Questions for practice

Final Old

Paper 4: Corporate and Allied Laws

Question 1

The Articles of Association of Rajasthan Toys Private Limited provide that the maximum number of Directors in the company shall be 10. Presently, the company is having 8 directors. The Board of directors of the said company desire to increase the number of directors to 16. Advise whether under the provisions of the Companies Act, 2013 the Board of Directors 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 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 company, private or a one person company, the maximum number of directors is the same for all types at 15 directors.

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

(i) Alter its Articles of Association under section 14 of the Act, so as to increase the number of directors in the Articles from 10 to 16;

(ii) Approval shall also be taken to be authorised to increase the maximum number of directors to 16 by means of a special resolution of members passed at a duly convened general meeting of the company.

Question 2

ADJ Limited has 10 directors on its board. Two of the directors have retired by rotation at an Annual General Meeting. The place of retiring directors is not so filled up and the meeting has also not expressly resolved 'not to fill the vacancy'. Since the AGM could not complete its business, it is adjourned to a later date. At this adjourned meeting also the place of retiring directors could not be filled up, and the meeting has also not expressly resolved 'not to fill the vacancy'.

Referring to the provisions of the Companies Act, 2013, decide:

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

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

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

Answer

Retiring director – When to be deemed director?

In accordance with the provision of the Companies Act, 2013, as contained in section 152(7)(a) which

provides that if at the annual general meeting at which a director retires and the vacancy is not so filled up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned to same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

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

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

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

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

(iii) Section 152(6)(c) states that 1/3rd of the rotational directors shall retire at every AGM. They retire at the AGM and at its conclusion. Hence, they will retire as soon as the AGM is held. Further, as per section 96 (dealing with annual General Meeting) of the Companies Act, 2013, every company other than a One Person Company shall in each year hold an Annual General Meeting. Hence, it is necessary for the company to hold the AGM, whereby these directors will be liable to retire by rotation.

Question 3

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

(i) Whether M can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?

(ii) Can the power of appointing additional director be exercised by the Annual General Meeting?

(iii) As the Company Secretary of the company what checks would you make after M is appointed as an additional director?

Answer

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

(i) M cannot continue as director till the adjourned annual general meeting, since he can hold the office of directorship only up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. Such an additional director shall vacate his office latest on the date on which the annual general meeting could have been held under Section 96 of the Companies Act, 2013. He cannot continue in the office on the ground that the meeting was not held or could not be called within the time prescribed.

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

(iii) As a Company Secretary, I would put the following checks in place in respect of M's appointment as an additional director:

a. He must have got the Directors Identification Number (DIN);

b. He must furnish the DIN and a declaration that he is not disqualified to become a director under the Companies Act, 2013;

c. He must have given his consent to act as director and such consent has been filed with the Registrar within 30 days of his appointment;

d. His appointment is made by the Board of Directors;

e. His name is entered in the statutory records as required under the Companies Act, 2013.

Question 4

The Board of directors of XYZ Ltd. filled up a casual vacancy caused by the death of Mr. P by appointing Mr. C as a director on 3rd April, 2018 which was subsequently approved by the members in the immediate next general meeting. Unfortunately Mr. C expired on 15th May, 2018 after working about 40 days as a director. The Board now wishes to fill up the casual vacancy by appointing Mrs. C in the forthcoming meeting of the Board. Advise the Board in this regard as per the provisions under the Companies Act, 2013.

Answer

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

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

In view of the above provisions, in the given case, the appointment of Mr. C in place of the deceased director Mr. P was in order. In normal course, Mr. C could have held his office as director up to the date to which Mr. P would have held the same.

However, Mr. C expired on 15th May, 2018 and again a vacancy has arisen in the office of director owing to death of Mr. C who was appointed by the board and approved by members to fill up the casual vacancy resulting from P's demise. Vacancy arising on the Board due to vacation of office by the director appointed to fill a casual vacancy in the first place, does not create another casual vacancy as section 161 (4) clearly mentions that such vacancy is created by the vacation of office by any director appointed by the company in general meeting. Hence, the Board cannot fill in the vacancy arising from the death of Mr. C.

