# *SEBI Act*

***Question-1***

***Mr. Clever who is registered as an Intermediary fails to enter into an agreement with his client and hence penalised by SEBI under section 15B of the SEBI Act. Advise Mr. Clever as to what remedies are available to him against the order of SEBI.***

**Answer.**

**(i). Remedies against SEBI order:** Section 15B of the Securities and Exchange Board of India Act, 1992 lays down that if any person, who is registered as an intermediary and is required under this Act or any rules or regulations made there under, to enter into an agreement with his client, fails to enter into such agreement, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore rupees, whichever is less. Mr. Clever has been penalised under the above mentioned provision. Two remedies are available to Mr. Clever in this matter:-

(i) **Appeal to the Securities Appellate Tribunal :** Section 15 T of the SEBI Act, 1992 provides that any person aggrieved by an order of the Board made, on and after the commencement of the Security Laws (Second Amendment) Act, 1999, under this Act or the rules or regulations made there under may prefer an appeal to a Securities Appellate Tribunal having jurisdiction in the matter.

Such appeal shall be filed within a period of 45 days from the date on which a copy of the order made by the Board is received and it shall be in such form and be accompanied by such fee as may be prescribed. However, the Tribunal may entertain an appeal after the expiry of the said period if it is satisfied that there was sufficient cause for not filing it within the said period. The Tribunal may, after giving the parties an opportunity of being heard, pass such orders as it thinks fit, confirming, modifying or setting aside the order appealed against.



(ii) **Appeal to the Supreme Court:** Section 15 Z of the SEBI Act, 1992 provides that any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of communication of the decision or order to him on any question or fact or law arising out of such order. The Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding 60 days.

***SEBI (Issue of Capital and Disclosure) Requirements***

***Question-1***

***Explain clearly the meaning of the term "Green shoe option" in relation to a public company going for public offer of equity shares. What disclosures is such a company required to make in the draft red herring prospectus in accordance with SEBI (Issue of Capital and Disclosure) Requirements?***

**Green Shoe Option"** means an option of allotting equity shares in excess of the equity shares offered in the public issue as a post-listing price stabilizing mechanism; [Regulation 2(o)]

**Price stabilisation through green shoe option. (Regulation 45)**

(1) An issuer making a public issue of specified securities may provide green shoe option for stabilising the post listing price of its specified securities, subject to the following:

(a) the issuer has been authorized, by a resolution passed in the general meeting of shareholders approving the public issue, to allot specified securities to the stabilising agent, if required, on the expiry of the stabilisation period;

(b) the issuer has appointed a merchant banker or book runner, as the case may be, from amongst the merchant bankers appointed by the issuer as a stabilising agent, who shall be responsible for the price stabilisation process;

(c) prior to filing the draft offer document with the Board, the issuer and the stabilising agent have entered into an agreement, stating all the terms and conditions relating to the green shoe option including fees charged and expenses to be incurred by the stabilising agent for discharging his responsibilities;

(d) prior to filing the offer document with the Board, the stabilising agent has entered into an agreement with the promoters or pre-issue shareholders or both for borrowing specified securities from them in accordance with clause (g) of this sub-regulation, specifying therein the maximum number of specified securities that may be borrowed for the purpose of allotment or allocation of specified securities in excess of the issue size (hereinafter referred to as the "over- allotment"), which shall not be in excess of fifteen per cent. of the issue size;

(e) subject to clause (d), the lead merchant banker or lead book runner, in consultation with the stabilising agent, shall determine the amount of specified securities to be over-allotted in the public issue;

(f) the draft and final offer documents shall contain all material disclosures about the green shoe option specified in this regard in **Part A of Schedule VIII**;



(g) in case of an initial public offer pre-issue shareholders and promoters and in case of a further public offer pre-issue shareholders holding more than five per cent. specified securities and promoters, may lend specified securities to the extent of the proposed over- allotment;

(h) the specified securities borrowed shall be in dematerialised form and allocation of these securities shall be made pro-rata to all successful applicants.

(2) For the purpose of stabilisation of post-listing price of the specified securities, the stabilising agent shall determine the relevant aspects including the timing of buying such securities, quantity to be bought and the price at which such securities are to be bought from the market.

(3) The stabilisation process shall be available for a period not exceeding thirty days from the date on which trading permission is given by the recognised stock exchanges in respect of the specified securities allotted in the public issue.

(4) The stabilising agent shall open a special account, distinct from the issue account, with a bank for crediting the monies received from the applicants against the over- allotment and a special account with a depository participant for crediting specified securities to be bought from the market during the stabilisation period out of the monies credited in the special

bank account.

(5) The specified securities bought from the market and credited in the special account with the depository participant shall be returned to the promoters or pre-issue shareholders immediately, in any case not later than two working days after the end of the stabilization period.

(6) On expiry of the stabilisation period, if the stabilising agent has not been able to buy specified securities from the market to the extent of such securities over-allotted, the issuer shall allot specified securities at issue price in dematerialised form to the extent of the shortfall to the special account with the depository participant, within five days of the closure of the stabilisation period and such specified securities shall be returned to the promoters or pre-issue shareholders by the stabilising agent in lieu of the specified securities borrowed from them and the account with the depository participant shall be closed thereafter.

(7) The issuer shall make a listing application in respect of the further specified securities allotted under sub-regulation (6), to all the recognised stock exchanges where the specified securities allotted in the public issue are listed and the provisions of Chapter VII shall not be applicable to such allotment.

(8) The stabilising agent shall remit the monies with respect to the specified securities allotted under sub-regulation (6) to the issuer from the special bank account.

(9) Any monies left in the special bank account after remittance of monies to the issuer under sub- regulation (8) and deduction of expenses incurred by the stabilising agent for the stabilisation process shall be transferred to the Investor Protection and Education Fund established by the Board and the special bank account shall be closed soon thereafter.

(10) The stabilising agent shall submit a report to the stock exchange on a daily basis during the stabilisation period and a final report to the Board in the format specified in **Schedule XII**.

(11) The stabilising agent shall maintain a register for a period of at least three years from the date of the end of the stabilisation period and such register shall contain the following particulars:

(a) The names of the promoters or pre-issue shareholders from whom the specified securities were borrowed and the number of specified securities borrowed from each of them;

(b) The price, date and time in respect of each transaction effected in the course of the stabilisation process; and

(c) The details of allotment made by the issuer on expiry of the stabilisation process.



***3. Securities Contracts (Regulation) Act, 1956***

***(i) The shares of MLM Ltd. were listed in Cochin Stock Exchange. The stock exchange delists the shares of the company. The aggrieved company approaches you to know the remedy available to the company. Give your suggestion to the company keeping in view the provision of the Securities Contracts (Regulation) Act, 1956.***

***(i) M/s AB & Company, a member of a recognised stock exchange proposes to buy and sell shares of a particular company on behalf of investors as well as on their own account. They seek your advice as to restrictions, if any, under Securities Contracts (Regulation) Act, 1956 for dealing***

***in securities on their own account. Advise.***

**Answer**

**(i)** Section 21A of Securities Contracts (Regulation) Act, 1956 contains the provision relating to delisting of securities. As per this section

(1) A recognized Stock Exchange may delist the securities after recording reasons therefor from any recognized stock exchange on any ground or grounds as may be prescribed under this Act.

(2) The Securities of a company shall not be delisted unless the company concerned has been given a reasonable opportunity of being heard.

(3) A listed company may file an appeal before the Securities Appellate Tribunal (SAT) against the decision of the recognized stock exchange delisting the securities within fifteen days from the date of the decision of recognized stock exchange delisting the securities.

