# SUGGESTED ANSWERS

TO

## QUESTIONS

SET AT THE

**INSTITUTE'S EXAMINATIONS**

**MAY, 2000 – NOVEMBER, 2008**

# A COMPILATION

## FINAL EXAMINATION

## PAPER – 4 : CORPORATE LAWS AND SECRETARIAL PRACTICE

**BOARD OF STUDIES**
**THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA**

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# CHAPTER 1
## THE COMPANIES ACT, 1956

### UNIT – 1 : BOARD MEETINGS

Question 1

*The Board of Directors of M/s Infotech Consultants Limited, registered in Calcutta, proposes to hold the next board meeting in the month of May, 2000.They seek, your advice in respect of the following matters:*

*(i) Can the board meeting be held in Chennai, when all the directors of the company reside at Calcutta.*

*(ii ) Whether the board meeting can be called on a public holiday and that too after business hours as the majority of the directors of the company have gone to Chennai on vacation.*

*(iii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?*

*Advise with reference to the relevant provisions of the Companies Act.* *(May, 2000)*

Answer

(i) There is no difficulty at all in holding the board meeting at Chennai even if all the directors of the company reside at Calcutta and the registered office is situated at Calcutta provided requirements regarding signing of register of contracts, etc. are complied with.

(ii) Under provisions of Section 166 of the Companies Act, 1956, the annual general meeting shall be held during business hours and on a day that is not a public holiday. There is no similar provisions in the Act with regard to board meetings. Therefore, in the absence of any specific restrictive provision, the board meeting can be held even on a public holiday and out of the business hours.

(iii) If the articles of association of the company are silent, the notice of board meeting is not required to specify the nature of business to be transacted thereat *[Compagnie de Mayville v. Whitley (1896) 1 Ch. 788 (CA)]*. If, however, the articles provide otherwise, then the notice must specify the nature of business to be transacted. All said and done, a better course seems to be that the notice should specify the purpose of the meeting, if it is an extra-ordinary or special meeting .

## Question 2

*Accurate Arcs Ltd. maintains the Minutes Book of the Board Meetings in loose-leaf system and get them bound once in three months. Can it do so? Board meetings were held on 24th March, 2000 and 15th April, 2000. Mr. Rameshwar, who was the Chairman of these two Board Meetings died on 1.5.2000, without signing the Minutes. How should be the Minutes be signed and by whom? (November, 2000)*

## Answer

Ordinarily minutes cannot be kept in loose-leaf system. Section 193(1) of the Companies Act, 1956 enjoins the Minutes must be entered within 30 days of the conclusion of the relevant meeting. Ordinarily Minutes cannot be kept in loose-lead system. The Department of Company Affairs, however, has expressed that it would refrain from taking any action against a company which maintained its minutes in the loose-leaf form, provided that adequate safeguards are taken against falsification, and loose-leaves are bound in books at reasonable intervals, say six months.

In this case, since the Minutes Book leaves are bound once in three months (January to March, 2000), and as such the same is in order.

The minutes of the Board Meeting are required to be written within a period of 30 days from the date of the meeting held. [Section 193(1)]. But there cannot be any insistence that the same must be signed within a period of 30 days from the date of the Board Meeting. (Dept.'s circular No. 25/76 dated 1.9.1976). According to section 193(1A), the minutes of a Board Meeting may be signed by the Chairman of the said meeting or the Chairman of the next succeeding meeting.

In this case, Mr. Rameshwar, who was the Chairman of the Board Meeting held on 24.3.2000 and 15.4.2000 died on 1.5.2000 without signing the minutes.

The Chairman of the Board Meeting held after 15th April, 2000 for the first time may sign the minutes of Board Meeting, held on 15th April, 2000 in accordance with section 193(1A)(a).

According to the provisions of section 193(1) read with section 193(1A) the minutes of Board Meeting held on 24th March, 2000 should have been signed by Mr. Rameshwar himself as he was the Chairman of the Board Meeting held on 24th March, 2000 as well as the Chairman of the next succeeding meeting. There is no specific provision in the Companies Act, 1956 as to the person who can sign the minutes of Board Meeting held on 24th March, 2000 in this case. Hence a board meeting may be convened and the Chairman of the said meeting may sign the minutes of Board Meeting held on 24th March, 2000.

## Question 3

*Advise the company with reference to the relevant provisions of the Companies Act about sending notice of board meetings to the following directors:*

*(i) Mr. Rohit, a director, who intimates his inability to attend the next board meeting.*

*(ii) Mr. Bipin Ram, who has gone abroad for four months and an alternate director has been appointed in his place.*

*(iii) Mr. James is a director residing abroad representing the foreign collaborator and the Articles of Association of the company provide for sending notice to such directors.*

*(May, 2003)*

## Answer

According to Section 286 of the Companies Act, 1956 notice of every board meeting shall be given in writing to every Director for the time being in India and at his usual address in India to every other Director.

(i) Notice should be given even if Mr. Rohit expressed his inability to attend the next board meeting. Otherwise Section 286(i) will be violated. [In re Portigese Consolidated Copper Mines Ltd (1889)42 Ch.D. 160 9CA)]

(ii) Although there is no legal precedent in this regard, it would be a prudent practice (under section 286)that notice should be served to both, the alternative director as well as the original director Mr. Bipin Ram, who is outside India, at his usual address in India.

(iii) In the case of a company having foreign collaboration, Articles generally provide that notice of Board Meeting should be sent by Air Mail. But a question crops up whether such provisions are valid, as section 286(1) requires services of such notice to a Director to be sent at his usual address in India. Despite provision contained in the Articles and in the Act, 1956, it is advisable as a good secretarial practice and taking into account the fact that it is a foreign collaboration agreement, and to avoid unnecessary legal nitty-gritties, the company may also send notice of the Board Meeting to the director residing abroad.

## Question 4

*LMB Ltd., Kolkata is a multiproduct manufacturing company having paid up capital of Rs.5.00 Crores. In order to increase the product portfolio, the said company intends to procure certain machines and equipments worth Rs.1.00 Crore from a partnership firm, namely, M/s MLPK, in which the son of managing director of LMB Ltd. is a partner. The contract for purchase of said machines and equipments is to be placed before the board of directors of the company for its consideration.*

*In view of above facts, you are required to explain briefly the procedure under the provisions of the Companies Act, 1956 to be followed by LMB Ltd. to enter into the said contract.*

*(May 2005)*

## Answer

As per provisions of section 297 of the Companies Act, 1956, when a Company enters into a contract in which some of the directors are interested, then consent of the Board of Directors of the Company is required to be obtained. In the present case since the Managing Director of LMB is interested in the contract for the purchase of machines and equipments because of his son's partnership in the supplier firm, the same should be approved by the board of directors of the company.

Proviso to section 297(1) states that in the case of a company having a paid-up share capital of not less than rupees one crore, no such contract shall be entered into except with the previous approval of the Central Government. Since the paid up capital of LMB Ltd. is Rs.5.00 Crores the company is required to take prior approval of the Central Government.

For this purpose, following steps are required to be taken:

(i) Hold a board meeting and place the terms of the contract for consideration. The managing director should disclose the nature of his interest as required under section 299 of the Companies Act, 1956.

(ii) The managing director should not participate in discussion when in the board meeting; the matter in respect of the above mentioned contract is being discussed. He must not also vote on the relevant resolution. Moreover, his presence shall also not be counted for determining the quorum of the board meeting. [Section 300 of the Companies Act, 1956].

(iii) The consent of the board of directors must be accorded by way of a resolution and not otherwise.

(iv) An application to the Central Government (by delegation to Regional Director) should be made in prescribed form (Form No.24A). Following enclosures should be made with the said Form:

    (a) a certified true copy of the board resolution approving the contract.

    (b) a copy of the proposed agreement.

    (c) a copy of the Memorandum and Articles of Association of the company.

    (d) a copy of the latest audited annual accounts with directors' and auditors' reports thereon.

    (e) Bank draft or treasury challan evidencing the payment of prescribed fees.

(v) Necessary entries are to be made in the Register of Contracts (Section 301).

On receiving the approval from the Central Government (Regional Director), the company can proceed to enter into the contract for supply of machines and equipments with the firm M/s MLPK in which the son of managing director is a partner.

## Question 5

*The Board of Directors of ABC Ltd. met thrice in the year 2004 and the 4th Meeting, though called, could not be held for want of quorum.*

*Examine with reference to the relevant provisions of the Companies Act, 1956, the following:*

*(i) Whether any provisions of the Companies Act, 1956 have been contravened?*

*(ii) Is a Director bound to attend the Board Meetings and when his frequent absence from the Board Meeting may be excused? (November 2005)*

## Answer

(i) As per Section 285 of the Companies Act, 1956, a company must hold a meeting of its Board of Directors at least once in every three calendar months and there should be at least four directors' meeting every year. However, the Central Government may by notification in the official Gazette, direct these provisions will not apply in relation to any class of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification. But in the terms of Section 288(2), a company shall not be deemed to have contravened the provisions of Section 285 where the meeting had been called but could not be held for want of a quorum.

(ii) Though a director is not so bound to attend the Board meetings, nonetheless, he will be guilty of breach of duty if he fails to attend the Board meetings with reasonable regularity without sufficient cause being shown for his non-attendance. Willful non-attendance on his part may give rise to his liability on ground of negligence if it is patently prejudicial either to the company or to the general body of shareholders. Fairly frequent absence from the Board meetings may, however, be execused if the entire control is exercised by a single director or if the Board is pretty large in number *(Re Denhom & Co. D.25 ch. D. 752 Marquis of Bute's Case (1892)2 Ch. 100).* The fewer the directors, the more onerous is the duty to attend.

## Question 6

*In course of administration of the affairs of a limited company, Chairman of its Board of Directors came across a matter, which required the approval by say of a board resolution. In the prevailing circumstances, it is not possible to convent and hold a Board Meeting. The Chairman approaches you to advise him of the way and the relevant procedure to obtain such approval without holding the Board Meeting. You are required to advise him on the matter as per the provisions of the Companies Act, 1956.* *(May 2007)*

## Answer

As per the provisions of the Companies Act, 1956, several Board Resolutions are required in course of carrying on the affairs of a limited company. But it may sometimes so happen that a Board Meeting can not be held. To meet such eventualities, the Companies Act, 1956 contains the solution in section 289. According to this section, the board resolution can be passed by way of circulation. It may however be noted that the matter listed in the provisions of section 292 and other sections requiring passing of resolution at the board meetings only can not passed by way of circulation and can be passed only at the Board Meeting. The Chairman of the company is advised that the approval in the form of a Board Resolution may be obtained by way passing the relevant resolution by circulation if the matter is not covered by the barring sections of the said Act.

The procedure to be adopted for the purpose shall be as follows:'

(i) Send the draft of the resolution in duplicate together with the necessary papers, if any, to all the directors then in India. It is to be ensured that the number of such directors is not less than the directors required to form the quorum for a Board meeting.

(ii) Send the draft of the resolution in duplicate together with the necessary papers, if any, to all other directors at their usual address in India.

(iii) Obtain one copy of the draft resolution duly signed by the directors, whether approving the resolution or disapproving the same. It may be noted that the resolution shall be deemed to be passed by the Board if all the directors then in India or majority of all directors as are entitled to vote on the matter approve the resolution by singing one copy and returning the same to the company.

(iv) The resolution passed by circulation shall be placed before the next Board Meeting for confirmation.

(v) The resolution shall be recorded in the minutes of the next Board Meeting.

# UNIT – 2 : DIRECTORS

## Question 1

*Mr. V, a chartered accountant is a Director in PQR Limited. The company proposes to appoint/engage the firm V & Co. in which Mr. V is a partner in one or more of the following capacities:*

*(i) Consultants on regular retainer basis.*

*(ii) Authorised representatives to appear before tribunals.*

*Discuss whether the provisions of Section 314 of the Companies Act are attracted in the above situations.* *(May, 2000)*

## Answer

Apparently the prohibition under Sub-section (1) & (1B) of the Section 314 of the Companies Act, 1956 is not applicable to remuneration/compensation given to concerned persons (i.e. directors) for the services of a professional nature rendered by them to the company in their professional capacity such as advocate, chartered accountant, solicitor etc. However, prohibition will apply to them if they bind themselves on regular retainer ship basis. Therefore,

(i) Chartered Accountants appointed by a company on a regular retainer basis as advisers, consultants, internal auditors, etc., also hold the position or place of consultant or adviser and accordingly such appointments are hit by the restrictive provisions of Sub-sections (1) and (1B) of Section 314.

(ii) Based on the above analogy as contained above the bare engagement of a Chartered Accountant in a particular case and the payment to him of his professional fees in that case would not attract the provisions of Sub-sections (1) and (1B) of Section 314 of the Companies Act. Engaging a person in his professional capacity for performing a particular function, say, for attending to a particular case or for undertaking a particular assignment of consultancy, or rendering advice on a specific matter, would not by itself constitute appointment to an office or place of profit in or under the company. But if the terms of engagement of a Chartered Accountant are that he should attend to all the tax cases or act as adviser in all connected matters, whether generally or in a particular city or town, then even though he may be paid on a case by case basis, it would amount to appointment to a “place of profit” under the company.

## Question 2

*Can a company pay compensation to its directors for loss of office? Explain briefly the relevant provisions of the Companies Act, 1956 in this regard?* *(May, 2000)*

## Answer

A company can pay compensation to its directors for loss of office as provided in Sections 318 to 321 of the Companies Act 1956. Under Section 318, such compensation can be paid only to managing director, director holding the office of the manager and to a whole time director but not to others. The compensation payable shall be on the basis of average remuneration actually earned by such director for three years, or such shorter period as the case may be, immediately preceding the ceasing of holding of such office and shall be for the unexpired portion of his term or for three years whichever is shorter. No such payment can be made, if winding up of the company is commenced before or commences within 12 months after he ceases to hold office if the assets of the company on the winding up, after deducting expenses thereof, are not sufficient to repay to the shareholders the capital (including the premium, if any) contributed by them. However, no payment of compensation can be made in the following cases:

(a) where a director resigns excepting on the ground of amalgamation or reconstruction and holding the office of managing director or manager or other officer of such reconstructed or amalgamated company.

(b) where the director vacates office under section 203 or section 283(1).

(c) where the winding up of the company is due to the negligence of the director concerned.

(d) where the director has been guilty of any fraud or breach of trust.

(e) where the director has instigated or has taken part directly or indirectly in bringing about, the termination of his office.

Question 3

*Discuss the validity of the arguments of the Director in the following cases:*

*(i) In the General Meeting of X Ltd., held on 2.5.2000, Mr. A was appointed as a Director. On that day, he was not holding any equity shares in X Ltd. As per the Articles of Association of X LTD, the share qualification is the holding of 500 equity shares. On 15.6.2000 Mr. A applied for 1,000 equity shares in X Ltd and the shares were allotted on 10.7.2000. Mr. A claims that he was holding the qualification shares within the time specified in Companies Act.*

*(ii) X Ltd. entered into a contract with M & Co. Ltd . for the purchase of raw materials for Rs. 2,50,000, at the prevailing market rate. The Director, of X Ltd. Mr. B was holding shares of the value of 1% of the paid up capital of M & Co. Ltd. Another Director, of X Ltd. Mr. C was holding shares of the value of 1.5% of the paid up capital of M & Co. Ltd. Mr. B at the beginning of the year, gave a general notice to X Ltd., that he was interested in M & Co. Ltd., but did not disclose the nature of interest. Mr. B claims that he had give notice to X :Ltd. as required under the Companies Act and that his holding being only 1% is within the limit prescribed under the Companies Act. (November, 2000)*

Answer

(i) Under Section 270 of the Companies Act, 1956, the director must obtain qualification shares within two months from the date of appointment. In this case, he was appointed on 2.7.2000 and therefore he must obtain qualification shares on or before 2nd July, 2000 but the shares were allotted on 10th July, 2000. Only after the date of allotment, he was looking those shares and not on the date of application. Therefore, the argument of A is not correct.

(ii) In the problem given the contract was entered between two public companies for the purchase of raw materials for Rs.2,50,000 at the prevailing market rate. Therefore, transaction of this type, that too between two public limited companies will be hit by Section 299 and not by Section 297 as it may apparently appear to be. Though Section 299 to some extent overlaps Section 297, it is wider in scope and covers all kinds of contracts and arrangements as proposed in Section 297. In the problem given, contract between X Limited and M & Co. Limited was entered into wherein the concerned directors of X Ltd namely Mr. B (holding 1% of paid up capital of M & Co. Limited) and Mr. C (holding 1.5% of the paid up capital of M & Co. Limited) have given a general notice to X Limited but did not disclose the nature of their interest. The consequences of non-disclosure of interest is that it will cause vacation of the office of director under Section 283[1(i)] and will also subject to penalty under sub-section 4 of Section 299. However, in the opinion of the Department of Company affairs, (Company News & Notes dated 1.7.63) if a director has given a general notice in terms of sub-section 3 of Section 299, he will not be liable for prosecution provided the general notice covers the relevant contract in question. However, sub-section (6) of Section 299 provides that nothing contained in this section shall apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the one company or two or more of them holds or hold not more that 2% of the paid up share capital in the other company. By necessary implications it also means that where a director or two or more or all the directors hold more than 2% of the paid up share capital of another company, any contract or arrangement with that other company (in the instant case X LTD) will come within the purview of Section 299. In keeping with the spirit of Section 299 and in view of their occupying fiduciary position in the company, the concerned directors (namely Mr. B & Mr. C) should disclose their interest even if their individual holding is less than 2% of the paid up capital of the M & Co. Ltd and they should take steps to see that the disclosure is made at the next meeting of the Board of Directors. Hence the argument of Mr. B is not valid.

