of WNDS Ltd. as he was not eligible to be appointed as a registered valuer.
(ii) As per Section 247 of the Companies Act, if a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be liable to a penalty of fifty thousand rupees. However, if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to 1 year and with fine which shall not be less than Rs1 Lakh but which may extend to Rs5 lakhs. Further, where a valuer has been convicted as aforesaid, he shall be liable to—
a) refund the remuneration received by him to the company; and

b) pay for damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report.

Here, since Mr. Rajil have contravened the provisions of the Companies (Registered Valuers and Valuation) Rules, 2017 by accepting appointment as a registered valuer of WNDS Ltd., therefore, following consequences could arise on him:-
i. Levy of penalty of Rs 50,000 and if he intended to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to 1 year and with fine which shall not be less than Rs 1 Lakh but which may extend to Rs 5 lakhs.
ii. Refund of remuneration of Rs 88,000 received by him to the company.
iii. Pay for damages to the company or to any other person for loss arose due to furnishing of incorrect or misleading statements of particulars, if any, made in his report.

4. (SEPT 2022 MTP)

Jackpot Limited, a public company, with 7 Directors in the Board, had not filed annual returns and financial statements for 2 consecutive financial years. The Register after required formalities, entered the name of the company in the register maintained for dormant companies. One of the directors suggested that since, the company was now registered as a dormant company, the company need not have 7 directors and having one or maximum two directors would suffice. Following his advice, 5

directors resigned, and the company was left with only 2 directors. The existing two directors did not file any statement with the Registrar, regarding change of directors.
Advise stating the provisions of Section 455, of the Companies Act, 2013, whether the reduction in the number of directors and not filing a statement with Registrar regarding change of Directors, is appropriate.

ANSWER :

A dormant Company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the Register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed.
According to Rule 6 of the Companies (Miscellaneous) Rules, 2014,a dormant company shall have a minimum number of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of a One Person Company.
According to the Rule 7 of the Companies (Miscellaneous) Rules, 2014, a dormant company shall also continue to file the return / returns and change in directors in the manner and within the time specified in the Act, or whenever the company allots any security to any person or whenever there is any change in the directors of the company.
Under the provisions, a dormant public company should have minimum 3 directors. The reduction of number of directors to 2 is not appropriate.
Hence, by taking into account the above provisions, reduction in the number of directors to 2 and not filing a statement with Registrar regarding change of Directors by Jackpot Limited is not appropriate.

5. (OCT 2022 MTP)
Sukesh after passing of the CA examination, applied for the membership and Certificate of Practice from ICAI. Sukesh married to Manyata, who has done Graduation in Civil Engineering. Manyata had worked for 6 years in Town Planning Dept in Brihanmumbai Municipal Corporation, Mumbai.
After one year of his practice Sukesh appeared in valuation examination (Securities or Financial Assets). Sukesh also advised Manyata to appear in valuation exam (Land and Building). Both, Sukesh and Manyata passed the respective examination of valuation and applied for membership of IBBI.

Based on the above facts answer the following sub-questions:
(i) Whether Sukesh is eligible to be Registered Valuer?
(ii)Whether Manyata is eligible to be Registered Valuer?
(iii)Whether Manyata is eligible to accept valuation of Securities or Financial Assets?

ANSWER :
(i)In terms of the Companies (Registered Valuers and Valuation) Rules, 2017, Sukesh is not eligible to be the Registered Valuer of Securities or Financial Assets, since he is not having the minimum experience of 3 years.

(ii) In terms of the Companies (Registered Valuers and Valuation) Rules, 2017, Manyata is eligible to be the Registered Valuer of Land & Building, since she is having the minimum experience of 5 years after her graduation in Civil Engineering.

(iii) Manyata can do the valuation of Land and Building only and not of the Securities or Financial Assets since she is not the Registered Valuer for SFA.

She can do the valuation of SFA only, if she is possess the requisite qualifications and experience, passes the valuation examination of SFA and get herself registered with IBBI as Register Valuer of SFA

6. (OCT 2022 MTP)
Vikas Nidhi Ltd was incorporated as a Nidhi Company in the year 2018. It has 500 members with a Net Owned Funds (NOF) of 10 crore rupees and deposits of 190 crores as of 31.03.2022.

For the FY 2022-23 the company targets-

(i) To raise deposits by 20%.

(ii) To invite the public to deposit with the company.

(iii)To issue lockers to the depositors.

(iv) To grant loan against Gold Jewellery to any person.

Examine each of the above points, whether the Nidhi company is permitted to do so? (4 Marks)

ANSWER :

i. To raise deposits by 20%: As per Rule 5(1)(d) the ratio of NOF to deposits should not be more than 1:20. As on 31.03.2022 the NOF was 10 crore rupees and deposits was 190 crores. If target of deposit is achieved then the deposit will be 228 crore rupees, which exceed the ratio of 1:20. Thus, either the NOF shall be increased or deposits be restricted up to 200 crores.

ii. To invite the public to deposit with the company: In terms of Rule 6(f), no Nidhi company can accept deposits from or lend to any person, other that its members.

iii. To issue lockers to the depositors: In terms of proviso attached to Rule 6(e), the Nidhi Companies which adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding 20% of the gross income of the Nidhi at any point of time during a financial year.

v. To grant loan against Gold Jewellery to any person: In terms of Rule 6(f), no Nidhi company can accept deposits from or lend to any person, other that its members. Hence the gold loan to any person, other than the members is prohibited.

7. (MAY 2022 RTP)

Rudraksha Ayurveda Ltd. is engaged in the business of producing and selling of ayurvedic medicines. Its purchase department is headed by Jagriti. The purchase department of the company is responsible for purchasing various ingredients which are used for manufacturing of
the ayurvedic medicines. Some of the ingredients like Swarna Bhasma, Rajat Bhasma involves heavy costs.

Jagriti was delegated purchasing power of ingredients up to one lakh rupees individually for one lot and ten lakh rupees to committee. The committee consists of Head of Purchase department Head of Marketing department, Head of Finance and Accounts department and the Managing Director.

Suppliers of the Swarna Bhasma and Rajat Bhasma raised their invoices and the amount due from the company was somewhere between 18 to 20 lakhs. Jagriti always negotiates with the suppliers to inflate the price by 10% of the actual price and pass on this 10% as commission to Jagriti. This practice was being in vogue since Jagriti was promoted to the Head of Purchase department i.e., from January 2019. The bills of suppliers were sent to the Finance and Accounts department only after recommendation for payment by Jagriti. Jagriti takes the commission of 10% upfront before recommending the invoices for payment.

The management of the company was having some doubt on the integrity of Jagriti, so it entrusted the forensic audit since January 2019 to till date of the invoices recommended by her.

The forensic auditor carried detailed investigation, market price prevailing of Swarna Bhasma and Rajat Bhasma on different times. The auditor also sent a bogus supplier to Jagriti for supply of the Swarna Bhasma and Rajat Bhasma. The bogus supplier was also told the same commission sharing story.

The forensic auditor submitted the report to the Managing Director and narrated that by inflating the invoices by 10% the company since January 2019 has incurred a total loss of 25 lakh rupees.

The turnover of the company for the year ended on 31 st March, 2021 was 50 crore rupees. Based on the captioned facts, answer the following questions:

(i) What punishment for fraud has been provided in the Companies Act, 2013?

(ii) What would have been your answer, if the amount involved in the fraud done by Jagriti comes to Rs 9 lakh only.

(iii) If the fraud in question would have been of public interest, what would be the term of imprisonment?

ANSWER :

(i) Section 447 of the Companies Act, 2013 provides that without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:
Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.
In the given case:

The amount involved in fraud: Rs 25 lakh

One percent. of Turnover of Rs 50 crores: Rs 50 lakh Whichever is less, means Rs 25 lakh Imprisonment: Minimum of 6 months Maximum of 10 years AND Fine:
Minimum: Rs 25 lakh

Maximum 3 times of fraud amount i.e., Rs 75 lakhs.

(ii) The second proviso to Section 447 provides that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to fifty lakh rupees or with both.
If fraud amount is Rs 9 lakh:
One percent of Turnover of Rs 50 crores: Rs 50 lakh Whichever is lower i.e., Rs 9 lakh Imprisonment: May extend to 5 years OR
Fine: May extend to Rs 50 lakh OR With BOTH.

(iii) The first proviso to section 447 provides that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.
In the given case, only the company has suffered loss and public interest has not been involved.

8. (NOV 2022 RTP)

B. Pharma Ltd. is a company registered in India for last 5 years. Since last 2 financial years, it has not been carrying on any business or operations and has not filed financial statements and annual returns saying that it has not made any significant accounting transaction during the last two financial years. Considering the current situation, Directors of the Company is contemplating to apply to Registrar of Companies to obtain status of dormant or inactive company. Advise them on:
(i) Whether B. Pharma Ltd. is eligible to apply to Registrar of Companies to obtain dormant status for the company?
(ii) What will be your answer, if B. Pharma Ltd is continuing payment of fees to Registrar of Companies and payment of rentals for its office and accounting records for last two financials years?

ANSWER :

(i) According to section 455 of the Companies Act, 2013, an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
Here, "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

B. Pharma Ltd., since from last two years is not carrying on business or operations and has not filed financial statements and annual returns saying it has not made any significant accounting transaction during

the last two financial years. Thus, it falls within the definition of inactive company as stated above and hence is eligible to apply to Registrar of Companies to obtain the status of Dormant Company.

(ii)According to Explanation to section 455, "significant accounting transaction" means any transaction other than—

(1) payment of fees by a company to the Registrar;

(2) payments made by it to fulfill the requirements of this Act or any other law;

(3) allotment of shares to fulfill the requirements of this Act; and

(4) payments for maintenance of its office and records.

Thus, B. Pharma Ltd. is still eligible to apply to the Registrar of Companies to obtain the status of Dormant company even if it has continued 'payment of fees to Registrar of Companies and payment of rentals for its office and accounting records' for last two years, as these transactions have been kept outside the purview of significant accounting transactions.

9. (MAY 2022 EXAM)

The following balances are extracted from the last audited financial statement of Blow (Nidhi) Limited.

Particulars	Amount in Rs
Paid up Equity Share capital	15,00 000
Paid up Preference Share Capital	5,00,000
Free Reserves	1,00,000
Tangible Assets	10,00,000
Intangible Assets	2,00,000

Referring to the Nidhi Rules, 2014, as amended from time to time, formulated under the Companies Act, 2013 answer the following:

(iii) Compute the Net Owned Funds of Blow (Nidhi) Limited.

(iv) Compute the Maximum amount of deposits that Blow (Nidhi) Limited can accept.

ANSWER :

(i)Computation of Net Owned Funds of Blow (Nidhi) Limited Provision

According to Rule 3 of the Nidhi Rules, 2014, "Net Owned Funds" means the aggregate of paid up equity share capital and free reserves as reduced by accumulated losses and intangible assets appearing in the last audited balance sheet.

Provided that the amount representing the proceeds of issue of preference shares shall not be included for calculating Net Owned Funds.

Calculation

Particulars	Amount in Rs
Paid up Equity Share Capital	15,00,000
Free Reserves	1,00,000
Less: Intangible Assets	(2,00,000)
Net Owned Funds	14,00,000

(ii)Computation of maximum amount of deposits that Blow (Nidhi) Limited can accept According to Rule 11 of the Nidhi Rules, 2014, a Nidhi shall not accept deposits exceeding twenty times of its Net Owned Funds (NOF) as per its last audited financial statements.

Hence, Blow (Nidhl) Limited can accept maximum Rs 2,80,00,000 (20 times of 14,00,000) as deposits.

Chapter 10

Compounding of offences, Adjudication, Special Courts

Multiple Choice Questions

1. (RTP MAY 2019)

Who is empowered to designate court of session as special courts for trial of offence of money laundering?

(a) Central government in consultation with the Chief Justice of Supreme Court
(b) High court in consultation with the Chief Justice of Supreme Court
(c) Central government in consultation with the Chief Justice of Session Court
(d) Central government in consultation with the Chief Justice of High Court

Answer: Option D

2. (MARCH MTP 2022)

Rhea Marketing and Consultants Limited, incorporated under the Companies Act, 2013, had made political contributions amounting to ` 1,00,000 to a political party registered under section 29A of the Representation of the People Act, 1951. The statutory auditor of the company, while reviewing the donations made to the said political party, found that no proper board resolution authorizing the donation was made. Since there is contravention of the applicable provisions, it is imperative that the Directors of Rhea Marketing and Consultants Limited would liable to be punished with imprisonment upto six months and with fine up to five times the amount of contribution so made. You are required to choose the correct option which indicates the category under which offence committed by the Directors of the company will fall considering the applicable provisions of the Companies Act, 2013:

a) Compoundable offence.
b) Non-compoundable offence.
c) Compoundable and cognizable offence.

d) Non-compoundable and non-cognizable offence.

ASNWER :(D)

3. (APRIL 2022 MTP)

The Adjudicating Officers for adjudicating penalty under the provisions of the Companies Act, 2013 is appointed by:

a) The Central Government
b) The Registrar
c) Chief Justice of India
d) (d) The Regional Director

ANSWER :(A)

4. (SEPT 2022 MTP)

Trial of an offence under the Companies Act, by special court shall be of such an offence:

(a) which is punishable with imprisonment for a term exceeding one year
(b)which is punishable with imprisonment for a term not exceeding one year
(c)which is punishable with imprisonment for a term exceeding three years
(d) which is punishable with imprisonment for a term not exceeding three years
ANSWER : (D)

Part B-Descriptive Questions

1. March 2018

Mr. A is a judicial magistrate in a lower court. He was appointed to hold the office of the special court for the speedy disposal of the pending cases under the Act. Decide in the light of the Companies Act, 2013, whether the appointment of Mr. A is tenable.

Answer:
Appointment of judge: A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working. A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.
Since in the given case, Mr. A, a judicial magistrate of a lower court was appointed to hold the office of the special court for the speedy disposal of the pending cases under the Act. As per the above provision, person shall be qualified for appointment as a judge of a Special Court if he, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge. Here Mr. A. was not complying with the eligibility criteria, so his appointment as a judge of special court is not tenable.

2. (OCT 2022 MTP)
Progress Ltd. was incorporated with charitable object under Section 8 of the Companies Act, 2013. However, the company made default in complying with the requirements relating to the formation of

companies with charitable object. Whether this offence is a compoundable offence? State the relevant provisions of the Companies Act, 2013.

ANSWER :

Section 8(11) of the Companies Act, 2013 provides that if a company makes any default in complying with any of the requirements laid down in Section 8, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than 10 lakh rupees but which may extend to one crore rupees and the Directors and every officer of the company who is in default shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 25 lakh rupees. .

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

Any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by-

Offence compoundable by the NCLT: Default by the company in complying with the requirements relating to formation of companies with charitable objects etc.

Offence compoundable by the Regional Director: Default by the officers in complying with the requirements relating to formation of companies with charitable objects etc.where the maximum amount of fine which may be imposed for such offence does not exceed twenty-five lakh rupees.

Any officer authorised by the Central Government.

3. March 2018 ,(MTP-NOV 2019)

Excel Ltd. committed an offence under the Companies Act, 2013. The offences falls within the jurisdiction of a special court of Bundi district in which the registered office of Excel Ltd was situated. However, in that Bundi district, there were two special courts one in X place and other in Y place. Identify the jurisdiction of the special court for trial of an offences committed by Excel Ltd.

Answer:
All offences which are punishable in this Act with imprisonment of 2 years or more, shall be triable only by the special court established for the area in which the registered office of the company in relation to which the offence is committed. According to section 436 of the Companies Act, 2013 where there are more special courts than one for such area, by such one of them as may be specified in this behalf by the high court concerned.
Accordingly, in the given case, there are more than one special court in such area where registered office of Excel Ltd. is situated. The jurisdiction for trail in special court will be specified by High Court of the State (i.e. Rajasthan).

4. Oct 2018
What are the powers of the Central Government under the Companies Act, 2013 regarding Appeal against acquittal?

Answer:
Appeal against acquittal: According to section 444 of the Companies Act, 2013, the Central Government may, in any case arising under this Act, direct –
(i) any company prosecutor, or

(ii) authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any court, other than a High Court.
Appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

5. RTP Nov-18:

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

Answer:

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

Filing of application: Application for mediation and conciliation can be made by:
(a) any parties to the proceedings (It shall be accompanied with such fees and in such form as may be prescribed)
(b) The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending any, suo moto refer any matter pertaining to such proceeding to such number of experts as it may deem fit.

6. (RTP NOV 2021) VVI

Amar is a branch manager in Kismat Bank Ltd. During the course of recovery drive initiated by the Bank, Amar collected around 50 lakh rupees from the defaulters / non-performing accounts. He did not credited the amount so recovered, in the respective borrower's loan account, but kept with himself. Later he absconded along with amount so collected. A FIR was lodged by the Bank and the police, after making intensive search, caught and arrested him.
Chargesheet was issued and case was submitted in the court.
Give the following answers in reference to the Companies Act, 2013:

(i) In which category, cognizance or non-cognizance, the embezzlement of cash by Amar shall be treated?
(ii) Non-cognizable offences are less serious than that of the cognizable offences.
Do you agree? Substantiate your plea by differentiating between these two.
(iii) Which offences, Special Court cannot deal with? Whether the said case can be dealt by the Special court.

ANSWER

i) Embezzlement of the cash and absconding is a cognizable offence which means a police officer can arrest such person without the warrant of the magistrate.

(ii) Cognizable Offence:

"Cognizable offence" means an offence for which, and "cognizable case" means a case in which, a police officer may, in accordance with the First Schedule or under any other law for the time being in force, arrest without warrant.

Non- Cognizable Offence:

"Non-cognizable offence" means an offence for which, and "non-cognizable case" means a case in which, a police officer has no authority to arrest without warrant

Cognizable offences are heinous crimes, whereas non-**cognizable offences** are not so serious.
Cognizable offences encompasses murder, rape, theft, kidnapping, counterfeiting, etc. whereas the, non-**cognizable offences** include **offences** like forgery, cheating, assault, defamation and so forth.

By having an overview of the definitions of cognizable and non-cognizable offences as stated above, it is clear that in the matter of cognizable offences, a police officer have authority to arrest any person without warrant, but in case of non-cognizable offences, policy office do not have such authority. Therefore non-cognizable offences are less serious than that of the cognizable offences.

(iii) Section 435 (1) provides that the Central Government may, for the purpose of providing speedy trial of offences under this Act, **except under section 452,** by notification, establish or designate as many Special Courts as may be necessary.

Section 452 of the Companies Act, 2013 provides that
If any officer or employee of a company—
(a) wrongfully obtains possession of any property, including cash of the company; or
(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees. Hence, as per the provisions of the Companies Act, 2013, the Special Court cannot deal with the matters on which section 452 applies. In the given case, since the branch manager, after collecting the money from the borrowers, absconded [as defined as per section 452(1)(a) & (b)], which comes under the purview of section 452, hence this matter shall not be dealt with by the Special Court.

Chapter 11
National Company Law Tribunal and Appellate Tribunal

Part A- MCQ

1. (SEPT 2022 MTP)

Requisite number of shareholders of Vimaan Aerospace Limited, which has been incorporated under the Companies Act, 2013, filed an application with the National Company Law Tribunal (NCLT) under Section 241 highlighting the mismanagement in the conduct of the affairs of the company. Taking cognizance of the application, the National Company Law Tribunal (NCLT) passed an order under Section 420 on November 23, 2021, providing the sought after relief to the shareholders of Vimaan Aerospace Limited. On finding some mistake in the order, the shareholders brought the same to the notice of NCLT for rectification. You are required to select the correct statement from those given below as to the circumstances under which NCLT would be able to amend its order and the maximum period which the said order can be amended:

(a) National Company Law Tribunal (NCLT) can amend its order to rectify any mistake apparent from the record when such mistake is brought to its notice by the parties and further, the order can be amended by NCLT at any time within a period of six months from the date of such order provided no appeal has been made against the said order.

(b) National Company Law Tribunal (NCLT) can amend its order to rectify any mistake apparent from the record when such mistake is brought to its notice by the parties and further, the order can be amended by NCLT at any time within a period of one year from the date of such order provided no appeal has been made against the said order.

(c) National Company Law Tribunal (NCLT) can amend its order to rectify any mistake apparent

from the record when such mistake is brought to its notice by the parties and further, the order can be amended by NCLT at any time within a period of two years from the date of such order provided no appeal has been made against the said order.

(d) National Company Law Tribunal (NCLT) can amend its order to rectify any mistake apparent from the record when such mistake is brought to its notice by the parties and further, the order can be amended by NCLT at any time within a period of three years from the date of such order provided (2 Marks) no appeal has been made against the said order.

ANSWER :(C)

2. Any person who is aggrieved by the order of Appellate Tribunal may approach to the Supreme Court on any question of law within:-
(a) 30 Days
(b) 45 Days
(c) 60 Days
(d) 90 days

Answer: c) Hint: As per section 423 of the Companies Act, 2013, any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order.

3. (SEPT 2022 MTP)

As per the Companies Act, 2013, every petition filed before the Tribunal shall be disposed of:

a) Within 1 month from the date application is admitted
b) within 2 months from the date of first hearing
c) within 3 months from the date of its presentation
d) within 6 months from its filing (1 Mark)
ANSWER :(C)

Part B- Descriptive

1. Nov 2018
Aggrieved by an Order of NCLT dated 05.05.2018, passed without the consent of the parties, Madhruk Ltd. decided to file an appeal before NCLAT. Meanwhile, the employees and officers of the Company went on a strike from 10.05.2018 demanding higher pay and allowances and as a result of which, the operational and management activities were badly affected. The strike was called-off on 15.06.2018. Thereafter, the appeal was filed on 25.06.2018 before NCLAT with a prayer for condoning the delay in filing the appeal. A single judicial member of NCLT started the hearing. With reference to the provisions of the Companies Act, 2013, examine the following:
***(i)* Whether the appeal is admissible?**
***(ii)* Maximum period allowed for condonation**
Is the appeal transferable to a Bench consisting of two members?

Answer:
(1) Appeal from Orders of Tribunal [Section 421 of the Companies Act, 2013]
(2) **Appeal to AT:** Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal (AT).
(3) **When order made by consent of parties:** No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(4) **Period for filing of appeal:** Every appeal under sub-section (1) (i.e. appeal to AT against order of Tribunal) shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and
accompanied by such fees, as may be prescribed.
However, the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding 45, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.
In the instant case,
(i) The appeal is admissible as the order of NCLT was passed without the consent of the parties. The maximum period allowed for condonation is 45 days if the AT is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period. In the instant case, the appeal filed on 25.06.2018 before NCLAT is tenable.
(ii) As per second proviso to section 419(3) if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

2. RTP Nov'2020

On an application filed from shareholder of Company, Tribunal (NCLT) passed an order on 20th December, 2019 without the consent of parties. Mr. Rama whose family's condition was not good so didn't take much interest in order of tribunal but after few days due to aggrieved by an order, he filled an appeal before Appellate Tribunal (NCLAT) on 15th March, 2020 showing sufficient cause of delay for not filling appeal up to 45 days from the date of order. Even after receiving order from Appellate Tribunal dated 30th April, 2020, Mr. Rama was not satisfied and desires to make application to Supreme Court on 30th October, 2020.
Considering the given situation, examine whether Appeal to be filed before the Supreme Court will be admissible?

Answer

According to Section 423 of the Companies Act, 2013, any person aggrieved by an order of the Appellate Tribunal may prefer an appeal to the Supreme Court.
Every appeal shall be filed within a period of 60 days from the date on which a copy of the order of the Appellate Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed.
Supreme Court may entertain an appeal even after the expiry of the said period of 60 days from the date aforesaid, but within a further period not exceeding 60 days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within period.
In above case, since Mr. Rama even aggrieved by an order of Appellate Tribunal desires to fill an application before Supreme Court on 30th October 2020. But as Supreme Court can entertain appeal only upto 60 days + 60 Days (Extension if sufficient cause). Since this appeal was to be filled beyond 120 days by Mr. Rama, so, appeal to be filed before the Supreme Court will not be admissible.

3. (RTP MAY 2019)

Mr. RG is a practicing Chartered Accountant and having 15 years of professional experience. Can he be appointed as Technical Member of National Company Law Appellate Tribunal as per section 411 of the Companies Act, 2013? Will your answer be different, if he is appointed as Technical Member of National Company Law Tribunal? (SECTION DELETED) HOWEVER HAVE ONCE LOOK.

ANSWER

Qualifications of Chairperson and members of Appellate Tribunal [Section 411]
Section 411 of the Companies Act, 2013 prescribes the qualifications of the chairperson and the members of the Appellate Tribunal.

According to section 411(3), a technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.".
Here, in the given case, Mr. RG is having professional experience of 15 years. Hence, Mr. RG cannot be appointed as technical member of NCLAT.
However, as per section 409, Mr. RG is eligible to be appointed as technical member of NCLT as he is meeting up the requirement by being into practice as a Chartered Accountant, for fifteen years.

Chapter 12
Corporate Secretarial Practice- Drafting of Notices, Resolutions, Minutes & Reports

1. (SEPT 2022 MTP)

Draft a Board resolution for approval of investment in equity shares by Speed Cycles Limited in Brakes and Gears Limited.
ANSWER :

Specimen Board Resolution: Investment in Equity Shares_____Resolution passed at the meeting of the Board of Directors of Speed Cycles Limited held at its_____registered office situated at on _____(day) at _____A.M.
"Resolved unanimously that pursuant to provisions of Section 186(2) of the Companies Act, 2013, the company be and is hereby authorized to invest in __equity shares of_____`_____each of Brakes and Gears Limited, the investment in addition to other investments made____to date in the aggregate being within the limits prescribed under the said section."
"Resolved further that Mr. , the Managing Director of the Company be and is hereby authorised on behalf of the Board to sign /execute the necessary documents in this connection."

Sd/- Board of Directors

Speed Cycles Limited

2. (MTP 2022 OCT)

Draft a resolution for authorising to make application for compounding of offence under Section 8 of the Companies Act, 2013

ANSWER :

Draft Resolution for Authorising to make application for Compounding of an Offence under Section 8 of the Companies Act, 2013.

RESOLVED THAT an application be made to the Registrar of Companies pursuant to clause (a) of sub-section (3) of Section 441 of the Companies Act, 2013 for compounding the offence for which prosecution has been filed with the request to forward the same to the Tribunal for necessary action.
RESOLVED FURHTER THAT Mr. Joseph, the Managing Director of the Company, be and is hereby authorised to file/ move/ present/ before the Registrar of Companies, Mumbai, Tribunal, Mumbai, Central Government and / or such other judicial /quasi-judicial and / or administrative authority(es), as may be deemed appropriate and advised to by the legal counsels, such petitions/ application including any application for compounding on behalf of the Company, in connection with the show cause notice issued by the Registrar of Companies, Mumbai for violation of provision of Section 8 of the Companies Act, 2013 and any penal proceedings/ complaint initiated or may be initiated against the Company and / or directors / officials of the Company, and further verify, sign, affirm, submit the said petitions / applications including and other statements forming part of such petitions / applications.

"Resolved that consent of all the directors present at the meeting be and is hereby accorded to the appointment of Mr. Mantri, who is already the Managing Director of another limited company, and fulfils the conditions as specified in Schedule V of the Companies Act, 2013, as the Managing Director of the company for a period of 5 years effective from 1st May, 2022 subject to approval by a resolution of shareholders in a general meeting and that Mr. Mantri may be paid remuneration as follows:
(i) Salary of ` 1 Lakh per month

(ii) Commission

(iii) Perquisites: Free Housing, Medical reimbursement upto ` 10,000 per month, Leave Travel Concession for the family, Club membership fee, Personal Accident Insurance of `10 Lakhs, Gratuity, Provident Fund etc.
Resolved further that in the event of loss or inadequacy of profits, the salary payable to him shall be subject to the limits specified in Schedule V.
Resolved further that the Secretary of the company be and is hereby authorize to prepare and file with the Registrar of Companies necessary forms and returns in respect of the above appointment."
Sd/

Board of Directors Maharaja Limited

3. (MTP-NOV 2020)

The members of EBX Limited decided to pass a resolution for appointing Mr. S as an Independent director of the company. Draft a specimen resolution to be passed at the said meeting. (4 Marks)

ANSWER

Resolution passed at the meeting of EBX Limited held at its registered office situated at _____ on _____ (day) at _____ A.M.

"RESOLVED that pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force) read with Schedule IV to the Companies Act, 2013, Mr. S (holding DIN -------), Director of the Company who retires by rotation at the Annual General Meeting and in

respect of whom the Company has received a notice in writing from a member proposing his candidature for the office of Director, be and is hereby
appointed as an Independent Director of the Company to hold office for five consecutive years
for a term up to ---, 20---."

4. (MTP- NOV 2021)

Draft a Board resolution for approval of investment in equity shares by Speed Cycles Limited in Brakes and Gears Limited.

ANSWER

Specimen of Board Resolution: Investment in Equity Shares

Resolution passed at the meeting of the Board of Directors of Speed Cycles Limited held at its registered office situated at _____ on _____ (day) at _____ A.M.

"Resolved unanimously that pursuant to provisions of Section 186(2) of the Companies Act, 2013, the company be and is hereby authorized to invest in _____ equity shares of RS ____ each of Brakes and Gears Limited, the investment in addition to other investments made to date in the aggregate being within the limits prescribed under the said section."

"Resolved further that Mr. ……., the Managing Director of the Company be and is hereby authorised on behalf of the Board to sign /execute the necessary documents in this connection."