(4) Securities Appellate Tribunal may, if it is satisfied that the company was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period of not exceeding one month.

So here, the company may make an appeal to the Securities Appellate Tribunal against the delisting within fifteen days or such extended period not exceeding one month after showing sufficient cause of not filing within fifteen days.

**(ii)**

**Members not to act as principals in certain circumstances**: Members of stock exchange normally carry out transactions on behalf of investors and hence principal agent relationship exists. A Member can enter into transaction as principal with another member of the Exchange only. If he desires to enter into contract as principal with a non-member, then he has to get written consent from such person to act as principal. Contract note should indicate that he is acting as principal [Section 15, Securities Contract (Regulation) Act, 1956].

Where the member has secured the consent of such person other wise than in writing he shall secure written confirmation by such person or such consent within three days from the date of the contract [Proviso to Section 15].

Spot delivery contracts are outside the preview of section 15 (Section 18).

AB & Co, stock broker must bear in mind the above restrictions while entering into any transaction as principal with a non member.

***Foreign Exchange Management Act, 1999***

***1.***

***(i) Tomco Ltd., a vehicles manufacturing company in India has received an order from a transport company in Italy for supply of 100 Trucks on lease. You are required to state, how the said Tomco Ltd. can accept such an order.***

***(ii) Referring to the provisions of the Foreign Exchange Management Act, 1999, state the kind of approval required for the following transactions:***

***a. M requires U.S. $ 5,000 for remittance towards hire charges of transponders.***

***b. D requires U.S. $ 14,000 per annum for donation to Mr. White in U.S.A.***

***c. P requires U.S. $ 2,000 for payment related to call back services of telephones.***

***d. XYZ Limited, a company incorporated in India under the Companies Act,1956, wants to withdraw U.S. $ 5,00,000, for short-term credit to its overseas office situated in Australia.***

**Answer.(i).**

"Export," means the taking out of India to a place outside India any goods (Section 2(1) of Foreign Exchange Management Act, 1999). Hence sending 100 trucks on lease to Italy is an 'export' within the meaning of Section 2(1).

Under provisions of section 7 of the Foreign Exchange Management Act, 1999 rules have been made governing export of goods and services. Regulation 14-A of the Foreign Exchange Management (Export of Goods and Services) Regulations, 2000 prescribes that no person shall, except with prior permission of the Reserve Bank of India, take or send out by land, sea or air any goods from India to any place outside India on lease or hire or under any arrangement or in any other manner other than sale or disposal of such goods.

Based on the above provisions, it can be concluded that if the company, namely, Tomco Ltd. wants to accept the order for despatching 100 trucks to Italy on lease, it has to take prior permission of the Reserve Bank of India.

**(ii)**

Under section 5 of the Foreign Exchange Management Act, 1999, and Rules relating thereto, some current account transactions require prior approval of the Central Government, some others require the prior approval of the Reserve Bank of India, some are free transactions and some others are prohibited transactions. Accordingly,



(a) It is a current account transaction, where M is required to take approval of the Central Government for drawal of foreign exchange for remittance of hire charges of transponders.

(b) It is a current account transaction, which requires RBI's prior approval for donating US $ 14,000 per annum to Mr. White in U.S.A., as the donation amount exceeds the ceiling of US $ 10,000 per annum per beneficiary.

(c) Withdrawal of foreign exchange for payment related to call back services of telephone is a prohibited transaction. Hence, Mr. P will not succeed in acquiring US $ 2,000 for the said purpose.

(d) Here, XYZ Limited has to take prior approval of the RBI for withdrawing US $5,00,000 for short-term credit to its overseas office situated in Australia.

***The Competition Act, 2002***

***1. (i)***

***P Ltd. and Q Ltd. both dealing in chemicals and fertilizers have entered into an agreement to jointly promote the sale of their products. A complaint has been received by the Competition Commission of India (CCI) starting that the agreement between the two is anti-competitive and against the interests of others in the trade. Examine with reference to the provisions of the Competition Act, 2002, what are factors the CCI will take into account to determine whether the agreement in question will have any appreciable adverse effect on competition in the market.***

***(ii)***

**Mr. ZPM was appointed as a Member of the Competition Commission of India by Central Government. He has a professional experience in international business for a period of 12 years, which is not a proper qualification for appointment of a person as member. Pointing out this defect in the Constitution of Commission, Mr. YKJ, against whom the commission gave a decision, wants to invalidate the proceedings of the commission. Examine with reference to the provisions of the Competition Act,2002 whether Mr. YKJ will succeed……**

**Answe**

**(i)Factors determining appreciable adverse effect on competition**: The Competition Commission of India (CCI), while determining whether an agreement is anti-competitive under section 3 of the competition Act, 2002, will take into account the following factors.

a) creation of barriers to new entrants in the market
b) driving existing completions out of the market.
c) foreclosure of competition by hindering entry into the market. (d) accrual of benefits to consumers.
d) improvements in production or distribution of goods or provision of services and
e) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

**(ii)** As per section 15 of Competition Act 2002 any act or proceeding of the Commission shall not be invalidated merely on the ground of:

a) any vacancy in, or any defect in the constitution of the Commission; or
b) any defect in the appointment of a person acting as a Chairperson or as a member; or
c) any irregularity in the procedure of the Commission not affecting the merits of the case.



Here in this case Mr. ZPM should have professional qualification of not less than 15 years as per section 8 of the Act but this disqualification will not invalidate the proceeding of the Commission.

**Interpretation of Statutes, Deeds and Documents**

**1**

**(i) Explain the rules relating to interpretation of the terms 'subject to' and 'notwithstanding' used in the provisions of an Act. State the effect of the term 'notwithstanding anything contained in this Act' used in section 408 of the Companies Act empowering the Central Government to prevent oppression or mismanagement.**

**(ii) What do you understand by the term 'Preamble" and how does it help in interpretation of a statute?**

**(i)**

**Interpretation of the terms 'notwithstanding' and 'subject to':** The word 'notwithstanding anything contained' characterise the non obstante clause. It is generally included to give an overriding effect to the clause over the other. If there is any inconsistency or departure between the non obstante clause and another

provision, it is the non obstante clause which will prevail *(K. Parasuramaiah v. Pakari Lakshman, A/R 1965 AP 220).*

But the word 'subject to' conveys the idea of a provision yielding place to another provision or provisions to which it is made 'subject to'. Hence the effect of non obstante clause (i.e. notwithstanding) is the opposite of a provision which states 'subject to'.

Section 408 of the Companies Act, 1956 opens with the words 'notwithstanding anything contained in this Act. This is a non obstante clause which vests overriding powers in the Government to nominate directors to prevent mismanagement or oppression *(Oriental Industrial Investment Corporation Ltd vs. Union of India (1981) 52 Com cases 487, 493 (Del)).* This expression indicates that the appointment of directors under this section is not to be controlled by the maximum number or other proportion, if any, fixed by any provisions of the Act. Further, they cannot be removed by the company at general meeting under section 284 of the Companies Act.

**(ii)**

**Preamble:** The "Preamble" expresses the scope, object and purpose of the Act. It may recite the ground and the cause making a statue and the evil, which is sought to be remedied by it. It is a part of the statute and can legitimately be used for construing it. However, it does not over-ride the plain provisions of the Act, but if the wording of the statute gives rise to the doubts as to its proper construction, e.g., where the words or phrase have more than one meaning and a doubt arises as to which of the two meanings is intended in the Act, then the Preamble can and ought to be referred to in order to arrive at the proper construction.