The Board may however appoint Mrs. C as an additional director under section 161 (1) of the Companies Act, 2013 provided the articles of association authorises the board to do so, in which case Mrs. C will hold the office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

Question 5

Mr. John is a director of MNC Ltd., which had accepted deposits from public. The Financial position of MNC Ltd. turned very bad and it failed to repay the deposits which fell due for payment on 10th April, 2017 and such repayment has not been made till 5th May, 2018. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to be held on 6th May, 2018. You are required to state with reference to the provisions of the Companies Act, 2013 whether Mr. John can be appointed as a director of JKL Ltd.

Answer

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

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

Question 6

XYZ Limited is an unlisted public company having a paid-up capital of twenty crore rupees as on 31st March, 2018 and a turnover of one hundred fifty crore rupees during the year ended 31st March, 2018. The total number of directors is thirteen.

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

(i) State the minimum number of independent directors that the company should appoint.

(ii) How many independent directors are to be appointed in case XYZ Limited is a listed company?

Answer

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

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

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

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

In the present case, XYZ Limited is an unlisted public company having a paid-up capital of ₹ 20 crores as on 31st March, 2018 and a turnover of ₹ 150 crores during the year ended 31st March, 2018. Thus, as per the *Companies (Appointment and Qualification of Directors) Rules, 2014*, XYZ Limited shall have at least 2 directors as independent directors.

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

In the present case, XYZ Limited is a listed company and the total number of directors is 13. Hence, in this case, XYZ Limited shall have atleast 5 directors (1/3 of 13 is 4.33 rounded as 5) as independent directors.

The explanation to section 149(4) specifies that any fraction contained in such one-third numbers shall be rounded off as one.

As the explanation to rule 4 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* specifies that for the purpose of the assessment of the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, their existence on the last date of latest audited financial statements shall be taken into account.

In the present case, it is mentioned that paid up capital of XYZ Limited is ₹ 20 crore on 31st March, 2018 and turnover is ₹ 150 crore during the year ended 31st March, 2018. So, it is assumed that 31st March, 2018 is the last date of latest audited financial statements.

Question 7

Advise Super Specialties Ltd. in respect of the following proposals under consideration of its Board of

directors:

(i) Appointment of Managing Director who is more than 70 years of age;

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

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

Answer

(i) 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.

(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 per cent of the net profits of that company for that financial year computed in the manner laid down in section 198. Further, the third proviso to section 197 (1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors or whole-time directors shall not exceed one per cent. of the net profits of the company, if there is a managing or whole-time director or manager; or three per cent 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 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 ₹ 60 Lakhs for the year if the effective capital of the company is negative or upto₹ 5 Crores. In the present case, the proposed remuneration can be paid.

Question 8

Mr. X, a Director of MJV Ltd., was appointed on 1st April, 2013, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31st March, 2017, the company suffered heavy losses. The company was not in a position to pay any remuneration but he was paid ₹50 lacs for the year, as paid to other directors. The effective capital of the company is ₹150 crores. Referring to the provisions of Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X.

Answer

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a 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 pay remuneration to the managerial person not exceeding ₹ 120 Lakhs in the year in case the effective capital of

the company is between ₹ 100 crores to 250 crores. However, the remuneration in excess of ` 120 Lakhs may be paid if the resolution passed by the shareholders is a special resolution.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of ₹ 50 Lacs in the year as remuneration to Mr. X is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of ₹ 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V.

Question 9

Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2013 on a salary of ₹ 12 lakhs per annum with other perquisites. The Board of directors of the company on coming to know of certain questionable transactions, terminated the services of the Managing Director from 1.3.2016. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of ₹ 5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:

(i) The company is bound to pay compensation to Mr. Doubtful and, if so, how much.