Sd/-
Board of Directors
Speed Cycles Limited

Section B Securities Law

Chapter 1

The securities Exchange Board of India Act,1992 & SEBI (LODR) Regulations 2015

Multiple Choice Questions

1. MTP Mar 2019

Mr. KG filed a complaint against Mr. P alleging that Mr. P has communicated unpublished price sensitive information to Mr. X. Mr. P took a plea that Mr. X requested him for such information and it was done bonafidely. State the correct statement as to the liability of Mr. P in the given situation-

(a) Mr. P will not be liable as he communicated about unpublished price sensitive information on the request of Mr. X
(b) Mr. P will not be liable as he communicated about unpublished price sensitive information to Mr. X in the ordinary cause of business
(c) Mr. P will not be liable as he communicated about unpublished price sensitive information to Mr. X as it was done without any malafide intention.
(d) Mr. P will be liable as he communicated about unpublished price sensitive information to Mr. X, whether with or without his request for such information.

Answer: Option D

2. MTP Mar 2019

P Ltd. was holding 35% of the paid up equity capital of X Stock Exchange. The company appoints M Ltd. as its proxy who is not a member of the X Stock Exchange, to attend and vote at the meeting of the stock exchange. State the correct statement as to the appointment of M Ltd. as a proxy for P Ltd. and on the voting rights of P Ltd. in the X Stock Exchange:

(a) X Stock Exchange can restrict the appointment of M Ltd., as proxy, and voting rights of P Ltd. in the Stock Exchange.
(b) Central Goverment can restrict appointment of proxies and voting rights of P Ltd. in the X Stock Exchange.
(c) Both (a) & (b)
(d) X Stock Exchange can restrict the appointment of M Ltd. & also voting rights of P Ltd. if rules of the exchange so provides. Otherwise can restrict the voting rights of P Ltd. & appointment of proxies through amendment in rules.

Answer: Option D

3. Suppose SEBI has constituted its board as per requirements of section 4 of SEBI Act, 1992 with 3 whole time members under Section 4(1)(d) of the SEBI Act, 1992, but one of them resigned and to refill his post, it took 1 month. Examine acts done in between the vacancy period, as per SEBI Act 1992.

a) All acts become void ab-initio as per section 8 of the SEBI Act, 1992.
b) Only financial acts are void ab initio as per section 8 of the SEBI Act, 1992.
c) All acts are valid as per section 8 of the SEBI Act, 1992.
d) All acts should be rectified after composition of proper board as per section 8 of the SEBI Act, 1992.

Answer: c) Hint: Section 8 of SEBI Act, 1992

4. A ltd., a listed company, wants to revise the rate of interest of its existing 12% bond by 1%i.e. 13% bond from 14th August 2019, the said proposal is to be laid before board meeting to be held on 14th July 2019. Upto which of the following date, A Ltd. has to intimate to stock exchange as per regulation 29 of SEBI (LODR), 2015:

(a) 3rd July 2019.
(b) 3rd August 2019.
(c) 5th July 2019.
(d) 5th August 2019.

Answer: a) Hint: Regulation 29

5. In order to make Robotics Toys Private Limited as its subsidiary, Golden Rays Robots Limited raised its investment in Robotics Toys from 40% to 60% of its paid-up capital. From the options given below, choose the one which correctly indicates as to when the Robotics Toys shall be considered the undertaking of Golden Rays Robots Limited.

(a) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 10% of its 'net worth' calculated as per the audited balance sheet of the

preceding year or the Robotics Toys must have contributed in generation of 10% of the total income of Golden Rays during the previous Financial Year.

(b) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 20% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 20% of the total income of Golden Rays during the previous Financial Year.

(c) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 25% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 25% of the total income of Golden Rays during the previous Financial Year.

(d) In order that Robotics Toys is considered as one of its undertaking, Golden Rays is required to invest more than 30% of its 'net worth' calculated as per the audited balance sheet of the preceding year or the Robotics Toys must have contributed in generation of 30% of the total income of Golden Rays during the previous Financial Year.

ANSWER- b

Descriptive Questions

1. RTP May 2018

(i) On completion of 60 years of age as on 31st March 2014, Mr. Jain retired as Professor from a university. From 1st April 2014, he was appointed as Chairman of the Securities and Exchange Board of India for a period of three years. Under the, provisions of the Securities and Exchange Board of India Act, 1992, decide whether he can be re- appointed on the same post after expiry of the original tenure? Also discuss whether it could be possible for him to relinquish the office before expiry of his tenure?

(ii) List the quarterly compliances for a listed entity under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015?

Answer

(i) Appointment of Chairman: As per Section 5 of the SEBI Act, 1992 and the rules prescribed under the SEBI Act, 1992, the Chairman may hold office for a period of three years subject to the maximum age limit of 65 years and can be re-appointed by the Central Government.

Also, as **per Section 4(5)** of the Act, the Chairman shall be persons of ability, integrity and standing who have shown capacity in dealing with problems relating to securities market or have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline which, in the opinion of the Central Government, shall be useful to the Board.

In the instant case, Mr. Jain retired as professor from a university on completion of 60 years of age as on 31st March, 2014 appointed as Chairman of SEBI from 1st April, 2014 for a period of 3 years.

This appointment is valid as on the date of appointment, he is of 60 years of age and he, as a retired professor, is a person of ability, integrity and standing and have special knowledge or experience of law; finance; economics, accountancy, administration or in any other discipline.

If Mr. Jain is reappointed as a chairman after expiry of the original tenure of 3 years, he can be re-appointed but only upto 65 years of age i.e. upto 31st March, 2019 (i.e. only for two years).

Right to Relinquish the office: The Chairman shall equally have the right to relinquish office at any time before the expiry of their tenure by giving a notice of three months in writing or salary and allowances in lieu thereof to the Central Government.

Quarterly compliances– Listed Entity

A Listed company has to comply with the following quarterly compliances under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 :

1. Regulation 13(3):- Grievance Redressal Mechanism

The listed entity shall file with the recognized stock exchange(s) on a quarterly basis, within 21 days from the end of each quarter, a statement giving the number of investor complaints pending at the beginning of

the quarter, those received during the quarter, disposed of during the quarter and those remaining unresolved at the end of the quarter.

2. Regulation 27(2):- Other Corporate Governance Requirements

A listed entity shall submit quarterly compliance report on corporate governance in the format as specified by the Board from time to time to the recognized stock exchange(s), within 15 days from close of quarter.

3. Regulation 31(1): Holding of Specified Securities and Shareholding Pattern.

A listed entity shall submit a statement showing holding of securities and shareholding pattern separately for each class of securities:-

(a) One day prior to listing of its securities on the stock exchange(s);

(b) On a quarterly basis, within 21 days from the end of each quarter; and,

(c) Within 10 days of any capital restructuring of the listed entity resulting in a change exceeding 2 % per cent of the total paid-up share capital.

4. Regulation 33(3): Financial Results

The listed entity shall submit quarterly and year-to-date standalone financial results to the stock exchange within 45 days of end of each quarter, other than the last quarter.

5. Regulation 32(1): Statement of Deviation(S) Or Variation(S)

A listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue etc. -

(a) indicating deviations, if any, in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable;

(b) indicating category wise variation (capital expenditure, sales and marketing, working capital etc.) between projected utilization of funds made by it in its offer document or explanatory statement to the notice for the general meeting, as applicable and the actual utilization of funds.

2. March 2018 (MTP-NOV 2019) vvvi

PQR Ltd., is a listed entity with its subsidiary, Twig Ltd. State the Corporate Governance requirements with respect to the subsidiary of Listed Entity as per the SEBI (LODR) Regulations, 2015.

Answer:

Regulation 24: Corporate Governance Requirements with respect to Subsidiary of Listed Entity.

The Board: Atleast one Independent Director on Board shall be a Director on Board of Unlisted Material Subsidiary. The management of the unlisted subsidiary shall periodically bring to the notice of the board of directors of the listed entity, a statement of all significant transactions and arrangements entered into by the unlisted subsidiary.

A listed entity shall not dispose of shares in its material subsidiary resulting in reduction of its shareholding (either on its own or together with other subsidiaries) to less than **50 %** or cease the exercise of control over the subsidiary without passing a special resolution in its General Meeting except in cases where such divestment is made under a scheme of arrangement duly approved by a Court/Tribunal.

Selling, disposing and leasing of assets amounting to more than **20%** of the assets of the material subsidiary on an aggregate basis during a financial year shall require prior approval of shareholders by way of special resolution, unless the sale/disposal/lease is made under a scheme of arrangement duly approved by a Court/Tribunal

3. Nov 2018

Mr. Ravi failed to pay the penalty imposed by the Adjudicating Officer for an offence committed under Securities and Exchange Board of India Act, 1992. After the penalty has become due, Mr. Ravi, otherwise than for adequate consideration, transferred his residential property to his sister and the fixed deposits with Banks in favour of his minor son. The minor son has become major and deposits continue to be held by his son.

With reference to the provisions of SEBI Act, 1992 discuss,

***(i)* Whether the residential property and fixed deposits with Banks can be attached by the Recovery Officer for the purpose of recovering the penalty?**
Whether the Recovery Officer can seek assistance of local district administration for attaching the property?

Answer:
(a) As per requirement of section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed by the adjudicating officer, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by modes specified in the said section.
As per the explanation, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.
Further, Section 28A states that the Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising his powers.
In the light of the provisions enumerated above and facts of the question,
(i) The residential property shall not be attached by the Recovery Officer for the purpose of recovering the penalty, as it has been transferred by Mr. Ravi to his sister and said transfer has not been covered in the section.
The Fixed deposits with Bank that have transferred by Mr. Ravi in favour his minor son can be attached by the Recovery Officer for the purpose of recovering the penalty. Further, these Fixed deposits can even after the date of attainment of majority by such minor son, continue to be included in Mr. Ravi's monies held in bank accounts for recovering any amount due from him under this Act.
(iii) Yes, the Recovery Officer can seek assistance of local district administration for attaching the property.

4. Oct 2018

Mr. X files a complaint against Mr. P, Chief Executive Officer of the Company before SEBI. After enquiry SEBI finds that Mr. P. Mehta, on the basis of unpublished price sensitive information, has indulged in the trading of the securities of that company. Explain, on the basis of the said finding, what action SEBI can take against Mr. P. Mehta under the Securities and Exchange Board of India Act, 1992

Answer:
Section 15G of the Securities and Exchange Board of India (SEBI) Act, 1992 deals with penalty for Insider Trading. According to this, if any insider
(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate on any stock exchange on the basis of any unpublished price sensitive information; or
(ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary cause of business or under any law, or
(iii) counsels or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information, shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher. As such SEBI can, after following the prescribed procedure, impose a penalty on Mr. P. The maximum penalty that SEBI can impose is Rupees twenty-five crores or three times the amount of profits made out of insider trading, whichever is higher.

5. RTP May 2019

Upon complaints been received by SEBI, regarding the listed securities of Blue Rock Limited at the Guwahati Stock Exchange, SEBI has passed an order to delist the securities of the company from the said stock exchange. Blue Rock Limited is aggrieved by the order of the SEBI. Advise the company on the further step that the company can take against the order of SEBI to delist the securities.

Answer

As per the facts of the case given in the question above, the aggrieved company, i.e. Blue Rock Limited may appeal to the Securities Appellate Tribunal ('SAT') against the decision of SEBI within 45 days of date from which the order has been passed, unless further extension has been granted by SAT on reasonable grounds.
As per Section 23L, the Tribunal shall give an opportunity of being heard to the respondent and may pass the order confirming, modifying or setting aside the decision of SEBI. SAT shall also send a copy of its order to every party to appeal and to the concerned adjudicating officer. Also, the company, Blue Rock Limited should be assured that a speedy decision shall be taken, since the Tribunal is required to dispose of in every 6 months from the date of receipt of appeal.

6. Nov 2019(VVI)

The composition of Audit Committee of M/s MKBTC Limited, an unlisted Public Company, as on 31-3-2019 comprised of 7 Directors including 4 Independent Directors. The majority of the members of the Audit Committee has the ability to read and understand the financial statements but none of them has accounting or related financial management expertise. The Company listed its Securities in a recognized Stock Exchange in the month of August 2019. Referring to the regulations of Securities and Exchange Board of India [Listing Obligations and Disclosure Requirements] Regulations 2015, decide whether the existing Audit Committee can continue after listing of its Securities?

Answer

Audit Committee: According to Regulation 18 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, every listed entity shall constitute a qualified and independent audit committee which shall have:
(a) Minimum three directors as members.
(b) Two-thirds of the members of audit committee shall be independent directors.
(c) All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise.
As per the facts of the question, M/s MKBTC Limited, listed its securities in a recognised stock exchange in the month of August, 2019. In order to comply with the requirements of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, the company requires to do the following:
(i) The audit committee of M/s MKBTC Limited already has 7 directors as members, which is in compliance.
(ii) The audit committee has 4 directors as independent directors. However, once the company gets listed, at least 5 [7*(2/3)] directors shall be independent directors. Thus, they need to change the composition of audit committee once the company gets listed on stock exchange.
(iii) In the existing audit committee though majority of the members have the ability to read and understand the financial statement but none of them has accounting or related financial management expertise.
However, once the company gets listed it is required that all members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. Hence, it is required that the company should appoint at least one member in the audit committee who shall have accounting or related financial management expertise.
In view of above, the existing audit committee cannot continue after listing of its securities.

7. A group of complainants have alleged that Mr. Z, a Member of the Securities and Exchange Board of India (SEBI) has pecuniary interest in some of the cases that came up before the Board and that he misused his position and therefore, he should be removed from his office. The complainants seek your advice. Advise

Answer

Removal of Member of the SEBI (Section 6 of the Securities and Exchange Board of India Act, 1992)

According to section 6 of the Securities and Exchange Board of India Act, 1992, the Central Government shall have the power to remove a member appointed to the Board, if he:

(i) is, or at any time has been adjudicated as insolvent;

(ii) is of unsound mind and stands so declared by a competent court;

(iii) has been convicted of an offence which, in the opinion of the Central Government, involves a moral turpitude.

(iv) has, in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest.

Before removing a member, he will be given a reasonable opportunity of being heard in the matter.

In the present case, a group of complainants have alleged that Mr. Z, a member of the SEBI has pecuniary interest in some of the cases that came up before the Board and he misused his position and therefore, he should be removed from his office.

Here, above complainants may approach the Central Government for removal of Mr. Z, a member of the SEBI and if the Central Government is of the opinion that Mr. Z has so abused his position as to render his continuation in office detrimental to the public interest, the Central Government may remove Mr. Z from his office after giving him a reasonable opportunity of being heard in the matter

8. A group of investors are upset with the functioning of two leading stock brokers of Calcutta Stock Exchange and want to make a complaint to SEBI for intervention and redressal of their grievances. Explain briefly the purpose of establishing SEBI and what type of defaults by the stock brokers come within the purview of SEBI Act, 1992.

Answer

The Securities and Exchange Board of India (SEBI) was established primarily for the purpose of

1. to protect the interests of investors in securities
2. to promote the development of securities market
3. to regulate the securities market and
4. For matters connected therewith and incidental thereto.

The following defaults by stock brokers come within the purview of SEBI Act:

(a) Any failure on the part of the stock broker to issue contract notes in the form and in the manner specified by the Stock Exchange.

(b) Any failure on the part of the broker to deliver any security or to make payment of the amount due to the investor in the manner or within the period specified in the regulations.

(c) Any collection of charges by way of brokerage in excess of the brokerage as specified in the regulations. (Section 15 F, SEBI Act, 1992)

9. (RTP MAY 2019)

Securities and Exchange Board of India (SEBI) has undertaken inspection of books of accounts and records of LR Ltd., a listed public company. Specify the measures which may be taken by SEBI under the Securities and Exchange Board of India Act, 1992 to protect the interest of investors and securities market, on completion of such inquiry

Answer

As per section 11 (4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, take any of the following measures, either pending investigation or inquiry or on completion of such investigation or inquiry, namely:—

1. suspend the trading of any security in a recognised stock exchange;
2. restrain persons from accessing the securities market and prohibit any person associated with securities market to buy, sell or deal in securities;

3. suspend any office-bearer of any stock exchange or self-regulatory organization from holding such position;
4. impound and retain the proceeds or securities in respect of any transaction which is under investigation;
5. attach, after passing of an order on an application made for approval by the Judicial Magistrate of the first class having jurisdiction, for a period not exceeding one month, one or more bank account or accounts of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:
However only the bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached;
6.direct any intermediary or any person associated with the securities market in any manner not to dispose of or alienate an asset forming part of any transaction which is under investigation.

10. (RTP NOV 2021)

Perfect Tyres Ltd. was incorporated in January, 2019 and came out with its first IPO in the month of May 2020. The company's shares were listed on the BSE and NSE after successful completion of the IPO and allotment of equity shares made to the investors.
The Chairperson of the Board of Directors is a non-executive director. There are 13 directors, out of which one is woman director.
Based on the stated facts in the light of the relevant law, advise on the following issues:
(i) where if after listing of the shares, the total number of directors on the board are 13. Out of which, one is woman director. What shall be the required number of independent directors in the company.
(ii) If the Board of directors do not have regular non-executive director, then what shall be the required number of independent directors in the Board in the said case.

ANSWER
i) As per **Regulation 17** of the SEBI(LODR) Regulations, 2015, the composition of board of directors of the listed entity shall be as follows:
(a) board of directors shall have an optimum combination of executive and nonexecutive directors **with at least one woman director** and not less than fifty per cent. of the board of directors shall comprise of non-executive directors;
(b) where the chairperson of the board of directors is a **non-executive director**, at least one-third of the board of directors shall comprise of independent directors and where the listed entity does not have a regular non-executive chairperson, at least half of the board of directors shall comprise of independent directors.
Any fraction in number, shall be rounded off to the nearest number.
So one-third of 13 comes to 4.33, rounded off to 5. So at least 5 independent directors should be there.
(ii) In line with above clause (b) of part (i), where the listed entity does not have a **regular nonexecutive chairperson**, at least half of the board of directors shall comprise of independent directors.
So one-half of 13 comes to 6.5, rounded off to 7. So at least 7 independent directors should be there.

11. (study mat)

A group of complainants have alleged that Mr. Z, a Member of the Securities and Exchange Board of India (SEBI) has pecuniary interest in some of the cases that came up before the Board and that he misused his position and therefore, he should be removed from his office. The complainants seek your advice. Advise.

ANSWER
Removal of Member of the SEBI (Section 6 of the Securities and Exchange Board of India Act, 1992)
According to section 6 of the Securities and Exchange Board of India Act, 1992, the Central Government shall have the power to remove a member appointed to the Board, if he:
(i) is, or at any time has been adjudicated as insolvent;

(ii) is of unsound mind and stands so declared by a competent court;
(iii) has been convicted of an offence which, in the opinion of the Central Government, involves a moral turpitude.
(iv) has, in the opinion of the Central Government so abused his position as to render his continuance in office detrimental to the public interest.
Before removing a member, he will be given a reasonable opportunity of being heard in the matter.
In the present case, a group of complainants have alleged that Mr. Z, a member of the SEBI has pecuniary interest in some of the cases that came up before the Board and he misused his position and therefore, he should be removed from his office.
Here, above complainants may approach the Central Government for removal of Mr. Z, a member of the SEBI and if the Central Government is of the opinion that Mr. Z has so abused his position as to render his continuation in office detrimental to the public interest, the Central Government may remove Mr. Z from his office after giving him a reasonable opportunity of being heard in the matter.

12. (MTP- NOV 2021)

SEBI had ordered investigation into the affairs of a stock broking company, Rivori Securities Ltd. for alleged unauthorized trading and during the investigation, it passed an attachment order of two out of five bank accounts of the company on 20th April, 2021, which were involved in the violation of provisions of the SEBI Act, 1992, after recording the reasons for the same.
After passing the attachment order, opportunity of being heard was given to the company and the confirmation order for such attachment was obtained from Special Court on 5th July, 2021.
The investigation got completed on 10th August, 2021 and consequently the two bank accounts were released. Also, the Investigating Authority returned the books of the company after informing the Judge of a Designated Court.
In the context of aforesaid case-scenario, please answer to the following question:-
(i) Whether it can be said that there was proper attachment of banks accounts of Rivori Securities Ltd. by the SEBI?
(ii) Due to what reason, the Investigating Authority would be required to have informed the Judge of the Designated Court while returning the books of Rivori Securities Ltd.?

ANSWER
(i) As per section 11(4) of the Securities and Exchange Board of India Act, 1992, the Board may, by an order, for reasons to be recorded in writing, in the interest of investors or securities market, either pending investigation or inquiry or on completion of such investigation or inquiry, attach, for a period not exceeding ninety days, bank accounts or other property of any intermediary or any person associated with the securities market in any manner involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder:
Provided that the Board shall, within ninety days of the said attachment, obtain confirmation of the said attachment from the Special Court, established under section 26A, having jurisdiction and on such confirmation, such attachment shall continue during the pendency of the aforesaid proceedings and on conclusion of the said proceedings, the provisions of section 28A shall apply: Provided further that only property, bank account or accounts or any transaction entered therein, so far as it relates to the proceeds actually involved in violation of any of the provisions of this Act, or the rules or the regulations made thereunder shall be allowed to be attached.
Provided further that the Board shall, either before or after passing such orders, give an opportunity of hearing to such intermediaries or persons concerned.
Here, SEBI passed the attachment order on 20th April, 2021 after recording the reasons for the same. Also after passing such order, an opportunity of being heard was giving to the company.
The confirmation order for such attachment was obtained from Special Court on 5th July, 2021 i.e. within 90 days from passing the attachment order.
Further, only such bank accounts were attached which were involved in the violation of provisions of the SEBI Act, 1992 and such attachment was continued till the conclusion of the investigation proceedings.

Thus, it can be said that there was proper attachment of banks accounts of Rivori Securities Ltd. by the SEBI as all the requirements with respect to such attachment appeared to be fulfilled.
(ii) The Investigating Authority would have made an application to the Judge of the Designated Court for seizing the books of Rivori Securities Ltd. as per section 11C of the Securities and
Exchange Board of India Act, 1992, and further as per the said section, the books seized can be kept in the custody by the Investigating Authority till the conclusion of the investigation and thereafter it shall return the same to the company and inform the Judge of the Designated Court of such return.
Thus, due to the aforesaid reason, the Investigating Authority would be required to have informed the Judge of the Designated Court while returning the books of Rivori Securities Ltd.

13. (MTP-NOV 2021)

Mr. Kapoor, a market intermediary was found alleged to have violated certain conditions under the provisions of the SEBI Act, 1992. The SEBI is contemplating action on the intermediary and asked for submission of certain details. Mr. Kapoor submitted the required details with a full and true disclosure in respect of the alleged violation and the Central Government wants to grant him immunity in the said circumstances. SEBI is however of the view that immunity cannot be granted and wants to prosecute Mr. Kapoor by carrying out an investigation. Examine as to how the matter will be resolved under the provisions of the SEBI Act, 1992?

ANSWER

Power to grant immunity [Section 24B of the SEBI Act, 1992]
The Central Government may, on recommendation by the Board, if the Central Government is satisfied, that any person, who is alleged to have violated any of the provisions of this Act or the rules or the regulations made thereunder, has made a full and true disclosure in respect of the alleged violation.
• grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act, or the rules or the regulations made thereunder or also from the imposition of any penalty under this Act with respect to the alleged violation.
Exception: Provided that no such immunity shall be granted by the Central Government in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of application for grant of such immunity.
Provided further that recommendation of the Board under this sub-section shall not be binding upon the Central Government.
Hence, the instant case, in the light of the said provision, the Central Government cannot grant immunity to Mr. Kapoor, in the circumstances provided in the question. The recommendation of SEBI is required to grant immunity. Moreover, such recommendation shall not be binding upon the Central Government.

14. (MTP- NOV 2021)

Mr. Vasumadan Lal, one of the directors of Florence Shares (P) Ltd., was found to be guilty of contravention under the SEBI Act, 1992, under section 27 and was imposed a penalty of RS 70 lakhs vide order of SEBI dated 14th April, 2021. SEBI issued notice to Mr. Vasumadan for paying the penalty amount but he refrained from doing so and unfortunately, he passed away on 25th May, 2021 without paying the penalty amount.
His estate worth RS 60 lakhs was inherited by his son, Mr. Rajgopal Lal, which included a property worth RS 25 lakhs which was mortgaged by him for taking a bank loan. Recovery proceedings under section 28A were initiated against Mr. Rajgopal by the Recovery Officer for recovering the penalty amount payable by Mr. Vasumadan.
In the context of aforesaid case-scenario, please answer to the following questions:-
(i) Whether it was valid to initiate the recovery proceedings against Mr. Rajgopal?
(ii) What shall be the liability of Mr. Rajgopal in such recovery proceedings?

ANSWER

(i) As per section 28B of the Securities and Exchange Board of India Act, 1992, Where a person dies, his legal representative shall be liable to pay any sum which the deceased would have been liable to pay, if he had not died, in the like manner and to the same extent as the deceased:
Provided that, in case of any penalty payable under this Act, a legal representative shall be liable only in case the penalty has been imposed before the death of the deceased person.
For the purposes of sub-section (1), any proceeding for disgorgement, refund or an action for recovery before the Recovery Officer under this Act, except a proceeding for levy of penalty, which could have been initiated against the deceased if he had survived, may be initiated against the legal representative and all the provisions of this Act shall apply accordingly.
Explanation.--For the purposes of this section "Legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.
Here, penalty of RS 70 lakhs was imposed on Mr. Vasumadan Lal vide order of SEBI dated 14th April, 2021, and he passed away on 25th May, 2021. So, the penalty had been imposed before his death.
Further, he had refrained from paying the penalty for which recovery proceedings could have been initiated against him by the Recovery Officer but as he passed away because of which as per section 28B(2), as aforesaid, such recovery proceedings might be initiated against his legal representative and all the provisions of the SEBI Act, 1992, would apply accordingly.
Mr. Rajgopal Lal would be considered as the legal representative of Mr. Vasumadan as he inherited his estate.
Thus, it was valid for the Recovery Officer to initiate the recovery proceedings against Mr. Rajgopal as per section 28B of the SEBI Act, 1992.
(ii) As per section 28B of the Securities and Exchange Board of India Act, 1992, every legal representative shall be personally liable for any sum payable by him in his capacity as legal representative if, while his liability for such sum remains undischarged, he creates a charge on or disposes of or parts with any assets of the estate of the deceased, which are in, or may come into, his possession, but such liability shall be limited to the value of the asset so charged, disposed of or parted with.
The liability of a legal representative under this section shall be limited to the extent to which the estate of the deceased is capable of meeting the liability.
Though the penalty amount recoverable is RS 70 lakhs but the amount that would be recovered rom Mr. Rajgopal shall be limited to the extent to which the estate of the deceased was capable of meeting the liability i.e. to the extent of RS 60 lakhs.
However, the said estate included a property of RS 25 lakhs which was mortgaged by Mr. Rajgopal for taking a bank loan. So for paying the sum of RS 25 lakhs, Mr. Rajgopal would be personally liable as he has created a charge in the property included in the estate and the remaining amount i.e. RS 35 lakhs (RS 60 lakhs - RS 25 lakhs) would be required to be paid by him from the charge free assets of the estate

Part II Economic Laws

Chapter 1

The Foreign Exchange Management Act,1999

Multiple Choice Questions

1. MTP Apr 2019

Peter a citizen and resident of India, in the year 2011, got a job in a MNC in Germany. He planned to shift. Due to travelling and shifting, studies of his daughter Lisa was effected a lot, so he decided to admit her into Mayo College at Ajmer for her further studies. On 23rd March 2017, Peter, along with his wife and daughter reached India from Germany. On 22nd April 2017, Lisa got admission in the

college and since then she is living in India only. Peter and his wife returned Germany on 1 st May 2017. Peter did not visited India during the financial year 2017-18, however his wife was in India from 2nd December 2017 to 2nd January 2018. During the financial year 2018-19, Peter was in India for 185 days due to his deployment and Lisa's ill health. From the following who will be treated as person resident in India for the financial year ended on 2018-19 ---

(a) Lisa
(b) Peter
(c) Peter's wife
(d) Lisa and Peter's wife

Answer: Option (a)

2. MTP Apr 2019

Rahul, Son of Mr. Manish was going to USA under cultural exchange programme of his college. For meeting Rahul's expenses in USA, Mr. Manish purchased 5000 USD from an authorized person on 15th February 2018. Rahul came back to India on 15th March 2018. At the time of his return to India he was having 1850 unspent USD with him. From the following which option is the best suited for the above situation –

(a) Unspent foreign exchange shall be surrendered to the authorized person within 180 days from the date of his return to India.
(b) Unspent foreign exchange shall be surrendered to the authorized person within 180 days from the date of purchase of foreign exchange.
(c) Unspent foreign exchange shall be surrendered to the authorized person within 90 days from the date of his return to India.
(d) Unspent foreign exchange not exceeding 2000 USD may be retained by a person resident in India.