# Banking Regulation Act, 1949

**1. (i) The Board of directors of VDV Ltd., a banking 'company incorporated in, India, for the accounting year ended 31-3-2010 transferred 15% of its net profit to its Reserve Fund. Certain shareholders of the company object to the above Act .of the Board of Directors on the ground that it is violative of the provisions, of the Banking Regulation Act, 1949. Examine the provision of Banking' Act and decide:**

**(a) Whether contention of the Shareholders is tenable.**

**(b) Would your answer be still the same in case the Board of Directors transfer 30% of the company's net profits to Reserve Fund.**

**(i).** In accordance with the provisions of the Banking Regulation Act, 1949 as contained in section 17, every banking company incorporated in India must create a reserve fund and transfer a sum equal to not less than 20% of its net profits. However, Central Government is empowered to exempt from this requirement on the recommendation of the RBI. Such exemption will be allowed only:

1 when the amount in the reserve fund and the share premium account are equal to the paid-up share capital of the banking company.

2. when the Central Govt. feels that its paid-up share capital and reserves are adequate to safeguard the interest of the depositors.

If the banking company appropriates any sum from the Reserve Fund or the Share Premium account, it must be reported to RBI within 21 days explaining the

circumstances leading to such appropriation.

Therefore, applying the above provisions:

1. Contention of share holders shall be tenable since the %age of transfer of profits to Reserve Fund is lower than statutory limits, as provided in the Act.
2. In the second case the contention of shareholders shall not be tenable, since 30% is more than the minimum statutory limit of 20% of the net profits.

**SRFAESI Act, 2002**

**(i) RST Ltd. is a securitization and reconstruction company under SRFAESI Act, 2002. The certificate of registration granted to it was cancelled. State the authority which can cancel the registration and the right of RST Ltd. against such cancellation.**

**(i) Cancellation of Certificate of Registration under SRFAESI Act, 2002:** The Reserve Bank of India may cancel a certificate of registration granted to a securitisation and reconstruction company for the reasons stated in Section 4 of SRFAESI Act, 2002.

RST Ltd., can prefer an appeal to the Central Government (Secretary, Ministry of Finance, Government of India) within a period of 30 days from the date on which order of cancellation was communicated to it. The Central Government must also give such company a reasonable opportunity of being heard before rejecting the appeal. If RST Ltd., is holding investments of qualified institutional buyers at the time of cancellation of certificate of registration, it shall be deemed to be a securitisation and reconstruction company until it repays the entire investments held by it, together with interest if any, within such period as may be specified by the Reserve Bank.



**Prevention of Money Laundering Act, 2002.**

**Q. Enumerate the obligations of banking companies under the Prevention of Money Laundering Act, 2002.**

Section 12 of Prevention of Money Laundering Act, 2002 provides for the obligations of Banking Companies, Financial Institutions and Intermediaries of securities market. Every banking company, financial institution and intermediary shall:

(a) Maintain a record of all transactions, the nature and value of which may be prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other, and where such series of transactions take place within a month. Such records shall be maintained for a period of ten years from the date of cessation of the transactions between the clients and the banking company or financial institution or intermediary, as the case may be:

(b) Furnish information of the above transactions to the Director appointed for the purpose of this Act within the prescribed time;

(c) Verify and maintain the records of the identity of all its clients, in the prescribed manner.

If the principal officer of a banking company or financial institution or intermediary has reason to believe that a single transaction or series of transactions integrally connected to each other have been valued below the prescribed value so as to defeat the provisions of this section, such officer shall furnish information in respect of such

transactions to the Director within the prescribed time.

1. ***Bluemoon Galaxy Ltd., whose financial year ended on 31st March, 2012 held its annual general meeting on 30th September, 2012. The meeting transacted all other business except the accounts as they were not ready and adjourned the meeting to 20th December, 2012 for consideration of accounts. The Registrar of Companies issued show cause notice for violation of section 210 of the Companies Act, 1956. Advise.***

**Adjournment of meeting as accounts was not ready:**

As per section 166(1) of the Companies Act, 1956 every company must hold its first Annual General Meeting within 18 months of its incorporation sunsequently one in each calendar year.

Not more than 15 months shall elapse between the two Annual General Meetings. Powers are vested in the Registrar of Companies to grant extension of time up to 3 months for holding an Annual General Meeting for genuine reasons.

Section 210(3)(b) provides that every company should lay before every subsequent Annual General Meeting its annual accounts within 6 months and the extension granted thereof for holding Annual General Meeting, if any, by the Registrar of Companies, from the date of closure of the accounts.

Annual General Meeting including any adjournment thereof shall be completed within the statutory period specified under section 166 and 210. Company cannot adjourn the Annual General Meeting beyond the last date on which the Annual General Meeting is required to be held.



In the given case, Bluemoon Galaxy Ltd. convened and held the Annual General Meeting within 6 months from the date of closure of the accounts, but failed to lay the accounts within 6 months. Hence, it has violated the provisions of section 210 of the Act and the Registrar of Companies was justified in issuing the show cause notice.

**Company may go for compounding of offence under section 621A**

Since the company has violated the provisions of section 210 of the Companies Act, 1956, therefore, the company has to go for compounding of offence under section 621A, since the offence is punishable with imprisonment or fine or with both.

**Commentary.**

1. *Extension of ROC is required only when Annual General Meeting is not at all held. Here Annual General Meeting has been held and adjourned for item relating to laying over of annual accounts.*
2. *In the given case since the adjourned meeting is the continuation of the Annual General Meeting, therefore, question of seeking extension from the Registrar does not arise.*

***2. Live Life Fabric Limited did not prepare its Balance Sheet as at 31st March, 2012 and the Profit and Loss Account for the year ended on that date in conformity with some of the mandatory Accounting Standards issued by the Institute of Chartered Accountants of India. You are required to state with reference to the provisions of the Companies Act, 1956, the responsibilities of directors and statutory auditor of the company in this regard.***

**Answer....**As per section 211(3A) of the companies Act, 1956, every profit and loss account and balance sheet of the company shall comply with the accounting standards.

As per section 211(3B), where the profit and loss account and balance sheet of the company do not comply with the accounting standards, such companies shall disclose in their profit and loss account and balance sheet, the following, namely:

(a) the deviation from the accounting standards;
(b) the reasons for such deviation; and
(c) the financial effect, if any, arising due to such deviation.

According to sections 211 (7) and (8) read with section 209 (6) of the Companies Act, 1956, following persons are responsible for complying with the above requirements:

a) the managing director or manager of the company, if any,
b) all officers and employees of the company, and
c) the company does not have a managing director or manager, then every director of the company.



As per the above provisions of the Companies Act, 1956, the managing director/directors have a responsibility to ensure that in case of non-compliance of any mandatory Accounting Standard, proper disclosure is made in the profit and loss account and the balance sheet.

Apart from that, the Board of directors is also required under section 217 of the companies Act, 1956 to include a Directors Responsibility Statement indicating therein that in the preparation of the annual accounts the applicable accounting standards had been followed along with proper explanation relating to material departures, if any.

If person referred in Section 209(6) fails to take all reasonable steps to secure compliance by the company, as respects any accounts laid before the company in general meeting, with the provisions of this section and with the other requirements of this Act as to the matters to be stated in the accounts, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to 6 months, or with fine which may extend to 10,000 or with both.

Responsibilities of auditors:

As per section 227(3)(d) of the Companies Act, 1956, the statutory auditor's responsibility is to state in his report, whether in his opinion, the profit and loss account and balance sheet comply with the accounting standards referred to in sub-

section 211 of the Companies Act, 1956.