(ii) The company can recover the amount of ₹ 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guiding of corrupt practice.

Answer

According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing, Whole-time Director or Manager. 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. Doubtful, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. But, it is not proper on the part of the company to withhold the payment of compensation on the basic of mere allegations. The compensation payable by the company to Mr. Doubtful would be ₹ 25 Lacs calculated at the rate of ₹ 12 Lacs per annum for unexpired term of 25 months.

Regarding adhoc payment of ₹ 5 Lacs, it will not be possible for the company to recover the amount from Mr. Doubtful in view of the decision in case *of Bell vs. Lever Bros. (1932) AC 161* where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him. In that case the Managing Director was initially removed by paying him compensation and later on it was discovered that he had been guilty of breaches of duty and corrupt practices and that he could have been removed without compensation.

Question 10

A and B were appointed as first directors on 4th April, 2016 in Sun Glass Ltd. Thereafter, C, D International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.

(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of ₹50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

Answer

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) **Commission at the rate of 5% of the net profits to its Managing Director, Mr. Kamal**: Part (i) of the second proviso to section 197(1), provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to any one managing director; or whole time director or manager shall not exceed 5 % of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10 % of the net profits to all such directors and manager taken together.

In the present case, since the International Technologies Limited is being managed by a Managing Director, the commission at the rate of 5% of the net profit to Mr. Kamal, the Managing Director is allowed and no approval of company in general meeting is required.

(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of ₹ 50,000 and also commission at the rate of 1 % of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed 2 % of the net profits of the company: Part (ii) of the second proviso to section 197(1) provides that except with the approval of the company in general meeting by a special resolution, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

(A) 1% of the net profits of the company, if there is a managing or whole time director or manager;

(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed for directors other than managing or whole time director is 1% of the net profits of the company because the company is having a managing director also. Hence, if the company wants to fix their remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required by a special resolution.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized:

(1) According to section 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

(i) by the articles of the company, or

(ii) by a resolution or,

(iii) if the articles so require, by a special resolution, passed by the company in general meeting, and

(2) the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

(3) Any remuneration for services rendered by any such director in other capacity shall not be so included if—

(i) the services rendered are of a professional nature; and

(ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bhatt, a director for professional services rendered as software engineer will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

Also, the International Technologies Limited (a listed company) shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed under the *Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014*.

Question 11

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

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

Answer

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

(ii) 1. The Companies Act, 2013 permits a decision of the Board of Directors to be taken by means of a resolution by circulation. Board approvals can be taken in one of the two ways, one by a resolution passed at a Board Meeting and the other, by means of a resolution passed by circulation.

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

(a) the resolution has been circulated in draft, together with the necessary papers, if any,

(b) the draft resolution has been circulated to all the directors, or members of the committee, as the case may be;

(c) the Draft resolution has been sent at their addresses registered with the company in India;

(d) such delivery has been made by hand or by post or by courier, or through prescribed electronic means;

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.

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

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

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

Question 12

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

Answer

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

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

In the given case as no notice, was served on Mr. P and Mr. Q who are the directors of the company, thus, under section 173(4) every officer of the company responsible for the default shall be punishable with fine of ₹ 25,000.

Neither the Companies Act, 2013 nor *the Companies (Meetings of the Board and its Powers) Rules, 2014* lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors as stipulated in the Act. We shall have to go by the provisions of the Act which clearly provide for the notice to be sent to every director failing which the resolutions passed will be invalid. The Supreme Court, in case of *Parmeshwari Prasad vs. Union of India (1974)* has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing. Notice must be given to each director in writing. Hence, even though the directors concerned knew about the meeting, the meeting shall not be valid and resolutions passed at the meeting also shall not be valid.