Answer: Option (d)

3. MARCH MTP 2022)
Which amongst the following transactions, is not the current account transaction:

a. payments due in connection with short-term banking and credit facilities in the ordinary course of business.
b. payments due on loans.
c. remittances for living expenses of parents residing abroad
d. expenses in connection with foreign travel of spouse and children

ANSWER :(B)

4. (MTP-II- July 2021)

Minimum Average Maturity Period prescribed for ECB raised for working capital purposes or general corporate purposes under the ECB framework is: (1 Mark)

(a) 1 year
(b) 5 year
(c) 7 year
(d) 10 year

ANSWER- d

5. (RTP JULY 2021)

Mr. X, a resident of India planned a tour of 15 days to visit Paris and to meet his niece living there. While returning to India, Mr. X was carrying with him INR 30,000. Her niece told him that limit is marked on bringing Indian currency notes at the time of return to India. Identify the correct limit :

(a) INR 2000
(b) INR 5000
(c) INR 10,000
(d) INR 25,000

ANSWER-d

6. (OCT 2022 MTP)
Priti, on 1st September, 2021 went to UK for doing one year MBA course. Her MBA course completed on 31st August, 2022 and she returned India on the next day. What shall be her residential status for the FY 2022-23 and 2023-24:
(a) Resident in India for FY 2022-23 and FY 2023-24
(b) Resident in India for FY 2022-23 and Resident outside India for FY 2023-24
(c) Resident outside India for FY 2022-23 and FY 2023-24
(d) Resident outside India for FY 2022-23 and Resident in India for FY 2023-24
ANSWER :(D)

Descriptive Questions

1. (MARCH MTP 2022)
Mr. Ashok, a citizen of India, has been working in a company in Chicago, USA, since last 8 yearand had been settled there with his family.
However, the said company opened its branch in India last year and Mr. Ashok has been deputed there for a duration of 26 months from 25th April, 2020. He remitted an amount of $ 2,80,000 on 20th December, 2021 to his family in USA. The details of salary earned by him from 25th April, 2020 to 30th November, 2021 are as follows:-

Particulars	$*
Gross Salary	3,50,000
Contribution to Provident Fund	40,000
TDS as per Income Tax Act, 1961	40,000

*** Amount is converted to USD from INR.**
You being an expert in Foreign Exchange Matters, kindly advise on the below issues:-
(i) How much excess amount, if any, has been remitted by Mr. Ashok to his family in USA?
(ii) Whether the company in USA in which Mr. Ashok was deputed, can be treated as MNC under FCRA, 2010?
ANSWER :

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 but does not include a person who has come to or stays in India, for or on taking up employment in India.
As per Schedule III to the Foreign Exchange Management (Current Account Transactions) Rules, 2000,
For a person who is resident but not permanently resident in India and-
(a) is a citizen of a foreign State other than Pakistan; or
(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident.
Fact of the case & Conclusion: Mr. Ashok is a citizen of India working in a company in USA and has been deputed to its branch in India for a duration of 26 months i.e. for not more than 3 years and Mr. Ashok's stay in F.Y. 2020-21 was more than 182 days in India, so, he would be considered as a resident but not permanently resident in India.
Accordingly, he was allowed to remit an amount upto his net salary i.e. $ 2,70,000 ($ 3,50,000 - $ 40,000 - $ 40,000) while he has remitted an amount of $ 2,80,000 to his family in USA.
Thus, the excess amount remitted by him is $ 10,000 ($ 2,80,000 - $ 2,70,000).

2. (SEPT 2022 MTP)

Ms. Milap had resided in India for 182 days in the financial year 2019-20. She went to UK on 1st April, 2020 and returned to India on 1st July, 2021 on an employment contract in India for a year. She completed her contract and immediately left India. Under Section 2(v) of FEMA 1999, determine the residential status of Milap for the financial years:
(i) 2020-21
(ii) 2021-22

ANSWER :
As per 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 the preceding financial year 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;

In line with the above definition, Residential status of Milap for the financial years will be as follows :

(i) For FY 2020-2021: As in the preceding year 2019-2020, Milap resided for 182 days which is not in compliance with the requirement of number of days of her stay (for more than 182 days). Here, residential status of Milap is a Person resident outside India.

(ii) For FY 2021-2022: In the preceding year 2020-2021, Milap has not resided in India as she went to UK on 1st April 2020 and returned on 1st July 2021. In this case also, the residential status of Milap is a person resident outside India.

3. (SEPT 2022 MTP)

Hill Limited, a Public Limited company in India, obtained an External Commercial Borrowing('ECB') of USD 50,000 dated 30th June 2020, from a foreign lender. On 2nd July 2021, based on mutual consent of the parties, ECB is fully converted into equity. The shares were issued to foreign lender at the par value and not at fair value. You are required to provide the correct legal position regarding the valuation of shares and state the reporting requirements by Hill Limited at the time of conversion of ECB into equity in the light of the provisions of the Foreign Exchange Management Act, 1999 and the Rules made thereunder.

ANSWER :

Legal position regarding valuation of shares
For conversion of ECB dues into equity, the exchange rate prevailing on the date of the agreement between the parties concerned for such conversion or any lesser rate can be applied with a mutual agreement with the ECB lender. It may be noted that the fair value of the equity shares to be issued shall be worked out with reference to the date of conversion only.

In view of the above, Hill Limited cannot convert ECB into shares at par value. It has to issue shares to the borrower at fair value at the conversion date (i.e. based on applicable pricing guidelines prevailing on the date of conversion).

Reporting requirements
Conversion of ECB, including those which are matured but unpaid, into equity is permitted subject to the following conditions:

In case of full conversion of ECB into equity, the reporting to the Reserve Bank will be of the entire portion, reported in Form FC-GPR. While reporting to DSIM in Form ECB 2 Return should be done with remarks "ECB fully converted to equity". Subsequent filing of Form ECB 2 Return is not required.

4. (OCT 2022 MTP)
Surbhi deals in exporting of handicrafts items to abroad. On 1st January, 2022 Surbhi exported handicrafts items to UK. However, the payment of the same has not been realised even after passing of more than 9 months.

Explain the relevant provisions under the FEMA relating to –
(i) the realisation period of exported goods.
(ii) the delay in receipt of payment.
ANSWER :

(i) Period within which export value of goods/software/ services to be realized

Regulation 9 of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 deals with the matter relating to the period within which export value of good to be realised.
Regulation 9(1) provides that-
The amount representing the full export value of goods / software/ services exported shall be realised and repatriated to India within nine months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of export, provided that-

(a) where the goods are exported to a warehouse established outside India with the permission of the Reserve Bank, the amount representing the full export value of goods exported shall be paid to the authorised dealer as soon as it is realised and in any case within fifteen months or within such period as may be specified by the Reserve Bank, in consultation with the Government, from time to time, from the date of shipment of goods;

(b)further that the Reserve Bank, or subject to the directions issued by that Bank in this behalf, the authorised dealer may, for a sufficient and reasonable cause shown, extend the said period.

(ii) Delay in Receipt of Payment Regulation 14 provides that -
Where in relation to goods or software export of which is required to be declared on the specified form and export of services, in respect of which no declaration forms has been made applicable, the specified period has expired and the payment therefor has not been made as aforesaid, the Reserve Bank may give to any person who has sold the goods or software or who is entitled to sell the goods or software or procure the sale thereof, such directions as appear to it to be expedient, for the purpose of securing-

(a) the payment therefor if the goods or software has been sold and
(b) the sale of goods and payment thereof, if goods or software has not been sold or reimport thereof into India as the circumstances permit, within such period as the Reserve Bank may specify in this behalf; Provided that omission of the Reserve Bank to give directions shall not have the effect of absolving the person committing the contravention from the consequences thereof.

5. (OCT 2022 MTP)

Ruchika got an employment opportunity in a UK based IT company. She moved to UK and remained there for 10 years. During her tenure she purchased a small flat in UK for the residential purpose. After returning to India, she joined another IT company and let out her flat situated in UK. The rental income of UK flat was deposited by her in the bank account of UK. A good amount was accumulated in her UK' bank account, so she planned to purchase a second flat in the UK.
Based on the above facts, answer the following questions:
(i) Whether Ruchika can purchase the first flat in UK and continue to retain even after returning to India?
(ii) Whether Ruchika can purchase second flat in UK after returning to India?

ANSWER :

(i) Purchase of First Flat in UK Section 6(4) of the FEMA, 1999 provides that a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Ruchika purchased the first flat when she residing in UK and was resident outside India. After returning to India and after becoming the resident in India, she can continue to hold such flat.

(ii) Purchase of Second Flat After returning to India and becoming the resident in India, Ruchika cannot buy another property in UK as mentioned in Section 6(4) of the FEMA.

6. (MAY 2022 EXAM)

Mr. MGJ, a person resident outside India, is contemplating to invest his foreign currency funds through equity contribution in an Indian company engaged in a huge township development project consisting commercial and residential complex in Bangalore (India). Examine, referring to the provisions of the Foreign Exchange Management Act, 1999, the feasibility of his proposal of investing funds in the said company.

ANSWER :

As per the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, a person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or anyentity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farm houses.

Here the term "real estate business" shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations 2014.

Conclusion: Accordingly, the proposal of investing funds in an Indian Company by Mr. MGJ, is feasible as the investment is for development of township as per the above stated laws.

7. (MAY 2022 EXAM)

XYZ Private Limited is a Start-up company recognized by the Central Government. The company is intending to raise External Commercial Borrowing under automatic route of USD 3 million for 3 years in the form of partially convertible preference shares for working capital from one of the shareholders.
You are requested to advice the company on the Maturity, Forms and Amount of External Commercial Borrowing permitted as per the provisions of the Foreign Exchange Management Act, 1999. (3 Marks)

ANSWER :

XYZ Limited, based on the guidelines contained in the Master Direction No 5/2018 - 19 issued by the Reserve Bank of India, is advised as under:
ECB facility for Start-ups: AD Category-I Banks are permitted to allow Start-ups to raise ECB under the automatic route as per the following framework:
Eligibility: An entity recognized as a Start-up by the Central Government as on date of raising ECB.
Maturity: Minimum average maturity period will be 3 years.
Forms: The borrowing can be in form of loans or non-convertible, optionally convertible or part I convertible preference shares.
Amount of ECB: The borrowing per Start-up will be limited to USD 3 million or equivalent per financial year either in INR or any convertible foreign currency or a combination of both**.**

8. (NOV 2022 RTP)

EDC Computer Hardware Limited received an advance payment for export of high-tech hardware to a business concern in Abu Dhabi (UAE) by entering into an export agreement to supply the hardware within 14 months from the date of receipt of advance payment. Examine under the provisions of the Foreign Exchange Management Act, 1999 and decide:

(i) Whether it is permissible to receive advance payment in the above scenario?

(ii) If so, what are the conditions to be complied with in the relation to the advance payment against export in the above scenario?

ANSWER :

Advance payment against exports under Regulation 15 of the FEM (Export of Goods & Services) Regulation 2015.
(1) Where an exporter receives advance payment (with or without interest), from a buyer/ third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that-

i. the shipment of goods is made within one year from the date of receipt of advance payment;
ii. the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR)+ 100 basis points, or other applicable benchmark as may be directed by the reserve bank , as the case may be ; and (amendment)
iii. the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

(2) Exemption: An exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.
In view of the above provisions EDC Computer Hardware Limited can receive the advance payment for export of high-tech hardware to business concern in Abu Dhabi, complying the above conditions.

9. March 2018

Explain the meaning of "Capital Account Transactions" under the Foreign Exchange Management Act, 1999. Examine whether an Investment by person resident in India in Foreign Securities is permissible or not under the above Act as Capital Account transactions.

Answer:

Meaning of Capital Account Transaction: It means a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of a person resident outside India, and includes transactions referred to in sub- section (3) of section 6 of FEMA Act, 1999.

The Reserve Bank of India has formed the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.

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

(1) Permissible capital account transaction of persons resident in India (schedule 1)

(2) Permissible Capital transactions of persons resident outside India (schedule II).

(3) Prohibited capital account transactions.

A person resident in India may enter into any of the following capital account transactions provided the regulations specified by the Reserve Bank of India in respect of such capital account transactions are complied with.

In view of the above, **an Investment by person resident in India in Foreign Securities** is permissible capital account transaction.

10. May 2018

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

***(i)* to acquire a farm house in Munar (Kerala).**

***(ii)* to make investment in KLJ (Nidhi) Ltd., registered as Nidhi Company.**

***(iii)* to make investment in Rose Real Estate Ltd., an Indian Company formed for the development of township.**

Mr. Unsatisfactory, brother of Mr. Bandha residing at Chennai is aggrieved by an order made by Appellate Tribunal established under Foreign Exchange Management Act, 1999, desires to file further appeal.

With references to the provisions of Foreign Exchange Management Act, 1999, analyse whether there are any restrictions in respect of the transactions desired by Mr. Bandha. Also

determine the appeal procedure to Mr. Unsatisfactory on the order of Appellate Tribunal under the said Act.

Answer:

Acquisition of a Farm House

Mr. Bandha, cannot acquire a farm house in Munnar (Kerala) because a person resident outside India who is a citizen of India may acquire immovable property in India other than an agricultural property, plantation, or a farm house.

Making Investments in KLJ Nidhi Limited

Mr. Bandha cannot make investment in KLJ (Nidhi) Ltd., as a person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage as Nidhi Company.

Making Investments in Rose Real Estate Limited

The person resident outside India is prohibited from making investments in India in any form, in any Company, or partnership firm or proprietary concern or any entity whether incorporated or not which is engaged or proposes to engage in real estate business, or construction of farm houses. However, development of townships shall not be included in the real estate business.

Thus, Mr. Bandha can make investment in Rose Real Estate Ltd.

Appeal to High Court (Section 35)

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal on any question of law arising out of such Order.
However, the High Court may, if it is satisfied that the Appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.
Mr. Unsatisfactory can file an appeal to the High Court, as per the above procedure.

11. Nov 2018

Bharat Computer Hardware Ltd. received an advance -payment for export of high-tech hardware to a business concern in Singapore by entering into an export agreement to supply the hardware within six months from the date of receipt of advance payment. The shipment of hardware was made after 9 months and the documents covering the shipment were routed through an authorized dealer through whom the advance payment was received.
Examine whether Bharat Computer Hardware Ltd. has discharged its obligation in accordance with the provisions of the Foreign Exchange Management Act, 1999?
Is it possible to receive advance payment where the export agreement provides for shipment of goods within 15 months from the date of receipt of advance payment? Also identify the maximum rate of interest payable on the advance payment under the said Act.

Answer:
According to the Foreign Exchange Management (Export of Goods and Services) Regulations,
2015, Advance payment against exports:
(1) Where an exporter receives advance payment (with or without interest), from a buyer / third party named in the export declaration made by the exporter, outside India, the exporter shall be under an obligation to ensure that –

i. the shipment of goods is made within one year from the date of receipt of advance payment;
ii. the rate of interest, if any, payable on the advance payment does not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points and
iii. the documents covering the shipment are routed through the authorised dealer through whom the advance payment is received;

Provided that in the event of the exporter's inability to make the shipment, partly or fully, within
one year from the date of receipt of advance payment, no remittance towards refund of unutilized portion of advance payment or towards payment of interest, shall be made after the expiry of the period of one year, without the prior approval of the Reserve Bank.

Notwithstanding anything contained in clause (i) of sub-regulation (1), an exporter may receive advance payment where the export agreement itself duly provides for shipment of goods extending beyond the period of one year from the date of receipt of advance payment.

In the light of the provisions as enumerated above,
Since Bharat Computer Hardware Ltd. has exported the hardware within 9 months of the date of receipt of advance payment, it has discharged its obligations within the provisions of the Foreign Exchange Management Act, 1999.
Yes, it is possible to receive advance payment where the export agreement provides for shipment of goods extending beyond the period of one year (here in question 15 months) from the date of receipt of advance payment.
The maximum rate of interest, if any, payable on the advance payment should not exceed the rate of interest London Inter-Bank Offered Rate (LIBOR) + 100 basis points.

12. Oct 2018 Qn
Mr. Rohan, an Indian Resident individual desires to obtain Foreign Exchange for the following purposes:

(A) US$ 1,20,000 for studies abroad on the basis of estimates given by the foreign university.

(B) Gift Remittance amounting US$ 10,000.
Advise him whether he can get Foreign Exchange and if so, under what condition(s)?

Answer:
(A) Remittance of Foreign Exchange for studies abroad: Foreign exchange may be released for studies abroad up to a limit of US $ 2,50,000 for the studies abroad without any permission from the RBI. Above this limit, RBI's prior approval is required. Further proviso to Para I of Schedule III states that indiuvial 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 since US $ 1,20,000 is the drawal of foreign exchange, so permission of the RBI is not required.

(B) Gift remittance exceeding US $ 10,000: Under the provisions of Section 5 of FEMA 1999, certain Rules have been made for drawal of foreign exchange for current account transactions. Gift remittance is a current account transaction. Gift remittance exceeding US $ 2,50,000 can be made after obtaining prior approval of the RBI. In the present case, since the amount to be gifted by an individual, Mr. Rohan is USD 10,000, so there is no need for any permission from the RBI.

13. RTP Nov-18:

Mr. Hillary Benjamin, a citizen of India, left India for employment in U.S.A. on 1 st June, 2015. Mr. Hillary Benjamin purchased a flat at New Delhi for Rs.60 lacs in September, 2016. His brother, Mr. Henry Benjamin employed in New Delhi, also purchased a flat in the same building in September 2016 for Rs. 65 lacs.
Mr. Henry Benjamin's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Hillary Benjamin. Examine with reference to the provisions of the Foreign Exchange Management Act, 1999 whether purchase of flat and guarantee by Mr. Hillary Benjamin are Capital Account transactions and whether these transactions are permissible.

Answer:
Section 2(e) of Foreign Exchange Management Act, 1999 states that 'capital account transactions' means:
(a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India
(b) a transaction which alters assets or liabilities in India of persons resident outside India and includes transactions referred to in section 6(3).

According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

Purchase of immovable property by Mr. Hillary Benjamin in India is a capital account transaction. It has also been specifically provided in section 6(3)(i) as a capital account transaction.
Guarantee will be considered as a capital account transaction in the following cases:

(1) Guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India.

(2) Guarantee in respect of any liability, debt or other obligation incurred by a person resident outside India.
In this case, Mr. Hillary Benjamin, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India. Hence, it would appear that guarantee by Mr. Hillary Benjamin cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

All capital account transactions are prohibited unless specifically permitted. RBI is empowered to issue regulations in this regard [Section 6(3)]. Permissible capital account transactions by persons resident outside

India are given in Schedule II to the *Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000.* According to the said regulations both the purchase of immovable property by Mr. Hillary Benjamin and guarantee by Mr. Hillary Benjamin are permissible.

14. RTP Nov 2019

Mr. Daksh, an Indian National desire to obtain foreign exchange for the following purposes:
(i) Payment to be made for securing health insurance from a company abroad.
(ii) Payment of commission on exports under Rupee State Credit Route. Advise whether he can get foreign exchange and if so, under what condition?

Answer

Any person may sell or draw foreign exchange to or from an authorized person if such sale or drawal is a current account transaction. However, the Central Government may in public interest and in consultation with the RBI, impose such reasonable restrictions for current account transactions as may be prescribed (Section 5). The Central Government has framed Foreign Exchange Management (Current Account Transactions) Rules, 2000.
The Rules stipulate some prohibitions and restrictions on drawal of foreign exchange for certain purposes. In the light of provisions of these rules, the answer to the given problem is as follows:

(i) Drawl of foreign exchange for securing health insurance from a company abroad does not fall under any of the Schedules I, II or Ill. Therefore, such a transaction is permitted without any restriction or condition.

(ii) Rule 3 read with Schedule I of Foreign Exchange Management (Current Account Transactions) Rules, 2000 prohibits payment of commission on exports under Rupees State Credit Route (except commission upto 10% of invoice value of exports of tea and tobacco). Therefore, payment of commission on exports under Rupee State Credit Route is prohibited unless such commission is paid for export of tea and tobacco, and the commission does not exceed 10% of invoice value of exports.

15. RTP May 2020

Enumerate the given situations in the light of the term defined as Current Account Transaction under FEMA.
(a) An Indian resident imports machinery from a vendor in UK for installing in his factory.
(b) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.
(c) An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.

Answer

(1) An Indian resident imports machinery from a vendor in UK for installing in his factory.
Answer: As per accounts and income-tax law, machinery is a "capital expenditure". However, under FEMA, it does not alter (create) an asset in India for the UK vendor. It does not create any liability to a UK vendor for the Indian importer. Once the payment is made, the Indian resident or the UK vendor neither owns nor owes anything in the other country. Hence, the said transaction, is a Current Account Transaction.
(2) An Indian resident imports machinery from a vendor in UK for installing in his factory on a credit period of 3 months.
Answer: As per accounts and income-tax law, for the credit period of 3 months, there is a liability of the Indian importer to the UK vendor. Technically under FEMA also, it is a liability outside India. However, under definition of Current Account Transaction [S. 2(j)(i)], "short-term banking and credit facilities in the ordinary course of business" are considered as a Current Account Transaction. Hence import of machinery on credit terms is Current Account Transaction.
(3) An Indian resident transfers US$ 1,000 to his NRI brother in New York as "gift". The funds are sent from resident's Indian bank account to the NRI brother's bank account in New York.

Answer: Under accounts and income-tax law, gift is a "capital receipt". However, under FEMA, once the gift is accepted by the NRI, no one owns or owes anything to anyone in India or USA. The transactions is over. Hence it is a Current Account Transaction.

16. Mr. X had resided in India during the financial year 2015-2016 for less than 182 days. He had come to India on April 1, 2016 for business. He intends to leave the business on April 30, 2017 and leave India on June 30, 2017. What would be his residential status during the financial year 2016-2017 and during 2017-2018 up to the date of his departure?

Answer

As explained in the above example, Mr. X will be considered 'as person resident in India' from 1st April 2016. As regards, financial year 2017-2018, Mr. X would continue to be an Indian resident from 1st April 2017.

If he leaves India for the purpose of taking up employment or for business/vocation outside India, or for any other purpose as would indicate his intention to stay outside India for an uncertain period, he would cease to be person resident in India from the date of his departure. It may be noted that even if Mr. X is a foreign citizen, if he has not left India for any these purposes, he would be considered, 'person resident in India' during the financial year 2017-2018. Thus it will depend on the purpose of leaving India which will decide his status from 1st July 2017.

17. Mr. Z had resided in India during the financial year 2015-2016. He left India on 1st August, 2016 for United States for pursuing higher studies for 3 years. What would be his residential status during financial year 2016-2017 and during 2017-2018?

Answer

Mr. Z had resided in India during financial year 2015-2016 for more than 182 days. After that he has gone to USA for higher studies. In other words, he has not gone out of, or stayed outside India for or on taking up employment, or for carrying a business or any other purpose, in not circumstances as would indicate his intention to stay outside India for an uncertain period. Accordingly, he would be 'person resident in India' during the financial year 2016-2017.

RBI has however clarified in its AP circular no. 45 dated 8th December 2003, that students will be considered as non-residents. This is because usually students start working there to take care of their stay and cost of studies.

For the financial year 2017-2018, he would not have been in India in the preceding financial year (2016-2017) for period exceeding 182 days. Accordingly, he would not be 'person resident in India' during the financial year 2017-2018.

18. Toy Ltd. is a Japanese company having several business units all over the world. It has a robotic unit with its head quarter in Mumbai and has a branch in Singapore. Headquarter at Mumbai controls the branch of robotic unit. What would be the residential status of robotic unit in Mumbai and that of the Singapore branch?

Answer

Toy Ltd. being a Japanese company would be a person resident outside India. [Section 2(w)]. Section 2(u) defines 'person'. Under clause (viii) thereof person would include any agency, office or branch owned or controlled by such 'person'. The term such 'person' appears to refer to a person who is included in clauses (i) to (vi). Accordingly, robotic unit in Mumbai, being a branch of a company, would be a 'person' Section 2(v) defines 'person resident in India'. Under clause (iii) thereof 'person resident in India' would include an office, branch or agency in India owned or controlled by a person resident outside India. Robotic unit in Mumbai is owned or controlled by a person 'resident outside India'. Hence, it would be 'person resident in India'.

However, robotic unit in Mumbai, though not 'owned' controls Singapore branch, which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Singapore branch is 'person resident in India'

19. Miss Alia is an airhostess with the British Airways. She flies for 12 days in a month and thereafter takes a break for 18 days. During the break, she is accommodated in 'base', which is normally the city where the 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

Miss Alia stayed in India at Mumbai 'base' for more than 182 days in the preceding financial year. She is however employed in UK. She has not come to India for employment, business or circumstances which indicate her intention to stay for uncertain period. Under section 2(v)(B), such persons are not considered as Indian residents even if their stay exceeds 182 days in the preceding year. Thus, while Miss Alia may have stayed in India for more than 182 days, she cannot be considered to be an Indian resident.

If however she has been employed in Mumbai branch of British Airways, then she will be considered as Indian resident.

20. 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) defines 'person' under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly, Printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by Print unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

21. Mr. Ram had resided in India during the Financial Year 2014-2015 for less than 183 days. He again came to India on 1st May, 2015 for higher studies and business and stayed upto 15th July, 2016. State under the Foreign Exchange Management Act, 1999.

***(i)* If Mr. Ram can be considered 'person Resident in India' during the Financial year 2015 -2016 and**

***(ii)* Is citizenship relevant for determining such a status?**

Answer

(i)No. Mr. Ram cannot be considered 'Person resident in India' during the financial year 2015- 2016 notwithstanding the purpose or duration of his stay in India during 2015- 2016. 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 2015-2016.

(ii) No. Citizenship is no more relevant for determining the status.

22. Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:

***(i)* M requires U.S. $ 5,000 for remittance towards hire charges of transponders.**

***(ii)* P requires U.S. $ 2,000 for payment related to call back services of telephones**

VVI.

Answer

Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are free transactions and some others are prohibited transactions. Accordingly,

(i) It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.

(ii) Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P will not succeed in acquiring US $ 2,000 for the said purpose.

23. (MTP-I- July 2021)

What is an overseas direct investment? Differentiate between Automatic Route and Approval Route for direct investment?

ANSWER

Direct investment outside India/overseas direct investment means investments, either under the Automatic Route or the Approval Route, by way of:

(i) contribution to the capital or subscription to the Memorandum of a foreign entity or

(ii) purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS).

Difference between Automatic Route and Approval Route for direct investment

Automatic route for direct investment or financial commitment outside India: An Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank. With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Approval route for direct investment or financial commitment outside India:

(i) Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad.

(ii) Reserve Bank would, inter alia, take into account the following factors while considering such applications:

(a) Prima facie viability of the JV / WOS outside India;

(b) Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);

(c) Financial position and business track record of the Indian Party and the foreign entity; and

(d) Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

Therefore, under the approval route (proposals not covered by the conditions under the automatic route) prior approval of the Reserve Bank would be required. For which a specific application in Form ODI with the documents prescribed therein is required to be made through the Authorized Dealer Category – I banks.

24. (Past exam Jan 2021)

GOGU Limited, a resident company in India, has achieved a turnover of Rs. 20,000 croreduring the financial year 2019-20. The paid-up share capital and Free Reserves of the company as on 31st March, 2020 as per the audited financial statements was Rs. 1500 crore and Rs. 500 crore

respectively. The company is planning to make an investment of INR 7800 crore in an Overseas Joint Venture in Singapore. The company approached you whether it can make the desired investment under the terms of automatic route for direct investment during the financial year 2020-21. The equivalent currency in US $ comes to around USD 1.05 billion. Referring to the Foreign Exchange Management (Transfer of Issue of Any Foreign Security) (Amendment) Regulations, 2004 and notifications issued by the Reserve Bank of India, decide whether there is any restriction in the above investment.

ANSWER

Automatic route for direct investment or financial commitment outside India: As per Regulation 6 of the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004, an Indian Party has been permitted to make investment/ undertake financial commitment in overseas Joint Ventures (JV) or Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank.

With effect from July 03, 2014, it has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route [i.e., within 400% of the net worth (Paid up capital + Free Reserves) as per the last audited balance sheet].

Here, 'Indian Party' includes a company incorporated in India.

As per the facts of the question and provision of law, GOGU Limited (Indian party) will require prior approval of the Reserve Bank of India even though its total financial commitment is within the eligible limit under automatic route [i.e. {400% of (1500+500) = Rs. 8,000 crore}], because financial commitment is more than USD 1 billion.

25. (RTP JULY 2021)

A foreign tourist comes to India and he purchases a antiques from a shop. He would like to pay US$ 30 in cash to the shopkeeper. Comment in the light of the FEMA, whether shopkeeper is permitted to accept foreign currency?

ANSWER

As per section 3 of the FEMA, save as otherwise provided in this Act, rules or regulations made thereunder, or with the general or special permission of the Reserve Bank, no person shall receive otherwise than through an authorised person, any payment by order or on behalf of any person resident outside India in any manner.

Where any person in, or resident in, India receives any payment by order or on behalf of any person resident outside India through any other person (including an authorised person) without a corresponding inward remittance from any place outside India, then, such person shall be deemed to have received such payment otherwise than through an authorised person;

Here in the given case, the foreign tourist wanted to pay foreign currency in cash on purchase of antiques to shopkeeper which as per section 3, is not permissible to any person to receive any payment by order or on behalf of any person resident outside India in any manner except received through an authorised person. Therefore, the Shopkeeper cannot accept cash as it will be a receipt otherwise than through Authorised Person except where the shopkeeper have taken a money changers license to accept foreign currency.

26. ADDITIONAL QUESTION FOR PRACTICE

Mr. Raees purchased a flat for Rs. 90 lakhs in the name of his daughter's mother in law, who is a resident of USA.

However, when her mother in law was contacted, she denied the ownership of this property.

Discuss the nature of the transaction in the light of the Foreign Exchange Management Act,1999 .

ANSWER

A person resident in India may acquire immovable property outside India, -

(a) by way of gift or inheritance from a person referred to in sub-section (4) of Section 6 of the Act, or referred to in clause (b) of regulation 4 (acquired by a person resident in India on or before 8th July 1947 and continued to be held by him with the permission of the Reserve Bank.)

(b) by way of purchase out of foreign exchange held in Resident Foreign Currency (RFC) account maintained in accordance with the Foreign Exchange Management (Foreign Currency accounts by a person resident in India) Regulations, 2015;
(c) jointly with a relative who is a person resident outside India, provided there is no outflow of funds from India;
Explanation—For the purposes of these regulations, 'relative' in relation to an individual means husband, wife, brother or sister or any lineal ascendant or descendant of that individual.

Thus, *Mr. Raees,* can purchase the property only in the name of the above mentioned relatives. Daughter's mother in law does not fall within the purview of the mentioned definition of relatives.
Hence, this transaction is not valid.