***Question. The paid up capital of Western Zone Insurance Limited is 7 crore. Point out whether the said company is required to file Balance Sheets and Profit and Loss Account along with Director's and Auditor's Report for the year 2011-12 by using the XBRL taxonomy under the Companies Act, 1956? (4 Marks)***

**Answer.** (a) The Ministry of Corporate Affairs has mandated certain class of companies to file Balance Sheets and Profit and Loss Account along with Director's and Auditor's Report for the year 2010-11 onwards by using XBRL taxonomy. The following classes of companies have to file the Financial Statements in XBRL Form only from the year 2010-2011:-

(i) All companies listed in India and their Indian subsidiaries; or
(ii) All companies listed in India and their Indian subsidiaries; or
(iii) All companies having a paid up capital ` 5 Crore and above, or
(iv) All companies having a turnover of ` 100 crore and above.

However banking companies, insurance companies, power companies and Non Banking Financial Companies (NBFCs) are exempted for XBRL filing.

Thus, in the instant case, Western Zone Insurance Limited is an insurance company and is not required to file Balance Sheets and Profit and Loss Account along with Director's and Auditor's Report for the year 2011-12 by using the XBRL taxonomy.



**Audit.**

***A group of shareholders approaches you for advice regarding the affairs of Fabulous Apparels Ltd. According to the shareholders, the management of the company is not exercising its powers properly and that the statutory audit is being carried out in a routine manner. They want that a special audit should be conducted so that the real nature of transactions carried out by the management will come to light. Advise, with reference to the provisions of the Companies Act, 1956, as to when a special audit can be directed and by whom.***

As said by section 233A of the Companies Act, 1956, the Central Government has the power to direct special audit in certain circumstances. They are:

a) if the Government is of the opinion that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices; or
b) that the company is being managed in a manner likely to cause serious injury or damage to the interests of the trade, industry or business to which it pertains or
c) that the financial position of the company is such as to endanger its solvency.

Therefore, the group of shareholders can make a complaint about the affairs of

Fabulous Apparels Ltd., to the Central Government. If the Government is satisfied, it may order a special audit to be carried out either by the statutory auditors of the company or by any Chartered Accountant. The special auditor appointed under this section will have the same powers as an auditor of the company has under Section 227 of the Act.

***(ii) Explain how the auditor will be appointed in the following cases:***

***(a) A Government Company within the meaning of section 617 of the Companies Act, 1956.***

***(b) The Auditor of the company has resigned on 31st December, 2012, while the financial year of the company ends on 31st March, 2013.***

***(c) A company, whose shareholders include the following:***

***(1) Bank of Baroda (A Nationalized Bank) holding 12% of the subscribed capital in the company.***

***(2) National Insurance Company Limited (carrying on General Insurance Business) holding 10% of the subscribed capital in the company.***

***(3) Maharashtra State Financial Corporation (A Public Financial Institution) holding 8% of the subscribed capital in the company.***



**(ii) Appointment of Auditors**

a) The appointment and re-appointment of auditor in the case of a Government Company is governed by the provisions of section 619 of the Companies Act,1956. The said section states that the auditor of a Government Company shall be appointed or re-appointed by the Comptroller and Auditor General of India. Accordingly, the auditor of a Government Company shall be appointed by the Comptroller and Auditor General of India.

b) The situation as stated in the question is covered by the provisions of section 224(6) of the Companies Act, 1956. Clause (a) of the said section states that the Board of Directors may fill any casual vacancy in the office of an auditor, but proviso thereto states that where such vacancy is caused by the resignation of an auditor, the vacancy shall only be filled by the company in general meeting. Hence, in the case of resignation by the auditor, the company is required to convene and hold a general meeting and appoint the auditor thereat.

c) The case of appointment of auditor of a company whose 25% or more of the subscribed capital is held by Government, financial institutions, nationalised banks, General insurance companies is governed by the provisions of section 224A of the Companies Act, 1956. According to the provisions of the said section in the case of a company in which not less than twenty-five per cent of the subscribed share capital is held, whether singly or in any combination, by-

*(1) a public financial institution or a Government company or Central Government or any State Government, or*

*(2) any financial or other institution established by any Provincial or State*

*Act in which a State Government holds not less than fifty-one per cent of the subscribed share capital, or*

*(3) A nationalised bank or an insurance company carrying on general insurance business. The appointment or re-appointment at each annual general meeting of an auditor or auditors shall be made by a special resolution.*

considering the above provisions of the Companies Act, 1956, since the combined holding of the nationalised bank, general insurance company and the financial institution covered by the said provisions is 30% which exceeds the limit of 25% of the subscribed capital of the company, the company has to appoint its auditor in the Annual General Meeting by passing a special resolution.

**Dividend**

*Advise on the following situations:*

(i) A company wants to transfer more percentage of profits to reserves.

*(ii) A company wants to declare dividends out of past reserves instead of current year profits.*

*(iii) A company wants to provide depreciation higher than the rates provided in Schedule XIV.*



(i) A company can make a transfer of more than 10% to reserves provided it ensures the minimum distribution specified in Rule 3 of the Companies (Transfer of Profits to Reserves) Rules, 1975.

a) The minimum distribution is the rate of dividend equal to the average of the rates of dividend for the last 3 financial years.

b) Where bonus shares have been issued during the financial year, minimum distribution would be the average of the amount of dividend for the last three financial years.

c) Where, however, the net profits after tax for the financial year are lower by 20% or more than the average net profits after tax for the last two financial years, it will not be necessary to ensure the minimum distribution for making a higher transfer to reserve.

Hence, the Board of Directors of Nimbahera Chemicals Limited may follow the above Rules accordingly to transfer more than 10% of the profits of the company to the reserves for the current year.

**(ii)** Dividends may be declared out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with Section 205 of the Companies Act, 1956. However, the Central Government may in the public interest relax the payment of the profits without providing for depreciation. The Companies (Declaration of Dividend out of reserves) Rules, 1975 provided that

(a) The rate of dividend declared does not exceed the average of the rates at which dividend was declared by it in the 5 years immediately preceding that year or 10% of its paid-up capital, whichever is less.

(b) The total amount to be drawn from the accumulated profits earned in previous years and transferred to the reserves does not exceed an amount

equal to 1/10th of the sum of its paid-up capital and free reserves and the amount so drawn must first be utilized to set off losses incurred in the financial year before any dividend in respect of preference or equity shares is declared.

(c) The balance of reserves after such drawal does not fall below 15% of its paid- up capital.

**(iii)** The rates contained in Schedule XIV are the minimum rates below which companies are not permitted to charge for depreciation and therefore there is no bar in providing a higher rate of depreciation. However, it is advisable to give a statement to the effect that the management has estimated life of the asset which requires higher rate of depreciation to be provided than rates prescribed under schedule XIV of the Companies Act, 1956.

# Directors

***1.Question.****.Dream Constructions 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 Mr. Smith is appointed as an additional director. In the light of the provisions of the Companies Act, 1956, examine:*

*a) Whether Mr. Smith 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?*

*b) Can the power of appointing additional director be exercised by the Annual General Meeting?*

*c) As the Secretary of the company what checks would you make after Mr. Smith is appointed as an additional director?*



Section 260 of the Companies Act, 1956 empowers the Board of directors, if authorized by the Articles to appoint additional directors, provided that such additional directors shall hold office only up to the date of the next Annual General Meeting of the company, and the number of the directors including additional directors shall not exceed the maximum strength fixed for the Board by the Articles.

(a) Mr. Smith 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. Such an additional director shall vacate his office latest on the date on which the Annual General Meeting could have been held under Section 166.

He cannot continue in the office on the ground that the meeting was not held or could not be called within the time prescribed. (*Krishna Prasad Pilani v. Colaba Land Mills* .)