## Question 4

*Mr. Nanavati holding 3% shares in OPQ Ltd., became a director of this company on 1.5.2000. The company, prior to his appointment as director, had commenced transactions with A Ltd. In the next Board Meeting to be held on 10.5.2000, the Board proposes to discuss about price revisions sought for by A Ltd. Briefly explain:*

*(i) Whether Mr. Nanavati 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?*

*(ii) Can he vote in the price revision resolution in the Board Meeting?*

*You are informed that Mr. Nanavati holds 1.5% of the share capital of A Ltd and that his wife holds another 3% of the share capital of A Ltd.* *(November, 2000)*

## Answer

OPQ Ltd. entered into certain transactions (arrangement/contract) with A Ltd. in which Mr. Nanavati is interested before his appointment as a director in OPQ Ltd. The issue is whether Mr. Nanavati should disclose his interest in 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 10.5.2000 the price revision sought by A Ltd.

In view of the above, Mr. Nanavati should make a disclosure of his interest in the first meeting to be held on 10.5.2000 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. Nanavati 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. Nanavati 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, therefore, it cannot be said he is interested only to the extent of less than 2% of the paid-up share capital of A Ltd. [The word 'solely' is used in section 300(2)(d)]. Hence Mr. Nanavati should not participate and vote in the Board Meeting to be held on 10.5.2000.

## Question 5

*Due to internal problems in the working of M/s Infighting Detergents Ltd., Mr. Satyam, the Executive Director, and Mr. Shivam, a Director, have submitted their resignations and decided to dissociate themselves with the working of the company. Mr. Sundram, the Managing Director, decides to refuse their resignations. Examine whether the Managing Director can compel Mr. Satyam and Mr. Shivam to continue as per the provisions of the Companies Act*

*(November 2001)*

### Answer

There is no provision in the Companies Act, 1956 relating to the resignation of his office by a director. If there is any provision in the articles giving the right to a director to resign at any time, the resignation shall take effect without any need for its acceptance by the Board or the Company in General Meeting. However, it is not clear what will be the position if the articles do not contain any provision relating to resignation of directors. One view is that the ordinary rule of common law as regards resignation by an officer or agent must be followed namely, resignation by notice given either to the Company or the Board and acceptance of the same. *(Glossop V. Glossop; Latchford Premier Cinema Ltd. V. Ennion)*. Another view is where the resignation says that it is to take effect immediately, acceptance is not necessary unless the articles or any provision of law makes it necessary. Further the directors do not have the power to refuse the resignation of the co-director unless such a provision is there in the Articles of Association. *(Re. Neokratine Safety Explosives Co. of New Ltd. (1891)*. Hence in the absence of contrary provisions in Articles, the Company (i.e., Mr. Sundaram) can not compel Mr. Shivam to continue as a director.

However, the position is somewhat different in the case of a managing or whole time director. In such a case a formal acceptance of resignation by the company is essential so as to make it compete and effective. This is because the managing director occupies two positions (i) one that of a director and (ii) the other that of a whole time employee. An employee cannot give up office at his pleasure simply by giving notice. The notice or letter of resignation is required to be accepted by the company and the officer concerned has to be relieved of his duties and responsibilities, attaching to the office which he has resigned from. [*Achutha Pai Vs. Registrar of Companies (1956) 36 comp. Case 598*]. Thus as the Executive Director, Mr. Satyam is full time employee of the company, the managing Director (Mr. Sundaram) can compel him to work as per the terms of employment agreed into at the time of appointment.

### Question 6

*X Ltd. is being managed by Mr. Clever as the Managing Director. Serious allegations have been made by some shareholders and creditors of the company that the Managing Director has misused his position and caused enormous loss to the company. The said shareholders and creditors of the company make a complaint to the Central Government to intervene and provide relief to them. Their main prayer is that the Managing Director should be removed from the post. Explain the powers of the Central Government in this regard. (May, 2001)*

### Answer

On receipt of the complaint from some of the shareholders and creditors of X Ltd., that its managing director Mr. Clever has misused his office and thereby caused loss to the company, the Central Government, if satisfied with the contents of the complaint may make a reference to the Company Law Board with a request to inquire into the case and record a finding whether or not Mr. Clever is a fit and proper person to hold the office of Managing Director. The application made to CLB must contain a concise statement of the circumstances and material as the central Government may consider necessary for the purpose of the enquiry.

The Company Law Board will hear both the parties viz. (1) The Central Government and (2) The Respondent Mr. Clever as well as the company. The CLB has powers to pass any interim order to the effect that the respondent Mr. Clever shall not discharge any of the duties of his office until further orders and appoint a suitable person in place of the respondent. At the conclusion of the hearing the CLB will record its finding. If the finding of the CLB is against the respondent, the Central Government, by order, shall remove him from office, as provided in Section 388E(1) of the Companies Act, 1956. The person against whom such an order is passed is debarred from holding the post of director etc., for a period of 5 years from the date of order of removal. Also no compensation is payable to him for termination of office.

## Question 7

*The Board of Directors of Stepping Stones Publications Ltd. at a meeting held on 15.1.2001 resolved to borrow a sum of Rs. 15 crores from a nationalized bank. Subsequently the said amount was received by the company. One of the Directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:*

| | | |
|---|---|---|
| *(i)* | *Share Capital* | *Rs. 5 crores* |
| *(ii)* | *Reserves and Surplus* | *Rs. 5 crores* |
| *(iii)* | *Secured Loans* | *Rs. 15 crores* |
| *(iv)* | *Unsecured Loans* | *Rs. 5 crores* |

*Advice the management of the company.* *(May, 2001)*

## Answer

According to the provisions of Section 293(1)(d) of the Companies Act, 1956 there are restrictions on the borrowing powers to be exercised by the Board of directors. According to that section, the borrowings should not exceed the aggregate of the paid up capital and free reserves. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case the proposed borrowing of Rs. 15 crores will exceed the limit mentioned. Thus the borrowing will be beyond the powers of the Board of directors. However the share holders have the power to ratify the act of the Board of Directors, if it is not beyond the powers of the company as laid down in the memorandum of association. In that case the shareholders can ratify as it is intra vires the company even though it may be beyond the powers of the Board of Directors.

Thus the management of Stepping Stone Publications Ltd., should take steps to convene the annual general meeting and pass a resolution by the members in the meeting as stated in Section 293(1)(d) of the Act. Then the borrowing will be valid and binding on the company and its members.

Question 8

*Mr. Doubtful was appointed as the Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.1998 on a salary of Rs. 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 1.3.2001. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of Rs. 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 Rs. 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guilty of corrupt practices.*

*(May, 2001)*

Answer

Section 318 to 328 of the Companies Act, 1956 contain elaborate provisions for regulating payment of compensation to directors for loss of office. According to Section 318, such compensation can be paid only to Managing Director or Whole Time Directors or directors who are full time employees of the company. The compensation payable is limited to the average remuneration actually earned by such director during the three years period immediately preceeding the date on which he ceased to hold the office and multiplied for the unexpired period of his term or for three years whichever is shorter. Further no compensation will be payable to such a director if the company goes into compulsory winding up within a period of 12 months from the date of cessation of his office. The company is not bound to pay compensation to Mr. Doubtful if he has been found guilty of any fraud or breach of trust or gross negligence and mismanagement of the affairs of the company. [Section 318(3)(e)]. However, it is not proper for the company to with hold the payment of compensation on the basis of allegations unless there is a proper finding on the involvement of Mr. Doubtful in corrupt practices. The compensation payable is Rs. 25 lakhs i.e., at the rate of Rs. 12 lakhs per annum for unexpired period of 2 years and 1 month.

Regarding the ad hoc payment of compensation to Mr. Doubtful, it will be difficult to recover the amount already paid. In the case of *Bell Vs. Lever Brothers* it was held that the director was not bound to refund the money because he failed to disclose his fiduciary obligation. In the said case Lever Bros. removed the managing director by paying him compensation. Later on it was discovered, that the managing director could have been removed without paying any compensation for the malpractices committed by him. Action was initiated for recovery of the compensation money paid. Held no recovery was possible because Managing Director was not bound to disclose his fiduciary obligations so as to give an opportunity to the company to dismiss him.

## Question 9

*Mr. Influential is already a director of 19 companies. He is being appointed as a director of another company named M/s Expensive Remedies Ltd. Advise Mr. Influential in regard to the following:*

*(i) Restrictions on the number of directorships to be held by an individual and whether he can accept the new appointment in view thereof.*

*(ii) What are the companies to be excluded for the purpose of calculating the ceiling on the appointment of directors? (November, 2001)*

## Answer

(i) After the commencement of the Companies (Amendment) Act, 2000, (i.e, w.e.f. 14.12.2000), no person, shall save as otherwise provided in section 276, hold office at the same time as director in more than 15 companies (Section 275). Earlier the limit was 20 companies.

For calculating the limit certain companies are to be excluded as provided in section 278(1).

Any person holding office as Director in more than 15 companies immediately before the commencement of the Companies (Amendment) Act, 2000, has to make a choice of 15 companies in which he wishes to continue as Director. He has to make this choice within 2 months from the commencement of the Companies (Amendment) Act, 2000 (i.e. 12.2.2001) [Section 276(1)]. No such person shall act as a director in more than 15 companies after the expiry of 2 months from the commencement Companies (Amendment) Act, 2000 [Section 276 (3) (1)].

In view of the above, it is not possible for Mr. Influential to be a director in 19 companies after excluding the companies listed in section 278 (1). In the absence of information about companies, it is not possible to ascertain the exact number of directorship held by Mr. Influential for the purpose of section 275.

There are two possibilities. Either Mr. Influential is a director in less than 15 companies (say 14 Companies) or 15 Companies. If he is a director in 14 Companies he can accept the directorship of M/s Expensive Remedies Limited. If he is already a director in 15 companies, he must within 15 days of his appointment as a director in M/s Expensive Remedies Ltd., relinquish any of his directorship. If he does not exercise the option within 15 days and does not vacate his directorship in any of the 15 companies, the appointment in M/s Expensive Remedies Ltd., shall become void immediately on the expiry of the 15 days [Section 277(1)].

(ii) For calculating the limit of 15 companies the following companies can be excluded:

(i) a private company which is neither a subsidiary nor a holding company of a public company.

(ii) An unlimited company.

(iii) An association not carrying on business for profit or which prohibits the payment of a dividend.

(iv) A company in which the person is only acting as alternate director.[Section 278(1)].

In making the above said calculation, any company referred to in (I), (ii) & (iii) above shall be excluded for a period of 33 months from the date on which the company ceases to fall within the purview of these clauses [Section 278(2)].

## Question 10

*The Articles of Association of a company states that a director shall not vote in respect of a contract in which he is interested. In a resolution put up for approval of the shareholders, can a director exercise his voting right in favour of a contract in which he is interested?*

*(November, 2001)*

## Answer

When a director exercises his voting right as a shareholder, he is free to vote in his own best interests like any other shareholder.

A provision in the articles of association of a company stating that a director shall not vote in respect of a contract in which he is interested does not preclude him from voting thereon as a shareholder in the general meeting of the company. A shareholder may vote as he pleases even when his interests are different from or opposed to those of the company. Shareholders are not trustees for the company or for one another.

However, in *Cooks vs. Deeks*, it was held that if directors use their position as directors to obtain for themselves the property of the company, as for example, by means of a beneficial contract, they cannot, by using their voting power as shareholders in general meeting, prevent the company from claiming the benefit of it.

Further section 182 makes it clear that a public company or a private company which is subsidiary of a public company shall not put any restriction on voting right of members except the one specified in section 181 (i.e. restriction on exercise of voting right of members who have not paid calls).

Hence the director can exercise his voting right at a general meeting in favour of a contract in which he is interested.

## Question 11

*The Companies (Amendment) Act, 2000 has prescribed an additional duty on the Board of Directors to include in the Board's Report a `directors' Responsibility Statement'. Explain briefly the details to be furnished in the said statement.* *(November, 2001)*

## Answer

The Companies (Amendment) Act, 2000 has prescribed additional duty on the board of directors to include in the directors report the additional particulars by way of Directors' responsibility statement. The details are:-

(i) That in the preparation of the annual accounts the applicable accounting standards had been followed along with proper explanation relating to material departures.

(ii) That the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit or loss of the company for that period.

(iii) That the directors had taken proper and sufficient care for the maintenance of adequate accounting standards in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.

(iv) That the directors had prepared the annual accounts on a going concern basis. [Section 217 (2AA)]

## Question 12

*M/s Rao & Rao, a firm of Chartered Accountants have to be appointed as the auditors of M/s ABC Co. Ltd., a Government Company. Explain the steps to be taken regarding the appointment and payment of remuneration to the auditors. (November, 2001)*

## Answer

According to the provisions of Section 619(2) of the Companies Act, 1956, the auditor of a Government company shall be appointed or re-appointed by the Comptroller and Auditor General of India. Further, the limits specified in sub-sections (1B) and (1C) of Section 224 shall apply in relation to the appointment or reappointment of an auditor under Section 619. Therefore, M/s ABC Company Ltd., the Government Company must approach C&AG for appointment of auditor).

The Companies (Amendment) Act, 2000 has introduced a new sub-section (aa) to Section 224(8) stating that in the case of an auditor appointed under Section 619 by the Comptroller and Auditor General of India, the remuneration shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine. Previously the remuneration of auditors was fixed by the Central Government. Thus, the remuneration is to be fixed by the company itself even though the appointment is made by C&AG.

## Question 13

*Mr. Stubborn is a director of M/s Doubtful Industries Ltd. He along with other two directors has been running the Company for the past twenty years without declaring any dividends or giving any benefit to the shareholders. Frustrated by this, some shareholders are desirous of giving notice to pass a resolution with the support of other shareholders for his removal as a director in the Annual General Meeting of the Company to be held in the month of December* *of 2001. State the procedure to be followed for the removal of Mr. Stubborn as a director and the right of Mr. Stubborn to defend his position.* *(November, 2001)*

### Answer

Mr. Stubborn a director of M/s Doubtful Industries Ltd., can be removed by following the procedure laid down in Section 284 of the Companies Act, 1956. The procedure is as under:

(i) An ordinary resolution is required to be passed at the general meeting of the company.

(ii) A special notice, as provided in Section 190 of the Act is required to be given to the company at least 14 days before the general meeting.

(iii) On receipt of the notice, the company has to send a copy of the notice to Mr. Stubborn and he is entitled to be heard on the resolution at the meeting.

(iv) Mr. Stubborn is also entitled to make a representation in writing to the company and the same has to be sent to all the members by the company.

(v) In case the representation has reached or the same could not be sent to all the members the same has to be read out at the meeting.

(vi) Such a representation need not be sent to the members or read out at the meeting if on the application of the company or any person aggrieved, the Company Law Board is satisfied that the rights conferred under this section are being abused to secure needless publicity for defamatory matter and passes an order to this effect.

If at the general meeting the resolution is passed by a simple majority, Mr. Stubborn will have to step down from the office as director of the company.

### Question 14

*Mr. X is a director of M/s ABC Ltd. He has approached M/s Housing Finance Co. Ltd. for the purpose of obtaining a loan of Rs.50 lacs to be used for construction of building his residential house. The loan was sanctioned subject to the condition that M/s ABC Ltd. should provide the guarantee for repayment of loan instalments by Mr. X. Advise Mr. X.* *(November, 2001)*

### Answer

According to section 295 of the Companies Act, 1956, no company shall make a loan or give any guarantee, or provide any security in connection with a loan made by any other person to any director of the lending company unless the previous approval of the Central Government is obtained in this behalf. Thus, Mr. X has to approach his company ABC Ltd by stating the full details of the loan transaction and the stipulation of M/s Housing Finance Company Ltd. Thereafter M/s ABC Ltd has to make an application to the Central Government for approval under Section 295 along with the prescribed fees. Only on receipt of the approval M/s ABC Ltd can provide guarantee to M/s Housing Finance Co. Ltd.

The company is also required to comply with the provisions of section 292 (i.e. Board Resolution) and section 372A (special resolution in a general meeting if required).