Question 13

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

Answer

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

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

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

Question 14

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

(i) An interested Director;

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

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

Answer

Notice of Board meeting

(i) Interested director: 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. In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted.

(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.

(iii) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also. 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.

Question 15

Out of the powers exercisable by the Board under section 179, the board wants to delegate to the Managing Director of the company the power to borrow monies otherwise than on debentures. Advise whether such a delegation is possible? Would your answer be different, if the delegation is given 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.

Matters referred to in clauses (d), (e), and (f) above, may be decided by the board by circulation instead of

at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013 vide Notification dated 5thJune 2015.

From the above provisions, it is clear that the power to borrow monies under (d) above, may be delegated to the Managing Director or to the manager or any other principal officer of the company.

Question 16

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

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

(ii) Delegation of Power to the Managing Director of the company to invest surplus funds of the company in the shares of some companies.

Answer

(i) According to clause (b) of section 179(3), The Board of Directors of a company shall exercise the power to authorise 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 authorising the buy-back:

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,

Thus, we can say that in the case of buy-back of shares of the Company, for the first time, upto 10% of the 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.

(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 meetings of the Board.

The board may under the proviso to section 179(3) of the Companies Act, 2013 delegate the power to invest the funds of the company by a Board Resolution passed at a duly convened Board Meeting. However, the investment in shares of other companies will be governed by the applicable provisions of the Companies Act, 2013 (i.e. section 186 of the Companies Act, 2013). Since the investment of funds is governed by section of the Companies Act, 2013, thus, specific provisions of section 186 will be applicable for such investment. According to section 186(5), No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained. Thus, a unanimous resolution of the Board is required. Section 186 does not provide for delegation. Hence, the proposed delegation of power to the Managing Director to invest surplus funds of the company in the shares of some other companies, is not in order.

Question 17

An Audit Committee of a Listed Company constituted under section 177 of the Companies Act, 2013 submitted its report of its recommendation 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 be Board resort to?

Answer

(a) As per Section 177(2) and (3) of the Companies Act, 2013 an audit committee must be formed within a year of the commencement of the Act or within a year of the incorporation of a company as the case may be, and will consist of at least 3 directors out of which the independent directors shall constitute the majority.

Under section 177(8) the Board's Report which is laid before a general meeting of the company under section 134 (3) where the financial statements of the company are placed before the members, must disclose the composition of the audit committee and also where the Board has not accepted any recommendations of the audit Committee the same shall be disclosed alongwith the reasons therefor. Therefore, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and with legitimate reasons.

(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) placed before a general meeting of the company.

Question 18

MNC Ltd., a company, whose paid up capital was ₹ 4.00 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 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, the majority of 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 non acceptance of any recommendations of the Audit Committee with reasons therefor."

Question 19

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

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

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

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*

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

(i) 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, upto an amount calculated as follows:

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

(ii) 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:

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

Particulars	₹
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

Hence, the maximum amount that can be donated by the Board of Directors to a genuine charitable fund by PTL Ltd during the financial year 2018 -19 will be ₹ 1,10,000 without seeking the approval of the shareholders in a general meeting.

Question 20

Following is data relating to Prince Company Limited:

Authorised Capital (Equity Shares)	*₹ 100 crores*
Paid – up Share Capital	*₹ 40 crores*
General Reserves	*₹ 20 crores*
Debenture Redemption Reserve	*₹ 10 crores*
Provision for Taxation	*₹ 5 crores*
Securities premium	*₹ 2 crores*
Loan (Long Term)	*₹ 10 crores*
Short Term Creditors	*₹ 3 crores*

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

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, free reserves and securities premium. Such borrowing shall not include temporary loans obtained from the company's bankers in ordinary course of business.