27. (MTP- NOV 2021)

Ice Slash (P) Ltd. had taken an INR denominated ECB of ₹ 10 crore from HBSG Bank, a designated AD Category-I bank. It had last filed its Form ECB 2 Return on 5th April, 2019. The bank had send over 10 remainders vide emails during the past 9 quarters to the company to file Form ECB 2 for the month of April, 2019 and thereafter but there has been no response from either the entity or its directors till date. Also, the company had not submitted Statutory Auditor's Certificate with respect to ECB transactions for F.Y. 2019-20 and F.Y. 2020-21, respectively. During the visit by the officials of the HBSG Bank at the registered office address of Ice Slash (P) Ltd., it was found inoperative. Accordingly, HBSG bank filed form ECB 2 Return without certification from Ice Slash (P) Ltd. with 'UNTRACEABLE ENTITY' written in bold on top. The amount outstanding from the company at that time was ₹ 2 crore.
In the context of aforesaid case-scenario, please answer to the following questions:-
(i) Whether HBSG Bank can be considered to have validly treated Ice Slash (P) Ltd. as an 'untraceable entity'?
(ii) How the outstanding amount of ₹ 2 crore shall be treated and what other actions would be taken in respect of Ice Slash (P) Ltd.?

ANSWER
(i) Under the ECB framework, any borrower who has raised ECB will be treated as 'untraceable entity', if entity/auditor(s)/director(s)/ promoter(s) of entity are not reachable/responsive/reply in negative over email/letters/phone for a period of not less than two quarters with documented communication/ reminders numbering 6 or more and it fulfills both of the following conditions:

(a) Entity not found to be operative at the registered office address as per records available with the AD Bank or not found to be operative during the visit by the officials of the AD Bank or any other agencies authorised by the AD bank for the purpose;

(b) Entities have not submitted Statutory Auditor's Certificate for last two years or more. Ice Slash (P) Ltd. or its directors have not responded to over 10 remainders made by HBSG Bank during the past 9 quarters for filing returns and had not submitted Statutory Auditor's Certificate for F.Y. 2019-20 and F.Y. 2020-21, respectively. Also, the company was found inoperative by the officials of the HBSG Bank.
Thus, HBSG Bank can be considered to have validly treated Ice Slash (P) Ltd. as an 'untraceable entity' as all the conditions with respect to the same had been satisfied in the case of it.

(ii) Under the ECB framework, in respect of 'untraceable entities', the outstanding amount will be treated as written-off from external debt liability of the country but may be retained by the lender in its books for recovery through judicial/ non-judicial means.
Thus, the outstanding amount of RS 2 crore shall be written-off from the external debt liability of the country and it might be retained by the HBSG Bank for recovery.
Other actions that would be taken in respect of Ice Slash (P) Ltd. are as follows:-

(a) No fresh ECB application by Ice Slash (P) Ltd. should be examined/processed by the AD bank;
(b) Directorate of Enforcement should be informed about Ice Slash (P) Ltd. being designated as 'UNTRACEABLE ENTITY'; and
(c) No inward remittance or debt servicing will be permitted under auto route for Ice Slash (P) Ltd.

Chapter 2
Prevention of Money Laundering Act

Multiple Choice Questions

1. (MARCH MTP 2022)

The term "contracting State" defined under the PMLA, 2002 means :

a) any state in India in respect of which arrangements have been made by the state Governments;
b) any country in respect of which arrangements have been made by the Governments of such country;
c) any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise;
d) Any state in India in respect of which arrangements have been made by the Government of any country outside India through a treaty or otherwise.

ANSWER :(C)

2. RTP Nov 2019

Mr. Ram gave two of his friends' cash amount of Rs. two lakh each for their business purposes. Later at the time of return, he asked both of them, in lieu of the same, to buy his product via credit card and online transfers in installments through next couple of months' time for which he issued bills to adjust the amount in his account books.
Does this payment system through credit card and online transfer mode are covered under Money Laundering Act?

a) No, because payment are made through credit cards & being an online transfers, it's a genuine transaction.
b) Yes, money laundering transactions done via credit card and online payments comes under the Prevention of Money Laundering Act
c) No, it is not money laundering as none of Mr. Ram friends are benefiting from this transaction.
d) No, because the transactions are not done with shell companies.

Answer: (b)

3. MTP Apr 2019

On the basis of material in possession with the Director, Mr. Q was under remand evidencing that he is in possession of proceeds of crime falling under the offence said to be committed in PMLA. Director may order for provisional attachment of the property of Mr. Q for a period- ----------

a) Within 90 days from the date of the order
b) Exceeding 180 days from the date of the order
c) Within 180 days from the date of the order
d) Not exceeding 280 days from the date of the order

Answer: Option C

4. (NOV 22 RTP)

Where a property is involved in money laundering and the said property is provisionally attached by the competent officer. State the time period within which a complaint of such attachment shall be filed before the Adjudicating Authority:
(a)thirty days from such attachment
(b)Forty five days from such attachment
(c)sixty days from the attachment
(d)One eighty days from the attachment

ANSWER :(A)

5. The offences under the Prevention of Money Laundering Act, 2002 shall be:

(a) Cognizable and Bailable
(b) Non- cognizable and non - bailable
(c) Cognizable and non-bailable
(d) Non- cognizable and bailable

Answer : (c)

6. RTP Nov 2020

Mr. Kamal is accused of an offence as mentioned in Part B of Schedule to the PMLA, 2002. What must be the minimum amount of the offence for which Mr. Kamal is accused of?

(a) INR 25 Lakhs
(b) INR 50 Lakhs
(c) INR 100 Lakhs
(d) INR 75 Lakhs

Answer: c)

7. (MTP-II- July 2021)

Mr. Ramnik purchased a property out of an unaccounted money in the joint name of his wife and son. On complaint, Adjudicating Authority, served a notice to seek information regard the sources of income and other particulars. State as per the PMLA, 2002, to whom notice may be served by the Adjudicating Authority:

a) Mr. Ramnik
(b) Mr. Ramnik's wife
(c) Mr. Ramnik's son
(d) To all the three i.e., Mr. Ramnik, his wife and son.

ANSWER- d

8. (RTP JULY 2021)

Proceedings under the Prevention of Money Laundering Act, 2002 were initiated against Mr. Suraj. Through an order, property of Mr. Suraj has been attached under section 8. Mr. Suraj Preferred an appeal to the Appellate Tribunal. Mr. Suraj is adjudicated an insolvent during the pendency of the appeal. What will happen to the proceedings initiated under PMLA in the given case?

(a) Proceedings will be dispensed with
(b) His legal representatives will continue proceedings before the Appellate Tribunal
(c) The official assignee or the official receiver, as the case may be, continue the appeal before the Appellate
Tribunal.
(d) Creditors will continue the proceedings before the Appellate Tribunal

ANSWER- c

Part B-Descriptive Questions

1. MARCH MTP 2022

Mr. Ram with malafide intention, to take revenge with his rival competitor, gives false information as regards to conduct of his business in illegal manner. So search warrant was issued by the concerned

authority against him. Examine the legal position of Mr. Ram with respect to the act committed by him in the given situation in the light of Prevention of Money Laundering Act, 2002:

ANSWER :

As per section 63 of the Prevention of Money Laundering Act, 2002, any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act, shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

Accordingly, Mr. Ram, here in the said instance, wilfully gives false information in order to take revenge, shall be liable for imprisonment for a term which may extend to two years or with fine extending to ` 50,000 or both.

2. (MARCH MTP 2022)

Mr. 'Bemaan' purchased a flat out of the proceeds obtained by illegal transactions of business. The flat was attached by the Director of Enforcement Directorate after complying with the procedures under Section 5 of the Prevention of Money Laundering Act, 2002. Mr. 'Bemaan' got a stay from the High Court for any proceedings under the said Act. The stay was subsequently vacated.

State the relevant provisions of the PMLA, 2002 for computing the period of provisional attachment including extension, if any.

Whether Mr. 'Beta', son of Mr. ''Bemaan'' can occupy the flat during the period of provisional attachment?

ANSWER :

According to section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer (not below the rank of Deputy Director authorised by the Director), has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—

(i) any person is in possession of any proceeds of crime; and

(ii) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter,

he may, by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.

Provided further that, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.

Computation of period of attachment: Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted.

No effect on the right to enjoy the property: This section shall not prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.

Here, “person interested”, in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.

In the given case, Mr. Beta, son of Mr. Bemaan can occupy the flat during the period of provisional attachment if he claims to have any interest in the said property.

3. (SEPT 2022 MTP)

The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching certain properties of XYZ Limited alleged to be involved in money laundering for a specified period. The company aggrieved by the order of the Adjudicating Authority seeks your advice about the remedy that is available under the Act. Advise explaining the relevant provisions of the Prevention of Money Laundering Act, 2002.

ANSWER :

Establishment of Appellate Tribunal

According to section 25 of the Prevention of Money Laundering Act, 2002, the Appellate Tribunal constituted under sub- section (1) of section 12 of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.

Appeals to Appellate Tribunal

Section 26 deals with the right and time frame to make an appeal to the Appellate Tribunal. The Director or any person aggrieved by an order made by the Adjudicating Authority under this Act may prefer an appeal to the Appellate Tribunal.

The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and it shall be in such form and be accompanied by prescribed fees. The appeal shall be in such form and be accompanied by such fee as may be prescribed. The Appellate Tribunal may extend the period if it is satisfied that there was sufficient cause for not filing it within the period of 45 days.

The Appellate Tribunal may after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.

Appeals to High Court

The Act also provides further appeal. According to Section 42 any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal.

In the light of the provisions of the Act explained above, the company is advised to prefer an appeal to Appellate Tribunal in the first instance.

4. (OCT 2022 MTP)

Ravi is a Mining Engineer and employed in Mines and Geology Dept of Government of Rajasthan.He earned a good amount of money through bribe to the tune of 50 lakhs just in a year. He purchased a flat of Rs 60 lakh and to show the funding, availed housing loan of Rs 50 lakh from a bank and rest Rs 10 lakh as margin money by availing gold loan (in the name of his wife) from another bank by pledging the gold jewellery of his wife. The repayment period of housing loan was for 20 years and gold loan was for 2 years. He however, liquidated the gold loan in just 3 months. The housing loan was also paid within a year.

Ravi continued to take bribe and one day he was caught red handed by a team of Anti-Corruption Bureau (ACB). His house was inspected and bank accounts were also seized. The ACB team observed that in just 3 years of his service, the assets (including the flat and gold jewellery) were not in proportion of his salary. The ACB reported the matter to the Enforcement Directorate (ED) which treated the house property as the proceeds of crime and accordingly attached the house property.

Ravi pleaded that house property was purchased through bank finance and cannot be treated as proceeds of crime.

Based on the above facts, whether the house property shall be treated as 'Proceeds of Crime'.

ANSWER :

What is Proceeds of Crime

In terms of Section 2(1)(u) of the Prevention of Money Laundering Act, "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.

Explanation. —For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence.

Ravi purchased the flat by availing bank finance and its repayments was to be made in 20 years. The said housing loan was liquidated by Ravi within a year, this was paid not from the salary income but was paid from the money received from the bribe. As per the definition given above, the bribe amount was indirectly paid in acquiring / paying the loan amount, hence the flat shall be termed as proceeds of crime and hence he is liable to be prosecuted under PMLA, 2002 with in the preview of scheduled offence.

5. (MAY 22 EXAM)

LMR Limited, a banking company has a "Record Preservation Policy" which inter alia states to maintain the documents evidencing identity of its clients and beneficial owners for a period of 5 years after the account has been closed. Evaluate, whether the "Record Preservation Policy" of the Company has fulfilled its obligation under the provisions of the Prevention of Money Laundering Act, 2002?

ANSWER :

Section 12 of the Prevention of Money Laundering Act, 2002 provides for the obligation of Banking Companies, Finanial Institutions and Intermediaries i.e. the reporting entity to maintain records of all transactions.

According to sub-section (1)(e), every reporting entity shall maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients.

Maintenance of Records: The records referred to in clause (e) of sub-section (1) of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients shall be maintained for a period of five years after the business relationship between a client and the reporting entity has endedor the account has been closed, whichever is later.

The records shall contain information about nature of transaction, amount of transaction, currency, date of transaction and parties to transaction as per the respective Rules of the Prevention of Money• laundering (Maintenance of Records) Rules, 2005.

Conclusion

In view of the above, LMR Limited has not fulfilled its obligation to maintain the above stated documents for a period of 5 years after the business relationship between a client and the Company has ended or the account has been closed, whichever is later. The Preservation Policy of the Company does not provide such conditions stated above.

6. (MAY 2022 EXAM)

TZ is a promoter director of Ind Exports Limited engaged in the export of software productsto various countries in the world. ZZ, a customer in U.S. to whom the company exported certain products, failed to pay the amount due for these exports. Later, the company settled the amount for 50% with ZZ and the amount was transferred through hawala to India. The money so received was partly used by the company to part finance its office building in Mumbai and the balance of the money to part finance the residential flat in Delhi purchased by TC, a son of TZ. During the search in the premises of hawala businessman, some documentary evidences were captured by the search officer and based on which, the Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching the office of Ind Exports Limited and the flat of TC alleged to be involved in scheduled offence of money laundering.

Based on the above scenario, answer the following as per the provisions of the Preventionof Money Laundering Act, 2002 (the Act):

(i) What is the scheduled offence?

(ii) Where an order for confiscation has been made, all the rights and title in such property shall vest in President of India. Examine the statement.

Advise Ind Export Limited about the remedy available under the Act.

ANSWER :

(i) Scheduled Offence

The term "Scheduled Offence" has been defined in clause (y) of sub-section (1) ofSection 2 of the Prevention of Money Laundering Act, 2002. It means -

(f) the offences specified under Part A of the Schedule; or

(g) the offences specified under Part B of the Schedule if the total value involved in such offences is one crore rupees or more; or

(h) The offences specified under Part C of the Schedule.

(ii) Whether all the rights and title in property vest in President of India

According to Section 9 of the Prevention of Money Laundering Act, 2002, where an order of confiscation has been passed in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances. Therefore, the statement that right and title in property shall vest in President of India on the passing of an order of confiscation, is incorrect.

(iii) Remedies Available

According to Section 5 of the Prevention of Money Laundering Act, 2002, Ind Exports Limited shall have right to enjoy or use its Office. The flat purchased by TC, son of TZ can enjoy the rights during the period of provisional attachment being an interested person here.

Also, under Section 26 and 42 of the Act, Ind Exports Limited, if being aggrieved by an order made by the Adjudicating Authority on the attachment order, may prefer an appeal to the Appellate Tribunal. The appeal shall be filed within 45 days from the date on which a copy of the order made by the Adjudicating Authority is received and appeal further in the High Court against any decision or order of the Appellate Tribunal.

7. RTP MAY 2022)

Mr. Joshi was in possession of some cash (money) obtained from the offence of money laundering. He bought a property with that money and transferred such property to Mr. Keyur Pandya. Registration of the said property in the name of Mr. Keyur was pending and the Adjudicating Authority under the Prevention of Money Laundering Act, 2002, after issuing a show cause notice to Mr. Joshi and considering his reply, passed an order for provisional attachment of the said property.

During the trail of the said case by Special Court, Mr. Keyur came to know of such attachment of the property bought by him from Mr. Joshi and he made immediately claim for such property with the Special Court. In his claim, he mentioned that he was not aware that the property which he bought was "proceeds of crime" as per the provisions of the Prevention of Money Laundering Act, 2002, and he was totally unrelated to Mr. Joshi and had bought the said property at fair market value by making payment through account payee cheques'. Further, he mentioned in his claim, that due to such provisional attachment of the property, he has suffered a business loss of ` 5 lakhs.

In the given context of facts, answer the following questions:-

i. **Whether the Special Court can consider the claim of Mr. Keyur and direct for restoration of property to him?**
ii. **Whether Mr. Keyur could have made such claim at an earlier stage of the proceedings in respect of such property under the Prevention of Money Laundering Act, 2002?**
iii. **What is the option available with Mr. Keyur, if the Special Court rejects his claim?**

ANSWER :

(i) Under section 8(5) of the Prevention of Money Laundering Act, 2002, the Special Court, in such manner as may be prescribed, may also direct the Central Government to restore such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may have suffered a quantifiable loss as a result of the offence of money laundering:

Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has acted in good faith and has suffered the loss despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.
In the given case, it appears that Mr. Keyur in good faith had bought the property from Mr. Joshi without knowing that the said property was "proceeds of crime" as per the provisions of the Prevention of Money Laundering Act, 2002 and he also does not appear to be involved in the offence of money laundering because as per his claim he was totally unrelated to Mr. Joshi and had bought the said property at fair market value by making payment through account payee cheques'. Also, as per his claim, he has suffered a business loss of ` 5 lakhs due to such provisional attachment of the said property.
Thus, Special Court might consider the claim of Mr. Keyur during the trial of the case and direct Central Government for restoration of property to him.

(ii)As per Section 8(2) of the Prevention of Money Laundering Act, 2002, the Adjudicating Authority (AA) shall by an order, after—

a) considering the reply, if any, to the notice issued;
b) hearing the aggrieved person and the Director or any other officer authorised by him in this behalf; and
c) taking into account all relevant materials placed on record before him, record a finding whether all or any of the properties referred to in the notice issued, are involved in money-laundering.

If the property is claimed by a person, other than a person to whom the notice had been issued, such person shall also be given an opportunity of being heard to prove that the property is not involved in money-laundering.
Thus, Mr. Keyur could have made such claim to the Adjudicating Authority at the time of its adjudication in respect of such property and he would have been given an opportunity of being heard for the same by the Adjudicating Authority.

(iii) As per Section 26 of the Prevention of Money Laundering Act, 2002, the Director or any person aggrieved by an order made by the Adjudicating Authority under this Act, may prefer an appeal to the Appellate Tribunal.
Thus, if the Special Court rejects the claim of Mr. Keyur, he can file an appeal with the Appellate Tribunal against the order of provisional attachment made by the Adjudicating Authority.

8. (NOV 2022 RTP)

Mr. Manoj managed to transfer the proceeds of crime to his son, abroad (a contracting state). His son then converted the proceeds into immovable properties in his name. if that property would have been situated in India. It would have been liable for confiscation. Will Mr. Manoj succeed in escaping the investigation proceedings and the property situated abroad not being subjected to confiscation? Explain, referring to the provisions of the Prevention of Money Laundering Act, 2002.

ANSWER :

According to Section 57 of the Prevention of Money Laundering Act, 2002, (the Act) a Special Court, if satisfied, may issue a letter of request to a Court or an Authority in the Contracting State abroad competent to deal with such request to examine facts and circumstances of the case, take such steps as the Special Court may specify in such letter of request, and forward all the evidence so taken or collected to the Special Court issuing such letter of request.

According to Section 60 of the Act where a Special Court has made an order of confiscation relating to a property found to be involved in money laundering under sub-section (5) of Section 8, and such property is suspected to be in a contracting State, the Special Court, on an application by the Director or the Administrator appointed under sub-section (1) of Section 10, as the case may be, may issue a letter of request to a Court or an Authority in the Contracting State for execution of such order.

Mr. Manoj has transferred the proceed of crime into the Contracting State, a Special Court by order confiscate the property situated abroad and take steps to enforce his order by following the due procedure as

explained above. Thus, Mr. Manoj will not succeed in escaping the process of investigation and property being confiscated.

9. March 2018

(i)Raghu, a clerical staff in the Power Board, was assigned with the task of inspection of the file with the requisite documents of the applicants who have applied for the new connections. Mr. Rajiv Shah, for his new flat, applied for the power connection as per the required usage with all the supportive documents. Raghu, conveyed Mr. Rajiv Shah, that his file has been rejected due to discrepancies in the compliances. Indirectly he communicated that, if required, he may clear his file and put into process. Mr. Rajiv Shah give him cash amount of Rs. 2 lacs to clear his file.
State in the light of the above situation, the liability of Raghu and Mr. Rajiv Shah in the commission of an offence as per the Prevention of Money Laundering Act, 2002.

(ii)The Adjudicating Authority appointed under the Prevention of Money Laundering Act, 2002 issued an order attaching certain properties of XYZ Limited alleged to be involved in money laundering for a specified period. The company, seeks your advice about the remedy available under the Prevention of Money Laundering Act, 2002.

Answer:
As per the section 3 of the Prevention of Money Laundering Act, 2002, offence of money laundering is said to be committed when whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use
and projecting or claiming it as untainted property shall be guilty of offence of money - laundering.
In the given case, Mr. Rajiv Shah and Raghu, is knowingly a party to an offence of lending and accepting of a bribe to move the file of applicant, which was prima facie rejected by the authority. Both Mr. Rajiv Shah and Raghu, are guilty of offence of money laundering.
Section 4 of the PMLA, specifies punishment for money-laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine.
So accordingly, Mr. Rajiv Shah and Raghu are punishable in compliance with the above provisions.
(ii) Appeal to Appellate Tribunal: According to section 25 of the Prevention of Money Laundering Act, 2002, the Appellate Tribunal constituted under section 12(1) of the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 shall be the Appellate Tribunal for hearing appeals against the orders of the Adjudicating Authority and the other authorities under this Act.
The appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Adjudicating Authority, However, period may be extended on the sufficient cause. The Appellate Tribunal may after hearing the parties, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.
Any person aggrieved by any decision or order of the Appellate Tribunal, may file an appeal to the High Court within 60 days from the date of communication of the order of the Appellate Tribunal. (Section 42)
In the light of the above provisions of the Act, the company is advised to prefer an appeal to Appellate Tribunal in the first instance.

10. May 2019

(i)Mr. Dawood Moosa, a known smuggler was caught in transfer of funds illegally exporting narcotic drugs from India to some countries in Africa. State the maximum punishment that can be awarded to him under Prevention of Money Laundering Act, 2002.

(ii) Mr. Robert has been arrested for a cognizable and non-bailable offence under Part- A of the schedule punishable for a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He seeks your advice as to how can he be released on bail. Advise him.

Answer:

Paragraph 2 of Part A of the Schedule to the Prevention of Money Laundering Act, 2002, covers Offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. Whereby, illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances (section 23) is covered under paragraph 2 of Part A.

Punishment: Section 4 of the said Act provides for the punishment for Money- Laundering. Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and shall also be liable to fine. But where the proceeds of crime involved in money-laundering relate to any offence specified under paragraph 2 of Part A of the Schedule, the maximum punishment may extend to 10 years instead of 7 years. Thus, in the given case, the maximum punishment may extend to 10 years.

Section 45 of the Prevention of Money Laundering Act, 2002 provides that the offences under the Act shall be cognizable and non bailable. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence [under this Act shall be released on bail or on his own bond unless-

(i) The Public Prosecutor has been given an opportunity to oppose the application for such release and

(ii) Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of a woman or in case of a sick or infirm or is accused either on his own or along with other co-accused of money laundering a sum of less than one crore rupees may be released on bail,if the the Special Court so directs.

In compliance to above provision, Mr. Robert can be released on bail.

11. May 2019 (PAST EXAM NOV 2018)

(i) An Appellate Tribunal consisting of two members was formed to hear the appeal preferred by Mr. Hari, being aggrieved by an Order made by the Adjudicating Authority under the Prevention of Money Laundering Act, 2002. Two members of the Bench differ in their opinion on a particular point referred in the appeal.

Explain the next course of action to be followed by the Bench members under the said Act.

(ii) Mr. Narayan willfully gives false information, refuses to give evidence and to sign statement made by him in the course of proceedings under the provisions of Prevention of Money Laundering Act, 2002. Explain the penal provisions and mode of recovery of fine or penalty enumerated under the said Act.

Answer:

Decision to be by majority [Section 38 of the Prevention of Money Laundering Act, 2002] If the Members of a Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairman who shall either hear the point or points himself or refer the case for hearing on such point or points by third Member of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it.

In the instant case, the above procedure has to be followed by the Bench members.

Punishment for false information or failure to give information, etc. [Section 63 of the Prevention of Money Laundering Act, 2002]

1. Any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

2. If any person,-

(a) refuses to give evidence and

(b) refuses to sign statement made by him in the course of proceedings he shall pay, by way of penalty, a sum which shall not be less than 500 rupees but which may extend to 10,000 rupees for each such default or failure.

Mode of Recovery of fine or penalty [Section 69]
Where any fine or penalty imposed on any person under section 13 or section 63 is not paid within six months from the day of imposition of fine or penalty, the Director or any other officer authorised by him in this behalf may proceed to recover the amount from the said person in the same manner as prescribed in Schedule II of the Income-tax Act, 1961 for the recovery of arrears and he or any officer authorised by him in this behalf shall have all the powers of the Tax Recovery Officer mentioned in the said Schedule for the said purpose.

12. Nov 2019

Mr. 'B' purchased a flat out of the proceeds earned by Drug Trafficking. The flat was attached by the Director, Director of Enforcement after complying the procedures under Section 5 of the Prevention of Money Laundering Act, 2002 (PMLA, 2002). Mr 'B' got a stay from the High Court for any proceedings under the said Act. The stay was subsequently vacated State the relevant provisions of the PMLA, 2002 for computing the period of provisional attachment including extension, if any.
Whether Mr. 'C', son of Mr. 'B' can occupy the flat during the period of provisional attachment?

Answer
According to section 5 of the Prevention of Money Laundering Act, 2002, where the Director or any other officer (not below the rank of Deputy Director authorised by the Director), has reason to believe (the reason for such belief to be recorded in writing), on the basis of material in his possession, that—
(a) any person is in possession of any proceeds of crime; and
(b) such proceeds of crime are likely to be concealed, transferred or dealt with in any manner which may result in frustrating any proceedings relating to confiscation of such proceeds of crime under this Chapter, he may, by order in writing, provisionally attach such property for a period not exceeding 180 days from the date of the order, in such manner as may be prescribed.
Provided further that, any property of any person may be attached under this section if the Director or any other officer not below the rank of Deputy Director authorised by him has reason to believe (the reasons for such belief to be recorded in writing), on the basis of material in his possession, that if such property involved in money-laundering is not attached immediately under this Chapter, the non-attachment of the property is likely to frustrate any proceeding under this Act.
Computation of period of attachment: Provided also that for the purposes of computing the period of 180 days, the period during which the proceedings under this section is stayed by the High Court, shall be excluded and a further period not exceeding 30 days from the date of order of vacation of such stay order shall be counted.
No effect on the right to enjoy the property: This section shall not prevent the person interested in the enjoyment of the immovable property attached from such enjoyment.
Here, "**person interested**", in relation to any immovable property, includes all persons claiming or entitled to claim any interest in the property.
In the given case, Mr. C, son of Mr. B can occupy the flat during the period of provisional attachment if he claims to have any interest in the said property.

13. Nov 2019 (VVI)

Mr. 'K' used his car for smuggling cash and the Special Court found on conclusion of trial that an offence of money laundering was committed by Mr. 'K' under the provisions of the Prevention of Money Laundering Act, 2002 (PMLA, 2002). The car was under hypothecation to a Nationalized Bank for the car loan obtained. Referring to provisions of the PMLA, 2002, examine whether the car can be confiscated despite the existence of encumbrance?

Answer

Vesting of property in Central Government [Section 9]: Where an order of confiscation has been made under section 8(5) or section 8(7) or section 58B or section 60(2A) of PMLA, 2002 in respect of any property of a person, all the rights and title in such property shall vest absolutely in the Central Government free from all encumbrances.

However, where the Special Court or the Adjudicating Authority, as the case may be, after giving an opportunity of being heard to any other person interested in the property attached under this Chapter, or seized or frozen, is of the opinion that any encumbrance on the property or leasehold interest has been created with a view to defeat the provisions of this Chapter, it may, by order, declare such encumbrance or lease-hold interest to be void and thereupon the aforesaid property shall vest in the Central Government free from such encumbrances or lease-hold interest.

In the instant case, Mr. K used his car for smuggling cash and Special Court found on conclusion of trial that an offence of money laundering was committed by Mr. K. The car was under hypothecation to a Nationalized bank for the car loan obtained. As the encumbrance on the car has been created to defeat the provisions and special court may order to declare such encumbrance to be void and therefore the car can be confiscated and shall vest in the Central Government.

14. (Past exam Jan 2021)

By means of an order in writing, the Adjudicating Authority (AA) appointed under the Prevention of Money Laundering Act, 2002, attached certain properties under Section 8 of the Act belonging to Mr. AAA alleged to be involved in money laundering. Aggrieved by the order of the AA, Mr. AAA preferred an appeal before the Appellate Tribunal (AT). Subsequently, after proper hearing, an order was passed by the AT upholding the decision of the AA. Aggrieved by the order of the AT, Mr. AAA preferred a further appeal before the Honorable High Court.

During the pendency of the appeal before the High Court, unfortunately, Mr. AAA dies. In the light of the provisions of the Prevention of Money Laundering Act, 2002 :

i. **What is the time limit for preferring an appeal before the High Court against the order of the AT ?**
ii. **By how many days an extension of time can be sought if the appellant was prevented by sufficient cause from filing the appeal within the said period ?**
iii. **On the death of Mr. AAA can the appeal be further continued in the High Court? If so, by whom?**
iv. **What will be the position if Mr. AAA dies before appeal has been preferred in the Honorable High Court ?**
v. **What shall be the jurisdiction of the High Court, if the Central Government is the aggrieved party?**

ANSWER

(i) According to Section 42 of the Prevention of Money Laundering Act, 2002, a person aggrieved by any order of the Appellate Tribunal can file an appeal to the High Court within 60 days from the date of communication of the order on question of law/fact.

(ii) The High Court, if satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, it can allow filing of appeal within a further period not exceeding sixty days.