Question 15

*Examine, with reference to the relevant provisions of the Companies Act, 1956, the validity/legality of the following:*

*(i) A meeting of the Board of Directors of OPQ Co. Ltd. due to be held on 30.9.2001 did not take place for want of quorum. As a result, the Company did not hold any Board meeting for the quarter ended 30.9.2001 and there is a complaint that the Company has violated the provisions of the Act in this regard.*

*(ii) M/s RST Computers Ltd. want to file its documents with the Registrar of Companies in computer print out form.*

*(III) M/s XYZ Co. Ltd. held its Annual General Meeting beyond the permissible time limit and the legality of the documents filed by the Company has been questioned .*

*(November, 2001)*

Answer

(i) According to the provisions contained in Section 288(2) of the Companies Act, 1956, the provisions of Section 285 relating to the holding of at least one Board meeting in a quarter cannot be deemed to have been contravened merely by reason of the fact that a Board meeting which had been called in compliance with the terms of the said section could not be held for want of a quorum. Thus the allegation that the company has contravened the provisions of Section 285 in the matter of holding the Board meeting is not correct.

(ii) M/s RST Companies Ltd., can file with the Registrar of companies floppy, diskette, etc. particularly in the case of bulky documents like annual return. Computer printout of information contained in such floppy etc. is seemed to be a document for the purposes of the Companies Act and the rules made thereunder [Section 610A(1)]. Further, notwithstanding anything contained in any other law for the time being in force, the computer print out is advisible as evidence of all legal proceedings without further proof or production of original. [Section 610A(1)] if the following conditions are satisfied:

(a) the information contained in the statement reproduces on paper or any other computer readable media.

(b) scanning the documents filed on computer media will be carried out and duly authenticated by the Registrar.

(c) the Registrar will take due care to preserve the computer media by duplicating, transferring, mastering or storage without loss of data.

(iii) It is not correct to say that once the time for holding the annual general meeting has expired, the meeting held after the prescribed time is void. Failure to hold the annual general meeting is punishable with fine only. Therefore, the legality of the meeting and the document filed pursuant to the meeting cannot be questioned merely because of the delay in holding the meeting.

## Question16

*PQR Limited is paying remuneration to its non-executive directors in the form of commission at the rate of one percent of the net profits of the company distributed equally among all the non-executive directors. The company is providing depreciation on straight-line basis at the rates specified in Schedule XIV to the Companies Act, 1956. The company seeks your advice in respect of the following:*

*(I) Whether it is necessary to make adjustment in respect of depreciation for the purpose of arriving at the net profit of the company to determine the quantum of remuneration payable to its non-executive directors.*

*(ii) Is it possible to pay minimum remuneration to non-executive directors besides sitting fees in the event of loss in a financial year?*

*Advise the company explaining the relevant provisions of the Companies Act, 1956.*

*(May, 2002)*

## Answer

### Remuneration to Non-executive directors'

(i) According to section 349(4)(k), of the Companies Act, 1956 in computing the net profits of a company in any financial year for the purpose of determination of the managerial remuneration, the sum of depreciation to the extent specified in section 350 shall be deducted.

Section 350, as amended by the Companies (Amendment) Act 2000, specifies the manner of ascertainment of depreciation. The amount of depreciation to be deducted, is the amount of depreciation as appearing in the books is as shown in the profit and loss account of the relevant financial year, at the rates specified in Schedule XIV to the Companies Act, 1956.

Schedule XIV specifies different rates of depreciation applicable to the two methods of depreciation, namely, written-down value method and straight line method. Thus, after, the Companies (Amendment) Act 2000, depreciation as per written-down value need not be recalculated where depreciation is charged in the books as per straight-line method.

(ii) The total amount of managerial remuneration payable by a public company to its directors shall not exceed 11% of net profits of that company computed in accordance with sections 349 and 350, except that remuneration of the directors shall not be deducted from the gross profits (section 198(i)). This percentage is exclusive of sitting fees payable to directors (section 198(2))

If the company is not making profits, remuneration to non-executive directors can be made only with the approval of Central Government [Section 198 (4)]. Hence without approval of Central Government, minimum remuneration cannot be paid to non-executive directors. However Central Government's approval is not required if the appointments has been made in accordance with the terms and conditions specified in Schedule XIII

## Question 17

*Examine the validity of the following:*

*(i) Mr. Q, a Director of PQR Limited proceeding on a long foreign tour, appointed Mr. Y as an alternate director to act for him during his absence. The articles of the company provide for appointment of alternate directors. Mr. Q claims that he has a right to appoint alternate director.*

*(ii) The Articles of Association of M/s ABC Ltd. provide that a meeting of the Board of Directors shall be held at 11.00 A.M. on the last day of every quarter ending on 31$^{st}$ March, 30$^{th}$ June, 30$^{th}$ September and 31$^{st}$ December. Relying on the said provision, the company did not send notices to the directors in respect of a board meeting held on 31.3.2002. Some of the directors have questioned the validity of the board meeting on the ground that individual notices have not been sent to directors. (May 2002)*

## Answer

(i) Section 313 of the Companies Act, 1956 provides that the Board of Directors of a company may, if authorised by its articles or by resolution passed by the company in general meeting, appoint an alternate director to act for a director during his absence for a period of not less than 3 months from the State in which the meetings of the Board are ordinarily held. The alternate director can be appointed only by the Board of Directors and only in cases where the Board is authorised by Articles or by the company in general meeting. Hence Mr. Q, the director in question, is not competent to appoint alternate director and the appointment of Mr. Y as alternate director is not valid.

(ii) If the articles of association of M/s. ABC Ltd. provides that a meeting of the board of directors shall be held on the last day of each quarter, it is not necessary that separate notice is required to be served on the directors. It was held in *Arunachalam Chettiar vs. Kaleswarar Mills Ltd* that where articles of the company provide that there will be a meeting on the first Saturday of every month, there will be no necessity of the service of notice under section 286(i) in as much as a provision in the articles is sufficient compliance of section 286(1). However, as a good secretarial practice, notice should be sent to all the directors.

## Question 18

*M/s Hurybury Builders Limited is contemplating to enter into a joint venture agreement with another construction company for the development of landed properties located at Bangalore. Since it is not possible to convene the Board Meeting immediately, as the directors are at different places in connection with various works, the Managing Director seeks your advice on the following matters:*

*(i) Whether the resolution pertaining to the joint venture agreement is required to be passed at the Board Meeting convened for this purpose or whether it can be passed by means of a circular resolution.*

(ii) *What are the resolutions that are required to be passed only at the meetings of the Board of Directors?*

(iii) *The steps that are required to be taken to pass the Board resolution by circulation. Advise.* *(May, 2002)*

## Answer

The directors of the company act together as a body and generally at the meeting of the Board duly convened, unless special powers are delegated to an individual director or the managing director. Where it is not possible to hold board meetings because the directors are busy elsewhere or the time for convening such a meeting is short, it is possible that the required resolution can be passed by way of circular resolution as provided in section 289 of the Companies Act, 1956. However, under section 292, certain powers can be exercised by the Board of directors only by means of a resolution passed at meeting convened for this purpose. They are (i) to make calls (ii) to issue debentures (iii) to borrow money otherwise than on debentures (iv) to invest the funds of the company and (v) to make loans. In view of the above, the Managing Director can go ahead and complete the joint venture agreement after obtaining the approval of the board by passing a circular resolution. For this purpose, the proposed resolution has to be circulated in draft along with the other necessary papers, if any, to all the directors in India at their usual residential addresses. The resolution will become valid if the same is approved by majority of the directors and who are entitled to vote on the resolution. There after the resolution as passed by way of circulation will be entered in the minutes book of the Board of Directors and is enough compliance of the provisions of Companies Act in this regard.

## Question 19

*M/s Kith and Kin Consultants Private Limited seeks your legal advice regarding the following appointments relating to directors and their relatives:*

(i) *Mr. Nephew, who is a relative of one of the directors, is to be appointed as the Managing Director on a monthly salary of Rs.30,000 plus other perquisites as applicable to other executives of the company.*

(ii) *Miss Niece, a relative of a director, is to be appointed as Chief Executive Officer on a consolidated salary of Rs.25,000 per month.*

*Advise explaining the relevant provisions of the Companies Act, 1956.* *(May, 2002)*

## Answer

According to the provisions of section 314 of the Companies Act, 1956, except with the consent of the company accorded by a special resolution, no director of a company or relative shall hold any office or place of profit except that of Managing Director or manager of the company. Thus Mr. Nephew, if he is appointed as the Managing Director of the company, the provision of section 314 are not attracted, even through he is related to one of the directors of the company. This is because the appointment of Managing Director or manager is outside the purview of the provisions of Section 314.

Further according to section 314 (1B) no relative of director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs.50,000/- (previously Rs. 20,000/-) except with the prior consent of the company by a special resolution and the approval of the central Government. Thus in the case of Mr. Wellconnected who is related to the managing director, his appointment requires not only the passing of a special resolution by the company but also the approval of the Central Government. The special resolution is required to be passed before the appointment. However in the case of Miss Niece, her appointment requires only prior passing of the special resolution and not the approval of Central Government because the remuneration proposed to be paid is less than Rs. 50,000/- per month.

## Question 20

*Mr. A is a director of ABC Limited failed to repay matured deposits from 1st April, 2001 onwards and the default continues. But ABC Limited is regular in filing annual accounts and annual returns. Mr. A is also a director of PQR Limited and XYZ Limited.*

*Answer the following questions with reference to the relevant provisions of the Companies Act, 1956:*

*(i) Whether Mr. A is disqualified under Section 274(1)(g) of the Companies Act, 1956 and if so, whether he is required to vacate his office of director in PQR Limited and XYZ Limited.*

*(ii ) Is it possible for Board of Directors of DEF Limited to appoint Mr. A as an Additional Director at the board meeting to be held on 15th May, 2002? Would your answer be different if Mr. A ceased to be a Director of ABC Limited by resignation on 1st March, 2002 ?*

*State also the auditor's responsibility with regard to reporting of disqualification under Section 274(1)(g). (May, 2002)*

## Answer

### Disqualification of directors

(1) A person who is already a director of a public company becomes disqualified for being appointed as a director, if the concerned company has committed default on either of the two counts mentioned in sub-clauses (A) and (B) of section 274 (1) (g) of the Companies Act, 1956. In this case ABC Ltd., is regular in filing annual accounts and annual returns. But ABC Ltd failed to repay matured deposits from 1st April 2001 onwards and such failure continues for more than one year. Hence ABC Ltd committed default under section 274(1)(g)(B) and Mr. A, being a director of ABC Ltd is disqualified under Section 274(1)(g).

This disqualification would come into operation only at the time of appointment or reappointment of Mr. A as a director in any other public company after the default has become effective. Hence Mr. A. need not vacate the office of director in PQR Ltd and XYZ Ltd as there is no such requirement either in section 274 or in section 283 which provides for vacation of office.

(2) According to proviso to section 274(1)(g), Mr. A is disqualified to act as director of any other public company for a period of 5 years from the date on which ABC Ltd. in which he is a director makes default under section 274(1)(g)(A) or 274(1)(g)(B). Hence, the Board of Directors of DEF Ltd cannot appoint Mr. A as additional director at the board meeting to be held on 15th May 2002.

The words 'such a person is already a director of public company' in section 274(1)(g) indicates that this disqualification would attach only if the two conditions are satisfied (i) either of the two defaults have taken place while the person was a director of the concerned public company and (ii) he holds that directorship at the time of his appointment/re-appointment in public company. The essential condition, therefore, is that a person should be a director of a public company at the relevant time when the default under sub-clause (B) takes place. The failure under sub-clause (B) takes place only when such failure continues for one year or more. If Mr. A ceased to be a director of ABC Ltd. by resignation on 1st March 2002, he would not attract disqualification for a period of 5 years from being eligible to be appointed as a director of any other public company. Hence Mr. A can be appointed as a director in DEF Ltd.

The auditor is required to state in his report whether any of the directors of the company, whether public or private are disqualified from being appointed as a director in terms of section 274(1)(g). [Section 227(3)(f)]. Section 274(1)(g) is applicable to appointment of directors both in public and private companies but the reporting will be limited to this directors of a company who are also directors of any public company.

## Question 21

*ABC Company Ltd. in its First General Meeting appointed six Directors whose period of office is liable to be determined by rotation. Briefly explain the procedure and rules regarding retirement of these directors. Will it make any difference, if ABC Company Ltd. does not carry on business for Profit? (November, 2002)*

## Answer

According to section 255 of the Companies Act 1956, unless the articles provide for the retirement of all directors in every general meeting, at least 2/3rds of the total number of directors of the public limited company in question must, in the first place, be appointed, save as otherwise expressly provided in the Act by the company in general meeting; Secondly, they must be persons whose period of office is liable to be determined by rotation.

According to section 256, out of 2/3rd rotational directors only 1/3rd must retire by rotation at one general meeting.

If the number is not three or multiple of three, then the number nearest to 1/3 must retire from office.

Yes it will make a difference if ABC company does not carry on business for Profit. Provisions of Section 256 do not affect those companies which do not carry on business for profit or those which by their articles prohibit the payment of dividend to their members. Such companies are not affected by Section 255 also which provides that at least 2/3rd of the directors shall retire by rotation while section 256 provides that 1/3rd of the retiring directors shall retire every year.

## Question 22

*In the light of the conditions laid down by Section 295 of the Companies Act, 1956, examine if the following transactions can be considered as loans to Directors:*

*(i) Advance payment of salary to the employee who is also the spouse of the Managing Director of the Company.*

*(ii) A sale of flat of the company at the Current Market Rate and Price. The Director pays sixty per cent Cash immediately and contracts to pay the balance in ten monthly instalments.*

*(iii) A loan to a firm in which the Director of the company is a Partner. (November, 2002)*

## Answer

A company's powers of lending money to its directors is strictly regulated by the Companies Act, 1956. The Act prohibits the company not only from directly lending money to its directors but also from giving any guarantee for a loan taken by a director from any other person, and providing any security for such loan. Section 295 deals with loans to Directors.

(i) This transaction does not per se amount to a loan so as to violate Section 295 of the Companies Act, 1956. The burden of proving otherwise lies with the prosecution. Thus in the absence of any evidence that there has been circumvention of the section by disguising the loan to the wife of the director, who is an employee, as salary advance, the court refused to accept the case for prosecution*. M.R.Electronic Components Ltd. vs. Assistant Registrar of Companies (1987) 6 Comp. Case 8 (Mad).*

(ii) In a petition, *Dr. Fredie Ardeshir Mehta V. Union of India* seeking quashing of a prosecution launched under section 295, the Bombay HIgh Court came to the conclusion that a company selling one of its flats to one of its directors on receiving more than half the price in cash and agreeing to accept the balance in installments does not amount to giving a loan to the directors. It is a credit sale. It can not even be described as indirect loan.

(iii) Through the loan given by the company to the firm may not be direct loan to the directors of the company, yet the provisions of Section 295 of the Companies Act, 1956 prohibit any loan to a firm in which one or more of the company directors are partners. Since one of the directors of the company is a partner of this firm, a loan to this firm is in contravention of the provisions of Section 619.

## Question 23

*M/s XYZ Ltd. was incorporated on 1st January, 2000. On 1st November, 2002 a Political Party Approaches the Company for a contribution of Rs. Ten lakhs for political purpose. Advise in respect of the following:*

*(I) Is the Company legally authorised to give this Political contribution?*

*(ii) Will it make any difference, if the Company was in existence on 1st October, 1999?*

*(iii ) Can the company be penalised for defiance of Rules of this regard? (November, 2002)*

## Answer

1. No. prior to amendment of Section 293 A, by the Companies (Amendment) Act 1985, there was a blanket ban on political Contributions by Companies. But the amended section seeks to continue the existing blanket ban against political contributions in case of government companies and companies which have been in existence for less than three financial years.

   Since XYZ Co. has not completed three years of existence on 2nd November 2002, it is not eligible to give political contribution.

2. Yes, because in that case, XYZ co. limited shall complete three financial years of its existence, therefore, will be eligible to give political contribution subject to the condition that such a political contribution should not exceed five percent of the average net profits and a resolution authorising such contribution is passed at a meeting of the Board of Directors.

3. The Amended Section 293A seeks to impose an obligation on every company to disclose in its profit and loss account contributions made by it to any political party or for any political purpose. Contravention of the provisions of this section will make a company liable to fine which may extend to three times the amount so contributed. Further every officer of the company in default would be liable to imprisonment for a term which may extend to three years and also to fine.

## Question 24

*Mr. Busybody has been appointed as a Director of ACE Automobiles Limited on 2nd April, 2002. The articles of association of the company provides that the qualification of a director shall be holding of at least 10 shares in the company. Mr. Busybody applied for 10 equity shares of the company on 31st May, 2002. But the shares were allotted only at the Board meeting held on 19th August, 2002. Examine with reference to the relevant provisions of the Companies Act, 1956 whether Mr. Busybody has complied with the requirements relating to qualification shares. If not, what are the consequences? (May, 2003)*

## Answer

The Companies Act, 1956 does not provide for any share qualification of any director. But Regulation 66 of Table A provides that a Director must hold at least one share in the company.

Usually the Articles of a company provides for holding qualification share by a Director. Where a share qualification has been prescribed in the Articles of a company which is a public company or a private company which is a subsidiary of a public company, the provisions of section 270 regarding holding of share qualification by a Director shall apply whereby such director must take his qualification share within 2 months after his appointment.