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

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

Particulars	₹
Paid up Share Capital	40 Crore
General Reserve (being free reserve)	20 Crore
Debenture Redemption Reserve (This reserve is not to be considered since it	----

is kept apart for specific purpose of debenture redemption)	
Securities Premium	2 Crore
Aggregate of paid up capital, free reserve and securities premium	62 Crore
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	62 Crore
Less: Amount already borrowed as Long term loan Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting.	10 Crore 52 Crore

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

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

[**Note:** In case of private companies section 180 shall not apply vide Notification no. G.S.R. 464(E), dated 5th June 2015]

Question 21

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

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

Whether the contention of members against the non-compliance of members' decision by the directors is tenable?

Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?

Answer

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

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

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

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

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

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

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

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

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

Question 22

(i) R Ltd. wants to constitute an Audit Committee. Draft a board resolution covering the following matters [compliance with Companies Act, 2013 to be ensured].

(1) Member of the Audit Committee

(2) Chairman of the Audit Committee

(3) Any 2 functions of the said Committee

(ii) What would be the minimum likely turnover or capital of this company?

(iii) What is the role of the Audit Committee vis a vis the statutory auditor when the company wishes to engage them to perform certain engagements not restricted under Section 144?

Answer

(i) **Audit Committee – Board's Resolution:**

"Resolved that pursuant to Section 177 of the Companies Act, 2013 an Audit Committee consisting of the following Directors be and is hereby constituted.

1. Mr. ---- Independent Director
2. Mr. ---- Independent Director
3. Mr. ----Independent Director

4. Mr. ---- Independent Director

5. Mr. ---- Managing Director.

6. Mr. ---- Chief Financial Officer"

"Further resolved that the Chairman of the Audit Committee shall be elected by its members from amongst themselves and shall be an independent director'.

"Further resolved that the quorum for a meeting of the Audit committee shall be three directors (other than the Managing Director), out of which at least two must be independent directors".

"Resolved further that the Audit Committee shall perform all the functions as laid down in section 177(4) of the Companies Act, 2013 including but not limited to:

a. make the recommendation for appointment, remuneration and terms of appointment of the auditors of the company;

b. review and monitor the independence and performance of auditors of the company and the effectiveness of the audit process".

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".

(ii) Rule 6 of the *Companies (Meetings of Board and its Powers) Rules*, 2014 have prescribed that the following classes of companies shall constitute Audit Committee:

(a) all public companies with a paid up capital of 10 crore rupees or more;

(b) all public companies having turnover of 100 crore rupees or more;

(c) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Hence, in the present question, the likely turnover shall be ₹ 100 crore or more or capital shall be ₹ 10 crore or more.

(iii) According to section 177(5), the Audit Committee is empowered to:

(1) call for the comments of the auditors about:

(A) internal control systems,

(B) the scope of audit, including the observations of the auditors,

(C) review of financial statement before their submission to the Board,

(2) discuss any related issues with the internal and statutory auditors and the management of the company.

Question 23

Provide various grounds on which the investigation is assigned to Serious Fraud Investigation Office?

Answer

As per section 212 of the Companies Act, 2013, the Central Government may assign the investigation into affairs of a company to the Serious Frauds Investigation Office on the basis of an opinion formed from the following:

a) After the inspection of books of account or papers or inquiry the Registrar shall submit a written report to the Central Government. The report may recommend the need for further investigation along with reasons in support. The Central Government on receipt of such report can order an investigation under Serious

Frauds Investigation Office.

b) The company may pass a special resolution and can request Central Government to investigate into the affairs of the company.

c) The Central Government can order investigation under Serious Frauds Investigation Office, in public interest.

d) The departments Central Government and State Governments can request for investigation under Serious Frauds Investigation Office.

Question 24

Discuss the powers of Inspectors regarding investigation into affairs of related companies.

Answer

Section 219 states that, if the inspector appointed under Sections 210, 212 or 213 to investigate into the affairs company considers it necessary for the purposes of the investigation to investigate, he can do the investigation of the affairs of other related companies or body corporate with the prior approval of the Central Government.