(iii) On the death of Mr. AAA, the appeal filed with High Court can be continued even after the death of Mr. AAA by legal representatives of Mr. AAA. [Section 72(2)]

(iv) In case Mr. AAA dies before filing an appeal with High Court, it shall be lawful for the legal representative of Mr. AAA to prefer an appeal with High Court. [Section 72(2)]

(v) Where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain shall be the jurisdiction. [Section 42]

15. (Past exam Jan 2021)

SSG Bank Limited has recently started its operations. The bank approached you for your advice regarding the maintenance of records as a reporting entity in terms of the provisions of the Prevention of Money Laundering Act, 2002. Referring to and analyzing the relevant provisions of the Prevention of Money Laundering Act, 2002, advice the Bank. (3 Marks)

ANSWER

Section 12 of the Prevention of Money Laundering Act, 2002, provides for the obligation of Banking Companies, Financial Institutions and Intermediaries i.e. the reporting entity to maintain records of transactions. SSG Bank Limited have been advised to maintain records in the compliance to said section.
Accordingly, every reporting entity shall –
(i) maintain a record of all transactions, including information relating to transactions covered under point (ii) below, in such manner as to enable it to reconstruct individual transactions. Here records shall be maintained for a period of five years from the date of transaction between a client and the reporting entity.

(ii) furnish to the Director within such time as may be prescribed, information relating to such transactions, whether attempted or executed, the nature and value of which may be prescribed;

(iii) maintain record of documents evidencing identity of its clients and beneficial owners as well as account files and business correspondence relating to its clients. The records here shall be maintained for a period of five years after the business relationship between a client and the reporting entity has ended or the account has been closed, whichever is later.

16. (RTP NOV 2021) VVI

Sudip of Jaipur was posted as Tehsildar in a Tehsil Headquarter near Jaipur. After a year of his joining he purchased a ready built house in Jaipur in the name of his wife. He ostensibly shown the business income of his wife and availed loan of 90% of the value of house from a bank and also gave a guarantee of house loan.
The Bank in this case, did not ensured the business activity of his wife, (address of business place, Income tax Return filed, how long she is doing business etc.) and solely relying that Sudip is giving the guarantee, it sanctioned the loan.
After availing the loan, he continued to deposit some amount in the house loan account of his wife, regularly (apart from the EMI) and within a year, liquidated the loan account. One of the employee in his office made compliant to ED of taking of bribe/commission by him on regular basis and so liquidating the account in just a year.
Examine whether Sudip was involved in the money laundering activity in the light of the given facts.

ANSWER

As per the Section 3 of the Prevention of Money Laundering Act -
Whosoever **directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime** including its concealment, possession, acquisition or use and projecting or claiming it as untainted
property shall be guilty of offence of money-laundering.

The process or activity connected with **proceeds of crime** is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted
property in any manner whatsoever.

Section 2(1)(u) "proceeds of crime" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a **scheduled offence** or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad;

Section 2(1)(y) of the PML Act provides that –
"scheduled offence" means— (i) the offences specified under Part A of the Schedule;
Under Schedule -Part A - Paragraph 8: Offences under the Prevention of Corruption Act, 1988 specifies Section 7- Offence relating to public servant being bribed.

In the light of the above mentioned sections, act of Sudip is a case of money laundering i.e. converting of black income earned through bribe and efforts in converting it into white money and raising the house loan in the name of wife.

17. (MTP- NOV 2021)

The declared suspect, Mr. SP, was facing charges under the Prevention of Money Laundering Act, 2002. Mr. SP died in the midst of the proceedings. What shall happen to the confiscated property under the Act and whether a claimant with a legitimate interest in the property who suffered a loss, is entitled for claims.

ANSWER
According to Section 8(6) of the Prevention of Money Laundering Act, 2002, where the trial under this Act cannot be conducted by reason of the death of the accused, the **Special Court shall**, on an application moved by a person claiming to be entitled to possession of a property in respect of which an order has been passed, **pass appropriate orders regarding confiscation or release of the property**, as the case may be, involved in the offence of money-laundering after having regard to the material before it.

Where a **property stands confiscated to the Central Government** under section 8(5), **the Special Court**, in such manner as may be prescribed, may also direct the Central Government **to restore** such confiscated property or part thereof of a claimant with a legitimate interest in the property, who may **have suffered a quantifiable loss** as a result of the offence of money laundering:
Provided that the Special Court shall not consider such claim unless it is satisfied that the claimant has **acted in good faith and has suffered the loss** despite having taken all reasonable precautions and is not involved in the offence of money laundering.

Provided further that the Special Court may, if it thinks fit, consider the claim of the claimant for the purposes of restoration of such properties during the trial of the case in such manner as may be prescribed.
In the light of above, a claimant with a legitimate interest in the property and suffered a loss is entitled for claim.

Chapter 3
Foreign Contribution Regulation Act, 2010

Multiple Choice Questions

1. MTP Mar 2019

Surya Ltd., incorporated and registered in New Delhi with a foreign shareholding more than 50% due to liberalisation in Foreign Direct Investment (FDI) policy. State the correct statement as to the status of the Surya Ltd.

(a) Surya limited shall not considered as foreign source because of its registration in India.

(b) Surya Ltd would be 'foreign source' have foreign shareholding more than 50% of foreign company.

(c) Surya Ltd would be 'foreign source' have foreign contribution through various international agencies.

(d) Both (b) & (c)

Answer: Option B

2. (MARCH MTP 2022)

The Central Government, after making inquiry, finds that the holder of the grant of certificate to accept foreign contribution, has violated the terms and conditions of the certificate. Therefore, by an order, cancelled the certificate. What shall be the cooling period for obtaining of a grant of certificate again?

a) Two years from the date of cancellation of such certificate.
b) Three years from the date of cancellation of such certificate.
c) Five years from the date of cancellation of such certificate
d) Once cancelled cannot be applied again.

ANSWER : (B)

3. (OCT 2022 MTP)

Kamlesh has got the admission in a US based University names as 'Illinois Institute of Technology', where he does the MS in Technology. The initial expenses for travelling and other miscellaneous expenses to US were born by the Kamlesh's father. After taking the formal admission in the course, the University provide scholarship to Kamlesh to cover the cost of education and stay. Other expenses are to be meet out by the candidate from his own source. In light of this fact, what shall be the treatment of receiving of the scholarship from the Foreign Source in reference to the Foreign Contribution (Regulation) Act, 2010:

a) Receiving of such foreign contribution is prohibited under the FCRA.
b) Receiving of such foreign contribution require prior registration with the Central Government.
c) Receiving of such foreign contribution in the nature of scholarship comes under the exempted category.
d) Receiving of scholarship from foreign university is not permitted activity since no reciprocal arrangement are present in India.

ANSWER : (C)

4. (MTP-II- July 2021)

X Ltd. Submitted an application on 31st August, 2020 for renewal of certificate to Central Government for acceptance of foreign contribution under FCRA, 2010, shall be renewed latest by:

(a) 30th September 2020
(b) 29th November 2020
(c) 28th February 2021
(d) 31st July 2021
ANSWER- b

Descriptive Questions

1. (MARCH MTP 2022)

Whether the company in USA in which Mr. Ashok was deputed, can be treated as MNC under FCRA, 2010?
ANSWER :
As per Explanation to Section 2(1)(g) of the FCRA, 2010,- a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation,—

(a)has a subsidiary or a branch or a place of business in two or more countries or territories; or
(b)carries on business, or otherwise operates, in two or more countries or territories;

Facts: Mr. Ashok has been working in a company in Chicago, USA since last 8 years and the said company opened its branch in India last year.
So, it appears that the said company had been incorporated in USA and operating in USA since a long time and has also started its operations in India by opening a branch in India.

Thus, the company in USA in which Mr. Ashok is deputed, can be treated as MNC under FCRA, 2010 as it is carrying on business or operating in two countries i.e. USA and India, respectively.

2. APRIL 2022 MTP

Mr. Ashok, a citizen of India, has been working in a company in Chicago, USA, since last 8 years, and had been settled there with his family. However, the said company opened its branch in India last year and Mr. Ashok has been deputed there for a duration of 26 months from 25th April, 2020. He remitted an amount of $ 280,000 on 20th December, 2021 to his family in USA. The details of salary earned by him from 25th April, 2020 to 30th November, 2021 are as follows:-
*** Amount is converted to USD from INR.**

In the context of aforesaid case-scenario, determine following issues:-
i. How much excess amount, if any, has been remitted by Mr. Ashok to his family in USA?

ii. Whether the company in USA in which Mr. Ashok was deputed, can be treated as MNC under FCRA, 2010?
ANSWER :

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 but does not include a person who has come to or stays in India, for or on taking up employment in India. As per Schedule III to the Foreign Exchange Management (Current Account Transactions) Rules, 2000-
For a person who is resident but not permanently resident in India and-

(a) is a citizen of a foreign State other than Pakistan; or
(b) is a citizen of India, who is on deputation to the office or branch of a foreign company or subsidiary or joint venture in India of such foreign company, may make remittance up to his net salary (after deduction of taxes, contribution to provident fund and other deductions).

Explanation: For the purpose of this item, a person resident in India on account of his employment or deputation of a specified duration (irrespective of length thereof) or for a specific job or assignments, the duration of which does not exceed three years, is a resident but not permanently resident.
Fact of the case & Conclusion: Mr. Ashok is a citizen of India working in a company in USA and has been deputed to its branch in India for a duration of 26 months i.e. for not more than 3 years and Mr. Ashok's stay in F.Y. 2020-21 was more than 182 days in India, so, he would be considered as a resident but not permanently resident in India.

Accordingly, he was allowed to remit an amount upto his net salary i.e. $ 270,000 ($ 350,000 - $ 40,000 - $ 40,000) while he has remitted an amount of $ 280,000 to his family in USA.
Thus, the excess amount remitted by him is $ 10,000 ($ 280,000 - $ 270,000).

(ii) As per Explanation to Section 2(1)(g) of the FCRA, 2010,— a corporation incorporated in a foreign country or territory shall be deemed to be a multi-national corporation if such corporation,—
(a) has a subsidiary or a branch or a place of business in two or more countries or territories; or
(b) carries on business, or otherwise operates, in two or more countries or territories;
Facts: Mr. Ashok has been working in a company in Chicago, USA since last 8 years and the said company opened its branch in India last year.
So, it appears that the said company had been incorporated in USA and operating in USA since a long time and has also started its operations in India by opening a branch in India.

Conclusion: Thus, the company in USA in which Mr. Ashok is deputed, can be treated as MNC under FCRA, 2010 as it is carrying on business or operating in two countries i.e. USA and India, respectively.

3. (SEPT 2022 MTP)

Advise on the following legal positions as per the FCRA, 2010.

1. **Whether donation given by Non-Resident Indians (NRIs) is treated as 'foreign contribution'?**
2. **Whether foreign remittances received from a relative are to be treated as foreign contribution as per FCRA, 2010?**

ANSWER :

(1) Contributions made by a citizen of India living in another country (i.e., Non-Resident Indian), from his personal savings, through the normal banking channels, is not treated as foreign contribution. However, while accepting any donations from such NRI, it is advisable to obtain his passport details to ascertain that he/she is an Indian passport holder.

(2) The position in this regard as given in Section 4(e) of FCRA, 2010 and Rule 6 of FCRR, 2011 are as under: Subject to the provisions of section 10 of the FCRA, 2010, nothing contained in section 3 of the Act shall apply to the acceptance, by any person specified in that section, of any foreign contribution where such contribution is accepted by him from his relative. However, in terms of Rule 6 of FCRR, 2011, any person receiving foreign contribution in excess of one lakh rupees or equivalent thereto in a financial year from any of his relatives shall inform the Central Government in Form FC-1 within thirty days from the date of receipt of such contribution.

4. (NOV 2021 EXAM)

Mr. Rajesh seeks your expert advice for reporting compliance in respect of receiving the following foreign contribution/gift article in India referring to the provision of the Foreign Contribution (Regulation) Act, 2010.

(i) Foreign Contribution from his brother who stays in Singapore to the extent of INR 12,20,000 in a financial year.

(ii) A TV set of USB 1300 gifted to him by his friend who stays in Japan for his personal use. The market value of the said gifted article in India on the date of gift is 1,00,000.

ANSWER :

(i) As per Section 4(e) of the FCRA, 2010 and Rule 6 of FCRR, 2011, even the persons prohibited under section 3, i.e., persons not permitted to accept foreign contribution, are allowed to accept foreign contribution from their relatives. However, in terms of Rule 6 of FCRR, 2011, any person receiving foreign contribution in excess of one lakh rupees or equivalent thereto in a financial year from any of his relatives shall inform the Central Government regarding the details of the foreign contribution received by him in electronic form in Form FC-1 within thirty days from the date of receipt of such contribution.

Since, the amount of contribution is ` 12,20,000, Mr. Rajesh has to inform the Central Government regarding the details of the foreign contribution received by him (from his brother who stays in Singapore) in electronic form in Form FC-1 within thirty days from the date of receipt of such contribution.

(ii) As per Section 6A of the Foreign Contribution (Regulation) Act, 2010, "foreign contribution" as defined in Section 2(1)(h) means the donation, delivery or transfer made by any foreign source, of any article, not being an article given to a person asa gift for his personal use, if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf. (This sum has been specified as Rupees One lakh/-currently).
In the given situation, Mr. Rajesh received the TV set (market value `1,00,000) as gift from his friend, who stays in Japan. Since, the value of the TV set is within the prescribed limit, hence, Mr. Rajesh is permitted to receive the article.
Therefore, the TV set received by Mr. Rajesh shall not be deemed to be the foreign contribution and no reporting compliance shall be attracted in this case.

5. (MAY 2022 EXAM)
Upalayam Old Student Association was formed with the object of providing Coaching & Hostel facilities to the students studying in the government school. Mr. Murugan, an Indian Origin, acquired American citizenship and settled in USA. However, he is an overseas citizen of India cardholders. Mr. Murugan donated ` 10 Lakh to the said Association fromhis personal savings through the normal banking channel. Referring to the provisions of the Foreign Contribution (Regulation) Act, 2010, answer the following:
(i) Whether the donation made by Mr. Murugan is a foreign contribution?
(ii) What will be your answer in case Mr. Murugan still holds Indian Citizenship?

ANSWER :

(a) Foreign Contribution:
Foreign Contribution is defined under Section 2(1)(h) of the Foreign Contribution (Regulation) Act, 2010 (FCRA, 2010), to mean the donation, delivery or transfer made by any foreign source. Section 2(1)(j) only speaks about citizen of a foreign country while inclusively defining foreign source. A donation, delivery or transfer of any article, currency or foreign security by any person who has received it from any foreign source, either directly or through one or more persons is a foreign contribution.

(i)Whether the donation made by Mr. Murugan is a Foreign Source?
Yes. Donation from Mr. Murugan, a Person of Indian origin who has acquired American citizenship and also is an Overseas Citizen of India cardholder, will be treated as foreign contribution.

(ii) In case if Mr. Murugan still holds Indian Citizenship

Contributions made by a citizen of India living in another country i.e. 'Non-resident Indians' from his personal savings through normal banking channels is not to be treated as foreign contribution. In case if Mr. Murugan holds Indian citizenship, he is not a foreigner and therefore, donation given by Mr. Murugan, will not be treated as foreign contribution.

6. (RTP MAY 2022)

Shaksharta Foundation, a trust, is running a renowned private school named, MK Triwam, engaged in the activities of providing education from primary to higher secondary.

For the financial year ended March 2020, it received an interest of ` 35 lakhs in its FCRA account from which it withdrew ` 5 lakhs for conducting an open workshop with participation of schools at the National level, for development of the children and the teachers in the school in tune with the today's education system. The income earned through such workshop was ` 12 lakhs.

Recently, the school collected its annual fees from the students, totaling to ` 5 crore which included fees from foreign students amounting to ` 40 lakhs.

For a training programme to be held, Shaksharta Foundation received sponsorship money of ` 10 lakhs from Krimerse (P) Ltd. in which 60% of the shares are held by Housder Inc., a USA company, within the limits specified under FEMA. Such money was deposited by it in its FCRA account.

In the context of aforesaid scenario, answer to the following questions:-

i. Whether the amount received from Krimerse (P) Ltd. was to be deposited in FCRA account by Shaksharta Foundation?

ii. Identify, in the given case, the foreign contributions received by Shaksharta Foundation.

ANSWER :

(i) According to section 2(1)(j) of the Foreign Contribution (Regulation) Act, 2010, Foreign Source, inter-alia, includes,- a company within the meaning of the Companies Act, 1956 (presently, the Companies Act, 2013) and more than one-half of the nominal value of its share capital is held, either singly or in the aggregate, by one or more of the following, namely:-

A. the Government of a foreign country or territory;
B. the citizens of a foreign country or territory;
C. corporations incorporated in a foreign country or territory;
D. trusts, societies or other associations of individuals (whether incorporated or not), formed or registered in a foreign country or territory;
E. Foreign company;

Provided that where the nominal value of share capital is within the limits specified for foreign investment under the Foreign Exchange Management Act, 1999, or the rules or regulations made there under, then, notwithstanding the nominal value of share capital of a company being more than one-half of such value at the time of making the contribution, such company shall not be a foreign source.

According to section 17 of the Foreign Contribution (Regulation) Act, 2010, every person who has been granted certificate or prior permission under section 12 shall receive foreign contribution only in an account designated as "FCRA Account" by the bank.
No funds other than foreign contribution shall be received or deposited in any such account.

Here it is given that, 60% of the shares of Krimerse (P) Ltd. are held by Housder Inc., a USA company, within the limits specified under FEMA. So, even though more than 50% shares held by a foreign company, Krimerse (P) Ltd. cannot be considered as a foreign source as per the proviso of Section 2(1)(j)(vi).

Any donation, delivery or transfer received from a 'foreign source' whether in rupees or in foreign currency is construed as 'foreign contribution' under FCRA, 2010, and as per Section 17, only foreign contribution has to be deposited in FCRA account.

Thus, the amount received from Krimerse (P) Ltd. was not to be deposited in FCRA account by Shaksharta Foundation as it was not a foreign contribution.

(ii)The following items can be considered as the foreign contributions received by Shaksharta Foundation:-

Sr. No.	Particulars	Amount (`)	Explanation
1.	Interest received in FCRA account	35 lakhs	As per Explanation 2 to Section 2(1)(h) of the FCRA, 2010, - The interest accrued on the foreign contribution deposited in any bank referred to in section 17(1), or - any other income derived from the foreign contribution or interest thereon.
2.	Income earned from workshop	12 lakhs	Shall also be deemed to be foreign contribution within the meaning of this clause.
			Here, workshop was conducted from the amount of interest earned in the FCRA account and so it constitutes to other income derived from it.

Notes:-

(1) Fees collected from foreign students of ` 40 lakhs is not be considered as foreign contribution as per Explanation 3 to Section 2(1)(h) of the FCRA, 2010.

(2) Sponsorship money of ` 10 lakhs received from Krimerse (P) Ltd. would also be not considered as foreign contribution as per Section 2(1)(h) read with proviso of Section 2(1)(j)(vi), as explained above.

7. (NOV 2022 RTP)

Health Care Foundation has submitted an application of the Central Government for granting prior permission for receipt of foreign contribution. The value of such foreign contribution, on the date of

final disposal of the application, is ` 3.00 crores. Referring to the provisions and relevant rules of the Foreign Contribution (Regulations) Act, 2010 advise on the following:

(i) Can permission for receiving the foreign contribution of ` 3.00 crores in instalments be granted by the Central Government?

(ii) Compliance requirement for obtaining the next instalment, if answer of (i) is affirmative.

ANSWER :

(i) Permission from the Central Government

As per Rule 9A of the Foreign Contribution (Regulation) Rules, 2011, if the value of foreign contribution on the date of final disposal of an application for obtaining prior permission is over rupees one crore, the Central Government may permit receipt of foreign contribution in such instalments, as it may deem fit.

Hence, the Central Government may grant permission to Health Care Foundation for receiving foreign contribution of ` 3.00 crores in instalments, as it may deem fit.

(ii) Compliance requirement for obtaining the next instalment:

It is further provided in Rule 9A that the second and subsequent instalment shall be released after submission of proof of utilization of seventy-five per cent of the foreign contribution received in the previous instalment and after field inquiry of the utilization of foreign contribution. Health Care Foundation may get next instalment, if this requirement is fulfilled.

8. May 2019

After giving a reasonable opportunity of being heard, Central Government cancelled the certification of registration of Toastea Ltd, a company registered under FCRA on the ground of public interest 2.5 years have passed since such cancellation.

Company has submitted its written declaration not to involve in such activity again and request to restore the registration. Advise Toastea Ltd. on its eligibility for re-registration or grant of prior permission. Also state the circumstance under which Government can cancel the certificate of registration granted to a person under the Foreign Contribution (Regulation) Act, 2010.

Answer:

Restoration of Registration: As per section 14(3) of the Foreign Contribution (Regulation) Act, 2010, any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.
In the instant case, Toastea Ltd. is not eligible for re-registration or grant of prior permission as only 2.5 years have passed since such cancellation. So, requirement of 3 years of cooling period from the date of cancellation of such certificate for re-registration is not complied with.

Circumstances for cancellation of certificate of registration [Section 14(1) of the Foreign Contribution (Regulation) Act, 2010]
(i) The Central Government may, by an order, cancel the certificate if —

a) the holder of the certificate has made a statement in, or in relation to, the application for the grant of registration or renewal thereof, which is incorrect or false; or
b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof; or

c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate; or
d) the holder of certificate has violated any of the provisions of this Act or rules or order made there under; or
e) if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

9. MTP Mar 2019

A foreign co., Srikripa Ltd. established by few Indians in Singapore. Being a strong believer of Sai, the management of the company used to donate a huge amount to the sai trust, in Mumbai, India. Enumerate in the given situation whether the donation so made by Srikripa Ltd. is a foreign contribution. Is the acceptance of such donation by the Sai trust is valid.

Answer
As per the definition of Foreign Contribution given in section 2(1)(*h*) of FCRA, 2010, "Foreign contribution" means the donation, delivery or transfer made by any foreign source,-

(i) of any article, (except given as a gift for personal use), if the market value, in India, of such article, on the date of such gift, is not more than such sum as may be specified from time to time, by the Central Government by the rules made by it in this behalf;

(ii) of any currency, whether Indian or foreign;

(iii) security and includes any foreign security under the Foreign Exchange Management Act, 1999.

As per explanation to the section, a donation, delivery or transfer of any article, currency or foreign security referred to in this clause by any person who has received it from any foreign source, either directly or through one or more persons, shall also be deemed to be foreign contribution within the meaning of this clause.
Whereas the foreign source as per the definition given in section 2(j) of the FCRA includes a foreign company. Since the Srikripa Ltd. is a foreign company, so donation made by the Srikripa Ltd is a foreign contribution for the religious and charitable purpose.

Whereas, Sai Trust can accept foreign contribution with prior permission of Central Government, if it is not registered under the FCRA. But where if the Sai trust is registered under the FCRA, [section 11 of FCRA, 2010], it may accept the foreign contribution within the limit without seeking prior permission.

10. **State under what circumstances Government can cancel the certificate of registration granted to a person under FCRA? VVI**

Answer
Yes. As per section 14 of the FCRA, Central Government may cancel the certificate, after carrying out an inquiry, on the following grounds –

(a) the holder of the certificate has made an incorrect/false statement in the application for the grant of registration or renewal
(b) the holder of the certificate has violated any of the terms and conditions of the certificate or renewal thereof
(c) in the opinion of the Central Government, it is necessary in the public interest to cancel the certificate
(d) the holder of the certificate has violated any of the provisions of this Act or rules or order made thereunder.
(e) if the holder of the certificate has not been engaged in any reasonable activity in its chosen field for the benefit of the society for two consecutive years or has become defunct.

In any person whose certificate has been cancelled under this section shall not be eligible for registration or grant of prior permission for a period of three years from the date of cancellation of such certificate.

11. Can capital assets purchased with the help of foreign contributions be acquired in the name of the Mr Ram, an office bearers of the association?

Answer

No. Every asset purchased with foreign contribution should be acquired and possessed in the name of the association since an association has a separate legal entity distinct from its members.

12. RTP Nov 2020

XYZ Foundation, a society registered under the Societies Registration Act, 1860, has received foreign contribution from a Mala Company LLC, a company incorporated in Singapore. XYZ Foundation deposited the amount of foreign contribution in a bank and earned interest on it.
XYZ Foundation desires to invest maturity proceeds from deposits in mutual funds. You are required to advise whether XYZ Foundation is allowed to make such investment considering the provisions of the Foreign Contribution (Regulation) Act, 2010
(Note: XYZ Foundation has obtained certificate of registration under section 11 of the Act).

Answer

As per the explanation 2 to the definition of the Foreign Contribution under the Act, the interest accrued on the foreign contribution deposited in any bank referred to in section 17(1) or any other income derived from the foreign contribution or interest thereon shall also be deemed to be foreign contribution within the meaning of this clause.
Further as per section 8 of the Act, every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution, shall utilise such contribution for the purpose for which the contribution has been received.
Provided that any foreign contribution or any income arising out of it shall not be used for speculative business, where as speculative business includes investment in mutual fund. XYZ Foundation cannot use the contribution as well as the interest component for the Investment in Mutual Fund.

13. (RTP NOV 2021)

Amol Open University of Languages, a private university established under a State Act was meant to provide degree/ diploma/ certificate course to the students, through an online leaning platform of various foreign languages. The examination was also decided to be held online through their PC/Laptop.
Several Foreign Governments intend to offer donations / contributions for the development of their language. Mr. Bhupendra, the Registrar applied for the registration of the university and was granted certificate to receive foreign exchange for the purpose of preparing the educational material (print or soft copy), paying of honorarium to teachers and IT related infrastructure for online classes only. Mr. Bhupendra faced financial problems for building the infrastructure of the University Campus. Advise Mr. Bhupendra, whether foreign contribution received for language development, can be used by him for building the infrastructure of the University Campus.

ANSWER

Section 8(1) of the FCRA, 2010 provides that every person, who is registered and granted a certificate or given prior permission under this Act and receives any foreign contribution,-

(a) shall **utilise such contribution for the purposes for which the contribution has been received**.

Provided that any foreign contribution or any income arising out of it shall not be used for speculative business.

(b) shall **not defray as far as possible such sum, not exceeding twenty per cent. of such contribution**, received in a financial year, to meet administrative expenses:
Provided that administrative expenses exceeding twenty per cent. of such contribution may be defrayed with prior approval of the Central Government.

(2) The Central Government may prescribe the elements which shall be included in the administrative expenses and the manner in which the administrative expenses referred to in subsection (1) shall be calculated.
Accordingly, the purpose for which the Certificate of Registration has been granted, cannot be diverted. The end use of the funds has to ensured to utilise in that purpose only. Therefore, Mr. Bhupendra, the registrar of Amol Open University cannot use the foreign contribution for building the infrastructure of the University Campus.

Chapter 4

The Arbitration and Conciliation Act, 1996

Multiple Choice Questions

1. RTP Nov 2019

Mr. A. Mr. B and Mr. C are partners in XYZ partnership firm. The firm made an agreement in writing to refer a dispute between them in business to an arbitrator. Inspite of this agreement Mr. B files a suit against Mr. A and Mr. C relating to the dispute in a court. Examine on the admission of the suit filed by Mr. B in the court in the light of the Arbitration and Conciliation Act, 1996.

(a) Yes it can be admitted by the court, as the said court has jurisdiction over the matter and it overpowers arbitration agreement
(b) Yes it can be admitted by the court, only in the case of challenge to the arbitral award in appeal
(c) Yes, it can be admitted by the court, if Mr. A and Mr. C mutually agrees.
(d) No it cannot be admitted by the court, as the jurisdiction of court is ousted because of existence of a valid arbitration agreement

Answer: (d)

2. (MARCH MTP 2022)
Mr. Ram and Rahim entered into a contract for a conduct of business and came with an arbitration agreement in case of dispute, if any, in the contract. Said documents were duly executed with proper signature. Identify the correct statement with respect to execution of arbitration agreement referred in such contract:

a. Signature is only required when the arbitration agreement is contained in a contract. However, no signature is required if the arbitration agreement is contained in correspondence or exchange of pleadings.

b. No signature is required at all as the arbitration agreement is forming the part of main contract.

c. Signature is required throughout correspondence or during exchange of pleadings under the arbitration agreement.

d. Signature is every time required in an arbitration agreement though forming a part of a main contract.
ANSWER : (A)

3. (NOV 2022 RTP)

State the primary legislations amongst the following that deals with alternate methods of dispute resolution:
a. The Code of Civil Procedure, 1908

b. Arbitration
c. Lok Adalat
d. Judicial settlement.
ANSWER :(A)

4. Mr. Komal and Mr. Rajesh, entered into arbitration agreement for the disputes that arise, if any in their business transactions. Due to certain fault on the part of Mr. Rajesh, the dispute came before the arbitration for settlement. In the meantime, Mr. Komal dies. Mr. Rajesh shed of their liabilities on the plea that arbitration agreement has come to end with the death of the other party. Decide the affirmative statement in the given situation-

(a) Arbitration agreement get terminated due to death of the party.
(b) It shall be remain enforceable by or against the legal representatives of the deceased.
(c) Since it is a private law between the parties, it will be terminated with the death of the party.
(d) Both (a) & (c)

Answer: c

5. RTP Nov'2020

Milan Limited entered into an agreement with Vinne Limited for the supply of confectionary biscuits and cakes for a period of 5 years. The Arbitration clause of the agreement states, "That all the disputes shall be submitted to arbitration." After a period, it was found that the principal contract is invalid in the light of the Indian Contract Act, 1872. You are required to select the best option in the given scenario considering the provisions of the Arbitration and Conciliation Act, 1996.