If a person acts as a director without acquiring the qualification share in accordance with the provisions of section 270, he shall be punishable with fine which may extend to Rs.500/- for every day during which he continues to act as a director (Section 272). Moreover a director who fails to hold qualification shares is liable to vacate his office. (Section 283(i)(a).

In this case, Mr. Busybody was appointed as Director of ACE Automobiles Ltd on 2nd April, 2002. He applied for shares of the company on 31st May, 2002 which were allotted only at the Board Meeting held on 19th August 2002. Unless the shares applied for by Mr. Busybody has been allotted in his favour it cannot be said that he held the shares before expiry of 2 months from the date of his appointment. Therefore Mr. Busybody must vacate his office of director.

## Question 25

*Mr. Ram is a Director of ABC Limited, XYZ Limited and PQR Limited. ABC Limited was regular in filing annual returns, but did not file annual accounts for the year ended 31st March, 2002. Further ABC Limited failed to pay interest on loans taken from a public financial institution from 1st January, 2002 onwards and also failed to repay the matured deposits on due date from 1st April, 2002 onwards.*

*Mr. Ram is proposed to be appointed as additional director of MN Limited on 1st June, 2003. MN Limited has sought a declaration from Mr. Ram to the effect that the disqualification specification Section 274(1)(g) of the Companies Act, 1956 is not applicable in his case. Mr. Ram seeks your advice on the following:*

*(i) Whether it is in order for him to give the declaration sought by MN Limited in view of the defaults committed by ABC Limited.*

*(ii) Whether he can continue as a Director in XYZ Limited and PQR Limited and also seek reappointment when he retires by rotation at the annual general meetings of respective companies to be held in September, 2003.*

*Advise explaining the relevant provisions of the Companies Act, 1956. Would your answer be different, if Mr. Ram resigned his office of director in ABC Limited on 31st December, 2002?*

*(May 2003)*

## Answer

### Disqualification under Section 274(1)(g) the Companies Act, 1956

According to Section 274 (1)(g) of the Companies Act, 1956, a person who is already a director of a public company becomes disqualified for being appointed as director; if the concerned company has committed default on either of the two counts mentioned below:-

(i) The concerned public company has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after 1st April, 1999 or

(ii) The concerned public company has failed to repay its deposit or interest on due date or redeem its debentures on due date or pay dividends and such failure continues for one year or more.

Such a person is disqualified to act as a director of any other public company for a period of five years from the date on which the public company (in which he is a director) makes default as specified in the (A) or (B) above.

Here Mr. Ram is a director of ABC Ltd. ABC Ltd was regular in filing annual returns but did not file annual accounts (i.e. Balance sheet and profit and loss accounts) for only one year i.e financial year ended 31st March 2002. The disqualification specified in 274(i)(g) (A) will not apply unless the company has committed defaults in respect of both the matters i.e annual returns and annual accounts for three consecutive financial years. Hence Section 274(i)(g)(s) is not attracted in this case.

ABC Ltd. failed to pay interest on term loan taken from a public financial institution from 1.1.2002 onwards and also failed to repay matured deposits from 1.4.2002 onwards. The disqualification specified in sub-clause (B) will not apply unless the company has committed default in respect of loans from public financial institution is not covered under section 276(i)(g)(B). But as ABC Ltd has failed to repay its deposits on due date and the failure continues for more than one year, Mr. Ram is disqualified under section 274(1)(g)(B) and he cannot give the declaration sought by MN Ltd. In view of his disqualification u/s 274(I)(g)(B), Mr. Ram is not eligible to be appointed as additional director in MN Ltd. from 1st June 2003 onwards.

The disqualification would come into operation only at the time of appointment or reappointment of Mr. Ram as director on any public company after the default has become effective. Till such time, Mr. Ram can continue to hold the office of director in all public companies in which he is a director. He need not vacate the office of director in XYZ Ltd and PQR Ltd. as there is no such requirement either in section 274(1)(g) or section 283(Section 283 stipulates the circumstances under which the office of a director shall become vacant). But Mr. Ram cannot seek reappointment on XYZ Ltd and PQR Ltd when he returns by rotation at the AGMs to be held in September, 2003.

If Mr. Ram resigned his office of director in ABC Ltd. on 31st December 2002, he is not a director when the default u/s 274(i)(g)(B) becomes effective i.e. 31st March, 2003. Hence he can give the declaration sought by MN Ltd. He can also seek re-appointment as a director in XYZ Ltd. and PQR Ltd. when he retires by rotation.

## Question 26

*M/s Supreme Technologies Limited propose to appoint Mr. E and Mr. F as whole-time directors for a period of three years with effect from 1st June, 2003. The company proposes to pay a consolidated salary of Rs. 80,000 per month to each of them.*

*Mr. D, the managing director of the company, has been appointed for a period of five years with effect from 1st January, 2001 on a remuneration payable in the form of commission at the* *rate of five per cent of net profit subject to a minimum remuneration of Rs. 80,000 per month.*

*The effective capital of the company at the end of the financial year ending 31st December, 2002 is Rs. 4.5 crores and it has been increased to Rs. 5.5 crores on 1st April, 2003 by way of right issue of equity shares. The company did not repay public deposits on the date of maturity from 1st January, 2003 onwards, but the default was made good on 1st April, 2003.*

*The company seeks your advice on the steps to be taken to comply with the requirements of Section 269 read with Schedule XIII to the Companies Act, 1956 with regard to the proposed appointment of Mr. E and Mr. F as whole time directors. Advise explaining the relevant provisions.* *(May 2003)*

## Answer

### Appointment of whole-time directors

Mr. E and Mr. F are proposed to be appointed as whole time directors for a period of 3 years with effect from 1st June, 2003. Each of them will get a consolidated salary of Rs.80,000 per month. It has been stated that both of them satisfy the conditions laid down in Part–I of Schedule XIII. It is necessary to examine whether the proposed payment of remuneration is within the limits laid down under A or B or C of Section II of Part II of Schedule XIII in order to determine the legal requirements to be complied with to give effect to the proposed appointment of Mr. E and Mr. F as whole-time directors.

The appointment is to be made on 1st June 2003. According to Explanation II (b) (of Schedule XIII), the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which appointment is made. In this case the effective capital on 31-12-2002 is the last date of the preceding financial year is Rs.4-5 crores. The right issue of equity shares on 1st April 2003 is not relevant here for the purpose of ascertaining effective capital. According to Schedule XIII, Part II, Section II(A) if the effective capital is Rs. 1 crore or more but less than Rs. 5 crores monthly remuneration payable shall not exceed Rs.1,00,000. This ceiling shall apply for each M.D and/or whole-time director. The proposed minimum remuneration for each of the directors Mr. E and Mr. F and also the existing director Mr. D is only Rs.80,000 i.e. within the ceiling laid down in Schedule XIII, Part-II, Section II(A).

It has been stated that the company has defaulted in repayment of public deposits during the period of 1st January 2003 to 31st March, 2003. According to proviso (ii) if the company has defaulted in repayment of debts including public deposits for a continuous period of 30 days during the preceding financial year (i.e. year 2002) before the date of appointment of the managerial person, then the appointment requires approval of Central Government as one of the conditions laid down in Schedule XIII, Part-II, Section II is not fulfilled. But as there was no default in this regard during the preceding financial year ended 31st December 2002,the company has fulfilled the above condition.

Hence the following steps are to be taken to comply with the requirements under section 269 read with Schedule XIII.

(i) If there is no remuneration committee, remuneration committee must be formed consisting of at least 3 non executive independent directors including nominee directors, if any (explanation (iv)).

(ii) The remuneration payable to Mr. E and Mr. F must be approved by a resolution passed by the remuneration committee taking into consideration the matters specified on Explanation V (Proviso (i)).

(iii) Board meeting must be convened to appoint Mr. E and Mr. F as additional directors, if they are not directors and later on appoint them as whole-time directors on a consolidated salary of Rs.80,000 p.m.

(iv) A return in the prescribed form (Form 25C) must be filed with Registrar of Companies within 90 days form the date of such appointment. The form must be certified by the auditor of the company or the secretary of the company or by a secretary in whole-time practice, if there is no secretary. They must certify that the requirements of Schedules XIII have been complied with. [Section 269(2) read with Schedule XIII – Part –III, (2)].

(v) The appointment of Mr. E and Mr. F and remuneration payable to them must be approved by the company in general meeting by an ordinary resolution [Schedule XIII part III(i)]. There is no need to file Form No.25C once again after the general meeting at which the appointment is approved.

## Question 27

*XYZ Company Ltd. in its annual general meeting appointed all its directors by passing one single resolution. No objection was made to the resolution. Examine the validity of appointment of directors explaining the relevant provisions of the Companies Act, 1956. Will it make any difference, if XYZ Company was a private company? (May, 2003)*

## Answer

Section 263 (1) of the Companies Act 1956 requires that the appointment of every director shall be voted on individually. Thus two or more directors cannot be appointed by a single resolution. However an exception has been carried out where under if a resolution has been first passed to the effect that all the directors shall be appointed by a single resolution without any vote being against it.

Any resolution, as per Section 263(2), in contravention of the aforesaid provisions shall be void whether or not objection was taken at the time of its being so moved.

The aforesaid provision, however apply to a public company or a private subsidiary of a public company. Hence, the appointments so made are void. However if XYZ co. was a private limited company, then the condition of provision of Section 263(1)(2) were not applicable as regards the condition of single resolution is concerned.

## Question 28

*Advise the Board of Directors of a public company about their powers in respect of the following proposals explaining the relevant provisions of the Companies Act, 1956 :*

*(i) Donation of Rs. 5,00,000 to a hospital established exclusively for the benefit of employees.*

*(ii) Buy-back of shares of the company for the first time upto 10% of the paid-up equity share capital.*

*(iii) Delegating to the managing director of the company the power to invest surplus funds of the company in the shares of some companies. (May, 2003)*

Answer

(i) Donation to a hospital run exclusively for the benefit of employees of the company: The limit of 5% of average net profits during the last 3 financial years is applicable only to contributions to charitable and other funds not directly relating to the business of the company or the welfare of its employees [Section 293(1)(e), Companies Act, 1956]. Hence the Board is empowered to make the proposed donation to the hospital.

(ii) Section 292 has been amended by Companies (Amendment) Act 2001 to facilitate buy back of shares upto 10% of the total paid-up equity capital and free reserves [Section 292(i)(aa)]. Hence special resolution in general meeting of the company is not required. Hence the proposed buy back of shares is in order provided other conditions laid down on section 77A are fulfilled.

(iii) Section 292 of the Companies Act, 1956, empowers the Board of Directors to delegate to the M.D the power to invest in general terms. But Section 372A(2) provides that no investment shall be made, unless it is sanctioned by a resolution passed at a meeting of the Board with the consent of all the directors present Section 372A does not provide for delegation. Hence the proposed delegation of power to invest to the M.D. is not in order.

Question 29

*The maximum number of Directors of each of the following Companies as per their Articles of Association is 11.*

*(i) ABS Company Ltd.*

*(ii) DSP Trading Private Ltd.*

*(iii) Traders Association (a Company registered under Section 25 of the Companies Act, 1956)*

*(IV) Hindustan Paper Ltd. (a Government Company under Section 617 of the Companies Act, 1956)*

*The Board of Directors of the Company wants to increase the number of Directors to 15.*

*State with reference to the provisions of the Companies Act, 1956 whether the Directors can do so. (November, 2003)*

### Answer

According to the provisions of section 259 of the Companies Act, 1956, in the case of a company incorporated after 21st July, 1951, any increase in the number of its directors beyond the maximum fixed by its Articles of Association as originally adopted and registered and in the case of a company existing prior to that date, any increase in the number of directors shall not have any effect unless approved by the Central Government and it is to become void to the extent to which it is disapproved by the Central Government. However, such approval from the Central Government is not required if the number of directors is increased to 12 or less than that.

From the reading of the provisions of the said section 259 of the Companies Act, 1956, it can be concluded that these provisions are applicable to only public companies or private companies which are subsidiaries of public companies.

Based on the above provisions, following can be stated in respect of various types of Companies as mentioned in the question:

In the case of ABS Company Ltd., the Directors have to obtain the approval of the Central Government for increasing the number of Directors from 11 to 15.

In the case of DSP Trading Private Ltd., a private company; Traders Association, a section 25 company and Hindustan Paper Ltd. a Government Company, the provisions of section 259 of the Companies Act, 1956 are not applicable to them, hence the Directors of these companies can increase the number of Directors from 11 to 15 without approval of the Central Government subject to fulfilment of other procedural requirement.

### Question 30

*With the knowledge of all the Directors of a Public Limited Company, a mortgage was created over the property of the company in respect of a loan given by the brother of one of the Directors of the company. But the interested Director neither disclosed his interest nor abstained from voting at the Board Meeting, when the loan transaction was approved.*

*Examine with reference of the provisions of the Companies Act, 1956 whether there is any ban on such contracts and whether non-disclosure of interest and voting by the interested Director would make the contract void.* *(November, 2003)*

### Answer

Section 299 of the Companies Act, 1956 requires the disclosure of interest by a director while Section 300 prohibits an interested director to participate or vote on Boards' proceedings. But where a whole body of directors is aware of the facts relating to an interest of a director, a formal disclosure is not necessary. *[Venkatachalapathy V.S. Guntur Collton Mills, AIR 1929 Mad. 353].*

(i) The mere voting by an interested director will not render the contract void or voidable unless with the absence of that vote, there would have been no quorum. The mere fact that voting under such situation is an offence punishable with fine under Section 299(4) and 300(4) of the Act, does not *ipso facto* render the contract void or violable. In this case, there is no allegation of earning secret profits. Thus the action of the company will fail as the contract of mortgage is fair and in the interest of the company.

(ii) Under Section 299 and 300 of the Act, there is no ban on a contract in which a director is interested. The only requirement is that the interest should be disclosed, bonafide and fair *[P. Leslie & Co. vs. V.O. Wapshare AIR 1969 SC 843].*

Even where the interest is not disclosed the transaction is only voidable against the interested director, and not void. *[Narayan Das Shreeram Somani vs. Sangli Bank AIR 1966 SC 170].*

## Question 31

*Mr. PMC is Director in 14 Public Limited Companies as on 30th July, 2003. He continues to be so till 4th September, 2003. The following companies appoint Mr. PMC as a Director at their respective Annual General Meetings held on dates mentioned against their names.*

*(i) PQR Ltd. (AGM held on 29th September, 2003).*

*(ii ) BCD Private Ltd. (AGM held on 25th September, 2003).*

*(iii) City Traders Association (A company registered under Section 25 of the Companies Act, 1956- AGM held on 26th September, 2003).*

*(iv) TSP Ltd. (AGM held on 25th September, 2003).*

*You are required to state with reference to the relevant provisions of the Companies Act,*

*1956 the options available to Mr. PMC in respect of accepting or not accepting the appointment of Director of the above companies.* *(November, 2003)*

## Answer

Section 275 of the Companies Act, 1956 debars any person to hold office as a director of more than 15 companies simultaneously. As per provisions of Section 277(2) of the Companies Act, 1956 where a person holds directorship of 14 or less companies is appointed as a director of other companies and such appointments make the total number of his directorships more than 15, then the person concerned has to choose the directorships which he wishes to continue to hold or to accept so that the total number of directorships, old and new henceforth to be held by him does not exceed 15.

The said section further provides that none of the new appointments shall be effective until such a choice is to be made and in case of failure of the person to make such a choice within 15 days of the day on which the last of the new appointments was made, all the new appointments shall become void.

Section 278 of the Companies Act, 1956 states that for the purpose of section 275 and section 277 the number of companies of which a person maybe a director, following companies are not to be counted:

(a) A private company unless it is a subsidiary of a public company.

(b) An unlimited company.

(c) An association not carrying on business for profit or which prohibits the payment of dividend.

(d) A company in which such a person is only an alternate director.

In view of the above mentioned legal provisions, Mr. PMC who is already a director in 14 companies has to consider the following aspects:

As per provisions of section 278 of the Companies Act, 1956, BCD Private Ltd. being a private company and City Traders Association being an association not carrying on business for profit and prohibiting payment of dividend by virtue of being a company registered under section 25 are not to be counted for the purpose of section 277 read with section 275.

Thus, Mr. PMC can accept the appointment in BCD Private Ltd and City Traders Association without any obstacle.

The appointment of Mr. PMC in the other two public companies along with the old directorships in 14 companies makes a total of 16, which is in excess of 15 prescribed by section 275. As per provisions of section 277, Mr. PMC has to decide within 15 days from 29th September, 2003, the date on which the last appointment was made, as to the directorships which he wishes to continue to hold or to accept so that the number of his total directorships does not exceed 15 and in case he fails to decide within the said 15 days, then his appointments as a director of PQR and TSP Ltd shall become void on the expiry of the said 15 days.