*(b)* Where the articles have conferred the power of appointing additional directors on the Board of directors, the company in a general meeting is precluded from appointing additional director. (*Blair Open Hearth Furnance Co. vs Reigart,).*

However, though in ordinary circumstances the company in general meeting is precluded from appointing such directors yet if owning to a deadlock or otherwise there is no board capable of making the necessary appointment, the company in a general meeting may do so. *(Barrow v. Potter ).* Therefore, in ordinary circumstances the general meeting cannot exercise the power to appoint additional director.

(c) As the Secretary of the company the following checks would be made after Mr. Smith is appointed as an additional director:

1) Whether the appointment was made by the Board?
2) Whether the maximum strength fixed for the Board was not exceeded by the appointment?
3) Did additional director gives his consent to become a director in terms of sec.264 (1).
4) Whether the company has filed e form 32 electronically?
5) Whether his particulars have been entered in the Register of Directors under section 303?

**2.Question.**. State with reference to the relevant provisions of the Companies Act, 1956 whether the following persons can be appointed as a Director of a Public Company:

i. Mr. A, who has huge personal liabilities far in excess of his Assets and Properties, has applied to the court for adjudicating him as an insolvent and such application is pending.
ii. Mr. B, who was caught red - handed in a shop lifting case two years ago, was convicted by a court and sentenced to imprisonment for a period of eight weeks.
iii. Mr. C, a Former Bank Executive, was convicted by a court Eight years ago for embezzlement of funds and sentenced to imprisonment for a period of one year.
iv. Mr. D is a Director of DL T Limited, which has not filed its Annual Returns pertaining to the Annual General Meeting held in the calendar years 2010, 2011 and 2012.

***Answer*--- See page no.. 16,, Question no.9**



**3.Question...** Mr. SDR, a shareholder in JKP Ltd. holding ten equity shares of Rs.10 each fully paid up wants to give a special notice to the company for removal of Mr. EDM, a Director of JKP Ltd. without stating any reason in the notice. You are required to state as per the provisions of the Companies Act, 1956 and/or any decided case law.

(i) Whether Mr. SDR is entitled to do so.
(ii) Would your answer be different, if Mr. EDM was a Director appointed by the CG .

Explain briefly the provisions of the Companies Act, 1956 relating to removal of a Director in case of receipt of an appropriate special notice by the company for this purpose.

**Answer--- See page no.. 47,, Question no.2**

***4.Question..*** A company wants to include the following clause in its Articles of Association:

"Each director shall be entitled to be paid out of the funds of the company for attending meetings of the Board or a Committee thereof including adjourned meeting such sum as sitting fees as shall be determined from time to time by the Directors but not exceeding a sum of Rs.30,000 for each such meeting to be attended by the Director."

You are required to advise the company as to the validity of such a clause and the correct legal position under the provisions of the Companies Act, 1956.

**Answer**

The payment of sitting fee to a Director is governed by the provisions of section 310 of the Companies Act, 1956 read with Rule 10B of the companies (Central Government's) General Rules and Forms, 1956.

According to the said provisions, a Company with a paid up share capital and free reserves of Rs.10 crores and above or a turnover of Rs.50 Crores and above can pay to its director by way of sitting fee

for each meeting of the board of directors or a committee thereof an amount not exceeding Rs.20,000/- and

in case of other companies, the limit has been set at Rs.10,000/-.

In view of the above legal provisions, the company cannot have a clause in its Articles of Association which exceeds the limit prescribed by law.

The company is advised to check whether the aggregate of its paid up capital and free reserves exceeds Rs.10 crore or whether its turnover exceeds Rs. 50 crores and accordingly it can have a clause in its Articles of Association.

In case the company keeps the clause as given in the question, it shall be ultra vires the Companies Act, 1956 as section 9 states that any provision contained in Memorandum of Association, Articles of Association, Agreements or Resolutions to the extent it is repugnant to the provisions of the Companies Act, 1956 shall be void.

***Question.5.*** The last three years' Balance Sheets of RBS Ltd., contains the following information.

| | As at 31/03/2011. Rs. | As at 31/03/2012. Rs. | As at 31/03/2013. Rs. |
|---|---|---|---|
| Paid up Capital | 50,00,000 | 50,00,000 | 75,00,000 |
| General Reserve | 40,00,000 | 42,50,000 | 50,00,000 |
| Credit Balance in Profit and Loss Account | 5,00,000 | 7,50,000 | 10,00,000 |
| Debenture Redemption Reserve | 15,00,000 | 20,00,000 | 25,00,000 |
| 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 | 12,50,000 | 19,00,000 | 34,50,000 |



In the ensuing Board Meeting scheduled to be held on 5th November, 2013, among other items of agenda, following item is 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, 1956, the amount upto which the Board can borrow from financial institutions and the amount upto which the Board of Directors can contribute to charitable funds during the financial year 2013-14, without seeking the approval In general meeting.

**Answer—See page no.. 55,, Question no.2**

**6**.Question.

***(i). The Board meeting of MNO Ltd. was held on 10th May, 2012 at Chennai at 11a.m. At the time of starting the Board meeting the number of directors present were 7. The total number of directors were 10. The board transacted ten items in the board meeting. At 12 noon after the completion of four items in the agenda 4 directors left the meeting. Examine the validity of these transactions explaining the relevant provisions of the Companies Act, 1956.***

**(i)**

Section 287 of the Companies Act, 1956 provides for the quorum of the meeting. The quorum for a meeting of the Board of directors of a company shall be

- ☹ one third of its total strength (any fraction contained in the said one third being rounded off as one), or
- ☹ two directors,

whichever is higher.

Where at any time the number of interested directors exceeds or it's equal to two thirds of the total strength, the number of remaining directors, that is to say, the number of directors who are not interested present at the meeting being not less than two shall be the quorum during such time. In this case, the quorum is 4 (i.e. 1/3rd of 10=3 1/3 rounded of as 4. Hence the quorum was present at the time of commencement of meeting.

As a rule, in the case of a meeting of the Board of directors, the meeting cannot transact any business, unless a quorum is present at the time of transacting the business. It is not enough that a quorum is present at the commencement of the business.

The quorum of the Board is required at every stage of the meeting and unless a quorum is present at every stage, the business transacted is void. *(Balakrishna vs. Balu Subudhi)*. In the given situation four items were transacted with the quorum and thus they are valid. Six items were transacted after 4 Directors left the meeting resulting in the reduction of quorum as only 3 Directors were present as against the required quorum of 4 Directors. Such six transactions are void.



***Question-8-**. Mr. Mohit was appointed as a director at the Annual General Meeting of a limited company held on 30th September, 2011 and he carried on his duties and functions as a director. In the month of August, 2012, it was found out that there were certain irregularities in his appointment and on 31st August, 2012, his appointment was declared invalid. But Mr. Mohit continued to act as director even after 31st August, 2012. You are required to state, with reference to the provisions of the Companies Act, 1956, whether the acts done by Mr. Mohit are valid and binding upon the company ?*

**(ii)Ans.** In accordance with the provision of the Companies Act, 1956 as contained in section 290, acts done by a person as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles.

The Proviso to section 290 provides that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been shown to the company to be invalid or to have terminated.

In view of the provision of section 290 of the Companies Act, 1956, the acts done by Mr. Mohit prior to 31st August, 2012 are to be treated as valid and binding on the Company.

However in view of the Proviso to the said section 290, the acts done by Mr. Mohit after 31st August, 2012 shall be deemed to be invalid and not binding upon the Company.