(a) The arbitration clause in the principal agreement also stands invalid due to the principal contract becoming invalid.
(b) The arbitration clause is an independent agreement of the principal agreement and cannot be treated as invalid merely because the principal contract was invalid.
(c) The arbitration clause shall be exercisable only if the Judicial Authority under the Arbitration and Conciliation Act, 1996 allows to treat it as an independent agreement.
(d) The arbitration clause in the principal agreement stands valid only till the time the principal contract was in force and valid.

Answer: b)

6. (MTP-II- July 2021)

Under which circumstances the arbitration process comes to an end as per the Arbitration and Conciliation Act, 1996: (1 Mark) (DISPUTED QUESTION)

(a) When Arbitrator denies to pass final award
(b) When arbitrator fails to pass the award within 12 months
(c) When the parties decide to no longer continue with issue.
(d) Where the parties decide to refer the matter before the court.

ANSWER- b

Descriptive Questions

1. (MARCH MTP 2022)

XYZ Company Ltd. entered into an agreement with PQR Company Ltd. for the supply of terrain tyres to PQR Company Ltd for a period of 5 years. The agreement had referred to the terms and conditions contained in the Indian Tyre Manufacturing Association for sale and purchase of manufacturing tyres. Clause 14 of the terms provided that if any dispute arises between the parties, the same shall be mutually decided by the parties or shall be referred for arbitration if the parties so determine. You are required to state whether the parties under the agreement will be able to refer the dispute, if any, to the arbitration considering the given scenario and the provisions of the Arbitration and Conciliation Act, 1996.

ANSWER :

The provisions of the Arbitration and Conciliation Act, 1996 outlines the requirements of a valid arbitration agreement. One of such requirements is clarity of consent i.e. the intention to go to arbitration must be clear in other words there must be consensus ad idem. Utilization of vague words cannot be considered as adequate.

Further the Arbitration and Conciliation Act, 1996 envisages the possibility of an arbitration agreement coming into being through incorporation i.e. arbitration agreement through reference.

In other words, parties to an agreement could agree to arbitrate by referring to another contract, containing an arbitration agreement.

Facts and conclusion: In the given scenario, it was an arbitration agreement through reference, but the terms and conditions of the said agreement were not clear and vague and therefore the said agreement is not a valid arbitration agreement as the italicized portion in the agreement clearly highlights the need for further agreement between the parties.

Accordingly in the given instance, the parties will not be able to refer the disputes, if any, to arbitration since the terms and conditions of arbitration agreement through reference are vague and not clear and thus the arbitration agreement is not valid in law.

2. (APRIL 2022 MTP)

XYZ Company Ltd. entered into an agreement with PQR Company Ltd. for the supply of terraintyres to PQR Company Ltd for a period of 5 years. The agreement had referred to the terms and conditions contained in the Indian Tyre Manufacturing Association for sale and purchase of manufacturing tyres. Clause 14 of the terms provided that if any dispute arises between the parties, the same shall be mutually decided by the parties or shall be referred for arbitration if the parties so determine.

You are required to state whether the parties under the agreement will be able to refer the dispute, if any, to the arbitration considering the given scenario and the provisions of the Arbitration and Conciliation Act, 1996.

ANSWER :

The provisions of the Arbitration and Conciliation Act, 1996 outlines the requirements of a valid arbitration agreement. One of such requirements is clarity of consent i.e. the intention to go to arbitration must be clear in other words there must be consensus ad idem. Utilization of vague words cannot be considered as adequate.

Further the Arbitration and Conciliation Act, 1996 envisages the possibility of an arbitration agreement coming into being through incorporation i.e. arbitration agreement through reference. In other words, parties to an agreement could agree to arbitrate by referring to another contract, containing an arbitration agreement.

In the given scenario, it was an arbitration agreement through reference, but the terms and conditions of the said agreement were not clear and vague and therefore the said agreement is not a valid arbitration agreement as the italicized portion in the agreement clearly highlights the need for further agreement between the parties.

Accordingly in the given instance, the parties will not be able to refer the disputes, if any, to arbitration since the terms and conditions of arbitration agreement through reference are vague and not clear and thus the arbitration agreement is not valid in law.

3. (SEPT 2022 MTP)

P-1 entered into a contract with P-2 wherein P-2 will supply the building materials of Cement and Iron to P-1. In a contract note entered into between them, there was a clause to refer the matter to the arbitration, in case of dispute arises in future, relating to the quality, quantity, price and place of supply of materials.

Both also executed an arbitration agreement and got it registered with the registering authority. The agreement copy was made in duplicate and each one of them was having the two original copies, duly signed.

During the course of business dealings, the disputes aroused between P-1 and P-2 for over pricing of invoices raised by P-2, whereas the same quality of material was available in the market at 10% lower prices.

P-1 referred the matter to a court and the summons were issued to P-2. P-2 informed to the court that there was an arbitration agreement between the P-1 and P-2 that in case of dispute, the matter will be decided by the arbitration.

Examine the following situations in the light of the Arbitration and Conciliation Act, 1996:

i. **P-1 referred the matter to the court, where as P-2 informed to the Court that there is an agreement to refer the matter to the arbitration, in case of dispute. What view the judicial authority will take in the matter?**
ii. **In the arbitration agreement there was no mention of the number of arbitrators. Whether the parties to the disputes can now determine the number of arbitrators?**

ANSWER :

(i) Section 8(1) of the Arbitration and Conciliation Act, 1996 provides that a judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies. Once the parties have agreed to arbitrate their matter, neither of the parties can unilaterally proceed to court to litigate that matter. Any party attempting to do that would be referred to arbitration, if the other party so requests

Therefore, the Court may ask to parties to submit the original copy of the arbitration agreement and after satisfying that arbitration agreement exist, it may refer the parties to the arbitration.

(ii) Section 10(1) of the Arbitration and Conciliation Act, 1996 provides that the parties are free to determine the number of arbitrators, provided that such number shall not be an even number.

Yes, they can decide to determine the number of arbitrators provided that such number shall not be an even number.

4. (OCT 2022 MTP)

ABC Ltd. and XYZ Ltd. entered in to a Joint Venture (JV) to construct a town consisting of 500 flats nearby Pune, which will be sold to the retail home buyers. They prepared a JV Agreement in which an arbitration clause entered. This clause specifies that in case of any dispute, the matter shall be referred to the arbitration.

After some time, a dispute was aroused between the companies. ABC Ltd. contended that there was no separate agreement in writing between the companies to refer the matter to the arbitration and it was just a clause in the JV Agreement, hence the matter should be referred to the Court of law instead of arbitration.

Based on the above facts define the meaning of the arbitration agreement and whether the insertion of arbitration clause in the JV agreement is sufficient or it should be a separate agreement for arbitration?

ANSWER :

Section 7 of the Arbitration and Conciliation Act, 1996 provides that -

(1) "arbitration agreement" means an agreement by the parties to submit to arbitration all or

certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing if it is contained in—

a) a document signed by the parties;

b) an exchange of letters, telex, telegrams or other means of telecommunication including communication through electronic means which provide a record of the agreement; or

c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

Thus, as per Section 7(2) of the Act, an arbitration agreement may be in the form of an arbitration clause in a contract. Since the JV Agreement contains a clause to refer the matter to the arbitration, in case of dispute, is sufficient the arbitration agreement was arrived at between the companies.

5. (MAY 2022 EXAM)

On 1st day of April, 2020, Alm Food Processors Limited, a company engaged in food processor manufacturing unit, entered into a joint venture agreement with Ron and Col Limited, the largest manufacturer of Food processors. Both the companies are registered under the Companies Act, 2013. The joint venture agreement does not contain the term for referring the dispute relating to the quality of the goods supplied to the arbitration. In light of the Arbitration and Conciliation Act, 1996, examine, what will happen, if the parties later on agreed to refer the dispute to the arbitration concerning quality of goods supplied in 2021?

ANSWER :

In the given question, the Joint Venture Agreement (JVA) between Alm Food Processors Limited and Ron and Col Limited, does not contain the term for referring the dispute relating to the quality of the goods supplied to the arbitration. To resolve this dispute, the parties later entered into an agreement to refer the dispute to the arbitration concerning quality of goods supplied in 2021.As per the Arbitration and Conciliation Act, 1996, the purpose of an arbitration agreement is to submit disputes to arbitration on the basis of whether existing or future disputes would be submitted to arbitration. Where an agreement is entered into after the disputes have arisen, then, it would be called as a 'submission agreement".

Conclusion: Thus, a submission agreement may be entered by the parties that shall be submitted arbitration, whereby they agree to abide by the decision of the arbitrator.

6. (MAY 2022 RTP)

A dispute has been aroused between the management of Paras Furnishing Ltd. and its labours. The dispute was to provide the basic facilities at the workplace, air- conditioning environment and hours of work. The management of the company sent an invitation to leader of the labour union to conciliate on the issues raised by the labours. The union leader accepted the invitation.

Examine the give situation and answer the following:

i. When the conciliation proceeding shall be said to be commenced in the given case?

ii. How the settlement agreement will be arrived at by the conciliators?

ANSWER :

(i) Section 62 of the Arbitration and Conciliation Act, 1996 provides that -

1. The party initiating conciliation shall send to the other party a written invitation to conciliate under this Part, briefly identifying the subject of the dispute.
2. Conciliation proceedings, shall commence when the other party accepts in writing the invitation to

conciliate.
3. If the other party rejects the invitation, there will be no conciliation proceedings.

In the given case the management of the company sent an invitation which has been accepted by the union leader, so the commencement of conciliation proceeding took place on acceptance of an invitation.

(ii) Following is the manner to arrive at the settlement agreement:

a) Terms of Settlement: When it appears to the conciliator that a settlement is possible, he should identify possible terms of settlement and submit them to the parties for their observations and suggestions. The parties may also make suggestions as to contents of the agreement.

b) Agreement – if the parties reach a settlement, then it has to be written down as an agreement. This agreement is known as settlement agreement (at times it is also referred to as Memorandum of Conciliation). It can be made by the parties or by the Conciliator on behalf of the parties. However the conciliator is required to authenticate the agreement without which the agreement would have no legal sanctity.
c) Enforcement -the settlement agreement has the same status as that of an arbitral award. It is final and binding on the parties and persons claiming under them.

7. (NOV 2022 RTP)

Answer the following in the light of the Arbitration and Conciliation Act, 1996 :

(i) How important are the ideas of independence and impartiality in arbitration in the below given context?
(a) Is the arbitrator required to disclose anything to the parties?

(b) Is membership of the same sports club as one of the parties problematic?

(ii) Can an arbitrator resign on their own account? Do they have to give reasons for their resignation? Could an award be challenged on the ground that the arbitrator had resigned without giving any proper justifications?

ANSWER :

(i) **(a)** The arbitrator are under a duty of disclose any relations with parties or their lawyers that might give rise to justifiable doubts as to their independence and impartiality.

(b) Such an association is too remote to count as a relation that might lead to doubts of bias.

(ii) An arbitrator can resign when they want, without giving reasons for their resignation. This action does not affect the validity either of the arbitration proceedings or the arbitral award.

8. March 2018

Raman garments manufacturer entered into an arbitration agreement with its regular customers on the supply of dress material on demand in advance. At the same time, also hold the term that in case of disputes they may refer to the arbitration for the settlement of the matter. Raman garments manufacturer fail to make delivery of supply of dress material to Mr. X, a regular customer. MR. X already made Raman garments manufacturer aware of this important order in advance. Since Raman garments manufacturer was not able to meet the said the order well in time, he took the plea of theft and setting of fire to the property in the manufacturing unit.

The said matter was referred to the arbitration. State the validity as to the submission of the said dispute to the arbitration in the light of the Arbitration and Conciliation Act, 1996.

Answer:

As per the arbitration agreement, the disputes submitted/ proposed to be submitted to arbitration must be arbitrable. In other words that law must permit arbitration in that matter only which are capable of arbitration. There are certain disputes that the law retains exclusively for the court, and the same cannot be submitted for arbitration. The rationale is that given the nature of disputes, the courts are the only appropriate forum for adjudicating the matter.

In the given matter, it clearly reveals of non-performance of the duties of the Raman garments manufacturer within the specified timelines. To safeguard himself from the non-performance of the contract, took the cause of theft and setting of fires in the manufacture ng unit. Accordingly, in the given situation, the submitted disputes before arbitration is not arbitrable as they are the offences of criminal natures. Such types of disputes is to be tried by the court of proper jurisdiction.

Therefore, the submission of the dispute in the situation to arbitration is invalid.

9. May 2018

Smart Automobiles Limited and Apex Four wheelers Limited entered into an agreement regarding annual maintenance services to be provided by Smart Automobiles for all vehicles within the state of Uttar Pradesh for five years. The agreement was containing a clause that in the event of a dispute between the parties the matter would be submitted to arbitration. At the end of the fifth year, the service agreement was not renewed.

Decide whether the arbitration. agreement should not be treated as terminated. Also describe the other grounds of termination of an arbitration agreement.

Answer:

Termination of an arbitration agreement

Just the way parties can enter into an arbitration agreement, they can also terminate an arbitration agreement. Thus, an arbitration agreement could be put to an end by:

1. Mutual consent: like any contract, the parties involved can joint ly agree to put an end to a particular arbitration agreement.

2. Termination of principal contract: an arbitration agreement always operates in relation to a principal contract. If the principal contract is terminated through discharge or novation, the arbitration agreement terminates with the contract. However, if the principal contract is breached, then the arbitration agreement survives because of the operation of the doctrine of separability.

In the given instance, at the end of the fifth year, the Service Agreement was not renewed. Hence, the contract terminates, and along with it the arbitration agreement.

10. . Aug 2018

ABC Pvt. Ltd. is a construction company. Mr. Builder is a Chief Engineer of the ABC Pvt. Ltd. A common arbitration agreement was framed by ABC Pvt. Ltd. in case of disputes if arises under any contract. According to the term of an agreement , any question, claim, right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of the work, or after the completion, termination or abandonment thereof, the dispute shall, in the first place, be referred to the Chief Engineer who has jurisdiction over the work specified in the contract. The Chief Engineer shall within a period of ninety days from the date of dispute bought into notice, give written notice of his decision to the contractor. Chief Engineer's decision shall be final. Examine on the validity of such arbitration agreement.

Answer:

As per the requirements of a valid arbitration agreement, parties to the arbitration agreement must agree that the determination of their substantive rights by a neutral third person acting as the arbitral tribunal would be final and binding upon them.

Since in the given case, the arbitration agreement formed by the XYZ Pvt. Ltd. contained a clause that any questions, claim right, matter, thing, whatsoever, in any way arising out of or relating to the contract designs, drawings, specifications estimates, instructions, or orders, or those conditions or failure to execute the same whether arising during the progress of' the work, or after the completion, termination or abandonment thereof, the dispute shall, firstly, be referred to the Chief Engineer , Mr. Builder. He will has jurisdiction over the work specified in the contract. He shall within a period of ninety days from the date of dispute bought into notice, give written notice of his decision to the contractor. Chief Engineer's decision shall be final and binding on both the parties.

Here Chief Engineer is not a neutral party and has a Control over the work specified in the contract, so this is not a valid arbitration agreement.

11. RTP Nov-18:

On 1st day of April, 2016, Arnold Food Processors limited, a company engaged in food processor manufacturing unit entered into a joint venture agreement with Ronnie and Coleman Company Limited, the largest manufacturer of Food processors for supply of parts of mixer and grinder for manufacturing its latest model. Both the companies are registered under the Companies Act, 2013. Agreement carries the term that all disputes shall be arbitrated in Delhi. In the light of The Arbitration and Conciliation Act, 1996, discuss:

(i) The type of arbitration agreement made between them.(VVI)

(ii) Examine what will happen if the agreement does not have any clause relating to arbitration where disputes arose between them concerning quality of material supplied in 2017.

Answer:

There are two basic types of arbitration agreement:

(i) Arbitration clause - a clause contained within a principal contract. The parties undertake to submit disputes in relation to or in connection with the principal contract that may arise in future to arbitration.

(ii) Submission agreement - an agreement to refer disputes that already exist to arbitration. Such an agreement is entered into after the disputes have arisen.

In first case, the agreement already carries the term that all disputes shall be arbitrated in Delhi at the time of entering into joint venture agreement. This would be an arbitration clause as it is contained in the principal contract (JVA) and no disputes have arisen till yet.

It concerns future disputes that may arise. In the second case, the Principal contract (JVA) does not have any term relating to arbitration. Disputes arose between the parties concerning quality of supplied goods in 2017. To resolve this dispute, parties later entered into an agreement "That all disputes including quality of goods supplied by Ronnie and Coleman Company Limited to Arnold Food Processors Limited shall be submitted to arbitration. The parties hereby agree to abide by the decision of the arbitrator". Such an agreement that is made after the disputes have arisen would be called a submission agreement.

12. How important are the ideas of independence and impartiality in arbitration?

a) **Is the arbitrator required to disclose anything to the parties?**
b) **Is membership of the same sports club as one of the parties problematic?**

Answer

(a) The arbitrator are under a duty of disclose any relations with parties or their lawyer that might give rise to justifiable doubts as to their independence and impartiality.

(b) Such an association is too remote to count as a relation that might lead to doubts of bias.

13. Can an arbitrator resign on their own account? Do they have to give reasons for their resignation? Could an award be challenged on the ground that the arbitrator had resigned without giving any proper justifications?

Answer

An arbitrator can resign when they want, without giving reasons for their resignation. This action does not affect the validity either of the arbitration proceedings or the arbitral award.

14. Mr. X wants to start a bakery and so he contacts Mr. Y Confectioners & Bakers for supply of cakes and biscuits. The communication between the parties were over email. On e-mail, there was a term of service between the parties containing that "any disputes regarding quality or delivery shall be submitted to arbitration conducted under the guidance of Indian Confectionary Manufacturers Association. Please place your order if the above terms and conditions are agreeable to you." X placed an order. State the legal position as the validity of the arbitration agreement.

Answer

As per the arbitration and Conciliation Act, an agreement must be in writing There is however no requirement for the same to be in writing in one document. There is also no particular form or template for an arbitration agreement. The communication over email of the term of services is a proper valid agreement and the same have been stood affirmed by reason of their conduct. This would be an arbitration agreement in writing contained in correspondence between the parties.

15. (MTP- NOV 2021)

Mr. Jayraj Mehta, a stock market investor had filed a complaint against Regency Securities (P) Ltd. regarding unauthorized trading and the case was referred to the arbitration. The arbitral tribunal passed the award in favour of Regency Securities (P) Ltd. which was received by Mr. Jayraj on 25th May, 2021. Regency Securities (P) Ltd. enforced the said award on 30th June, 2021 by selling the securities of Mr. Jayraj in its demat account.

Mr. Jayraj after issuing prior notice to Regency Securities (P) Ltd. made an application with the Civil Court on 15th July, 2021 under section 34 of the Arbitration and Conciliation Act, 1996. In the said application, Mr. Jayraj complained that the award has been improperly enforced and an application for recovery of the sold securities was also made along with main application. However, no stay application was made on the enforcement of order as the lawyer of Mr. Jayraj told that there is automatic stay on the enforcement of the award on filing of application under section 34.

In the context of aforesaid case-scenario, please answer to the following questions:-
(i) Whether Regency Securities (P) Ltd. can be considered to have properly enforced the arbitral award?
(ii) Whether the contention of lawyer of Mr. Jayraj is correct?

ANSWER

(i) According to section 36 of the Arbitration and Conciliation Act, 1996, where the *time for making an application to set aside an award has expired*, or when such application was made, but it was rejected, then the award can be enforced. Enforcement of an arbitral award shall happen under the Code of Civil Procedure 1908 in the same manner as if it were a decree of the court.

According to section 34 of the Arbitration and Conciliation Act, 1996, a challenge against arbitral award can be raised within a time period of three months from when the award is received by party, with a maximum extension of thirty more days by the court.

Thus, the time limit for making an application for setting aside the arbitral award is 3 months and in the given case, the arbitral award was received by Mr. Jayraj on 25th May, 2021. So, the time for making an application to set aside the said award was to expire on 25th August, 2021 and till that time, the award could not have been enforced as per section 36 of the Act, as aforesaid.

Thus, Regency Securities (P) Ltd. cannot be considered to have properly enforced the arbitral award as the time limit for filing application under section 34 to set aside the award had not expired and it had enforced the said award on 30th June, 2021. It was having the right to enforce the said award only after 25th August, 2021 or, if the court had granted extension of 30 days then after 24th September, 2021.

(ii) According to section 36 of the Arbitration and Conciliation Act, 1996, there is no automatic stay on the enforcement where an application to set aside the arbitral award has been filed in the Court under section 34. A party has to specifically request for a stay, and the court at the time of granting stay can impose conditions.

Thus, the contention of lawyer of Mr. Jayraj that there is automatic stay on the enforcement of the award on filing of application under section 34, is not correct.

Note: The court will order that Regency Securities (P) Ltd. had improperly enforced the arbitral award but after expiry of 3 months, Regency Securities (P) Ltd would have right to enforce the award, so in order to have stay on that, a stay application needs to be filed with the main application filed under section 34 by Mr. Jayraj as there is no automatic stay.

16. (MTP- NOV 2021)

A dispute has been aroused between the management of Paras Furnishing Ltd. and its labours. The dispute was to provide the basic facilities at the workplace, air-conditioning environment and hours of work. The management of the company sent an invitation to leader of the labour union to conciliate on the issues raised by the labours. The union leader accepted the invitation. It was decided between the parties that each one of them shall appoint one conciliator.

In the given case, explain how the two conciliators, appointed by each of them will address the matter under the Arbitration and Conciliation Act, 1996 and the procedure of conciliation?

ANSWER

Section 63 of the Arbitration and Conciliation Act, 1996 provides that –

1. There shall be one conciliator unless the parties agree that there shall be two or three conciliators.
2. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

Further Section 64, specifies, Procedure of Conciliation – once the conciliators have been appointed both parties are required to submit their statements in writing, supply documents and other evidence to the conciliator. The conciliator then provides a copy of the statements, documents and other evidence of one party to the other party. The conciliator is then required to encourage and assist parties to engage in discussions based on the information to arrive at a settlement.

Chapter 5-

Insolvency and Bankruptcy Code

Multiple Choice Questions

1.(RTP MAY 2019)

Under the IBC, The resolution plan shall be approved by the Committee of Creditors by a vote of not less than----------percent of voting share of the financial creditors.

(a) 51%
(b) 66%
(c) 75%
(d) 95%

Answer: Option B

2. MTP Mar 2019

With whom will the Central Government file an application if it is of the opinion that such a scheme is not in public interest or in the interest of the creditors?

(a) Cannot move an application
(b) it may file an application before the Tribunal
(c) it may file an application before the Parliament
(d) it may be through special leave filed before Supreme Court

Answer: Option B

3. MTP Apr 2019

In case of a contravention of the resolution plan, an application for liquidation can be made by

a) Only the original applicant
b) Only by the corporate debtor
c) By any person other than the corporate debtor whose rights have been prejudicially affected
d) By the financial creditors only

Answer: Option C

4. MTP April 2019

For initiation of Voluntary liquidation, a declaration of solvency (no debts or assets are sufficient to discharge liabilities) should be given by

a) Two directors
b) Two directors and 80% shareholders
c) Two directors and 80% shareholders and statutory auditors
d) Majority of the directors

Answer: Option D

5. MARCH MTP 2022)

The PPIRP may be made in respect of a corporate debtor, who commits a default subject to the condition that the majority of the directors of the corporate debtor have made a declaration, stating inter alia, that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period of:
(a) not exceeding 60 days
(b) not exceeding 90 days
(c) not exceeding 120 days
(d) not exceeding 150 days
ANSWER : (B)

6. (OCT 2022 MTP)

New Era Financial Services Limited of New Delhi, registered with Reserve Bank of India as Non-banking Financial Company (NBFC), has defaulted in the payment of dues to its catering contractor, Samarth Sweets, a partnership concern owned by two real brothers Swarn and Shivi. From the following four options, select the one which indicates whether Samarth Sweets being catering contractor can initiate insolvency resolution process under the Insolvency and Bankruptcy Code, 2016, against the company in the capacity as an operational creditor:

a) **The catering contractor Samarth Sweets in the capacity as operational creditor is entitled to initiateinsolvency process against New Era Financial Services Limited.**
b) **The catering contractor Samarth Sweets in the capacity as operational creditor is not entitled to initiate insolvency process against New Era Financial Services Limited because 'financial service providers' are excluded.**
c) **The catering contractor Samarth Sweets in the capacity as operational creditor is not entitled to initiate insolvency process against New Era Financial Services Limited since it is a partnership concern and not a limited company.**
d) **Since 'catering service provider' is an excluded service, the catering contractor Samarth Sweets in the capacity as operational creditor is not entitled to initiate insolvency process against New Era Financial Services Limited.**

ANSWER : (B)

7. (RTP MAY 2022)
Shivdeep submitted his claim as an operational creditor to the liquidator of Chiranjeevi Food Products Limited which is under liquidation. After submission of his claim, Shivdeep is desirous of altering it. Out of the following four options, which one correctly indicates the time period within which he can alter his claim after its submission.

a) **Shivdeep can alter his claim within five days of its submission to the liquidator of Chiranjeevi Food Products Limited.**
b) **Shivdeep can alter his claim within ten days of its submission to the liquidator of Chiranjeevi Food Products Limited.**
c) **Shivdeep can alter his claim within fourteen days of its submission to the liquidator of Chiranjeevi Food Products Limited.**
d) **Shivdeep can alter his claim within thirty days of its submission to the liquidator of Chiranjeevi Food Products Limited.**

ANSWER : Option (c): Shivdeep can alter his claim within fourteen days of its submission to the liquidator of Chiranjeevi Food Products Limited.

8. **RAB Bank Limited, a banking company, has defaulted in the payment of dues to their catering contractor. Can the contractor, as an operational creditor initiate insolvency process against the bank-**

(a) Yes, operational creditors are entitled
(b) No, financial service providers are excluded
(c) Yes, banking companies are covered under this code
(d) No, catering is an excluded service under the Code

Answer: b

9. **The timeline of 180 days for the Corporate Insolvency Resolution process commences from the**

a) Date of Debt
b) Date of preferring the application
c) Date of admission of application by NCLT
d) 90 days after the debt is due

Answer: c)

10. **.Ruby Ltd. filed an application to the NCLT stating that corporate insolvency resolution process against him, cannot be completed within the 90 days under the fast track insolvency resolution process. Considering application and on being satisfied, NCLT ordered to extend the period of such process by 30 days. Later, again Ruby Ltd. initiated an application for further extension of time period of insolvency process by 15 days. Decide in the given situation, whether NCLT, can extend timelines by further 15 days.**

a) Yes, because extension of duration in toto, is not exceeding 45 days.
b) Yes , depends of the facts , if it is justified , NCLT may extend the timelines.
c) No, extension of the fast track insolvency resolution process shall not granted more than once.
d) (a) & (b)

Answer: c

11. **Whether an operational creditor can assign or legally transfer any operational debt to a financial creditor:**

a) Yes. However, the transferee shall be considered as an operational creditor to such extent of transfer.
b) Yes but the transferee shall be considered as a financial creditor in relation to such transfer
c) No. An operational creditor cannot assign or legally transfer any operational debt to a financial creditor.
d) No. An operational creditor can assign or legally transfer an operational debt only to an

operational creditor.

***Answer:** a) Hint: Refer Section 21(5) of the Insolvency and Bankruptcy Code.*

12. Person who has provided goods or services and the payment for same is due from the corporate debtor, is a:

(a) Financial Creditor
(b) Operational creditor
(c) Corporate applicant
(d) Both (a) & (b)

Answer: b

13. (RTP JULY 2021)

Who shall determine the amount of claim due to a creditor under the Insolvency and Bankruptcy Code during the Corporate Insolvency Resolution Process (CIRP)?

(a) Committee of creditors
(b) Resolution professional
(c) Adjudicating Authority
(d) Corporate debtor

ANSWER- b

14. (RTP JULY 2021)

Can an Adjudicating Authority order the liquidation of a corporate debtor even after approving the resolution plan:

a) Yes, if the resolution plan is contravened.
b) The Adjudicating Authority may order the liquidation of a corporate debtor even after approving the resolution plan on receiving an application from a third party who is unaffected by such liquidation
c) Yes, the Adjudicating Authority may order for the liquidation of a corporate debtor if the committee of creditor does not approve the resolution plan after its approval by the Adjudicating Authority
d) No, the Adjudicating Authority cannot order the liquidation of a corporate debtor after approving the resolution plan.

ANSWER- a

15. (RTP NOV 2021)
A meeting of committee of creditors shall quorate if members of the CoC representing - --------- are present either in person or by video/audio means:

(a) at least thirty three percent of the voting rights
(b) at least Fifty one percent of the voting rights
(c) at least sixty six percent of the voting rights
(d) at least seventy five percent of the voting rights

ANSWER- a

Descriptive Questions

1. **(MARCH MTP 2022)**

Nature Limited is a Micro Enterprise under section 7 of the MSME Development Act, 2006 which has filed an application for initiating Pre-package Insolvency Resolution Process (PPIRP) under Section 54C of the Insolvency Bankruptcy Code, 2016. You have been appointed as the Resolution Professional to conduct the PPIRP. Nature Limited has prepared a Base Resolution Plan (BRP) which was presented to the Committee of Creditors (CoC). The CoC evaluated the BRP and realised that the plan impairs the claims owed to few operational creditors. In the capacity of Resolution Professional, advice the CoC on whether it is mandatory for them to approve the BRP and if not, the process in which they can invite alternative resolution plans.