## Question 32

*Examine whether the payment of following remuneration to Non-executive Directors (Directors who are neither in the whole-time employment of the company nor Managing Director) is in accordance with the provisions of the Companies Act, 1956:*

*(i) Sitting fee payable to Directors is increased from Rs.3,000 to Rs.6,000 per meeting by amending the Articles of Association.*

*(ii) Commission payable to Non-executive Directors is calculated on the basis of book profits arrived at after providing for depreciation as per straight line method.*

*(iii) Guarantee commission has been paid to one of the Non-executive Directors for having guaranteed the term loans obtained from a Financial Institution. (November, 2003)*

## Answer

### Non-Executive Directors Remuneration

**Sitting Fees:** Sitting fees are payable to directors at the rates prescribed in the Articles of Association of the company [Section 309(2) Companies Act, 1956]. No approval of the Central Government will be necessary for an increase in the amount of sitting fees so long as such increase is within the prescribed limits (Proviso 1 to Section 310) - The present prescribed limit is Rs.5,000 per meeting [Rule 10B of the Companies (Central Governments) General Rules and Forms 1956]. Since the sitting fee of Rs.6,000/- is above the prescribed limit, the amendment shall not have effect unless approved by the Central Government under Section 310.

Depreciation: Section 350, as amended by the Companies (Amendment) Act, 2000 specifies the manner of ascertainment of depreciation. The amount of depreciation to be deducted is the amount of depreciation as appearing in the books i.e. as shown in the profit and loss account of the relevant financial year, at the rates specified on Schedule XIV to the Companies Act. Schedule-XIV specifies different rates of depreciation applicable to the two methods of depreciation, namely, written-down value method and straight-line method. Thus after the Companies (Amendment) Act, 2000, depreciation as per written-down value need not be recalculated where depreciation is charged in the books as per straight-line method. Hence, the computation of commission payable is in order.

Guarantee Commission: Section 309(1) provides that the remuneration payable to any director shall be inclusive of the remuneration payable for services rendered by him in any other capacity. The question is whether the guarantee commission is a remuneration within the meaning of Section 309. It was held in *Suessen Textile Bearings Ltd v. Union of India [(1984) 55 (Comp. Cases 492, 496, 497)]* that the guarantee commission paid to directors for giving surety against loans or credit facilities taken by the company from financial institution is not a remuneration for any professional services within the meaning of section 309 and therefore, approval of the Central Government is not necessary. The director giving guarantee does not render manual, clerical, technical supervisory or administrative service. He gets the commission for the risk which he bears and that has nothing to do with his directorship. In view of this judgement, the Department of Company Affairs has withdrawn the earlier circular dated 16.12.1969, where the department has clarified that guarantee commission is 'remuneration' within the meaning of Section 309 (Circular No.3 dated 16.2.1994). Hence the payment of guarantee commission is in order.

## Question 33

*The Board of Directors of XYZ Limited appointed Mr. A as a Director in the casual vacancy caused by resignation of Mr. X. Mr. A is proposed to be re-appointed as a Director at the Annual General Meeting, when he vacates his office. Examine with reference to the relevant provisions of the Companies Act, 1956 whether Mr. A can be considered as a 'Retiring Director' and state the legal requirements to be fulfilled to give effect to the proposed appointment of Mr. A as a Director at the Annual General Meeting. (November, 2003)*

## Answer

### Re-appointment of a person acting against the casual vacancy:

If a person who is not a 'retiring director' is proposed to be appointed as a director at any annual general meeting, the formalities prescribed under section 257 of the Companies Act, 1956 are to be followed:

The expression 'retiring director' appearing in sections 256 and 257 means a' director retiring by rotation'. (Explanation under Section 256).

The expression 'a director retiring by rotation' refers only to a director appointed by the company in general meeting and retiring (Section 255 read with Section 256).

If office of any director who was appointed at the general meeting is vacated before he is due to retire on normal course, such casual vacancy can be filled in by the Board of Directors [Section 262(1)]. The person so appointed would continue in office until the date when retirement of the original director in whose place the former is appointed would fall due in the usual course [Section 262(2)].

Hence the director appointed by the Board in a casual vacancy is not a 'retiring director' within the meaning of Section 257. When such a person is proposed to be appointed as a regular director in the annual general meeting, a notice to appoint him as director has to be received from the member under Section 257 at least 14 days before the meeting along with a deposit of Rs.500/-. The deposit will be refunded when the person succeeds in getting elected as director at the Annual General Meeting.

### Question 34

*A Public 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 meetings 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.* *(May, 2004)*

### 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 crore 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.

### Question 35

*The articles of Association of XYZ Computers Limited provide for a maximum of 15 Directors. But the company has only 10 Directors and for two of them representing Foreign Collaborators, alternate Directors have been appointed. Board Meeting held on 1st August, 2003 was attended by 4 Directors including 2 alternate Directors.*

*Examine with reference to the relevant provisions of the Companies Act, 1956 whether* *quorum was present at the Board Meeting held on 1st August, 2003.*

*Will your answer be different, if the articles provide for a Quorum of 6 Directors? (May, 2004)*

## Answer

### Quorum for Board Meeting

Section 287 of the Companies Act, 1956 prescribes a quorum for meetings of Board of Directors of Companies. According to Section 287(2) quorum for a meeting of the Board of Directors of any company, public or private shall be one third of the total strength of the Board, or two directors, whichever is less. According to Section 287(1), 'total strength' means the total strength of the Board of Directors of a company as determined in pursuance of the Act, after deducting there from the number of directors, if any, whose place may be vacant at the time. Hence the total strength is 10 directors (excluding 2 alternate directors) even though the Articles provide for a maximum of 15.

Section 287(2) provides that 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 that one-third being rounded off as one), or two directors, whichever is higher. Hence, in this case 1/3 of 10 i.e. 3 1/3↓ the fraction being rounded off as one i.e. 4 is quorum.

The alternate directors present at a meeting will be counted for quorum, if the original director is not present, the alternate directors present at a meeting will be counted for quorum. The Board meeting held on 1.8.2003 was attended by 4 directors including 2 alternate directors, quorum was present at the meeting. Hence, it is a valid meeting.

Section 287 only provides for a minimum quorum. It does not forbid a company to fix a higher quorum. A company in its articles cannot provide a quorum of lesser number of directors than what is provided in Section 287(2). However, it can provide for a higher number. Hence, if the articles provide 6 as quorum, the meeting held on 1.8.2003 is not valid as it was attended only by 4 directors.

## Question 36

*Examine whether the following contracts require previous approval of the Central Government keeping in view the effect of the proviso to Section 297(1) of the Companies Act, 1956:*

*Contracts for purchase of goods from a Public Company having a paid-up Share Capital of more than Rupees one crore by a firm in which a director of the Public Company is a partner. The purchase is for cash at prevailing market prices. (May 2004)*

## Answer

**Contracts in which directors are interested:** Section 297(a) of the Companies Act, 1956, provides that consent of the Board of Directors of a company shall be necessary for a contract for the sale, purchase or supply of any goods, material or services entered into by the company with a director of the company or his relative or a firm in which such a director or relative is a partner. The proviso to this sub-section requires that in the case of a company having paid up share capital of not less than Rs.1 crore (i.e. Rs.1 crore or more), no such contract shall be entered into except with the previous approval of the Central Government.

Certain exemptions are provided in Sub-section (2) of Section 297. One such exemption is that noting contained in clause (a) sub-section (1) shall affect the purchase of goods and materials from the company by by any director, relative, firm stated in Section 297(1) for cash at prevailing market prices. As the contract referred to in the question qualifies for exemption under section 297(2)(a), approval of Central Government is not required.

## Question 37

*Contracts attracting Section 297(1) to be entered into by a Public Company having a paid-up share capital of Rupees one crore in circumstances of urgent necessity.* *(May, 2004)*

## Answer

Section 297(3) provides that a contract attracting Section 297(1) may be entered into by the company without obtaining the consent of the Board in circumstances of urgent necessity. But the consent of the Board must be obtained within three months of the date on which the contract was entered into. While section 297(2) provides an exemption, Section 297(3) provides only a relaxation that too only with one of the requirements i.e. consent of the Board. In the case under reference as the paid-up share capital of the company is Rs. 1 crore, both the consent of the Board as well as approval of the Central Government are required. Hence, the relaxation provided in Section 297(3) does not apply to a company which has a paid-up share capital of Rs.1 crore. The company must obtain approval of the Central Government before entering into contract even in circumstances of urgent necessity.

## Question 38

*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 DLT Limited, which has not filed its Annual Returns pertaining to the Annual General Meetings held in the calendar years 2001, 2002 and 2003.*

*(May, 2004)*

## Answer

All the cases stated in the question are based on the provisions of Section 274(1) of the Companies Act, 1956 dealing with disqualifications of directors. Based on the provisions of the said section, each case can be discussed as follows:

(a) Section 274(1)(c) states that a person shall not be capable of being appointed as a director of a company if he has applied to be adjudicated as an insolvent and his application is pending in the present case, Mr. A has applied to be adjudicated as an insolvent and his application is pending with the Court. Hence, he cannot be appointed as a Director of a Company – whether public or private.

(b) Section 274(1)(c) states that a person shall not be capable of being appointed as a director of a company if he has been convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months, and a period of five years has not elapsed from the date of expiry of the sentence. In the present case, although the sentence was only two years ago, but the period of sentence was only eight weeks, i.e., less than six months. Hence, Mr. B does not come under the prescribed disqualification and can be appointed as a director of a company.

(c) This case also falls within the provisions of section 274(1)(c). In this case the imprisonment was for a period of one year, i.e., for more than six months, but since more than five years have elapsed from the expiry of the sentence, Mr. C has come out of the prescribed disqualification and can be appointed as a director of a company.

(d) Section 274(1)(g) states that a person who is already a director of a public company which ahs not filed the annual accounts and annual returns for any continuous three years, then such a person shall not be eligible to be appointed as a director of another public company. In the present case, DLT Limited has failed to file only annual returns and not annual accounts. Hence, the disqualification for Mr. D is not attracted and he can be appointed as a director.

## Question 39

*(i) Mr. SDR, a shareholder in M/s 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 M/s 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 whether Mr. SDR is entitled to do so.*

*(ii) Would your answer be different, if Mr. EDM was a Director appointed by the Central Government under Section 408 of the Companies Act, 1956?*

*(iii) 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. (May, 2004)*

## Answer

(i) The problem as stated in the question is governed by the provisions of section 284 of the Companies Act, 1956. Sub-section (2) of the said section states that a special notice is required of any resolution to remove a director. The section does not put any condition in respect of the number of members or their shareholding and furnishing any reason therefore. Accordingly, the Karnataka High Court in the case of *Karnataka Bank Ltd. Vs.*

*A.B. Datar & Others reported at [1994] 79 Comp. Cases 417* held that there is no requirement with regard to the number of members or their shareholding and even one member is entitled to give special notice for removal of director. The court also held that there is no need to give any reason for removal of a director in the resolution proposed to be moved. Hence Mr. SDR holding only ten equity shares can alone give a special notice for removal of Mr. EDM from the office of director of M/s JKP Ltd.

(ii) According to section 284(1) of the Companies Act, 1956, the provisions relating to removal of directors are not applicable to the directors appointed by the Central Government under section 408 of the said Act. Hence, in case Mr. EDM was a director appointed by the Central Government under the said section 408, Mr. SDR would not be entitled to give any special notice under section 284 for removal of director.

(iii) On receipt of notice of a resolution to remove a director, the relevant provisions of the Companies Act, 1956 in this regard are as follows:

(a) The company has to forward a copy of the notice to the concerned director. [Section 284(3)].

(b) The concerned director, whether he is a member of the company or not, shall be entitled to be heard on the resolution at the meeting. [Section 284(3)].

(c) In case the concerned director makes any representation in writing of reasonable length and requests the company to notify the same to the members of the company, the fact of receiving the representation should be stated in the notice of the meeting and a copy should be circulated to all the members of the company. [Section 284(4)].

(d) In case the representation received by the company is too late for inclusion in the notice or if there is an omission of the part of the company, the same should be read out at the meeting [Section 284(4)].

(e) The company or the person who claims to be aggrieved may make an application to the Central Government seeking exemption from circulating or reading out the representation if the rights are sought to be abused to secure needless publicity for defamatory matter and the Central Government may pass an order granting such exemption. [Proviso to Section 284(4)].

Question 40

*Mr. A, an Advocate, is a Director of M/s ABC Limited and he is proposed to be engaged by the company as an Advocate to appear before the court in connection with a case, on a remuneration of Rs.10,000.*

*Will it amount to an 'Office' or Place of Profit' attracting Section 314 of the Companies Act, 1956?*

*Will your answer be different, if he is proposed to be appointed on a regular retainer basis for rendering legal advice on a retainer fee of Rs.5,000 per month either by ABC Limited or its subsidiary?*

*State also whether the proposed appointments can be made by the Board of Directors of the Companies.* *(May, 2004)*

### Answer

### Office of Profit

Office or place of profit means in the case of a director, if the director obtains remuneration over and above the remuneration to which he is entitled as a director. Such remuneration may be as salary, fees, commission, perquisites, right to occupy any premises free of rent or in any other way [Section 314(3)(a)Companies Act, 1956].

An advocate who renders professional services as and when called upon to do so cannot be said to be holding an office or place of profit under the company or in the company. An advocate who cannot by reasons of his status at the Bar held any direct contractual relations with his clients in regard to the performance of his professional work and duties and he acts essentially as an officer of the court when he appears before the court. Hence A cannot be said to be holding an office or place of profit under Section 314 and the appointment can be made by the Board.

But if Mr. A. is appointed on a regular retainer basis for rendering legal advice, other than appearance in courts, the provisions of Section 314(1) will be applicable. (DCA's Circular No. 14 of 1975 dated 5th June, 1975) and A will be said to be holding an office or place of profit. For the same reason, A will be considered as holding an office or place of profit if he gets the retainer fee from the subsidiary of ABC Ltd.

The exemption from Section 314(1) in respect of offices of profit carrying remuneration of less than Rs.10,000 per month applies only to the partners relatives, etc of a director and not to the director himself. In the case of a director, the section will hit any office of profit, however small the remuneration attached to it may be.

Hence A cannot be appointed on a regular retainer basis on a retainer fee of Rs.5,000 per month without obtaining the consent of the company (ABC Ltd.) by a special resolution.

If A receives retainer fee from the subsidiary of ABC Ltd., special resolution must be passed by both the holding company and the subsidiary company unless A remits the retainer fee received from the subsidiary company to the holding company.

### Question 41

*The Board of Directors of M/s ABC Limited, an unlisted company having a paid-up capital of Rs.6 crores consisting of equity share capital of Rs.5 crores and preference share capital of Rs.1 crore and also 1,100 'Small Shareholders' holding equity shares seeks your advice on the following:*

*(i) Is it necessary for the Company to appoint a Director to represent the 'Small Shareholders'?*

*(ii) In case the Company decides to appoint such a Director. The procedure to be followed by the company for such appointment and the period for which such appointment can be made.*

*(iii) Can such a director be removed by the Company before the expiry of his period of appointment without the consent of the 'Small Shareholders'?*

*Advise explaining the relevant provisions of the Companies Act and the Rules. (May, 2004)*

Answer

Director elected by small shareholders

(1) A public company (i) having a paid up capital of Rs.5 crores or more; (ii) One thousand or more shareholders, may have a director elected by small shareholders in the manner prescribed by rules [proviso to Section 252(1)].

(2) Paid-up capital includes both equity and preference share capital. In this case, the total paid up share capital including the preference share capital exceeds Rs.5 crores and the equity share capital is also Rs.5 crores. The company has also got more than 1000 small shareholders. Hence the provisions of Section 252(1) are applicable to this company.

(3) Since the words used in proviso to Section 252(1) are "may have a director ", the appointment of small shareholders' director is voluntary Rule 4(1) of the Companies (Appointment of the Small Shareholders' Director) Rules, 2001, a company can act suo motu to elect such director. It may also act upon notice of small shareholders and have proposed name of a person as director. However, if a notice is received from required number of shareholders, it will be mandatory to appoint small shareholders' director, otherwise it is discretionary.

(4) The director in this case is the small shareholders' nominee and he is elected by the small shareholders only in the manner provided in Rule 4. The director so elected is appointed by the company. (Rule 4(5). Small shareholders intending to propose to person shall give notice to company at least 14 days before meeting. The notice should be signed by at least 100 small shareholders and it must contain the prescribed particulars. The person whose name is proposed as director will sign and file with the company his consent in writing to act as a director (He must be a small shareholder). In case of unlisted company, appointment of small shareholder, director can be made at the general meeting, if may oath of small shareholders recommend his candidature for the post of director in the meeting.

A nominee director is normally removed by the person who has got authority to make such nomination [e.g. UTI, LIC nominee]. But in view of Rule 6(viii) relating to vacation of office, small share holders director can be removed by the share holders at a general meeting under section 284 of the companies Act, 1956 before the expiry of his tenure.

He cannot be considered as a director appointed by the company in general meeting within the meaning of section 255. It can, therefore, be said that small shareholders' director is like and nominee director.

(5) Small shareholders' director can be appointed for a maximum period of 3 years subject to meeting the requirements of provisions of Companies Act except that he is not required

to retire by rotation (Rule 4(6). But on expiry of his tenure, the same person, if so desired by small shareholders, may be elected for another period of 3 years [Rule 4(7)].