***Question-8-*** *Mr. Abhay holding 3% shares in OPQ Ltd., became a director of this company on 1.5.2012. The company, prior to his appointment as director, had commenced transactions with A Ltd. In the next Board Meeting to be held on 10.5.2012, the Board proposes to discuss about price revisions sought for by A Ltd. Briefly explain:*

*a. Whether Mr. Abhay should make a disclosure of his interest in A Ltd., assuming that the company is going to have transactions with A Ltd. on a continuous basis; if yes, when and how? When should it be renewed?*

*b. Can he vote in the price revision resolution in the Board Meeting?*

*You are informed that Mr. Abhay holds 1.5% of the share capital of A Ltd and that his wife holds another 3% of the share capital of A Ltd.*

Section 299(2)(b) of the Companies Act, 1956 applies to a case of contract or arrangement in which a person was concerned or interested before he becomes a director and also to a case of a contract or arrangement in which he becomes concerned or interest after he becomes a director. The words 'becomes concerned or interested' occurring in the provision denotes a present state of thing. In the case of a person who was actually concerned or interested in the contract or arrangement, the liability for disclosure arises the moment he accepts office as director *(M.O. Varghese v. Thomas Stephen & Co. Ltd. (1970) 40 CC 1131 Kerala)*.



Further, in this case, the Board proposes to discuss in the Board meeting to be held on 10.5.2012 the price revision sought by A Ltd.

In view of the above, Mr. Abhay should make a disclosure of his interest in the first meeting to be held on 10.5.2012 after he became a director. Such disclosure may be made by a general notice under section 299(3) to the effect that he is a member or a director of a specified body corporate. Such notice is valid only for the financial year in which it is given and therefore, it should be renewed in the last month of every year, where necessary.

Another issue is whether Mr. Abhay can vote in the price revision resolution in the Board Meeting. As per section 300(1), no director of a company shall, as a director, take any part in the discussion of, or vote on, any contract or arrangement entered into, or to be entered into, by or on behalf of the company, if he is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement. As per sub-section (2) the provision of sub-section (1) shall not apply

to any contract or arrangement entered into or to be entered into with a public company, in which the interest of the director aforesaid consists solely in his being a member holding not more than two percent of its paid-up share capital.

In the given case, Mr. Abhay is holding 1.5% of the share capital of A Ltd., and his wife is

holding another 3% in the share capital of A Ltd. and there is no restriction on Mr. Abhay in participating in the Board's proceeding as his individual holding is less than 2% of the paid up share capital. Thus he can vote.

# Sole Selling Agents:

***1. Question.... Board of directors of Woodland Stones Ltd. having a paid-up share capital of 40 lakhs appointed Y Ltd, as sole selling agent for a period of 5 years with effect from 1st January, 2012 and the said appointment was approved by the company in the Annual General Meeting held on 30th April, 2012. The Directors of Y Ltd. was holding fully paid-up shares of face value of 3 lakhs in Woodland Stones Ltd. Answer the following explaining the relevant provisions of the Companies Act:***

- ***a) Is the appointment of the sole selling agent in order?***
- ***b) Would your answer be different if both are Private Companies or if the Directors of Y Ltd. acquired the aforesaid shares in Woodland Stones Ltd. On 1st April, 2012?***

**Sole Selling Agents:** According to section 294AA(2) of the Companies Act, 1956 a company shall not appoint any individual, firm or body corporate, who or which has a substantial interest in the company, as sole selling agent of that company unless such appointment has been previously approved by the Central Government.

Here a body corporate is appointed as sole selling agent. A body corporate can be said to have "substantial interest' in the company, if such body corporate or one or more of its directors or any relative of such director, whether singly or taken together hold beneficial interest in the shares of the company, the aggregate amount paid-up on which exceeds Rs. 5 lakhs or 5% of the paid-up share capital the company, whichever is less.



Here 5% of the paid-up share capital of Woodland Stones Ltd. works out to Rs. 2 lakhs. The directors of Y Ltd. were holding fully paid-up shares of face value of Rs. 3 lakhs in Woodland Stones Ltd. and hence Y Ltd. can be said to have substantial interest in Woodland Stones Ltd. Therefore, the appointment of Y Ltd. as sole selling agent requires prior approval of the Central Government under section 294AA(2). In this case the appointment has been made by the Board of directors and approved by the company in general meeting. As the prior approval of the Central Government has not been obtained, the appointment is not in order and the company has contravened the provisions of section 294AA(2).

**(b)**

Section 294AA is applicable to both private and public limited companies. So it is immaterial whether Woodland Stones Ltd. is a private or public company. Again the body corporate includes both private and public companies. Hence the provisions of section 294AA(2) are attracted even if the sole selling agency

# Inspection and Investigation

**Question no.1. A group of creditors of Accent Snacks Ltd. makes a complaint to the Registrar of Companies, New Delhi, 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. Examine the powers, if any, of the Registrar in such circumstances.**

**Power of seizure of Records**: The power of Registrar of Companies to seize the records of a company is contained in Section 234 of the Companies Act, 1956. According to that section, if the Registrar has reasonable grounds to believe, upon information in his possession or otherwise, that the records of the company may be destroyed, mutilated, altered, falsified or secreted, he may make an application to the Magistrate of the first class or the Presidency Magistrate as the case may be having jurisdiction for an order for the seizure of the books and papers.

After getting permission, the registrar has power to enter the place where the books and records of the company have been kept, and search and seize the books and papers as he considers necessary.

The Registrar has to return back the books and papers within 30 days of seizure and he can place identification marks on the records and take copies or extracts from the records as he considers necessary. The Registrar has to follow the procedure laid down
in Criminal Procedure Code relating to search and seizure of the records. [Sec.234A (4)].



**Compromise, Arrangements and Reconstructions**

**Question-1-** Examine with reference to the provisions of the Companies Act, 1956 the validity of the following:

(a) A scheme provides for Amalgamation of a 'Foreign Company' with a Company registered under the Companies Act, 1956.

(b) The statement forwarded with the notice convening a meeting of its members pursuant to Court's Direction under section 391 contains only 'Exchange Ratio' without details of its calculation.

(c) At the time of filing of the petition for Amalgamation, the object clause of both the transferor and Transferee Companies does not contain power to Amalgamate.

**Amalgamation of a foreign company with a company registered under the Companies Act:** According to section 394(4)(b), 'transferee company' does not include any company, other than a company within the meaning of this Act. But transferor company includes any body corporate whether a company within the meaning of this Act or not. According to the definition of 'body corporate' in section 2(7), it includes a company incorporated outside India.

Further, as per section 390(a), for purposes of Section 391, 'Company' means 'any company liable to be wound up'. A foreign company having a place of business in India (i.e. a 'foreign company' within the meaning of Section 591) can be wound up as an 'unregistered company' under section 582(b) read with section 583 and 584.

Hence, a scheme providing for amalgamation of a foreign company as a transferor company can be sanctioned by the court.

**Statement under section 393:** Every notice sent to members or creditors to convene

a meeting pursuant to High Court's directions under section 391 must be accompanied by a statement setting forth the terms of compromise or arrangement and explaning its effects and material interests of directors and effect thereof on the scheme [Section 393(1)]. But the statement required under section 393 is different from one required.

The 'statement' required under section 393 is different from the 'explanatory statement' required under Section 173. The former does not contain disclosure of all material facts *[Re. Tata Gil Mills Co. Ltd (1994) 14 CLA 13 (Bom.)*]. The statement should contain the exchange ratio. But it is not necessary to give details thereof, nor is it necessary to circulate the valuation report to shareholders *(Hindustan Lever Employees' Union v. Hindustan Lever Ltd (1995) 83 Comp. Cas. 30(SC).* Hence the statement containing only exchange ratio without giving details of calculation of exchange ratio is valid.