ANSWER :

As per the provision of Section 54K of the Insolvency and Bankruptcy Code, 2016, following is the manner to initiate the PPIRP:

1. Submission of BRP: The corporate debtor (CD) shall submit the base resolution plan (BRP)to the resolution professional (RP) within 2 days of the pre-packaged insolvency commencement date (ICD).
2. Presentation of BRP to CoC: The RP shall present the same, to the committee of creditors(CoC).
3. Given opportunity to revise the BRP: The CoC may provide the CD an opportunity to revisethe BRP prior to its approval or invitation of Prospective Resolution Applicant (PRA), as thecase may be.
4. After approval submitted to AA: The CoC may approve the BRP for submission to the AA if it does not impair any claims owed by the CD to the Operational Creditors.
5. If BRP is biased: Where-
    a. the CoC does not approve the BRP under sub-section (4); or
    b. the BRP impairs any claims owed by the CD to the OC,the RP shall invite PRA, to submit a resolution plan(s), to compete with the BRP, in such manner as specified.
6. Fulfilment of criteria laid down by RP: The RA submitting resolution plans pursuant to invitation shall fulfil such criteria as may be laid down by the RP with the approval of the CoC, having regard to the complexity and scale of operations of the business of the corporate debtor and such other conditions as may be specified.
7. The RP shall provide to the RA:
    a) the basis for evaluation of resolution plans as approved by the CoC; and In the given case, Nature Limited, a MSME which is undergoing PPIRP has prepared a BRP that impairs the claims owed to operational creditors. In such a case, in view of the above provision, the RP can invite claims from the PRAs in the manner specified above.

Conclusion: It is not mandatory for the CoC to approve the BRP submitted by the CD. In case where the BRP impairs the claim owed to operational creditors, the CoC may either provide an opportunity to revise the plan or shall invite claims from PRAs and select the most suitable plan.

2. **(MARCH MTP 2022)**

Jewar Ltd., a diamond manufacturing company, is undergoing Corporate Insolvency Resolution Process (CIRP). The CIRP had initiated on 1st January 2020. Mr. Shubh was acting as the Interim Resolution Professional who was later appointed as Resolution Professional by the Committee of Creditor. Mr. Shubh has been working hard since Day 1 to get a resolution plan approved before the last day of the CIRP. However, due to external factors, as on 31st May, 2021, he realized that he is unable to decide as to which resolution plan can be taken to the committee of creditors for approval and also that he will need another 3 months to get a resolution plan approved. You are his partner in

an Insolvency Professional Entity. Advise as to the factors that need to be considered before taking the resolution plan to the committee of creditors.

ANSWER :

Mr. Shubh (the resolution professional) will have to consider the following factors while examining the resolution plan before taking it to the Committee of Creditors for approval:

a) Whether the resolution plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor

b) Whether the resolution plan provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than higher of:
   i. the amount to be paid to such creditors in the event of a liquidation of the corporatedebtor under section 53; or
   ii. the amount that would have been paid to such creditors, if the amount to bedistributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

c) Whether the resolution pln provides for the management of the affairsof the Corporate debtor after approval of the resolution plan;

d) Whether the resolution plan provides for the implementation and supervision of the resolution plan

e) Whether the resolution plan contravene any of the provisions of the law for the time being in force

f) Whether the resolution plan confirms to such other requirements as may be specified by the Board.

3. (APRIL 2022 MTP)

Four out of seven directors of Tatragat Ltd. made a declaration on 23rd June, 2021, with respect to filing of an application for initiating pre-packaged insolvency resolution process by 21st September, 2021. Mr. Ashok Jawal was proposed and approved to be appointed as the resolution professional, whose name was mentioned in the aforesaid declaration. However, Tatragat Ltd. failed to file an application for initiating pre-packaged insolvency resolution process by 21st September, 2021 with the Adjudicating Authority.

Examine the given situations in the light of the given facts:-

i. Whether the directors of Tatragat Ltd. can be said to have made a valid declaration?

ii. Whether the duty of Mr. Ashok can be considered to have ceased? Would your answer be different, if Tatragat Ltd. was able to file the application on time but was rejected by the Adjudicating Authority?

ANSWER :

(i) As per section 54A(2)(f) of the Insolvency and Bankruptcy Code, 2016, with respect to filing of an application for initiating pre-packaged insolvency resolution process, the majority of the directors or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified, stating, inter alia, —

a) that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days;

b) that the pre-packaged insolvency resolution process is not being initiated to defraud any person; and

c) the name of the insolvency professional proposed and approved to be appointed as resolution professional.

In the instant case:-

(i) Four out of seven directors of Tatragat Ltd. have made a declaration on 23rd June, 2021 i.e. majority of directors have made declaration.

The said declaration provides for a definite time period not exceeding ninety days for filing of an application for initiating pre-packaged insolvency resolution process i.e. by 21st September, 2021, which is exactly 90 days from date of declaration i.e. 23rd June, 2021.
Also, name of Mr. Ashok Jawal proposed and approved to be appointed as the resolution professional had been mentioned in the said declaration, as required.
Accordingly, it can be said that the directors of Tatragat Ltd. can be said to have made a valid declaration with respect to filing of an application for initiating pre-packaged insolvency resolution process assuming that the said declaration also states that the pre-packaged insolvency resolution process is not being initiated to defraud any person.

(ii) As per section 54B(2) of the Insolvency and Bankruptcy Code, 2016,the duties of the insolvency professional shall cease, if, —

(iii) the corporate debtor fails to file an application for initiating pre-packaged insolvency resolution process within the time period as stated under the declaration referred to in clause (f) of subsection (2) of section 54A; or

(b) the application for initiating pre-packaged insolvency resolution process is admitted or rejected by the Adjudicating Authority, as the case may be. In the instant case, duties of Mr. Ashok Jawal, the resolution professional, can be considered to have ceased, as Tatragat Ltd. failed to file an application for initiating pre-packaged insolvency resolution process within the time period as stated under the declaration i.e. by 21st September, 2021. If in case, Tatragat Ltd. was able to file the said application on time but was rejected by the Adjudicating Authority then also the duties of Mr. Ashok Jawal, the resolution professional, can be considered to have ceased.

4. (APRIL 2022 MTP)

(i) Jewar Ltd., a diamond manufacturing company, is undergoing Corporate Insolvency Resolution Process (CIRP). The CIRP had initiated on 1st January 2020. Mr. Shubh was acting as the Interim Resolution Professional who was later appointed as Resolution Professional by the Committee of Creditor. Mr. Shubh has been working hard since Day 1 to get a resolution plan approved before the last day of the CIRP. However, due to external factors, as on 31st May, 2021, he realized that he is unable to decide as to which resolution plan can be taken to the committee of creditors for approval and also that he will need another 3 months to get a resolution plan approved. You are his partner in an Insolvency Professional Entity. Advise as to the factors that need to be considered before taking the resolution plan to the committee of creditors.

(ii) Mr. Ram with malafide intention, to take revenge with his rival competitor, gives false information as regards to conduct of his business in illegal manner. So search warrant was issued by the concerned authority against him. This will be giving a bad name and effecting on his business. Examine the legal position of Mr. Ram, and with respect to act committed in the given situation in the light of the Prevention of Money Laundering Act, 2002: (3 Marks)
ANSWER :

(i) Mr. Shubh (the resolution professional) will have to consider the following factors while examining the resolution plan before taking it to the Committee of Creditors for approval:

a. Whether the resolution plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor

b. Whether the resolution plan provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than higher of:

1. the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
2. the amount that would have been paid to such creditors, if the amount to be distributed under the

resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,

c. Whether the resolution plan provides for the management of the affairsof the Corporate debtor after approval of the resolution plan;

d. Whether the resolution plan provides for the implementation and supervision of the resolution plan

e. Whether the resolution plan contravene any of the provisions of the law for the time being in force

f. Whether the resolution plan confirms to such other requirements as may be specified by the Board.

(ii) As per section 63 of the Prevention of Money Laundering Act, 2002, any person willfully and maliciously giving false information and so causing an arrest or a search to be made under this Act, shall on conviction be liable for imprisonment for a term which may extend to two years or with fine which may extend to fifty thousand rupees or both.

Accordingly, Mr. Ram, here in the said instance, willfully and maliciously gives false information in order to take revenge, shall be liable for imprisonment for a term which may extend to two years or with fine extending to ` 50,000 or both.

5. (SEPT 2022 MTP)

Crown Industrial Conveyors Limited had advanced a loan of ` 1 crore to M & Co. Private Limited whose office was functioning in a rented house property belonged to Mr. M, the Managing Director. The lending company intends to attach the property of Mr. M as liquidation asset and seeks your advice with regard to its position in a Liquidation proceeding initiated under the Insolvency and Bankruptcy Code 2016.

ANSWER :

According to Section 36 of the Insolvency and Bankruptcy Code, 2016 (the Code) for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor. The liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

Exceptions

In terms of Section 36(4) of the Code, the assets owned by a third party which are in possession of the corporate debtor, shall not be included in the liquidation estate assets and shall not be used for recovery in the liquidation. These assets include other contractual arrangements which do not stipulate transfer of title but only use of the assets.

In the given instance, Crown Industrial Conveyors Limited has advanced a loan of ` 1 crore to M & Co. Private Limited. Its (M & Co. Private Limited) office was functioning in a rented house property belonging to Mr. M, the Managing Director.

On liquidation of M& Co. Private Limited (the Corporate debtor), Crown Industrial Conveyors Limited, the Financial Creditor, intends to attach the property of Mr. M as a liquidation asset.

In line with above stated exclusion, the property in which M & Co. Private Limited was operating its office on rent belonged to Mr. M i.e. third party.

Conclusion

Therefore, Crown Industrial Conveyors Limited, the lending Company, cannot attach the property of Mr. M as it cannot be included in the liquidation estate assets and shall not be used for recovery in the liquidation.

6. (SEPT 2022 MTP)

Explain the time limit for completion of the Corporate Insolvency Resolution process?

ANSWER :

(i) Section 12 of the Insolvency and Bankruptcy Code states that any Corporate & Insolvency Resolution Process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate the process.
However, the National Company Law Tribunal (NCLT) may on an application made by the resolution professional, under a resolution passed by the Committee of Creditors, by a vote of 66% of voting shares, after consideration provide one extension which shall not extend more than 90 days.
Second proviso to Section 12 (3) states that the corporate insolvency resolution process (CIRP) shall compulsorily be completed within 330 days from the insolvency commencement date including any extension of the time period of corporate insolvency resolution process granted under Section 12 and also the time taken in legal proceedings in relation to such resolution process of the corporate debtor.
90

7. (OCT 2022 MTP)

Good Bank Ltd. granted a credit facility of Rs. 50 lakh to Sandhya Cosmetics Pvt Ltd. on the personal guarantee of Sandhya, who is the Managing Director of the Company.
After some time the company defaulted in paying the dues of the Bank so the financial creditor initiated CIRP against Sandhya. Sandhya opposed and pleaded that-

(i) The company has defaulted in payment of the dues of the Bank and not the 'Sandhya'. 'Sandhya' and 'Sandhya Cosmetics Ltd.' are two different persons, one is individual and the second is the corporate person. The Bank should first initiate action against the company and not against the Sandhya in her individual capacity.
(ii) The Adjudicating Authority for individual is DRT and not the NCLT.

ANSWER :

(i) As per the IBC,2016, that without initiating CIRP against the principal borrower, it is open to the FC to initiate CIRP under section 7 against corporate guarantors as the creditor is also the FC qua corporate guarantor.

(ii) In terms of Section 5(22) "personal guarantor" means an individual who is the surety in a contract of guarantee to a corporate debtor. In the given case 'Sandhya' is the personal guarantor of the Company.
Section 60(1) of the IBC provides that the Adjudicating Authority, in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantorsthereof shall be the National Company Law Tribunal having territorial jurisdiction over the place where the registered office of the corporate person is located.

8. (OCT 2022 MTP)

Win Bank Ltd., invited tender for supply of stationery items to Stationery Dept. This Stationery Dept. of the Bank is a centralised dept. of the Bank, which undertakes to supply the stationery items for whole of the financial year for its branches. Vallabh Stationers won the tender and supplied the materials as per the requirements of the Bank. After some times the
quality of the stationery items supplied by the Vallabh Stationers went down and the Bank stopped making the payment. Aggrieved to this the Vallabh Stationers planned to initiated CIRP proceedings against the Bank under section 9 of the Code.
Discuss, whether the application for initiation of CIRP by the Vallabh Stationers as Operational Creditor will succeed?
ANSWER :

Corporate Person

In terms of Section 3(7) of the IBC "corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013 (18 of 2013), a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008 (6 of 2009), or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.
Who is Financial Service Provider

In term of Section 3(17) "financial service provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator.
CIRP cannot be initiated against a financial service provider/non-banking financial company as financial service providers are excluded from definition of corporate debtor in terms of section 3(7) of the Insolvency Bankruptcy Code, 2016

9. (MAY 2022 EXAM)

Argunt Infrastructure Project Private Limited [Corporate Debtor] is classified as a Small Enterprise under Sub- section (1) of Section 7 of the Micro, Small and Medium Enterprises Development (27 of 2006) Act, 2006. It owes 60 Lakh to its creditors. In view of Covid- 19 Pandemic situation, the Corporate Debtor was not in a position to recover money from Sundry Debtors as per the payment schedule and it commits default in settling dues to the Sundry Creditors. The Corporate Debtor decided to go for Pre-packed Insolvency Resolution Process [PPIRP] under the provisions of the Insolvency and Bankruptcy Code, 2016 (IBC) and accordingly took the following steps to initiate PPIRP.

1. The Financial Creditors of the Corporate Debtor, not being its related parties, representing 66% in value of the financial debt due to them proposed Mr. Pure, the Insolvency Professional, to be appointed as Resolution Professional to conduct PPIRP.
2. The Majority of the Board of Directors of the Corporate Debtor have made a declaration that the PPIRP is not being initiated to defraud any person and nothing more is contained in the declaration.
3. The Members of the Corporate Debtor passed an Ordinary Resolution approving the filing of an application for initiating PPIRP.

There were no further approvals obtained from the Financial Creditors / Board of Directors on any matters.
Referring to the provisions of the Insolvency and Bankruptcy Code 2016, advise on the following matters for filing of an application before NCLT to initiate PPIRP.

i. Whether the act of Financial Creditors proposing the name of the Mr. Pure as Resolution Professional is valid?
ii. Whether the declaration made by the Board is in accordance with the Provisions of the IBC?
iii. Whether the resolution passed by the members of the company is in line with the requirements of the IBC?
iv. Are there any requirements to get the approval of the Financial Creditors/ Board of Directors on any other matters? If so, state the relevant provisions of the IBC.

Answer:

Pre-Packaged Insolvency Resolution Process (PPIRP) [Sections 54A - 54P of the Insolvency and Bankruptcy Code, 2016]. Corporate Debtors eligible for Pre-Packaged Insolvency Resolution Process
In terms of Section 54A(1) of the IBC,2016 an application for initiating PPIRP may be made in respect of a corporate debtor classified as a micro, small or medium enterprise under Section 7(1) of the Micro, Small and Medium Enterprises Development Act, 2006.

(i) Whether the Act of the Financial Creditors proposing the name of Mr. Pure as Resolution Professional is valid?

In terms of Section 54A(2) of the IBC, 2016 an application for initiating PPIRP may be made in respect of a corporate debtor who commits default referred to in Section 4 subject to a condition specified in Section 54A2(e) whereby, the financial creditors of the corporate debtor not being its related parties, representing such number and such manner as may be specified, have proposed the name of the insolvency professional to be appointed as resolution professional for conducting the PPIRP of the corporate debtor and the financial creditors of the corporate debtor not being its related parties representing not less than 66% in value of the financial debt due to such creditors have approved in such form as may be specified.

Therefore, In view of the above, the act of Financial Creditors proposing the name ofMr. Pure as Resolution Professional, is valid.

(ii)**Whether the declarations made by the Board is in accordance with the provisions of IBC, 2016?**
In terms of Section 54A(2)(f) of the IBC, 2016, the majority of the director or partners of the corporate debtor, as the case may be, have made a declaration, in such form as may be specified stating that:

1. That the corporate debtor shall file an application for initiating PPIRP within a definite time period of 90 days,
2. That the PPIRP is not being initiated to defraud any person.
3. The name of the insolvency professional proposed and approved to be appointed as resolution professional under clause (e).

In view of the above, the only declaration by the majority of Board of Directors of the Corporate Debtor that the PPIRP is not being initiated to defraud any person, is not sufficient. The declaration shall also contain the matters contained in Clause 2(f)(i) and (iii) above.

(iii) Whether the resolution passed by members is in line with the requirements of IBC, 2016?
No. The Act requires that the members of the corporate debtor to pass a special resolution, or at least three-fourth of the total number of partners, as the case may be, of the corporate debtor have passed a resolution approving the filing of an application for initiating pre-packaged insolvency resolution process.

(iv) Requirements to get the approval of Financial Creditors / Board of Directors
Yes. The corporate debtor shall obtain an approval from its financial creditors, representing at least sixty-six per cent. in value of the financial debt due to such creditors, for the filing of an application for initiating pre-packaged insolvency resolution process.
By majority of the directors of the corporate debtor, a declaration is required on stating that the corporate debtor shall file an application for initiating pre-packaged insolvency resolution process within a definite time period not exceeding ninety days; and the name of the insolvency professional proposed and approved to be appointed as resolution professional.

10. (EXAM 2022 EXAM)

Ram, the financial creditor, was an investor and a debenture holder of 'Optionally Convertible Debenture Bond (OCDB)' payable on maturity with redemption premium, issued by Asset Limited (Corporate Debtor). The zero interest OCDB bonds amounted to` 3 Crore was matured in 2016. The Corporate Debtor failed to discharge this liability in due date. Ram filed an application to initiate the Corporate Insolvency Resolution Process (CIRP) before the NCLT. Advise, in the light of the given facts, the following situations referring to the provisions of the Insolvency and Bankruptcy Code, 2016:

i. **Whether Ram is eligible for filing an application for initiation of CIRP?**
ii. **Whether the redemption of debenture bonds, payable on the maturity date, amounts to debt?**

ANSWER :

Optionally Convertible Debenture Bonds (OCDB) are debt securities which allow anissuer to raise capital and in return the issuer pays interest to the investor till the maturity.

(i) Whether Ram is eligible to file an application for initiation of CIRP?
In the given case, Ram, was a debenture holder of OCDB payable on maturity issued by Asset Limited (Corporate Debtor), which it failed to discharge on due date.
According to Section 21(6A), where a financial debt is in the form of securities ordeposits and the terms of the financial debt provide for appointment of a trustee or agent to act as authorised representative for all the financial creditors, such trustee or agent shall act on behalf of such financial creditors;
According to the proviso to Section 7 of the Code, an application for initiating corporate insolvency resolution process against the corporate debtor shall be filed jointly by required number of such creditors in the same class as specified, through such authorised representative i.e. trustee or agent.
Accordingly, Mr. Ram is entitled for filing an application for initiation of CIRP.

(ii) Whether the redemption of debenture bonds, payable on the maturity date amounts to debt?
Yes, Redemption of debenture bonds, payable on maturity amounts to debt. Debt under the Code means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt. [Section 3(11)]
Financial Debt - "Financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument.

11. (RTP MAY 2022)
Mr. Tushar Maheshwari submitted his candidature for being a resolution applicant of Valt Chambers Ltd. in pursuant to an invitation made for the names of prospective resolution applicants under section 25(2)(h) of the Insolvency and Bankruptcy Code, 2016, by Mr. Manish Dave, the resolution professional.
Mr. Tushar is a spouse of sister of Mr. Amit Dhariya who is going to be involved in the management of Valt Chambers Ltd. as a director at the time of implementation of the resolution plan and Mr. Tushar, being a person resident in India was convicted under the provisions of FEMA Act, 1999, for an act specified under the Twelfth Schedule of the IBC, 2016, with imprisonment for 2.5 years and only 1 year & 3 months has expired from the date of his release of imprisonment, for not paying penalty arose due to bringing into India from USA during his temporary visit, ` 2,00,00,000 worth Indian currency notes.
In the light of the given facts, examine whether Mr. Tushar is eligible to be a resolution applicant?

ANSWER :
As per clause (d) of Section 29A of the Insolvency and Bankruptcy Code, 2016, a person shall not be eligible to submit a resolution plan, if such person, or any other person acting jointly or in concert with such person has been convicted for an offence punishable with imprisonment for two years or more under the FEMA Act, 1999, specified under the Twelfth Schedule.

However, this clause is not applicable to person who is a connected person referred to in clause (iii) of Explanation I.
As per Explanation I — the expression "connected person" means—

i. any person who is the promoter or in the management or control of the resolution applicant; or
ii. any person who shall be the promoter or in management or control of the business of the corporate debtor during the implementation of the resolution plan; or
iii. the holding company, subsidiary company, associate company or related party of a person referred to in clauses (i) and (ii)

Further, as per section 5(24A) of the Code, "relative", with reference to any person, inter-alia, includes son, daughter, sister or brother and their spouses, respectively.
Here in the given case, Mr. Tushar being sister's spouse will be considered as a related party to Mr. Amit as per section 5(24A) of the Code and consequently will be considered as a 'connected person' to Mr. Amit who is going to be involved in the management of Valt Chambers Ltd. as a director at the time of implementation of the resolution plan.

Accordingly, the provisions of clause (d) of Section 29A of the Insolvency and Bankruptcy Code, 2016, will not be applicable to Mr. Tushar as the case is covered by proviso to the said clause.
Thus, Mr. Tushar will be eligible to be a resolution applicant of Valt Chambers Ltd. in view of the facts given in the present case.

12. (NOV 2022 RTP)
S & M Private Limited, classified as a small enterprise (a Corporate Debtor), has made an application to the Adjudicating Authority (the Tribunal) for initiating Pre-Packaged Insolvency Resolution Process (PPIRP). The requirement for filing an application being satisfied the Adjudicating

Authority, by an order, has admitted an application commencing the PPIRP. Referring to the provisions of the Insolvency and Bankruptcy Code, 2016 explain the following:

i. **An external agency of which an approval would be sought to base resolution plan prior to making an application to the Adjudicating Authority.**
ii. **Circumstances causing invitation for submission of resolution plan or plans.**
iii. **Consequences of not approving the selected resolution plan by the Committee of Creditors (CoC).**

ANSWER :

(i) Approval of External Agency to base Resolution Plan

S & M Private Limited, the Corporate Debtor, shall seek the approval of the financial creditors to base the Resolution Plan as required under Section 54A (4) of the IBC, 2016.

(ii) Circumstances causing invitation for submission of resolution plan or plans are as below:

a) Where the Committee of Creditors does not approve the base resolution plan or
b) the base resolution plan impairs any claims owed by the corporate debtor to the operational creditors.

(iii) Consequences of not approving the selected resolution plan by the Committee of Creditors (CoC)

If selected resolution plan is not approved by the Committee of Creditors (CoC), the resolution professional shall file an application for termination of the pre-packaged insolvency resolution process and the Adjudicating Authority shall, within 30, days of the date of such application, by an order, terminate pre-packaged insolvency resolution process. (Section 54N of the Code).

13. May 2018

Rose Garden Ltd. was incurring continuous losses and its financial position went bad to worse. Black Stone (Private) Ltd., a trade creditor, issued notice under Section 271 of the Companies Act, 2013 for winding up of Rose Garden Ltd. on the ground that it was unable to pay its debts. After some time, Black Stone (Private) Ltd. being an operational creditor filed a petition before the Adjudicating Authority to initiate insolvency process under the Insolvency and Bankruptcy Code, 2016. Demand Notice and copy of invoice were not served to Rose Garden. Ltd. since a notice was earlier issued for winding up. All other formalities were complied with. The Adjudicating Authority initiated Insolvency Resolution Process by admitting the application and appointed Resolution Professional. After complying required formalities, the Adjudicating Authority issued orders for moratorium and other relief within the stipulated time. Being aggrieved by the order of Adjudicating Authority, Rose Garden Ltd. (Corporate debtor) filed an appeal before NCLAT under the Insolvency and Bankruptcy Code, 2016. Determine will the Company succeed in its appeal?

Answer

As per **Section 8** of the Insolvency and Bankruptcy Code, 2016, once a default has occurred, the operational creditor has to deliver a demand notice or a copy of invoice demanding payment of debt in default to the corporate debtor.

Since in the given case, demand notice and copy of invoice was not served to the Rose Garden Ltd., so the requirement for the initiation of the corporate insolvency resolution process by operational creditor under section 9 of the Code, was not in compliance. So, the admission of application in line with the compliance of other required formality as to issue of order of moratorium and other relief, given by the NCLT was against the law.

As Rose Garden Ltd. (Corporate debtor) was aggrieved by the Order of the Adjudicating Authority on the non-compliance of requirement of Section 8, Rose Garden Ltd. will succeed in its appeal filed before the National Company Law Appellate Tribunal.

Further, as IBC is a special law, having an overriding effect on the Companies Act, 2013, therefore serving of notice for winding up as per the Companies Act, will not be considered as a sufficient compliance of the requirement for prevailing of section 8 of the Insolvency and Bankruptcy Code.

14. May2018

You are appointed as Interim Resolution Professional in XYZ Company Ltd. under the Insolvency and Bankruptcy Code, 2016. State the time limit to make Public Announcement? Also state the protocol for issuance of public notice. Who shall bear the expenses of public announcement?

Answer:

Time Limit for making Public Announcement

Interim Resolution Professional shall make the Public Announcement immediately after his appointment. "Immediately" here means not more than three days from the date of appointment of the Interim Resolution Professional. Hence, the time limit to make Public Announcement is within 3 days from the date of appointment of the Interim Resolution Professional.

2.Protocol for issuance of Public Notice

As per Section 15 of the Insolvency and Bankruptcy Code,2016, public announcement shall include the following:-

(a) Name & Address of Corporate Debtor under the Corporate Insolvency Resolution Process.
(b) Name of the authority with which the corporate debtor is incorporated or registered.
(c) Details of interim resolution Professional who shall be vested with the management of the Corporate Debtor and be responsible for receiving claims.
(d) Penalties for false or misleading Claims.
(e) The last date for the submission of the claims.
(f) The date on which the Corporate Insolvency Resolution Process ends which shall be the 180th day from the date of admission of the application under section 7,9 or section 10 as the case may be.

3)Expenses of Public Announcement

The expenses of public announcement shall be borne by the applicant which may be reimbursed by the Committee of Creditors, to the extent it ratifies them.

15. Oct 2018

The following particulars relate to Big Rammy (Private) Ltd. which has gone into Corporate Insolvency Resolution Plan (CIRP):

Sr.No.	Particulars	Amount in Rs.
1	Amount realized from the sale of liquidation of assets	14,00,000
2	Secured creditor who has relinquished the security	5,00,000
3	Unsecured financial creditors	4,00,000
4	Income-tax payable within a period of 2 years preceding the liquidation commencement date	50,000
5	Cess payable to state government within a period of one yearpreceding the liquidation commencement date	20,000
6	Fees payable to resolution professional	75,000
7	Expenses incurred by the resolution professional in running the business of the Big Rammy (Private) Ltd. on going concern	25,000
8	Workmen salary payable for a period of thirty months preceding the liquidation commencement date. The workmensalary is equal per month	3,00,000

9	**Equity shareholders**	**10,00,000**

State the priority order in which the liquidator shall distribute the proceeds under the Insolvency and Bankruptcy Code 2016.

Answer:

As per section 53 of the Insolvency and Bankruptcy Code, 2016, the proceeds from the sale of liquidation assets shall be distributed in the following order of priority:

Insolvency Resolution Process Cost and Liquidation cost to be paid in full

(i)	Fees payable to Resolution Professional in full	75,000
(ii)	Expenses incurred by the Resolution professional in running the business on going concern	25,000
(iii)	Workmen salary outstanding for a period of 24 months (proportionate to 24 months only). The balance Rs. 60,000 is considered as remaining debts and dues and will be settled before preference shareholder/equity shareholder.	2,40,000
(iv)	Secured creditor who has relinquished the security	5,00,000
(v)	Unsecured Financial Creditors	4,00,000
(vi)	Income- tax payable with in the period 2 years	50,000
(vii)	Cess to State Government payable with in a period of one year	20,000
(vii)	Balance amount in workmen salary	60,000
	Total distribution in the above priority	13,70,000
	Amount realized from the sale of liquidation of assets	14,00,000
	Balance available to Equity share holder on pro rata basis	30,000

16. May 2019

Continental Rubber Limited is a supplier of raw materials to Smooth Latex Limited. It filed a petition before the NCLT for the recovery of Rs. 10,00,000 from Smooth Latex Limited. Smooth Latex Limited, the Corporate Debtor, has other financial creditors to the extent of Rs. 1,50,00,000 and they also joined together and filed petitions to NCLT. The Corporate Debtor has a total of 40 financial creditors and 2 operational creditors. Further, all the financial creditors are having equal voting rights/shares.

Notice was issued on 1st August, 2018 for the conduct of the first meeting to be held on 5th August, 2018 at a common venue. The meeting was attended by all 40 financial creditors and 2 operational creditors. A resolution was passed to appoint Mr. TK as a Resolution Professional. 25 of the financial creditors voted in favour of the resolution and 10 voted against the resolution and 5 financial creditors and 2 operational creditors abstained from voting. Decide whether the resolution passed is valid? In the light of the provisions of Insolvency and Bankruptcy Code, 2016 read with rules framed thereunder, explain the requirements of issue of notice and quorum for the conduct of the meeting.

Answer:

According to section 22 of the Insolvency and Bankruptcy Code, 2016, First Meeting of Creditors

- The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.
- The committee of creditors in the first meeting may by a majority vote of not less than sixty-six

percent. of the voting share of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

- Notice of the Meeting

The resolution professional shall give notice of each meeting of the committee of creditors to:-
(a) Members of Committee of creditors, including the authorised representatives referred to in subsections (6) and (6A) of section 21 and sub-section (5);
(b) Members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
(c) Operational creditors or their representatives if the amount of their aggregate dues is not less than ten per cent. of the debt.
Quorum for the Meeting
A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means.