(6) He cannot be considered as a director appointed by the company in general meeting within the meaning of Section 255. It can, therefore, be said that small shareholders' director is like and nominee director.

## Question 42

*ABC Ltd. has 12 directors on its board and has the following clause in its Articles of Association:*

*"The questions arising at any meeting of the Board of Directors or any Committee thereof shall be decided by a majority of votes, except in cases where the Companies Act, 1956 expressly provides otherwise."*

*In a meeting of the Board of Directors of ABC Ltd. 8 directors were present. After competition of discussion on a matter voting was done. 3 directors voted in favour of the motion, 2 directors voted against the motion while 3 directors abstained from voting.*

*You are required to state with reference to the provisions of the Companies Act, 1956 whether the motion was carried or not.* *(November, 2004)*

## Answer

Regulation 74(1) of Table A of Schedule I to the Companies Act, 1956 provides that save as otherwise expressly provided in the Companies Act, 1956, questions arising at any meeting of the Board shall be decided by a majority of votes.

In the problem given in the question, the similar articles exist in the Articles of Association of ABC Ltd. In the given case, only 8 directors out of a total strength of 12 directors are present and out of those 8 directors present only 5 directors have exercised their votes. In such a case, only those directors who are present and vote on a motion are considered for determining whether the motion is carried or not. That means out of the 5 directors who voted on the motion are to be considered. Accordingly, since number of directors who voted in favour of the motion being 3 is higher than the number of directors who voted against the motion being 2, the motion is carried or is considered to be passed by majority, unless it is a matter requiring unanimous voting as in the case of a resolution under Section 372A(2).

## Question 43

*The last three years' Balance Sheets of RBS Ltd., contains the following information and figures:*

| | *As at 31.03.2002 Rs.* | *As at 31.03.2003 Rs.* | *As at 31.03.2004 Rs.* |
|---|---|---|---|
| *Paid up Capital* | *50,00,000* | *50,00,000* | *75,00,000* |
| *General Reserve* | *45,00,000* | *50,00,000* | *60,00,000* |
| *Debenture Redemption Reserve* | *15,00,000* | *20,00,000* | *25,00,000* |

| | | | |
|---|---|---|---|
| *Reserve Secured Loans* | *10,00,000* | *15,00,000* | *30,00,000* |
| *Net Profit for the year (as calculated in accordance with the provisions of Section 349 and 350 of the Companies Act, 1956)* | *12,50,000* | *19,00,000* | *34,50,000* |

*In the ensuing Board Meeting scheduled to be held on 5th November 2004, among other items of agenda, following item is also appearing:*

*"To decide about borrowing from financial institutions on long-term basis."*

*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 without seeking the approval in general meeting?* *(November, 2004)*

## Answer

As per section 293 (1)(d) of the Companies Act, 1956, the Board of Directors of a public company or a private company which is a subsidiary of a public company, without obtaining the approval of shareholders in a general meeting, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves. 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, 2004, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2004. According to the above provisions, the Board of Directors of RBS Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:

| | |
|---|---|
| Paid up capitalRs. 75,00,000/- | |
| General Reserve (being free reserve) | Rs. 60,00,000/- |
| Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption) | — |
| Aggregate of paid up capital and free reserve | Rs. 1,35,00,000/- |
| Total borrowing power of the Board of Directors of the company. i.e., 100% of the aggregate of paid up capital and free reserves | Rs. 1,35,00,000/- |
| *Less* amount already borrowed as secured loans | Rs. 30,00,000/- |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. | Rs 1,05,00, 000/- |

It is presumed that the amount already borrowed as secured loans are not "temporary loans" obtained from the company's bankers in the ordinary course of business within the meaning of Explanation II to Section 293.

## Question 44

*Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2000 on a salary of Rs.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 1.3.2003. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of Rs.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 Rs. 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guiding of corrupt practice*

*(November, 2004)*

## Answer

According to Section 318 of the Companies Act, 1956, compensation can be paid only to a Managing or Whole-time Director. 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 Rs.25 Lacs calculated at the rate of Rs.12 Lacs per annum for unexpired term of 25 months.

Regarding adhoc payment of Rs.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 45

*Excellent Technical Consultants Ltd. has approached you seeking your opinion on the following appointments relating to directors and their relatives*

*(i) Appointment of Mr. Sonata (relative of one of the directors) as the Managing Director of the Company on a monthly remuneration of Rs.40,000 and other perquisites as are currently being allowed to other executives of the Company.*

*(ii) Appointment of Mr. Romesh (relative of one of the directors) as the General Manager – Marketing of the Company on a consolidated monthly remuneration of Rs.30,000.*

*(iii) Appointment of Mr. Kamal (relative of one of the directors) as an Accounts Manager of the Company on a consolidated monthly remuneration of Rs.18,000.*

*Express your opinion explaining the relevant provisions of the Companies Act, 1956?*

*(November, 2004)*

## Answer

As per provisions of section 314(1) of the Companies Act, 1956, except with the consent of the company accorded by way of a special resolution, no director or relative of a director shall hold any office or place of profit except that of Managing Director or Manager of the Company.

Further, as per the provisions of Section 314(1B) of the Companies Act, 1956, no relative of a director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs.50,000/- (as per Notification vide 5th February, 2003) except with the prior consent of the company by way of a special resolution and the approval of the Central Government.

In the light of above legal provisions the opinion on the appointments of various persons as stated in the question can be expressed as follows:

Mr. Sonata is being appointed as the Managing Director of the Company, the provisions of section 314(1) are not attracted even though he is a relative of a director. This is because the appointment of Managing Director or Manager is outside the provisions of section 314 of the Companies Act, 1956. If Mr. Sonata is not already a director of the company, steps must be taken to appoint him first as an additional director/director. Thereafter he may be appointed as Managing Director by complying with the requirements under section 269 read with Schedule XIII to the Companies Act. The appointment can be made by the Board subject to the approval the company in general meeting as the proposed remuneration is within the limits laid down in Schedule XIII.

Since the remuneration proposed to be paid to Mr. Romesh does exceed Rs.50,000/- per month, his appointment does not require the passing of special resolution by the company and also the approval of the Central Government is not required. However, as the proposed remuneration exceeds Rs.10,000/- his appointment shall require the passing of special resolution by the company. The special resolution is required to be passed at a general meeting of the company held for the first time after such appointment.

In case of Mr. Kamal, since the remuneration proposed to be paid to him exceeds Rs.10,000/- but does not exceed Rs.50,000/- per month, his appointment shall require the passing of special resolution by the company only and the no approval of the Central Government is required. The special resolution according the consent may be passed at a general meeting of the members of the company held for the first time after such appointment.

## Question 46

*Mr. Weldon was appointed as a Director of Esquire Engineering Ltd., with effect from 1st October, 2002. Since the Company, namely, Esquire Engineering Ltd. wanted to take full advantage of the wisdom and expertise of Mr. Weldon, it offered him remuneration payable on monthly basis and made an application to the Central Government for approval for payment of such remuneration. Anticipating the approval of the Central Government, Esquire Engineering Ltd. started paying such remuneration from the date of appointment and continued to do so till 31st March, 2003. The Central Government did not fully approve the remuneration proposed by the company and restricted the same to a lower amount. On scrutiny of the accounts, it was established that the company, till 31st March, 2003, has paid to Mr. Weldon a total sum of Rs.1.20 Lacs in excess of the remuneration sanctioned by the Central Government.*

*You are required to:*

*(i) State with reference to the provisions of the Companies Act, 1956 in respect of recovery and waiver of recovery of the excess remuneration so paid, whether Mr. Weldon can keep the excess remuneration so received and under what conditions.*

*(ii) Draft a resolution for waiver of recovery of the excess remuneration so paid by the Company. (November, 2004)*

## Answer

(i) Mr. Weldon was appointed as a non-executive director. The services to be rendered by him are not stated to be of a professional nature. Hence, the provisions of Section 309 (4) are attracted in this case. According to Section 309(4) of the Companies Act, 1956 a non-executive director may be paid remuneration by way of monthly, quarterly or annual payment basis with the approval of the Central Government.

Section 309(5A) of the Companies Act, 1956 states that if any director draws or receives, directly or indirectly, by way of remuneration any sum in excess of the limits prescribed by section 309 of the Companies Act, 1956 or without the prior approval of the Central Government, wherever required, then such director shall refund such excess remuneration to the company and until such refund is made, he shall hold such sum in trust for the company.

Section 309(5B) of the Companies Act, 1956 states that the company shall not waive the recover of any sum refundable under section 309(5A) of the Companies Act, 1956 unless permitted by the Central Government.

In light of the above mentioned provisions of the Companies Act, 1956, Mr. Weldon is under obligation to refund the excess remuneration of Rs.1.20 Lakhs received by him from the company and till the same is refunded, he shall hold the said sum in trust for the company. Similarly, the company is also not eligible to waive the recovery of such excess sum. However, the company can waive the recovery and Mr. Weldon can keep such excess sum, if the permission from the Central Government as envisaged in section 309(5B) of the Companies Act, 1956 is obtained.

(ii) Board Resolution for waiver of recovery of excess remuneration paid to a director:

"RESOLVED that subject to the approval of the Central Government, the Board does hereby decides to waive the recovery of a sum of Rs.1.20 Lacs paid to Mr. Weldon, a director of the company during the period from 1st October, 2002 to 31st March, 2003 in excess of the remuneration sanctioned by the Central Government in terms of section 309 of the Companies Act 1956."

"RESOLVED FURTHER that an appropriate application under section 309(5B) of the Companies Act, 1956 be made to the Central Government and that Mr ………., the Secretary of the company be and is hereby authorized to take necessary action in this regard."

Question 47

*(i) The Articles of Association of MKP Limited incorporated with an Authorised Share Capital of Rs.50 crores divided into 5 crore Equity Share of Rs.10 each contained the following clause:*

*"The qualification of a director shall be the holding of at least 1,000 Equity Shares in the Company and such a director, if not already so qualified shall have to obtain his qualification within a period of 30 days from the date of his appointment as a director."*

*Examine the validity of the above clause in the light of the provisions of the Companies Act, 1956.*

*(ii) Redraft the above clause which would conform to the provisions of the Companies Act, 1956.* *(November, 2004)*

Answer

(i) The subject matter of the question is covered by the provisions of section 270 of the Companies Act, 1956. The Companies Act, 1956 does not provide for any qualification for becoming a director of any company. According to the said section, any person appointed as a director is required to obtain the qualification if it is so provided by the Articles of Association of the company.

The said section states that in case the Articles of Association of a company provides for the qualification of a director, then such a director is required to obtain the requisite qualification within a period of two months from the date of his appointment as a director. The section further states that any clause in the Articles of Association requiring the director to obtain the qualification shares within a shorter time than two months shall be void.

The said section also puts a maximum limit on the qualification that can be prescribed by the Articles of Association. Such maximum limit being shares with nominal value not exceeding Rs.5,000 or in a case where the nominal value of one shares exceeds Rs. 5,000 then the qualification share shall be maximum one share.

Based on the provisions of section 270 of the Companies Act, 1956 as explained above, the clause in the Articles of Association as given in the question is void since it stipulates the obtaining of the qualification shares within a period of 30 days which is shorter than two months. Moreover the clause also violates the maximum limit of share qualification by prescribing the same to be 1,000 shares of Rs.10 each totaling Rs.10,000 which is more than the limit of Rs.5,000 as prescribed in the said section.

(ii) The clause to be included in the Articles of Association regarding qualification of directors conforming to the provisions of the Companies Act, 1956 may be as follows:

"The qualification of a director shall be the holding of shares with a nominal value not exceeding Rs.5,000 or one share with a nominal value of Rs.5,000, and such a director if not already so qualified shall have to obtain his qualification within a period of two months from the date of his appointment as a director."

## Question 48

*Mr. Raj, a director of POL Ltd., submitted his resignation from the post of director to the Board of Directors on 30$^{th}$ June, 2004 and obtained a receipt therefore on the same day. The Board of Directors of POL Ltd. neither accepted the resignation nor did it file Form No.32 with the Registrar of Companies. You are required to state whether Mr. Raj ceases to be the Director of POL Ltd. and if yes, since when? (November, 2004)*

## Answer

There is no provision in the Companies Act, 1956 relating to resignation from his office by a director. If there is any provision in the articles giving the right to a director to resign at any time, the resignation will take effect without any need for its acceptance by the Board of

Directors or the company in general meeting in absence of a specific provision in the articles of association, a director can resign without being required to give reasonable notice. *In T. Murari Vs. State [(1976) 46 Comp. Cas. 613]* the Madras High Court held that even in the absence of a provision in respect of resignation under the Companies Act, 1956 or under the articles of association of the company, the resignation tendered by a director or a managing director unequivocally in writing will take effect from the time when such resignation is tendered.

The said judgement was followed by the same court in the case of *S.S. Lakshman Pillai Vs. ROC (1997) 47 Comp. Cas. 652.*

In a recent judgement in the case of *Mother Care (India) Ltd Vs. Prof. Ramaswamy P. Aiyar [(2004) 51 SCL 243]* the Karnataka High Court observed that as the appointment of a director is not a bilateral character, the question of acceptance of the request to relinquish the office would arise and filing of Form No.32 in terms of section 303(2) of the Companies Act, 1956 is only a consequential act to be performed by the company in obedience of the statutory provision, but it is not an act to be complied with in order to make a resignation valid.

Where the resignation letter states that it is to take effect on acceptance, or where the articles so require, acceptance is necessary to end the tenure of office of a director.

In view of the above legal position, Mr. Raj has ceased to be a director of POL Ltd. with effect from 30th June, 2004, provided his resignation letter does not state that the resignation is to take effect on acceptance or the articles of POL Ltd. does not so require.

## Question 49

*PQR Machines Ltd. Entered into a contract with MN forgings, in which wife of P, a director of the company is a partner. The contract is for supply of certain components by the firm for a period of three years with effect from 1st September, 2005 on credit basis. The paid-up Share Capital was increased from Rs. 70 lakhs to Rs. 140 lakhs on 1st March, 2006. Explain the requirements under the Companies Act, 1956, which should have been complied with by PQR Machines Ltd. before entering into contract with MN Forgings. Whether there is any additional requirement which is required to be complied with by PQR Machines Ltd. in view of the increased paid-up Share Capital on 1st March, 2006.*

*What would be your answer in case MN forgings is a Private Company in which P's wife is holding substantial shares ? (May 2006)*

## Answer

**Contracts in which directors are interested:** The contract for supply of components entered into between PQR Ltd. and MN Forgings, a partnership firm (on which wife of P, a director of the company is a partner) attracts Sections 297, 299, 300 and 301 of the Companies Act, 1956.

The contract cannot be entered into unless it is approved in the meeting of the Board of Directors of PQR Ltd. Specific Board resolution is required (Section 297). However, in case of urgent necessity such consent of the Board may be obtained within 3 months of the date on which the contract was entered into (Section 297(3))

P, the interested director must disclose his interest at the Board meeting at which the question of entering into the contract has been taken up for consideration ( Section 299(1) & (2). P, the interested director should not have taken part in the discussion at the said board meeting and he should not have noted on the resolution in respect of that contract (Section 300)

Prescribed particulars of the contract must be entered into the Registrar of Contract maintained under Section 301 within 7 working days of the Board meeting (Section 301).

In the given case the contract was entered into on 1.9.2005 for supply of components for a period of 3 years. As the paid-up share capital was only Rs. 70 lakhs (i.e. less than Rs. 1 crore) on 1.9.2005 proviso to Section 297(1) requiring prior approval of the Central Government is not attracted. Subsequent increase in the paid up share capital beyond Rs. 1 crore will not make it necessary to get the approval of the Central Government for continuation of the contract for the remaining period. Hence, there is no additional requirement.

If MN Forgings is a private company the provisions of Section 297 are not attracted as the director of PQR Ltd. is a director or member of MN Forgings Private Ltd.

Section 299 is also not attracted for the reasons given below:

If the contract or arrangement is between companies, a director is deemed to be interested only if he singly or along with other directors hold 2% or more shares in other company (Section 299(6)). While calculating the 2% shares in other company, only investment of directors is considered. Here P, a director of PQR Ltd. is not holding any shares in MN forgings Pvt. Ltd. Shares held by P's wife are not to be considered. Hence the provisions of Section 299 are not attracted. Sections 300 and 301 are also not applicable.

## Question 50

*Mr. Adam, a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years w.e.f. 1.4.2005 in the last Annual General Meeting of the company.*

*Mr. Adam seeks your advise to remove the MD after following the procedure laid down under the Companies Act, 1956.*

*(i) Specify the steps to be taken by Mr. Adam and the Company in his behalf;*

*(ii) Draft a suitable resolution to be passed for removal of MD;*

*(iii) Is it necessary to state reasons to support the resolution for his removal?*

*(November 2006)*

## Answer

(i) Under Section 284 of the Companies Act, 1956, a company may, by ordinary resolution, remove a director before the expiry of his tenure. For the purpose, special notice from a shareholder (Mr. Adam in the present case) shall be required to be given to the company for moving a resolution to remove a director. On receipt of notice, the company shall forthwith send a copy thereof to the director concerned (MD in the present case) and he shall be entitled to be heard on the proposed resolution at the meeting. Copy of the representation, if any, made by the director be also sent to all members of the company to whom notice of the general meeting is normally sent. In case, the representation is received too late, the same shall be read at the meeting. The representation need not be sent if the Company Law Board is satisfied that it will cause needless publicity for defamatory matter.