**(c) Power to amalgamate:** It has been held in various cases that where there is a statutory provision dealing with the amalgamation of companies, no special power in the object clause of the Memorandum of Association of a company is necessary for its amalgamating with its *company [Hari Krishna Lohia v. Hoolungoree Tea Company (1970) 47 Comp. Cases 458].* Hence the objects in the Memorandum of Association of the transferor company or transferee company need not contain power to amalgamate.

**Question-2--Sunflower Pharma Limited was amalgamated with and merged in Global Pharma Limited. Some workers of Sunflower Pharma Limited refuse to join as workers of Global Pharma Limited and claim compensation for premature termination of service. Global Pharma Limited resists the claim on the ground that their services are transferred to Global Pharma Limited by the order of amalgamation and merger and, therefore, the workers must join service of Global Pharma Limited and cannot claim any compensation. Examine whether the workers' contention is correct**.



**Answer.**

An order under section 394 of the Companies Act, 1956 transferring the property, rights and liabilities of one company to another does not automatically transfer contracts of personal service, which are in their nature, incapable of being transferred and no contract of service is thereby created between an employee of the transferor company on the one hand and the transferee company on the other. In *Nokes vs. Doucaster Amalgamated Collieries Ltd. ,* the House of Lords categorically stated that the workers are not furniture and their services can not be transferred without their consent. Therefore, the workers of Sunflower Pharma Ltd. will succeed against Global Pharma Ltd.

# Prevention of Oppression and Mismanagement

***Question.1. (i). The profits of MJR Company Limited for the financial year 2012-2013 fell considerably due to recession. The Board of directors of the company, therefore, bonafide did not recommend any dividend for the year. At the Annual General Meeting of the company, a group of shareholders/members objected to the Board's decision and wanted the Board to make***

***recommendation for dividend.***

***On refusal by the Board, the members, who feel oppressed by the Board's decision to skip the dividend, move to the Company Law Board/ and complain against the Board on the ground of oppression and mismanagement.***

***Examining the provisions of the Companies Act, 1956, decide:***

a. ***Whether the members contention shall be tenable?***
b. ***Whether the act of Board of Directors not to recommend any dividend shall amount to oppression and mismanagement?***

**Oppression & Mismanagement:** Under sections 397 and 398 of the Companies Act, 1956, members may apply to the Company Law Board (CLB) in cases of oppression and mismanagement. However, bona fide decisions consistent with the company's memorandum and articles are not to be equated with mismanagement even if they turn out to be wrong in the circumstances or these cause temporary losses. The Court will not permit the machinery created by the sections to be used by the minority for compelling the majority to come to terms, where the company is honestly managed. Directors' bona fide decision not to declare dividend and to accumulate available profits into reserves is not mismanagement. *(Thomas Vettom (V.J.) vs. Kuttanad Rubber Co. Ltd..*

Thus in the given case, the group of shareholders/members who complain to CLB against the decision of the Board not to declare any dividend and to accumulate available profits into reserves, would not succeed, as the act of directors does not amount to mismanagement. Furthermore, the shareholders cannot compel the Board to recommend a dividend. The Board's recommendations are placed in the general meeting. The general meeting can reduce the dividend, but cannot even increase the dividend as recommended by the Board. Therefore, the shareholders/members cannot compel the company to declare dividend and cannot charge the directors with oppression or mismanagement.



Applying the above, answers to the question shall be as under:

(a) The contention of shareholders/members shall not be tenable.

(b) The act of the Board of directors who acted bona fide, not to recommend any dividend shall not amount to oppression or mismanagement.

***Question.2.*** **Accurate Machines 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 Company Law Board for relief against oppression and mismanagement?**

**Ans.** Under section 399(1)(a) of the Companies Act, 1956, in the case of a company having share capital, the following member(s) have the right to apply to the Company Law Board under section 397 or 398:

(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 Company Law Board (CLB), regardless of the fact that he holds less than one-tenth of the company's share capital.

***Question.3. The issued, subscribed and paid-up share capital of Efficient Mechanism Limited is 10 lakhs consisting of 90,000 equity shares of Rs. 10 each fully paid up and 10,000 preference shares of Rs. 10 each fully paid up. Out of the members of company, 400 members holding one preference share each and 50 members holding 500 equity shares applied for relief under sections 397 and 398 of the Companies Act, 1956. As on the date of petition, the company had 600 equity shareholders and 5,000 preference shareholders.***

***State with details whether the above petition under section 397 and 398 is maintainable. Will your answer be different, if preference shareholders have subsequently withdrawn their consent?***

**E-governance**

***Question.--- The Board of Directors of DJA Ltd. seek your advice about the procedure to be followed for 'Electronic filing and Authentication of Documents' with the Registrar of Companies, Mumbai. Advise the Board about the procedure to be followed in this regard and explain the manner in which the 'E' filing is regulated by the Central Government***

**Answer. Procedure:**



1) When the business or the registered users access the My MCA portal, they enter their username and authentication details – Password/ Digital Certificate.
2) The user will be shown a list of eForms category-wise under **eForms** tab.
3) At any time, the users can read the related instruction kit, available under **Help** menu, to authorized themselves with the procedures.
4) The users can then fill the appropriate eForm for the service required. There is an option of pre-fill facility in the eForms, where the static details such as name and address of the company will be pre-filled by the system automatically on entering the Corporate Identity Number (CIN).
5) The users attach the necessary documents to the eForm.
6) The users may avail the pre-scrutiny service of the eForm. The documents will be verified (pre-scrutinised) by the system. In case of any inadequacies, for example, if a mandatory column in the eForm is not filled in, the user will be asked to rectify before the document is ready for execution (signature).
7) The applicant or a representative of the applicant will then submit the duly signed documents electronically through Digital Signatures.
8) The system will calculate the fee, including late payment fees, if applicable.
9) Payments will have to be made through appropriate mechanisms – electronic (credit card, Internet banking) or traditional means (at the bank counter).
10) Electronic payments can be made at the Virtual Front Office (VFO).
11) If the user selects the traditional payment option, the system will generate a pre-

filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated challan. There will be five banks with estimated 200 branches authorized for accepting challan payments.

12) The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.
13) Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).
14) MCA 21 will provide a unique transaction number, which can be used by the applicant for enquiring status pertaining to that transaction.
15) Filing will be complete only when the necessary payments are made.
16) In case of a rejection, helpful remedial tips will be provided to the applicant.
17) The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal

**Companies Incorporated outside India**

**Question.-**

i. As per provisions of the Companies Act, 1956, what is the status of XYZ Ltd., a Company incorporated in London, U.K., which has a share transfer office at Mumbai?
ii. ABC Ltd., a foreign company having its Indian principal place of business at Kolkata, West Bengal is required to deliver various documents to Registrar of Companies under the provisions of the Companies Act, 1956. You are required to state, where the said company should deliver such documents.
iii. In case, a foreign company does not deliver its documents to the Registrar of Companies as required under section 597 of the Companies Act, 1956, state the penalty prescribed under the said Act, which can be levied.



Ans.

i. According to section 591 of the Companies Act, 1956, a company incorporated outside India and having a place of business in India is treated as a "Foreign Company". As per clause (c) of section 602 of the said Act, the expression 'place of business' includes a share transfer office. Thus, according to the provisions of the Companies Act, 1956, the status of XYZ Ltd., incorporated in London, U.K., which has a Share Transfer office in Mumbai, shall be that of a 'Foreign Company'.
ii. According to section 597 of the Companies Act, 1956, any document which a foreign company is required to deliver to the Registrar of Companies shall be delivered to the Registrar having jurisdiction over New Delhi and also to the Registrar of the State in which the principal place of business of the foreign company is situate.