- If the requisite quorum for committee of creditors is not fulfilled the meeting cannot be held and the meeting shall automatically stand adjourned at the same time and place on the next day.
- The adjourned meeting shall quorate with the members of the committee attending the meeting. As per the facts of the question and the provisions of law:

(1) The first meeting of committee of creditors was validly held within three days of the constitution of the committee of creditors.
(2) The requisite quorum was present in the meeting as all 40 financial creditors attended the meeting.
(3) The Act requires that not less 66% of the financial creditors shall resolve to appoint resolution professional. However, in the given case 71.4% [(25/35)* 100] voted in favour of Mr. TK. Hence, the said appointment is valid.

17. RTP May 2019 VVI

The financial creditor, Mr. Raman, was an investor and a debenture holder of 'Optionally Convertible Debenture Bond (OPDB)' payable on maturity, was issued by the M/s Asset Ltd. (corporate debtor). The zero interest OCD bonds amounted to 2 crore matured in 2016 . The liability to redeem the debentures on maturity along with a redemption premium lay on the debtor, which was not made. Mr. Raman filed the Corporate Insolvency resolution process before the NCLT.
Advise in the light of the given facts, the following situations:
(i) State whether Mr. Raman is eligible for filing of application for initiation of CIRP?
(ii) Do the redemption of debenture payable on the maturity date amounts to debt?

Answer
As per Section 5(7) of the Insolvency and Bankruptcy Code, 2016, financial creditor means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to.
Whereas the term Financial debt defined under Section 5(8) means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes any amount raised pursuant to the issue of bonds, notes, debentures, loan stock or any similar instrument.

As per the facts, Mr. Raman, was an investor and a debenture holder of 'Optionally Convertible Debenture Bond (OPDB)' issued by the Asset Ltd. With the debenture payable, as on the maturity date with interest, it was disbursed against consideration for the time value of the money. Thus, it can be said that debentures on maturity will come under that purview of Section 5(8)(c). Since Mr. Raman is a person to whom a financial debt is owed, he will come within the definition of Financial creditor. Being a debenture-holder and shareholder of the company he, being a creditor is entitled to claim debt amount. Therefore, as per section 7, Mr. Raman is entitled to file an application to initiate CIRP against the M/s Asset Ltd.

18. Nov 2019

In view of the deep recession prevailing in, the market for the past three years, M/s. Infra Limited (Corporate Debtor), which was facing the brunt of financial crisis, could not pay salaries and wages to its workmen and employees for the past 6 months. The workmen and the employees, who are the members of a recognized Trade Union "Infra Labor Federation", made a complaint in this regard. Thereafter, the Trade Union approached and urged the Management of the Company in person and through representations in writing to settle the arrears of wages and salaries due to its members. The Corporate Debtor neither disputed nor took any actions to settle the amount. Under the circumstances, Infra Labor Federation filed an application before the Adjudicating Authority i.e. with the National Company Law Tribunal for initiating a Corporate Insolvency Resolution Process under the Insolvency and Bankruptcy Code, 2016.
In the light of the provisions of the Insolvency and Bankruptcy Code, 2016, examine the following:
***(i)* Validity of the Application.**
What will be the "Initiation date" for initiating the Corporate Insolvency Resolution Process?

Answer

Workmen & Employees as Operational Creditor: The Insolvency and Bankruptcy Code, 2016 considers all employees and workmen as operational creditors.
As per section 5(20) of the Code, *"Operational creditor" means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred;"*
Whereas Operational Debt as per Section 5 (21) of the Code *means a claim in respect of the provision of goods or services* including employment *or a debt in respect of the repayment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority."*
Accordingly, if there is any dues arising in the course of employment, then that will be considered as an operational debt and the person to whom such operational debt is owed shall be treated as the Operational Creditor. Therefore, workmen & employees shall be treated as Operational Creditor of the Corporate Debtor.
The term "person" as defined under section 3(23) of the IBC, 2016 includes "any other entity established under any statute". A trade union, when registered under the Trade Union Act, 1926 would come within the purview of any other entity "established" under the statute.

Filing of an application by Operational Creditor: Application can be filed by the Operational Creditor in the NCLT if there is a debt, in compliance with sections 8 & 9 of the Code.
Prior to filling the application before NCLT, an employee has to comply with the procedure of sending the demand notice to the Corporate Debtor. If the Corporate Debtor has not paid the amount of debt even after sending the demand notice, neither intimated to the operational creditor about the existence of any regarding the dispute pertaining to the due debts.
After the expiry of ten days, if the operational creditor does not receive his payment or the confirmation of a dispute that existed even before the demand notice was sent, he may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process.
The date of filing of the application before the NCLT will be the initiation date for initiating the Corporate Insolvency Resolution Process (Section 5(11)).

Accordingly, in the light of the given provisions, following are the answers:
(i) Application filed by trade union, Infra Labor Federation on behalf of the workmen & employees in the said instance is valid as operational debt had been being legally assigned to the trade union in terms of section 5(20) of the Code and is included in the definition in section 3(23) of IBC, 2016.

(ii) Trade union, Infra Labour Federation may file an application before the Adjudicating Authority for initiating a corporate insolvency resolution process after expiry of 10 days from the date of serving demand notice to the M/s Infra Ltd and the date of filing of the application before the NCLT will be the date of initiation.

19. Nov 2019

The Committee of Creditors of M/s XYZ Limited proposes to appoint Mr. Ajit, an Insolvency Professional, as Insolvency Resolution Professional in the matter of corporate insolvency process of M/s XYZ Limited. Mr. Ajit was a promoter of M/s ABC Limited which is a holding company of M/s XYZ Limited. Examine and decide whether Mr. Ajit is eligible for appointment as an Insolvency Resolution Professional under the Provisions of Insolvency and Bankruptcy Code, 2016.

Answer

As per Regulation 3 of *Insolvency and Bankruptcy (Insolvency Resolution process for corporate persons) Regulation, 2016*, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency resolution process if he and all partners and directors of the insolvency professional entity of which he is partner or director, are independent of the corporate debtor.

In the given instance, Committee of Creditors of M/s XYZ Ltd. proposed to appoint Mr. Ajit, as IRP in the matter of corporate insolvency resolution process of M/s XYZ Ltd. However, Mr. Ajit was a promoter of M/s ABC Ltd. which is a holding company of M/s XYZ Ltd.

Accordingly, Mr. Ajit, is a related party of the corporate debtor. Therefore, Mr. Ajit is not eligible for appointment as an insolvency resolution professional in terms of the said legal provisions of the Code.

20. RTP May 2020

ABZ Ltd. an unlisted company with total assets of Rs. one crore as per financial statement as on 31st March, 2018, defaulted in the payment of the financial debt against the financial creditor Mr. X. Mr. X filed an application for initiation of insolvency process against ABZ Ltd. under the fast track corporate insolvency resolution process on 31st May 2019. Discuss the relevancy for disposal through the mechanism of the fast track corporate insolvency resolution process and the legal position of holding of fast track corporate insolvency resolution process by Mr. X in the term of the IBC, 2016. Compute the time period for completion of fast track process in the said situation.

Answer

Relevancy : Fast track corporate insolvency resolution process is a speedy process for corporate insolvency resolution for small corporates. As per section 55 of the IBC, 2016, it is applicable to following corporate debtors - (a) a corporate debtor with assets and income below a level as may be notified by the Central Government; or (b) a corporate debtor with such class of creditors or such amount of debt as may be notified by the Central Government; or (c) such other category of corporate persons as may be notified by the Central Government.

Applicability of the provisions - The provisions are applicable to - (a) small company under section 2(85) of Companies Act (b) a start-up (other than partnership firm)[as defined by Ministry of Commerce and Industry notification No. GSR 501(E) dated 23 -5-2017] (c) an unlisted company with total assets not exceeding Rs. one crore as per financial statement immediately preceding the financial year [SO 1911(E) dated 14-6-2017].

Time period for completion of fast track process

The fast track corporate insolvency resolution process shall be completed within a period of 90 days from the insolvency commencement date. It can be extended by Adjudicating Authority by further 45 days, if resolution passed at a meeting of the committee of creditors and supported by a vote of seventy five per cent of the voting shares [section 56(3) of Insolvency Code, 2016].

According to the provisions, fast track corporate insolvency resolution process shall be completed by 29th of August 2019. On further extension uptil by 13th of October, 2019 in compliance with above provision.

21. What are the eligibility criteria for appointment of an Insolvency Professional as a Resolution Professional for a corporate insolvency resolution process?

Answer

As per Regulation 3 of Insolvency and Bankruptcy (Insolvency Resolution) Regulation, 2016, an insolvency professional shall be eligible for appointment as a resolution professional for a corporate insolvency

resolution process if he and all partners and directors of the insolvency professional entity of which he is partner or director are independent of the corporate debtor i.e.,

- He is eligible to be appointed as an independent director on the board of the corporate debtor u/s 149 of the Companies Act, 2013, where the corporate debtor is a company.
- He is not a related party of the corporate debtor.
- He is not an employee or proprietor or a partner of a firm of auditors or company secretaries in practice or cost auditors of the corporate debtor in the last three financial years.

He is not an employee or proprietor or a partner of a legal or consulting firm that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm in the last three financial years

22. What is the effect of order of moratorium? VVI

Answer

Moratorium has been explained in Section 14 of the Code, during the moratorium period the following acts shall be prohibited:

a) The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;
b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the SARFAESI Act, 2002
d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

23. (MTP-I- July 2021)

Ever Lasting Ltd. went into liquidation. XYZ Bank Ltd. the secured creditor, decided to realize its security interest by informing liquidator of such security interest and identify assets subject to which such security interest has to be realized. Liquidator denied the XYZ Bank Ltd. to enforce its security interest as said secured creditor is not a part of Committee of creditors. Throw a light on the stated situation and examine on the validity of the stand taken by the Liquidator. (3 Marks)

ANSWER

As per Provisions laid down in section 52 of the Insolvency and Bankruptcy Code, 2016, an option is given to secured creditor to realize its security interest by informing liquidator in respect of such security interest and identify assets subject to which such security interest has to be realized.

Therefore, it is not mandatory under Code proceedings for financial creditor to be a part of CoC (Committee of Creditors) to enforce its security interest. Hence, application filed by Financial creditor was to be accepted.

Therefore, the stand taken by the liquidator on his denial to the XYZ Bank Ltd. to enforce its security interest on the account that secured creditor is not a part of Committee of creditors, is not valid.

24. (MTP-II- July 2021)

OLAF Limited (Corporate Debtor) borrowed a loan of Rs. 250 crore for expansion of his business under the consortium arrangement in the proportion of 50%, 30% and 20% from A, B & C Banks respectively. The corporate insolvency resolution process has begun by order of the Tribunal on an application made by the Financial Creditor. The Interim Insolvency Resolution Professional constituted a Committee of Creditors (CoC) which noted that total financial debt owed by the Corporate Debtor is Rs. 500 crore in aggregate. Examine who shall be the member of CoC and what

shall be their voting share in the CoC as per the provisions of the Insolvency and Bankruptcy Code, 2016.

(ANSWER)

In case of Joint Financial Creditors:

As per the provisions of the Insolvency and Bankruptcy Code, 2016, where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the Committee of Creditors (CoC) and their voting share shall be determined on the basis of the financial debts owed to them. Voting share shall be based on the proportion of financial debt owed to such financial creditor in relation to the financial debt owed by the Corporate debtor. [Section 5(28)].

On the basis of above provision, A, B and C shall be the members of CoC and their voting share in the CoC shall be in proportion of their debt (i.e. in proportion of 50%, 30% and 20% respectively) to the total debt of the Corporate Debtor (loan amount of Rs. 250 crore under consortium arrangement).

Voting Share in the CoC

The Interim Insolvency Resolution Professional (IIRP) noted total financial debt (Rs. 500 cr) owed by the OLAF Ltd. Therefore, the voting share of A, B & C in the given case shall be as under:

A = (50% X Rs.250 Crore) / Rs.500 Crore = 25%

B = (30% X Rs.250 Crore) / Rs. 500 Crore = 15%

C = (20% X Rs.250 Crore) / Rs. 500 Crore = 10%

25. (MTP-NOV 2020)

The following particulars relate to Star House (P) Limited which has gone into Corporate Insolvency Resolution Process (CIRP): On the basis of the information, lay down the priority order in which the liquidator shall distribute the proceeds under the Insolvency & Bankruptcy Code, 2016. VVVI

S. No.	Particulars	Amount in (Rs.)
1.	Amount realized from the sale of liquidation of Assets	7,00,000
2.	Secured Creditors who has relinquished the security	2,50,000
3.	Unsecured Financial Creditors.	2,00,000
4.	Income Tax Payable within a period of two years preceding the liquidation commencement date.	25,000
5.	Cess Payable to State Government within a period of one year preceding the liquidation commencement date.	10,000
6.	Fees payable to resolution professional.	37,500
7.	Expenses incurred by the resolution professional in running the business of M/s. Star House (P) Limited onGoing concern.	17,500
8.	Workmen salary payable for a period of thirty months Preceding the liquidation commencement date. The workmen salary is equal per month.	1,50,000
9.	Equity Shareholders.	5,00,000

ANSWER

The priority order in which the liquidator shall distribute the proceeds will be as under:

Particulars	Amount (in Rs.)	
Amount realized from the sale of liquidation of assests		**7,00,000**
Less: (i) Fees payable to resolution professional	**37,500**	
(ii) Expenses incurred by the resolution professional in running	**17,500**	**(55,000)**

the business of Star House (P) Ltd. As going conccern		
Balance available		**6,45,000**
Less: (i) Secured Creditors who has relinquished the security	**2,50,000**	
(ii) Workmen salary payable for a period of 24 months preceding the liquidation commencement date { 1,50,000*(24/30)}	**1,20,000**	**(3,70,000)**
Balance Available		**2,75,000**
Less: Unsecured Financial creditor	**2,00,000**	**(2,00,000)**
Balance Available		**75,000**
Less: (i) Income tax payable	**25,000**	
(ii) cess payable to State Government	**10,000**	**(35,000)**
Balance Available		**40,000**
Less: Balance Workmen salary payable (apart for a period of 24 months preceding the liquidation commencement date)[1,50,000 – 1,20,000]	**30,000**	**(30,000)**
Balance Available for Equity Shareholders		**10,000**

26. (Past exam Nov 2020)

Pursuant to Section 33 of the Insolvency and Bankruptcy Code, 2016 (IBC, 2016) a liquidation order was passed against Luci Soya Limited (LSL) (Corporate Debtor) by the Adjudicating Authority (NCLT). Mr. Solanki was appointed as the liquidator by the NCLT. Upon resuming his mantle, Mr. Solanki started collecting claims from all the creditors within the time frame as prescribed in the IBC, 2016. While initiating the liquidation process as per provisions of the IBC, 2016, Mr. Solanki proposed to include the equity shares of one of its subsidiary as part of the liquidation estate in relation to the corporate debtor. Besides this, one of the unsecured financial creditor demanded that, at the time of distribution of liquidation proceeds, his dues may be paid before the government dues are paid. Mr. Solanki also observed that pending legal proceedings against the corporate debtor, 'A' Ltd, an operational creditor, has filed a case with the Arbitral Tribunal praying for an arbitral award against LSL.

On the basis of the above information and in the light of the Insolvency and Bankruptcy Code, 2016, answer the following:

(i) Whether the proposal of Mr. Solanki to include the equity shares of the subsidiary Company of LSL as part of liquidation estate is tenable?

(ii) How should Mr. Solanki deal with the demand of the unsecured financial creditor?

(iii) Whether 'A' Ltd will succeed in its prayer for an arbitral award against LSL?

ANSWER

(i) Liquidation estate: As per section 36 of the Insolvency and Bankruptcy Code, 2016, for the purposes of liquidation, the liquidator shall form an estate of the assets, which will be called the liquidation estate in relation to the corporate debtor.

Liquidation estate shall comprise all liquidation estate assets which shall include any assets over which the corporate debtor has ownership rights, including shares held in any subsidiary of the corporate debtor.

Hence, the proposal of Mr. Solanki to include the equity shares of subsidiary company of LSL as part of liquidation estate is tenable.

(ii) According to section 53 of the IBC, 2016, out of proceeds from the sale of the liquidation assets, financial debts owed to unsecured creditors shall be distributed in priority over the amount due to the Central Government and the State Government. [clauses (d) and (e)]

Hence, Mr. Solanki has to fulfill the demand of unsecured financial creditor, at the time of distribution of liquidation proceeds, to pay his dues before the Government dues are paid.

(iii) Section 33(5) of the Code provides that when a liquidation order has been passed, no suit or legal proceeding shall be instituted by or against the corporate debtor.

The institution of suits or continuation of any pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority.

Hence, Mr. A will not succeed in its prayer for an arbitral award against LSL.

27. (Past exam Nov 2020) VVVVI

Abhi Limited entered into an agreement with Atulya Gas Limited for purchase of natural gas, which is not specified as an essential supply. On failure of Abhi Limited to make payments, Atulya Gas Limited issued notice to Abhi Limited that further supply of gas would be stopped if payments are not made immediately. On further nonpayment, Atulya Gas Limited filed a petition before NCLT for initiating Corporate Insolvency Resolution process against Abhi Limited. On 15th March, 2020 the petition was admitted, on 30th April, 2020, Atulya Gas Limited disconnected gas supply to Abhi Limited for non-payment. As a result of disconnection of gas supply, operations of Abhi Limited came to a halt. The Resolution professional filed a petition to NCLT seeking Atulya Gas Limited to resume the supply of natural gas, as natural gas was an important material for production of electricity by Abhi Limited.
Referring to the provisions of Insolvency and Bankruptcy Code, 2016, answer the following:
(i) When the moratorium period will expire in this case?
(ii) Whether Resolution Professional will be successful in his petition filed with NCLT?

ANSWER
(i) According to section 14 of the IBC, with the admission of an insolvency application and commencement of Corporate Insolvency Resolution process, the Adjudicating authority will declare moratorium period during which no action can be taken against the company or the assets of the company to keep the Company as a going concern.
A calm period for 180 days is declared, during which all suits and legal proceedings etc. against the Corporate Debtor are held in abeyance to give time to the entity to resolve its status. It is called the Moratorium Period.
In the instant case, Atulya Gas Ltd. filed a petition before NCLT for initiating Corporate Insolvency Resolution process against Abhi Ltd. on 15thMarch, 2020. Hence, Moratorium period will expire within 180 days i.e. by 11th September 2020.

(ii) Section 14 also provides some exemptions under Moratorium according to which the supply of essential goods or services to the corporate debtor as may be specified shall not be terminated or suspended or interrupted during moratorium period.
Hence, since as per the agreement between Abhi Limited and Atyulya Gas Limited it's specified that natural gas is not an essential supply for production of electricity. Therefore, resolution professional will not be successful in his petition filed with NCLT to resume the supply of Natural Gas disconnected by Atulya Gas Ltd.

28. (Past exam Jan 2021)

(C) As at 31st March, 2020, XYZ Limited had the following debts:

Creditors Name	Nature of Debt	Amount (INR in Lakhs)
A	Financial Debt	200
B	Financial Debt	250
C	Financial Debt (Related Party) – Not Regulated by the Financial Sector Regulator	150
D	Operational Debt	150
E	Operational Debt	250
Total		1000

Due to impact of heavy losses and liquidity crunch, XYZ Limited could not pay the above debts. Since the debts were overdue for a long time, creditor A filed an application with the Adjudicating Authority (NCLT) to initiate a Corporate Insolvency Resolution Process against XYZ Limited and the application was accepted. Stating the provisions of the Insolvency and Bankruptcy Code, 2016 answer the following with reference to the above financial data:
(i) Who will all form part of the Committee of Creditors ('CoC') from the above list of Creditors?

(ii) Whether the above Operational Creditors have a right to vote in CoC Meeting?
(iii) What is the compulsory agenda to be discussed in the first meeting of CoC ?
(iv) What shall be the quorum of the CoC meeting if it is conducted through video conferencing ?

ANSWER

(i) As per section 21 of the Insolvency and Bankruptcy Code, 2016, the Committee of creditors shall comprise of all financial creditors of a corporate debtor. The Resolution Professional shall identify the financial creditors and constitutes a creditors committee. A related party of the corporate debtor cannot form part of the committee of creditors. In the given case, A & B will form CoC.

(ii) The directors, partners and operational creditor or representative of operational creditors do not have right to vote in the meeting of Committee of Creditors, however, they may attend the meetings of Committee of Creditors. D & E, operational creditors will not have a right to vote in CoC meeting.

(iii) As per section 22 of the Insolvency and Bankruptcy Code, 2016, Committee of Creditors in its first Meeting by majority (not less than 66% of voting shares) appoint Interim Resolution Professional or any other Insolvency Professional to act as Resolution Professional.

(iv) Section 21 of the Insolvency and Bankruptcy Code, 2016 provides of quorum for the meeting of committee of creditors. A meeting of committee of creditors shall quorate if members of the committee of creditors representing at least thirty three percent of the voting rights are present either in person or by video/audio means

29. (RTP NOV 2021)

Jewar Ltd., a diamond manufacturing company, is undergoing Corporate Insolvency Resolution Process (CIRP). The CIRP had initiated on 1st January 2020. Mr. Shubh was acting as the Interim Resolution Professional who was later appointed as Resolution Professional by the Committee of Creditor. Mr. Shubh has been working hard since day 1 to get a resolution plan approved before the last day of the CIRP. However, due to external factors, as on 31st May, 2020, he realized that he is unable to decide as to which resolution plan can be taken to the committee of creditors for approval and also that he will need another 3 months to get a resolution plan approved. You are his partner in an Insolvency Professional Entity. Advise as to:

1. The factors that need to be considered before taking the resolution plan to the committee of creditors
2. Whether Mr. Shubh can seek an extension for completion of the CIRP?

ANSWER

1. Mr. Shubh, the resolution profession will have to consider the following factors while examining the resolution plan before taking it to the Committee of Creditors for approval:

a. Whether the resolution plan provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor
b. Whether the resolution plan provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than higher of:
(i) the amount to be paid to such creditors in the event of a liquidation of the corporate debtor under section 53; or
(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53,
c. Whether the resolution plan provides for the management of the affairs of the Corporate debtor after approval of the resolution plan;
d. Whether the resolution plan provides for the implementation and supervision of the resolution plan
e. Whether the resolution plan contravene any of the provisions of the law for the time being in force
f. Whether the resolution plan confirms to such other requirements as may be specified by the Board.

2. Relevant Provision of the Insolvency and Bankruptcy Code for extension of period for completion of CIRP

As per Section 12, the corporate insolvency resolution process shall be completed within a period of 180 days from the date of admission of the application to initiate such process.
The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond 180 days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of 66% of the voting shares.
On receipt of the application, if the Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within 180 days, it may by order extend the duration of such process beyond 180 days by such further period as it thinks fit, but not exceeding 90 days.
Provided that any extension of the period of corporate insolvency resolution process under this section shall not be granted more than once Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.
In the given case, Mr. Shubh can seek an extension of maximum 90 days by making an application of the National Company Law Tribunal i.e. till 29th August, 2020.

30. (ICAI ADDITIONAL QUESTION FOR PRACTICE)

X Ltd. was intending to initiate voluntarily liquidation proceedings. A declaration was made on affidavit of the some of the directors of the X Ltd. verifying full inquiry of the affairs of the company. They gave the opinion that the company will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation. Analysing the given situation, comment whether X Ltd can initiate voluntary liquidation proceeding in compliance with the conditions given in the Insolvency and Bankruptcy Code, 2016. What are the required documents to be accompanied with the declaration?
Also, state the consequences, where if the articles fixed the period of duration for which company may be carried and that period expires.

ANSWER

Section 59 of the Insolvency & Bankruptcy Code, 2016 empowers a corporate person intending to liquidate itself voluntarily if it has not committed any default to initiate voluntary liquidation proceedings under the provisions of this Code.
Any corporate person registered as a company shall meet the following conditions to initiate a voluntary liquidation process:-

(a) A declaration from majority of the directors of the company verified by an affidavit stating
i. That they have made a full inquiry into the affairs of the company and have formed an opinion that either the company has no debts or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and
ii. That the company is not being liquidated to defraud any person.

(b) The declaration shall be accompanied with the following documents, namely:
i. Audited financial statements and a record of business operations of the company for the previous two years or for the period since its incorporation, whichever is later;
ii. A report of the valuation of the assets of the company, if any, prepared by a registered valuer.

(c) After making the declaration the corporate debtor shall within four weeks -
i. Pass a special resolution at a general meeting stating that the company should be liquidated voluntarily and insolvency professional to act as the liquidator may be appointed.
ii. Pass a resolution at a general meeting stating that the company be liquidated voluntarily as a result of expiry of the period of its duration (fixed by its articles or on the occurrence of any event in respect of which the articles provide that the company shall be dissolved, if any) and appointing an insolvency professional to act as the liquidator.

In the given situations, according to the above provisions, a declaration was made on affidavit of the some of the directors of the X Ltd. verifying full inquiry of the affairs of the company, is not In compliance as the majority was the requirement for initiation of the voluntary liquidation proceedings.

And the further declaration that the company is not being liquidated to defraud any person is not given in the affidavit. The documents to be accompanied with declaration shall be as per the point (b) given above.
Where if the articles fixed the period of duration of continuation and that period expires, X Ltd. After making declaration, shall within 4 weeks pass a resolution at a general meeting stating that the company be liquidated voluntarily as a result of expiry of the period of its duration as fixed by its articles and appointing an insolvency professional to act as the liquidator.

31. **(MTP- NOV 2021)**

Financial creditor initiated CIRP which was admitted by the NCTL. Interim Resolution Professional was appointed. The Interim Resolution Professional (IRP) after collation of all the claims, constituted the Committee of Creditors (CoC) and meeting of the CoC was called on. The expression of interest was called on from the prospective resolution applicants.
One Resolution Applicant named ABC Ltd, expressed its interest in owning the company. The IRP observed that ABC Ltd. is in the array of defaulters as announced by the RBI.
Meanwhile the CoC thought to replace the IRP, since the present IRP was not able to invite sufficient number of prospective resolution applicants.
Based on the above facts, whether CoC can replace the existing IRP with another Resolution Professional (RP)? Also state the manner of replacement of IRP with another RP.

ANSWER

Section 22 of the IBC, 2016 deals with the matter relating to the appointment of resolution professional. It provides that the committee of creditors, may, in the first meeting, by a **majority vote of not less than sixty-six per cent. of the voting share of the financial creditors**, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.
Further, where the committee of creditors resolves to replace the interim resolution professional, it shall file an application before the Adjudicating Authority.
Adjudicating Authority shall forward the name of the resolution professional proposed to the Board for its confirmation and shall make such appointment after confirmation by the Board.
Where the Board does not confirm the name of the proposed resolution professional within ten days of the receipt of the name of the proposed resolution professional, the Adjudicating Authority shall, by order, direct the interim resolution professional to continue to function as the resolution professional until such time as the Board confirms the appointment of the proposed resolution professional.
Thus the CoC can by majority of vote of 66% of the voting shares of financial creditors can replace the existing IRP to another RP in the above stated manner.

32. (MTP- NOV 2021)

The resolution plan of Ankush Ltd. was approved by the Adjudicating Authority under the provisions of the Insolvency and Bankruptcy Code, 2016. As a result of the implementation of the resolution plan, there was change in the entire management of Ankush Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue.
Ankush Ltd. was liable for an offence committed under the provisions of the Prevention of Money Laundering Act, 2002, prior to the commencement of corporate insolvency resolution process, due to which one of its properties was liable to be attached by the Enforcement Director (ED) under the said Act. Such property has been covered under the resolution plan approved by the Adjudicating Authority.
Also, one another property of Ankush Ltd. was liable to be seized under the provisions of the Foreign Contribution Regulation Act, 2010, prior to the commencement of corporate insolvency resolution process. However, such property was acquired by Lavan Ltd. through the corporate insolvency resolution process, covered in the resolution plan.

In the context of aforesaid case-scenario, enumerate whether any actions can be taken against the two aforesaid properties of Ankush Ltd., one of which has been acquired by Lavan Ltd.?

ANSWER

As per the Section 32A(2) of the Insolvency and Bankruptcy Code, 2016, no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority under section 31, which results in the change in control of the corporate debtor to a person, or sale of liquidation assets under the provisions of Chapter III of Part II of this Code to a person, who was not –

(i) a promoter or in the management or control of the corporate debtor or a related party of such a person; or
(ii) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court.
Explanation:- For the purposes of this sub-section, it is hereby clarified that-

(a) an action against the property of the corporate debtor in relation to an offence shall include the attachment, seizure, retention or confiscation of such property under such law as may be applicable to the corporate debtor;
(b) nothing in this sub-section shall be construed to bar an action against the property of any person, other than the corporate debtor or a person who has acquired such property through corporate insolvency resolution process or liquidation process under this Code and fulfils the requirements specified in this section, against whom such an action may be taken under such law as may be applicable.
Here, it is given that, as a result of the resolution plan, there was change in the entire management of Ankush Ltd. and its control has been handed over to persons who have not been its related parties and against whom no legal proceedings are going on under any statue.
Also, both the properties had been covered under the resolution plan approved by the Adjudicating Authority.
It appears from the given facts that conditions as demonstrated in section 32A(2) has been satisfied by Ankush Ltd. and thus, no action can be taken against the property of Ankush Ltd. which was liable to be attached by the Enforcement Director (ED), prior to the commencement of the corporate insolvency resolution process, for an offence committed under the provisions of the Prevention of Money Laundering Act, 2002, by it.

However, the said immunity has been not provided to such a property which has been acquired by a person through corporate insolvency resolution process. So, the property which has been acquired by Lavan Ltd. can be seized under the provisions of the Foreign Contribution Regulation Act, 2010, as there is no bar in doing so, under the provisions of the Insolvency and Bankruptcy Code, 2016.