Under Section 190, special notice of the intention to move the resolution shall be given not less than 14 days before the meeting.

In the present case, if the AGM is due to be held, Mr. Adam may send the special notice 14 days before the AGM. Otherwise, he may request the company to convent EGM under section 169 for consideration of the special notice and resolution for removal of MD. He already holds more than 10% shares in the company.

Once the ordinary resolution is passed in the general meeting, MD will cease to be a director of the company and consequently MD of the company.

(ii) Mr. Adam may give special notice of his intention to move the following resolution, as ordinary resolution: "RESOLVED THAT Mr. ……………., Managing Director of the Company be and is hereby removed as a director of the company under Section 284 of the Companies Act, 1956 with immediate effect."

(iii) A statement of reasons is not necessary to support the resolution for removal of a director. *LIC vs. Escorts Ltd. (1986) 59 Comp. Cases 548(SC)*

## Question 51

*Some small shareholders of TRG Ltd., a company listed with Mumbai Stock Exchange, want to appoint Mr. Raj, who is holding 1,000 Equity Shares of Rs.10 each in the Company as a Director as their representative on the Board of Directors of the said Company. You are required to state the relevant provisions of the Companies Act, 1956 in respect of such proposal to appoint Mr. Raj as a Small Shareholders' Director. (November, 2004)*

## Answer

The provisions of section 252 of the Companies Act, 1956, and the Companies (Appointment of Small Shareholders' Director) Rules, 2001 in respect of appointment of Small Shareholders' Director are as follows:

(1) The provisions of appointment of Small Shareholders' Director are applicable to public companies having paid-up share capital of Rs.5.00 Crores or more and having 1000 or more small shareholders. In case, TRG Ltd. is fulfilling both these conditions, then only its shareholders shall be eligible to proceed in the direction of appointing Mr. Raj as a Small Shareholders' Director. {Proviso to section 252 (1)]

(2) Small Shareholder for this purpose means a shareholder holding shares of nominal value of Rs. 20,000/- or less.[Explanation to section 252(1)].

(3) Small Shareholders who intend to propose Mr. Raj as a Small Shareholders' Director have to leave a notice of their intention with TRG Ltd. at least 14 days before the meeting and such notice has to be signed by at least 100 small shareholders.

(4) According to the rules, the person whose name is to be proposed for the post of Small Shareholders' Director should himself be a small shareholder. Since Mr. Raj is holding shares of nominal value of Rs.10,000/- only, which is less than Rs.20,000, he is eligible to be nominated as such.

(5) The said notice shall contain the name, address, number of shares held, of Mr. Raj whose name is to be proposed as a Small Shareholders Director and also that of other shareholders proposing Mr Raj.

(6) Before the meeting, Mr. Raj has to sign and file with TRG Ltd., his consent in writing to act as a director.

(7) Since TRG Ltd. is a company, which is listed with Mumbai Stock Exchange, it shall elect small shareholders' nominee through the postal ballot.

(8) On scrutinizing the postal ballot, if Mr. Raj secures the requisite number of votes, he will elected as a director for a term of 3 years and on expiry of the term shall be eligible to be re-appointed if small shareholders so wish at that time. However, he need not have to retire by rotation.

(9) Mr. Raj shall be treated as director for all other purposes except for appointment as whole time director or managing director.

## Question 52

*Advise M/s Super Specialities 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 ordinary directors of the company;*

*(iii) Payment of remuneration to an ordinary director for rendering professional services; and*

*(iv) Payment of remuneration of Rs.40,000 per month to the whole time director of the company running in loss and having an effective capital of Rs.95.00 lacs. (May 2005)*

## Answer

(i) Under Schedule XIII, Part I, Paragraph (c) of the Companies Act, 1956, a person shall be eligible for appointment as Managing Director who has attained the age of 70 years where his appointment is approved by a Special resolution passed by the company in the general meeting. In that case, approval of the Central Government is not required.

(ii) Under Section 309(4)(b) of the Companies Act, 1956 ordinary directors may be paid commission if the company by special resolution authorise such payment not exceeding 1% of net profit, if the company has MD/WTD/Manager or upto 3% of the net profits in any other case. Further, under section 309(7) of the Act, Special resolution shall not remain in force for a period of more than 5 years at a time.

Second proviso to section 309(4) states that a company in general meeting may, with the approval of the Central Government, authorise the payment of such remuneration at a rate exceeding one per cent or, as the case may be, three per cent of its net profits.

Thus, in the present case, commission of 4% of net profits of the company per annum can only be paid to the ordinary directors with the approval of the Central Government

(iii) Under proviso to section 309(1) of the Act, any remuneration for services rendered to any director in any other capacity shall not be so included if-

(a) the services rendered are of a professional nature, and

(b) in the opinion of the Central Government, the director possesses the requisite qualification for the practice of the profession.

In that case, approval of the Central Government will not be required for payment of any remuneration to the concerned director.

(iv) In terms of section II of Part II of Schedule XIII of the Act, approval of the Central Government is not required for payment of monthly remuneration upto Rs.75,000/- in case of a company with effective capital of less than Rs.1 crore and having no profit or its profits are inadequate, to its managerial persons, provided -

(1) the payment of remuneration is approved by the Remuneration Committee;

(2) the company has not defaulted in repayment of its debts, including public deposits or debentures or interest payable thereon for a continuous period of 30 days in the preceding year before the date of such appointment.

Thus, in the given case, the company may pay the remuneration of Rs.40,000 P.M. to its WTD without approval of the Central Government subject to the above restrictions.

## Question 53

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

| | As at 31.03.2003 | As at 31.03.2004 | As at 31.03.2005 |
|---|---|---|---|
| | Rs. | Rs. | 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 & 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 (as calculated in accordance with the provisions of Section 349 & 350 of the Companies Act, 1956 | *12,50,000* | *19,00,000* | *34,50,000* |

*In the ensuing Board Meeting scheduled to be held on 5th November, 2005, 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, 1956, 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 2005-06 without seeking the approval in general meeting. (November 2005)*

Answer

(i) Borrowing from Financial Institutions: As per Section 293(1)(d) of the Companies Act, 1956, the Board of Directors of a public company or a private company which is a subsidiary of a public company, without obtaining the approval of shareholders in a general meeting, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves. 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, 2005, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2005. 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:

| | Rs. |
|---|---|
| Paid up Capital | 7,500,000 |
| General Reserve (being free reserve) | 5,000,000 |
| Credit Balance in Profit & Loss Account (to be treated as free reserve) | 1,000,000 |
| Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption) | ---- |
| Aggregate of paid up capital and free reserve | 13,500,000 |
| Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid up capital and free reserves | 13,500,000 |
| Less: Amount already borrowed as secured loans | 3,000,000 |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting. | 10,500,000 |

(ii) Contribution to Charitable Funds: As per Section 293(1)(e) of the Companies Act, 1956, the Board of Directors of a public company or a private company which is a subsidiary of a public company, without obtaining the approval of shareholders in a general meeting, can make contributions to charitable and other funds not directly related to the business of the company or the welfare of its employees upto an amount which, in a financial year, does not exceed Rs.50,000/- or five per cent of its average net profits as determined in accordance with the provisions of Sections 349 and 350 of the Companies Act, 1956 during the three financial years immediately preceding, whichever is greater.

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 Sections 349 & 350 of the Companies Act, 1956:

| | Rs. |
|---|---|
| For the financial year ended 31.12.2003 | 12,50,000 |
| For the financial year ended 31.12.2004 | 19.00,000 |
| For the financial year ended 31.12.2005 | 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 |

Since this amount is higher than Rs.50,000/-, the Board of Directors of PTL Ltd. can make contribution to charitable funds upto Rs.1,10,000/- during the financial year 2005-06 without obtaining the approval of shareholders in a general meeting.

## Question 54

*A is Managing Director of APAR Ltd. He gave his resignation letter to the Chairman of the Board of Directors on 31st December, 2005 and requested that he should be relieved immediately. When does the resignation of Mr. A take effect?* *(May 2006)*

## Answer

A director can resign from his office by serving a notice of his resignation upon the Company or the Board. There is no need for its acceptance by the Board or the Company.

However, if a Managing Director resigns, he cannot give up his office at his pleasure simply by serving the notice. This is because he occupies two positions i.e., of a director and an employee. In case of Managing Director, the notice or letter of resignation is required to be approved or accepted by the company and he has to be relieved of his duties and responsibilities attaching to his office from which he has resigned. Similar views were accepted in the case of *Achutha Pal vs. Registrar of Companies (1956) 36 Comp. Cases 598.*

Accordingly, in the given case, the resignation of A, the Managing Director shall be effective when approved or accepted by the company and he is relieved of his duties and responsibilities attaching to his office from which he has resigned.

## Question 55

*(i)* *Mr. John has been appointed as Additional Director on the Board of MCX Ltd. on 12th January, 2006. Mr. John has filed his consent to Act as a Director, if appointed, only with the company. Examine with reference to the provisions of the Companies Act, 1956 whether he is also required to file his consent with the Registrar of Companies.*

*(ii)* *One of the members of ADB Ltd. has proposed the name of Mr. Fame for appointment as a Director of the Company in the Annual General Meeting and given a notice under Section 257 of the Companies Act, 1956. Mr. Fame is one of the partners of the Fame &*

*Fame, Chartered Accountants, who are the retiring auditors of the company. But the audit of the company is being looked after by another partner of the firm. Examine whether Fame & Fame can be reappointed as auditors, if Mr. Fame is appointed as Director* *(May 2006)*

## Answer

(i) Filing of consent under section 264: Problem as asked in the question is based on the provisions of Section 264(1) and (2) of The Companies Act, 1956 and also the case ruling in Lalitbhai C. Kapadia Vs. Laljibhai B. Desai. Section 264(1) of the Companies Act, 1956 requires that a person proposed as a candidate for the office of director should file with the company his consent to act as a director, if appointed. Section 264(2) stipulates that a person shall not act as a director unless he has filed with the Registrar of Companies his consent in writing (Form No. 32) to act as such. Additional and alternate directors are not required to file consent under section 264(2) *(Lalitbhai C. Kapadia v. Laljibhai B. Desai (1973) 43 Comp. Cases 17).* Accordingly, applying the above provisions and the ruling of the case, John is not required to file his consent for accepting Additional Directorship.

(ii) Appointment of a partner of the company's auditors as a director: Problem as asked in the question is based on the provisions of Companies Act, 1956 as contained in Section 2(30) read with Section 226(3)(b) and (c). Accordingly, Mr. Fame is appointed as a director of the company 'Fame and Fame' cannot be reappointed as company's auditors. It is so because a director is an officer of the company within the meaning of section 2(30) of the Companies Act, 1956 and the audit firm becomes disqualified under section 226(3) (b) and (c) even if any of its partner is also an officer of the company. It is immaterial that the audit of the company is being looked after by another partner of the firm and not by Mr. Fame. Therefore, if Mr. Fame is appointed as a director of the company, 'Fame and Fame' cannot be reappointed as company's auditors.

## Question 56

*PQR Machines Ltd. Entered into a contract with MN forgings, in which wife of P, a director of the company is a partner. The contract is for supply of certain components by the firm for a period of three years with effect from 1st September, 2005 on credit basis. The paid-up Share Capital was increased from Rs. 70 lakhs to Rs. 140 lakhs on 1st March, 2006. Explain the requirements under the Companies Act, 1956, which should have been complied with by PQR Machines Ltd. before entering into contract with MN Forgings. Whether there is any additional requirement which is required to be complied with by PQR Machines Ltd. in view of the increased paid-up Share Capital on 1st March, 2006.*

*What would be your answer in case MN forgings is a Private Company in which P's wife is holding substantial shares?* *(May 2006)*

## Answer

**Contracts in which directors are interested:** The contract for supply of components entered into between PQR Ltd. and MN Forgings, a partnership firm (on which wife of P, a director of the company is a partner) attracts Sections 297, 299, 300 and 301 of the Companies Act, 1956.

The contract cannot be entered into unless it is approved in the meeting of the Board of Directors of PQR Ltd. Specific Board resolution is required (Section 297). However, in case of urgent necessity such consent of the Board may be obtained within 3 months of the date on which the contract was entered into (Section 297(3))

P, the interested director must disclose his interest at the Board meeting at which the question of entering into the contract has been taken up for consideration (Section 299(1) & (2). P, the interested director should not have taken part in the discussion at the said board meeting and he should not have noted on the resolution in respect of that contract (Section 300)

Prescribed particulars of the contract must be entered into the Registrar of Contract maintained under Section 301 within 7 working days of the Board meeting (Section 301).

In the given case the contract was entered into on 1.9.2005 for supply of components for a period of 3 years. As the paid-up share capital was only Rs. 70 lakhs (i.e. less than Rs. 1 crore) on 1.9.2005 proviso to Section 297(1) requiring prior approval of the Central Government is not attracted. Subsequent increase in the paid up share capital beyond Rs. 1 crore will not make it necessary to get the approval of the Central Government for continuation of the contract for the remaining period. Hence, there is no additional requirement.

If MN Forgings is a private company the provisions of Section 297 are not attracted as the director of PQR Ltd. is a director or member of MN Forgings Private Ltd.

Section 299 is also not attracted for the reasons given below:

If the contract or arrangement is between companies, a director is deemed to be interested only if he singly or along with other directors hold 2% or more shares in other company (Section 299(6)). While calculating the 2% shares in other company, only investment of directors is considered. Here P, a director of PQR Ltd. is not holding any shares in MN forgings Pvt. Ltd. Shares held by P's wife are not to be considered. Hence the provisions of Section 299 are not attracted. Sections 300 and 301 are also not applicable.

## Question 57

*EF Chemicals Ltd. proposes to appoint one whole-time technical Director on a consolidated monthly remuneration of Rs. 30,000 and one whole-time Marketing Director on a consolidated salary of Rs. 25,000 per month for a period for three years with effect from 1st September, 2005. The company has got a Managing Director and he is getting Rs. 40,000 per month. Explain the requirements under the companies Act to be complied with by the company in connection with the proposed appointment of whole-time Directors taking into account the following data collected from the Balance Sheet of the company as on 31st March, 2005:*

| | | Rs. |
|---|---|---|
| *1.* | *Paid-up Share Capital* | *80,00,000* |
| *2.* | *Debentures redeemable after three years* | *90,00,000* |
| *3.* | *Investments* | *20,00,000* |
| *4.* | *Accumulated Loss* | *70,00,000* |
| *5.* | *Preliminary Expenses not written off* | *15,00,000* |

*(May 2006)*

## Answer

**Appointment of whole time directors:** In the given case two whole time directors are proposed to be appointed with effect from 1st September, 2005. The remuneration payable to these directors depends on the effective capital of the company on the last day of the preceding financial year i.e. 31.3.2005. The effective capital is Rs. 65 lakhs (Rs. 80 lakhs + 90 lakhs – Rs. 20 lakhs –Rs. 70 lakhs –Rs. 15 lakhs) on 31.3.2005.

The ceiling on minimum remuneration has been prescribed in Part II of Schedule XIII of the Companies Act, 1956. Here the Managing Director is already getting a minimum monthly remuneration of Rs. 40,000. The proposed minimum remuneration to the whole-time technical director is Rs. 30,000 p.m. and to the whole time marketing director is Rs. 25,000 p.m. If a company has more than one managing director and / or whole-time director, the company may pay to each of them minimum remuneration within the prescribed ceiling. As the effective capital is less than Rs.1crore, the company may pay to each of the Managing Director/whole time director minimum remuneration upto Rs. 75,000 p.m. Hence the proposed minimum remuneration is within the prescribed limits.

The remuneration payable to the whole-time directors must be approved by Remuneration Committee of the Board of Directors, and thereafter the appointments of the Technical Director and Marketing Director shall be approved at a Board meeting.

Abstract of terms of appointment of whole-time directors must be sent to every member within 21 days as required under section 302(2). Nature of concern or interest of each director must be disclosed.

Copy of Board resolution, Form No. 32 must be filed with the Registrar of Companies.

Return in Form No. 25C must also be filed within 90 days from appointment as required under section 269(2). The return must contain a certificate from the auditor or the Secretary of the company or a Secretary in Whole-Time Practice that the requirements under Schedule XIII have been complied with Part III of Schedule XIII – Para 2)

The appointment and remuneration of the whole-time marketing and technical directors must be approved in next annual general meeting by ordinary resolution (Section 305(1) and part III of Schedule XIII).

The company has to comply with the above requirements under the Companies Act, 1956 with regard to the proposed appointment of two whole-time directors.