- **Holding or Subsidiary Company:** which is or has been at the relevant time been the company's subsidiary or holding or subsidiary of its holding company;
- **Related Party:** which is or has been at the relevant time been managed by any person as a managing director or manager who is or was at the relevant time the managing director or the manager of the company;
- **Deemed Control:** whose Board of Directors' comprises nominees of the company or is accustomed to act in accordance with the directions of the company or any of its directors; or
- **In Employment of Company:** in case any person is or has at any relevant time been the company's managing director or manager or employee.

The results of the investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Question 25

A group of creditors of XYZ Limited makes a complaint to the Registrar of Companies, Gujarat alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 11 A.M. on 06th June, 2018 and the registrar has attempted to enter the premise of company but has been denied by the company, due to not having order from special court.

Is the contention of company being valid in terms of Companies Act, 2013?

Answer

Section 209, of the Companies Act, 2013 states that, if the Registrar has **reasonable ground to believe** that the books and papers of

- A company or
- relating to the key managerial personnel or
- any director or
- auditor or

- company secretary in practice if the company has not appointed a company secretary

are likely to be destroyed, mutilated, altered, falsified or secreted he may, **after obtaining an order from the special court for the seizure of such books and papers**,

a) enter with such assistance as may be required and search the place where such books or papers are kept; and

b) seize such books and papers as he considers necessary after allowing the company to take copies or extracts there from.

According the above provisions the registrar may enter, search and seize the books only after obtaining an order from the Special Court.

In the given scenario, the registrar has failed to obtain permission from the special court so, he is not authorized to enter the premises of the company and seize the books of accounts of XYZ Limited. Hence, the contention of the XYZ Limited is valid in law.

Question 26

Mr. Atul is an employee of the company ABC Limited and investigation is going on him under the provisions of Companies Act, 2013. The company wants to terminate the employee on the ground of investigation is going against him. They have filed the application to tribunal for approval of termination. Company has not received any reply from the tribunal within 30 days of filling an application. The company consider it as a deemed approval and terminated Mr. Atul.

- *Is the contention of company being valid in law?*
- *What is remedy available to Mr. Atul?*
- *What is remedy available to Mr. Atul, if reply of Tribunal has been received within 30 days of application?*

Answer

The provision of Section 218 states that, the company shall require to take approval of the tribunal before taking action against the employee if there is any pendency of any proceedings against any person concerned in the conduct and management of the affairs company.

The company shall require approval in the following circumstances:

- discharge or suspension of an employee; or
- punishment to an employee by dismissal, removal, reduction in rank or otherwise; or
- change in the terms of employment to the disadvantage of employee(s);

The Tribunal shall notify its objection to the action proposed in writing.

In case, the company other body corporate or person concerned does not receive the approval of the Tribunal within 30 days of making the application, it may proceed to take the action proposed against the employee. That means it can be consider as a deemed approval by the tribunal.

Appeal to the Appellate Tribunal

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of 30 days of the receipt of the notice of the objection, refer an appeal to the Appellate Tribunal in such manner and on payment of fees of INR 1,000 as per the schedule of Fees.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

- Yes, the termination of Mr. Atul made by the company is totally valid in law and company can do so by considering deemed approval of tribunal.
- In this scenario, Mr. Atul has not any remedy available. As per the provision of the law appeal to the appellate tribunal can be made only if the person is dissatisfied with the objection raised by the tribunal. Hence, in this case the tribunal has not replied Mr. Atul cannot refer an appeal to Appellate Tribunal.
- In this case, Mr. Atul can refer and appeal to appellate tribunal within 30 days of the receiving letter of objection raised by the tribunal and with payment of Fees on Rs. 1,000 as per schedule of Fees.

Question 27

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.

Question 28

Mr. Madhyam, was appointed as an Interim resolution professional during the Corporate Insolvency Resolution Process. What are the duties to be performed by Mr. Madhyam in the given capacity?