In light of the above provisions of the Companies Act, 1956, ABC Ltd. is required to deliver the requisite documents to the Registrar of Companies having jurisdiction over New Delhi and also to the Registrar of Companies, West Bengal.

iii. Section 598 of the Companies Act, 1956 prescribes the penalty for non-compliance of the provisions of section 597 of the said Act. According to the provisions of

the said section 598, the foreign company and its every officer or agent, who is in default, shall be punishable with a fine upto Rs.10,000/- and in case of continuing offence, additional fine upto Rs.1,000 per day for the period during which the default continues.

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**Corporate Secretarial Practice**

**Question.-**

***DVJ Limited decide to appoint Mr. A, as its Managing Director for a period of 5 years with effect from 1st May, 2012. A, fulfils all the conditions as specified in Part I and Part II of Schedule XIII of the Companies Act, 1956.***

***The terms of appointment are as under:***

a. ***Salary Rs.1 laks per month.***
b. ***Commission, as may be decided by the Board of Directors of the Company.***
c. ***Perquisites : Free Housing***
d. ***Medical reimbursement upto 10,000 per month. Leave Travel concession for the family.***
e. ***Club Membership Fee.***
f. ***Personal Accident Insurance Rs. 10 lacs. Gratuity; and***
g. ***Provident Fund as per company's policy.***

***You, being the Secretary of the company, are required to draft a resolution to give effect to the above, assuming that A is already the Managing Director of a public limited company.***



**Answer.**

*"Resolved* that Mr. A who fullfills the conditions specified in Parts I and Part II of Schedule XIII to the Companies Act, 1956 be and is hereby appointed as the Managing Director/Whole-time Director/Manager of the company for a period of five years effective from 1st May, 2012 and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule XIII of the Act, subject to approval of the Central Government.

*Resolved further* that in the event of loss or inadequacy of profits the salary payable to him shall be subject to the limits specified in Schedule XIII".

*"Resolved* that Mr. A be and is hereby appointed as Managing Director/Whole-time Director/Manager of the company subject to the approval of the Central Government for a period of five years effective from 1st May, 2012, and that he may be paid remuneration as follows:

a. Salary.
b. Commission
c. Perquisites: Housing, Medical reimbursement, Leave Travel Concession, Club fee, Personal Accident Insurance, Gratuity, Provident Fund etc.

Resolved further that the Secretary of the company be and is hereby authorized to make an application to the Central Government seeking their approval to the above appointment.

Sd/
Board of Directors

DVJ Ltd.

# Producer Company

**Question**

***(i) Under provisions of Companies Act, 1956, relating to producer company, examine whether the office of director of such company shall fall vacant in the following circumstances:***

***(a) X a Director of ABC Ltd., a producer company has made a default in payment of loan taken from a company and default continues for 60 days.***

***(b) Z a Director of the above company could not call the Annual General Meeting for the company due to some natural calamity which occurred three days before the Schedule date.***

***(ii) A group of individuals eligible to form a Producer Company within the meaning of the Companies Act, 1956 has entrusted you with the job of preparing the Memorandum of Association of the proposed Producer Company. You are required to state the matters, which are required to be included in such Memorandum of Association.***

**Producer Company - Vacation of Office of a Director:**

(a) According to provisions of Companies Act, 1956, as contained in section 581Q, if the producer company in which a director has made a default in repayment of any advances or loans taken from any company or institution or any other person and such default continues for 90 days, the office of such director shall become vacant. In the given case the default on the part of X, the director continues for less than 90 (i.e. only 60 days) days, the office of director shall not fall vacant.



(b)The office of director of a producer company shall become Vacant if the Annual General Meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason. In the given case since the Annual General Meeting could not be held due to some natural calamity, the office of Z, the director shall not fall vacant. This is an exception.

**(ii)** As per section 581F of the Companies Act, 1956, the Memorandum of Association of a Producer Company has to state the following:

a) the name of the company with "Producer Company Limited" as the last words of the name of such Company;
b) the State in which the registered office of the Producer Company is to situate;
c) the main objects of the Producer Company confirming to the objects specified in section 581B of the Companies Act, 1956;
d) the names and addresses of the persons who have subscribed to the memorandum of Association;
e) the amount of share capital with which the Producer Company is to be registered and division thereof into shares of a fixed amount;
f) the names, addresses and occupations of the subscribers being producers, who shall act as the first directors in accordance with section 581J(2) of the Companies Act, 1956;
g) that the liability of its members is limited;

h) opposite to the subscriber's name the number of shares each subscriber takes (Each subscriber must take at least one share);
i) in case the objects of the Producer Company are not confined to one State, the States to whose territories the objects extend.

**Winding-up**

***Question..1... Ganesh Textiles Private Limited has discontinued its Business since 2010. Negligible assets are available with the company, but also some liabilities. The company has been regular in filing Annual Returns and Balance Sheets. The Director of the Company proposes to apply to the Registrar of Companies for striking the name of the company on the ground that it is a defunct company.***

**Advise, as to what steps can be taken to get the name of the company struck off under the provisions of the Companies Act, 1956.**

Answer---In the given case, Ganesh Textiles Private Ltd. is required to follow the established procedure to enable the Registrar to remove the name of the company under Section 560 of the Companies Act, 1956. For this purpose, an application accompanied with the following documents be submitted to the Registrar of Companies –

1. An affidavit of at least two directors including that of the Managing Director or whole time Director to the effect that the company has no assets or liabilities as on date and the company has not been carrying on any business during the last one year or more.
2. Latest audited balance sheet and profit and loss account of the company.



An indemnity bond from the aforesaid directors to the effect that the liabilities of the company if any will be met by them even after the name of the company is struck off.

In view of the above, Ganesh Textiles Private Limited must first take steps to realize all the assets and pay all the liabilities and make it nil. Thereafter the company may apply to the Registrar of Companies along with "nil" balance sheet, affidavit and indemnity bond. After making necessary inquiry, the Registrar will publish notice in the Official Gazette that the name of the company has been struck off. Under Section 560(5) of the said Act, the company shall stand dissolved from the date of publication of notice in the Official Gazette.

***Question..2..*** **The value of the security of a secured creditor of a company is ` 1,00,000. The total amount of the workmen's dues is ` 1,00,000. The amount of the debts due from the company to its secured creditors is ` 3,00,000. The aggregate of the amount of workmen's dues and of the amounts of debts due to secured creditors is ` 4,00,000. With reference to the provisions of the Companies Act, 1956,**

**(a) what is the workmen's portion of the security?**

**(b) If the liquidator incurs RS. 10,000 for the preservation of the security before it is realised by the secured creditor, what is the portion of RS. 10,000 that should be borne by the secured creditors?**

**a)**

In the given problem the value of security of a secured creditor is RS.1, 00,000 and debts due to the secured creditor is RS. 3,00,000 and the workmen's dues is Rs.1,00,000. In the light of the provisions of Section 529 and 529A, workmen's portion of the security is

$$\frac{\text{Workmen's dues}}{\text{Workmen's dues + secured loan}}$$

$$\frac{\text{Rs.100000.}}{\text{Rs. 100000+Rs. 300000.}}$$

**Rs.2500**

The workmen portion of the security is therefore 1/4th of the value of the security, i.e. 25,000, [Sub-section (3) added to Section 529]

b) If he liquidators incur RS.10,000 for the preservation It is equal to the following equation:

Whole of expenses – Whole of expenses × security the of Value portion s' Workmen

**= ` 10,000 × 10,00025,0001,00,000×**

**= ` 10,000 – 2,500**

**= ` 7,500. This is the amount to be borne by the secured creditors.**