Answer

According to Section 18 of IBC, 2016, Mr. Madhyam as an Interim Resolution Professional shall perform the following duties:

(a) collect all information relating to the assets, finances and operations of MMPL including information relating to:

- Its business operations for the previous two years;
- Its financial and operational payments for the previous two years;
- A list of assets and liabilities of MMPL as on the initiation date; and
- Other specified matters;

(b) receive and collate all the claims submitted by PNB and other creditors, pursuant to the public announcement made by him under sections 13 and 15;

(c) constitute a committee of creditors;

(d) monitor the assets of MMPL and manage its operations until a Resolution Professional (RP) is appointed by the committee of creditors;

(e) file information collected with the information utility, if necessary (not applicable in the present case study); and

(f) take control and custody of the assets over which MMPL has ownership rights like plot, factory building, debtors, etc.

(g) perform such other duties as may be specified by IBBI.

Question 29

What are the possible actions which can be taken against persons / properties involved in Money Laundering?

Answer

Following actions can be taken against the persons involved in Money Laundering:-

(a) Attachment of property under Section 5, seizure/ freezing of property and records under Section 17 or Section 18. Property also includes property of any kind used in the commission of an offence under PMLA, 2002 or any of the scheduled offences.

(b) Persons found guilty of an offence of Money Laundering are punishable with imprisonment for a term which shall not be less than three years but may extend up to seven years and shall also be liable to fine [Section 4].

(c) When the scheduled offence committed is under the Narcotics and Psychotropic substances Act, 1985 the punishment shall be imprisonment for a term which shall not be less than three years but which may extend up to ten years and shall also be liable to fine.

(d) The prosecution or conviction of any legal juridical person is not contingent on the prosecution or conviction of any individual.

Question 30

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

Answer

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

- 2 or more small companies
- a holding company and its wholly-owned subsidiary company. If 100% of its share capital is held by the

holding company, except the shares held by the nominee or nominees to ensure that the number of members of subsidiary company is not reduced below the statutory limit as provided in section 187

- such other class or classes of companies as may be prescribed.

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

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

Question 31

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

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

Answer

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

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

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

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

Question 32

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

Answer

As per section 230 (6), of the Companies Act, 2013 where majority of persons at a meeting held

representing 3/4th in value, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order. The majority of person representing 3/4th Value shall be counted of the following:

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

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

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

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

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

Question 33

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

Answer

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

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

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

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

Question 34

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

Answer

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

100 members; or

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

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

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

₹ 5,00,00,000 equity share capital held by 500 members

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

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

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

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

100 members; or

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

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

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

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

Question 35

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

Answer

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

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

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

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

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

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

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

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

Question 36

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

Answer

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

Question 37

The Annual General Meeting of ABC Limited declared a dividend at the rate of 30 percent payable on paid up equity share capital of the Company as recommended by Board of Directors on 30th April, 2018. But the Company was unable to post the dividend warrant to Mr. Ranjan, an equity shareholder of the Company, up to 30th June, 2018. Mr. Ranjan filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for default period. Decide in the light of provisions of the Companies Act, 2013, whether Mr. Ranjan would succeed? Also state the directors' liability in this regard under the Act.

Answer

Section 127 of the Companies Act, 2013 lays down the penalty for non - payment of dividend within the prescribed time period. Under section 127 where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend:

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

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

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

Question 38

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

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

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

Answer

According to section 124 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or claimed within 30 days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

Further, according to section 127 of the Companies Act, 2013, where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, is liable for the punishment under the said section.

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

(i) 1. Since, declared dividend has not been paid or claimed within 30 days from the date of the declaration to any shareholder entitled to the payment of the dividend, the company shall, within 7 days from the date of expiry of the said period of 30 days, transfer the total amount of dividend which remains unpaid or unclaimed to a special account to be opened by the company in that behalf in any scheduled bank to be called the Unpaid Dividend Account.

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

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

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

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

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

Question 39

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

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

Answer

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

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

Question 40

Star Ltd. declared and paid dividend in time to all its equity holders for the financial year 2018-19, except in the following two cases:

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

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

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

Answer

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

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

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

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

Question 41

The Board of directors of Bharat Ltd. has a practical problem. The registered office of the company is situated in a classified backward area of Maharashtra. The Board wants to keep its books of account at its corporate office in Mumbai which is conveniently located. The Board seeks your advice about the feasibility of maintaining the accounting records at a place other than the registered office of the company. Advise.

Answer

According to section 128(1) of the Companies Act, 2013, every company is required to prepare and keep the books of accounts and other relevant books and papers and financial statement for every financial year which give a true and fair view of the state of the affairs of the company, including that of its branch office or offices,

if any, and explain the transactions effected both at the registered office and its branches and such books shall be kept on accrual basis and according to the double entry system of accounting.

The proviso to section 128(1) further provides that all or any of the books of account aforesaid and other relevant papers may be kept at such other place in India as the Board of Directors may decide and where such a decision is taken, the company shall, within seven days thereof, file with the Registrar a notice in writing giving the full address of that other place. Further company may keep such books of accounts or other relevant papers in electronic mode as per the Rule 3 of the *Companies (Accounts) Rules, 2014*.

Therefore, the Board of Bharat Ltd. is empowered to keep its books of account at its corporate office in Mumbai by following the above procedure.

Question 42

The Board of Directors of Vishwakarma Electronics Limited consists of Mr. Ghanshyam, Mr. Hyder (Directors) and Mr. Indersen (Managing Director). The company has also employed a full time Secretary.

The Profit and Loss Account and Balance Sheet of the company were signed by Mr. Ghanshyam and Mr. Hyder. Examine whether the authentication of financial statements of the company was in accordance with the provisions of the Companies Act, 2013?

Answer

Under section 134(1) of the Companies Act, 2013 the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:

(a) The chairperson of the company where he is authorised by the Board; or

(b) Two directors out of which one shall be managing director, if any, and

(c) the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed.

In the instant case, the Balance Sheet and Profit and Loss Account have been signed by Mr. Ghanshyam and Mr. Hyder, the directors. In view of Section 134(1) of the Companies Act, 2013, if there is a Managing Director, he must be one of the two directors to sign the financial statements. Hence, Mr. Indersen, the Managing Director should be one of the two signing directors. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit and Loss Account.

Question 43

ABC Limited has on its Board, four Directors viz. W, X, Y and Z. In addition, the company has Mr. D as the Managing Director. The company also has a full time Company Secretary, Mr. Wise, on its rolls. The financial statements of the company for the year ended 31st March, 2018 were authenticated by two of the directors, Mr. X and Y under their signatures.

Referring to the provisions of the Companies Act, 2013:

(i) Examine the validity of the authentication of the Balance Sheet and Statement of Profit & Loss and the Board's Report.

(ii) What would be your answer in case the company is a One Person Company (OPC) and has only one Director, who has authenticated the Balance Sheet and Statement of Profit & Loss and the Board's Report?

Answer

Under section 134(1) of the Companies Act, 2013 the financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board by at least:

(a) The chairperson of the company where he is authorised by the Board; or

(b) Two directors out of which one shall be managing director, if any, and

(c) the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed.

In case of a One Person Company, the financial statements shall be signed by only one director, for submission to the auditor for his report thereon.

(i) In the given case, the Balance Sheet and Profit & Loss Account have been signed by Mr. X and Mr. Y, the directors. In view of the provisions of Section 134 (1), the Managing Director Mr. D should be one of the two signatories. Since the company has also employed a full time Secretary, he should also sign the Balance Sheet and Profit & Loss Account. Therefore, authentication done by two directors is not valid.

(ii) In case of OPC, the financial statements should be signed by one director and hence, the authentication is in order.