## Question 58

*M/s Star Health Specialities Ltd. owns a Multi-specialty Hospital in Chennai. Dr. Hamilton, a practising Heart Surgeon, has been appointed by the company as its non-executive ordinary director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 1956.*

*Advise the company, which seeks to ensure that the same does not contravene any provision of the Companies Act, 1956 (November 2006)*

## Answer

Under the proviso to sub-section (1) or section 309 of the Companies Act, 1956, in case–

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

(ii) in the opinion of the Central Government, the director possesses the requisite qualifications for the practice of the profession,

the remuneration paid for these services shall be outside the scope of Section 309 of the Act and shall not be a part of managerial remuneration. It is then not open to the Central Government to put any restriction on the amount of remuneration payable to him for his approach work. The company is, accordingly, advised to approach the Ministry of Company Affairs to seek an affirmative expression of opinion that Dr. Hamilton who is a qualified surgeon, possesses the requisite qualification to practice the profession of surgery.

## Question 59

*Mr. Adam, a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years w.e.f. 1.4.2005 in the last Annual General Meeting of the company.*

*Mr. Adam seeks your advise to remove the MD after following the procedure laid down under the Companies Act, 1956.*

*(i) Specify the steps to be taken by Mr. Adam and the Company in his behalf;*

*(ii) Draft a suitable resolution to be passed for removal of MD;*

*(iii) Is it necessary to state reasons to support the resolution for his removal? (May 2006)*

## Answer

(i) Under Section 284 of the Companies Act, 1956, a company may, by ordinary resolution, remove a director before the expiry of his tenure. For the purpose, special notice from a shareholder (Mr. Adam in the present case) shall be required to be given to the company for moving a resolution to remove a director. On receipt of notice, the company shall forthwith send a copy thereof to the director concerned (MD in the present case) and he shall be entitled to be heard on the proposed resolution at the meeting. Copy of the representation, if any, made by the director be also sent to all members of the company to whom notice of the general meeting is normally sent. In case, the representation is received too late, the same shall be read at the meeting. The representation need not be sent if the Company Law Board is satisfied that it will cause needless publicity for defamatory matter.

Under Section 190, special notice of the intention to move the resolution shall be given not less than 14 days before the meeting.

In the present case, if the AGM is due to be held, Mr. Adam may send the special notice 14 days before the AGM. Otherwise, he may request the company to convent EGM under section 169 for consideration of the special notice and resolution for removal of MD. He already holds more than 10% shares in the company.

Once the ordinary resolution is passed in the general meeting, MD will cease to be a director of the company and consequently MD of the company.

(ii) Mr. Adam may give special notice of his intention to move the following resolution, as ordinary resolution: "RESOLVED THAT Mr. …………….., Managing Director of the Company be and is hereby removed as a director of the company under Section 284 of the Companies Act, 1956 with immediate effect."

(iii) A statement of reasons is not necessary to support the resolution for removal of a director. *LIC vs. Escorts Ltd. (1986) 59 Comp. Cases 548(SC)*

## Question 60

*M/s. Raman Limited having a paid up share capital of Rs. 5 crores owns an agency of Cement Corportion of India Ltd. and proposes to supply cement, on credit, to M/s. Raman Enterprises Private Limited. Mr. Raman is a common Director in both the companies.*

*State the requirements of the Companies Act, 1956, if any, to be complied with by the company on the facts of this case.*

*Will it make any difference, if -*

*(i) M/s. Raman Enterprises Private Limited were a public company;*

*(ii) M/s. Raman Limited were carrying on real estate business and it proposes to sell a flat to M/s. Raman Enterprises Private Ltd. for Rs. 50 lakhs?* *(November 2006)*

## Answer

Under Section 297 of the Companies Act, 1956 except with the consent of the board of directors of a company, a director of the company or his relative; a firm in which such director or relative is a partner; or a private company of which the director is a member or director, shall not enter into any contract with the company for the sale, purchase or supply of any goods, materials or services. Where the paid up capital of the company is not less than Rs. 1 crore, it will also require previous approval of the Central Government. Exemption from the said provisions are available in the following circumstances -

(i) the purchase of goods and materials from the company or sale of goods and materials to the company is for cash at prevailing market prices;

(ii) any contract for sale, purchase or supply of goods, materials and services in which the company, or director etc. regularly trades the cost of which does not exceed Rs. 5,000 in any year.

In the present case, Mr. Raman is a common director in both the contractee companies. Accordingly, apart from the approval of the Board, previous approval of the Central Government (power delegated to Regional Director) is also required for entering into the proposed contract of supply of cement on credit. The provisions of Section 299 and 300 of the Companies Act, 1956 have also to be complied with and

in the Board meeting Mr. Raman shall disclose his interest in the contract and shall not participate in the discussions on this item and shall not vote for the same. The particulars of the contract be also recorded in the Register of Contracts.

(i) Section 297 does not apply to a contract where both the contractee companies are public companies. If Ram Enterprises happens to be a public company, section 297 will have no applicability.

(ii) Section 297 does not apply to a contract relating to immovable properties being the sale of flat in case of Raman Ltd. is a real estate company. The expression 'goods' used in the section has been defined in the Sale of Goods Act, 1930 according to which its means every kind of movable property. Hence, sale of flat will not amount to sale of 'goods' for purposes of section 297 of the section.

## Question 61

*Bush and Tony Private Limited approached you seeking your opinion on the following appointments relating to Directors and their relatives.*

*(i) Appointment of Mr. Somen (relative of one of the Directors) as the Managing Director of the company on a monthly remuneration of Rs. 35,000 and other perquisites as are currently being allowed to other executives of the company.*

*(ii) Appointment of Mr. Raman (relative of one of the Directors) as the General Manager – Sales of the company on a consolidated monthly remuneration of Rs. 30,000.*

*Express your opinion explaining the relevant provisions of the Companies Act, 1956.*

*(November 2006)*

## Answer

As per provisions of Section 314(1) of the Companies Act, 1956, except with the consent of the company accorded by way of a special resolution, no director or relative of a director shall hold any office or place of profit, which carries a monthly remuneration of Rs. 10,000 or more, except that of Managing Director or Manager of the company.

Further, as per the provisions of Section 314(1B) of the Companies Act, 1956 no relative of a director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs. 50,000 (as per notification vide 5th February, 2003) except with the prior consent of the company by way of a special resolution and the approval of the Central Government.

In the light of the above legal provisions, the opinion of the appointments of various persons as sated in the question can be expressed as follows:

(i) Mr. Somen is being appointed as the Managing Director of the company, the provisions of section 314(1) are not attracted even though he is relative of a director. This is because the appointment of Managing Director or Manager is outside the provisions of section 314 of the Companies Act, 1956. If Mr. Somen is not already a director of the company, steps must be taken to appoint him first as an additional director / director. Thereafter he may be appointed as Managing Director by complying with the requirements under section 269 read with schedule XIII to the Companies Act. The appointment can be made by the board subject to the approval the company in general meeting as the proposed remuneration is within the limits laid down in schedule XIII.

(ii) Since the remuneration be paid to Mr. Raman does not exceed Rs. 50,000/- per month, provisions of section 314(1B) are not attracted and approval of the Central Government is not required. However, as the proposed remuneration exceeds of Rs. 10,000/- his appointment shall require the passing of special resolution by the company. The special resolution is required to be passed at a general meeting of the company held for the first time after such appointment.

(iii) In the case of Mr. Kabi, since the remuneration proposed to be paid to him exceeds Rs. 10,000 but does not exceeds Rs. 50,000/- per month, his appointment shall require the passing of special resolution by the company only and no approval of the Central Government is required. The special resolution according the consent may be passed at a general meeting of the members of the company held for the first time after such appointment.

## Question 62

*Articles of Association of a listed company has fixed payment of sitting fee for each Meeting of Directors subject to maximum of Rs. 10,000. In view of increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to Rs. 25,000 per meeting. Advise the company about the requirement under Companies Act, 1956 to give effect* *(November 2006)*

## Answer

(i) Under Section 310 of the Companies Act, 1956 approval of the Central Government shall not be required where sitting fee for each meeting of the Board of a Committee thereof does not exceed the prescribed sum under Rule 10-B of the Central Government's (General Rules & Forms, 1956) as under:

| | | |
|---|---|---|
| 1. | Companies with paid up capital of Rs. 10 crores and above or turnover of Rs. 50 corres and above | Sitting fee not to exceed Rs. 20,000 |
| 2. | Other companies | Sitting fee not to exceed Rs. 10,000 |

Any increase in the sitting fee will require amendment of relevant provision of the Articles of Association. In the given case, the proposed sitting fee of Rs. 25,000 will require approval of the Central Government as the same exceeds the prescribed limits. The company can pay the sitting fee upto Rs. 20,000 depending upon the aforesaid parameters laid down in Rule 10-B.

### Question 63

*Bush and Tony Private Limited approached you seeking your opinion on the following appointments relating to Directors and their relatives.*

*(i) Appointment of Mr. Somen (relative of one of the Directors) as the Managing Director of the company on a monthly remuneration of Rs. 35,000 and other perquisites as are currently being allowed to other executives of the company.*

*(ii) Appointment of Mr. Raman (relative of one of the Directors) as the General Manager – Sales of the company on a consolidated monthly remuneration of Rs. 30,000.*

*Express your opinion explaining the relevant provisions of the Companies Act, 1956.*

*(November 2006)*

### Answer

As per provisions of Section 314(1) of the Companies Act, 1956, except with the consent of the company accorded by way of a special resolution, no director or relative of a director shall hold any office or place of profit, which carries a monthly remuneration of Rs. 10,000 or more, except that of Managing Director or Manager of the company.

Further, as per the provisions of Section 314(1B) of the Companies Act, 1956 no relative of a director can be appointed to any office or place of profit under the company which carries a monthly remuneration of not less than Rs. 50,000 (as per notification vide 5$^{th}$ February, 2003) except with the prior consent of the company by way of a special resolution and the approval of the Central Government.

In the light of the above legal provisions, the opinion of the appointments of various persons as sated in the question can be expressed as follows:

(i) Mr. Somen is being appointed as the Managing Director of the company, the provisions of section 314(1) are not attracted even though he is relative of a director. This is because the appointment of Managing Director or Manager is outside the provisions of section 314 of the Companies Act, 1956. If Mr. Somen is not already a director of the company, steps must be taken to appoint him first as an additional director / director. Thereafter he may be appointed as Managing Director by complying with the requirements under section 269 read with schedule XIII to the Companies Act. The appointment can be made by the board subject to the approval the company in general meeting as the proposed remuneration is within the limits laid down in schedule XIII.

(ii) Since the remuneration be paid to Mr. Raman does not exceed Rs. 50,000/- per month, provisions of section 314(1B) are not attracted and approval of the Central Government is not required. However, as the proposed remuneration exceeds of Rs. 10,000/- his appointment shall require the passing of special resolution by the company. The special resolution is required to be passed at a general meeting of the company held for the first time after such appointment.

(iii) In the case of Mr. Kabi, since the remuneration proposed to be paid to him exceeds Rs. 10,000 but does not exceeds Rs. 50,000/- per month, his appointment shall require the passing of special resolution by the company only and no approval of the Central Government is required. The special resolution according the consent may be passed at a general meeting of the members of the company held for the first time after such appointment.

## Question 64

*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 meetings 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.* *(May 2007)*

## 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 t he 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 company 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 crores 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 65

*Mr. MTP was appointed as a director at the Annual General Meeting of a limited company held on 30th September, 2005 and he carried on his duties and functions as a director. In the month of August, 2006, it was found out that there were certain irregularities in his appointment and on 31st August, 2006, his appointment was declared invalid. But Mr. MTP continued to act as director even after 31st August, 2006. You are required to state, with reference to the provisions of the Companies Act, 1956, whether the acts done by Mr. MTP are valid and binding upon the company ? (May 2007)*

## Answer

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 further provide 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. MTP prior to 31st August, 2006 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. MTP after 31st August, 2006 shall be deemed to be invalid and not binding upon the Company.

## Question 66

*The management of ATP Ltd., a company listed with The Stock Exchange, Mumbai wants to appoint Mr. BDF as a Director of a Company at the Annual General Meeting of the Company to be held on 24th May, 2007. It maybe noted that Mr. BDF is not a retiring Director. The Management seeks you guidance regarding the procedure to be adopted for the purpose. You are required to state the procedure to be followed for giving effect to such proposal and formalities to be observed after appointment of Mr. BDF as Director, by the management of ATP Ltd., as per the provisions of the companies Act, 1956. (May 2007)*

## Answer

The directors of a company are appointed by the shareholders at the general meeting. Though the retiring directors are normally re-appointed, it may sometimes become necessary to appoint a person other than the retiring director as director. The shareholders also have a right to propose the appointment of a person as a director. This power may be exercised in order to increase the strength of the Board or to permit the shareholders to exercise this important right available to them.

In the case of private company which is not a subsidiary of a public company, the producers given below are not applicable and the appointment shall be in accordance with the Articles of Association.

Procedure to be adopted:

1. A person, other than the retiring director, shall be eligible for appointment to the office of director only if he or some other member intending to propose him has, at least 14 days before the meeting, left at the office of the company a special notice in writing under his hand signifying his candidature for the office of director along with a deposit of Rs. 500 as required under section 257 of the Companies Act, 1956.
2. On receipt of the special notice, information should be sent to all the members of the company not less than 7 days before the meeting. Alternatively, an advertisement may be issued regarding the candidature or intention not less than 7 days before the meeting in at least in two newspapers circulating in the place where the registered office of the company is situated both in English and in the local language.
3. The resolution for the appointment should be move before the annual general meeting and an ordinary resolution should be passed for this purpose. If the resolution is not passed, no further action needs to be taken in this regard.
4. In case the resolution is passed, the deposit money is Rs. 500 should be refunded to the person who made the payment.
5. In the case of a listed company, copy of the minutes of the meeting and intimation regarding the appointment should be sent to each of the stock exchanges in which the securities are listed.
6. Within 30 days of the appointment, a return in Form No. 32 should be filed electronically, with the Registrar of Companies together with the prescribed filing fee.
7. The Company and the director has to complete the formalities as prescribed under Companies (Director Identification Number) Rules, 2006.
8. A genial notice of disclosure of interest in Form No. 24AA indicated the names of bodies corporate of which he is a director or member (holding more than 2% of paid-up capital) or firms in which eh is a partner should be obtained. The said disclosures should be placed before the Board and a resolution taking the notice on record should be passed. The notice shall expire at the end of the financial year but may be renewed by giving a fresh Form No. 24AA in the last month of the financial year in which it would otherwise expire.
9. Articles of Association should be check and in case it provides for acquiring of qualification shares, the same should be acquired within two months of appointment, if the new appointee does not hold the same.
10. Particulars regarding directors should be entered in the Register of Directors and the Register of Directors' Shareholdings.

## Question 67

*(i) Mr. SDR, a shareholder in M/s 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 a Mr. EDM, a director of M/s JKP Ltd. without stating any reasons in the notice. You are required to*

state as per the provisions of the Companies Act, 1956 and / or any decided case law whether Mr. SDR is entitled to do so?

*(ii) Would your answer be different, if Mr. EDM was a director appointed by the Central Government under Section 408 of the Companies Act, 1956?*

*(iii) State the relevant provisions of the Companies Act, 1956 in case of an appropriate special notice is received by the company for removal of any director. (May 2007)*

Answer

(i) The problems as stated in the question is governed by the provisions of section 284 of the Companies Act, 1956. Sub-Section (2) of the said section stated that a special notice is required of any resolution to remove a director. The section states that a special notice is required of any resolution to remove a director. The section does not put any condition in respect of the number of members or their shareholding and furnishing any reason therefore. Accordingly the Karnataka High Court in the case of *Karnataka Bank Ltd. Vs. A.B. Datar & Other reported at [1994] 79 Comp. Cases 417* held that here is no requirement with regard to the number of members of their shareholding and even one member is entitled to give special notice for removal of director, The Court also held that there is no need to give any reason for removal of a director in the resolution proposed to be moved. Hence Mr. SDR holding only ten equity shares can alone give a special notice for removal of Mr. EDM from the office of director of M/s. JK Ltd.

(ii) According to section 284 (1) of the Companies Act, 1956, the provisions relating to removal of directors are not applicable to the directors appointed by the Central Government under section 408 of the said Act. Hence, in case Mr. EDM was a director appointed by the Central Government under the said section 408, Mr. SDR would not be entitled to give any special notice under section 284 for removal of director.

(iii) On receipt of notice of a resolution to remove a director, the relevant provisions of the Companies Act, 1956 in this regard are as follows:

(a) The Company has to forward a copy of the notice to the concerned director, [Sec 284(3)].

(b) The concerned director, whether he is a member of the company or not, shall be entitled to be heard on the resolution at the meeting. [Sec 284(3)].

(c) In case the concerned director makes any representation in writing of reasonable length and requests the company to notify the same to the members of the company, the fact of receiving the representation should be stated in the notice of the meeting and a copy should be circulated to all the members of the company. [Sec. 284 (4)]

(d) In case the representation received by the company is too late for inclusion in the notice or if there is an omission of the part of the company, the same should be read out at the meeting. [Sec 284 (4)]

(e) The company or the person who claims to be aggrieved may make an application to the Central Government seeking exemption from circulation or reading out the representation if the rights are sought to be abused to secure needless publicity for defamatory matter and the Central Government may pass an order granting such exemption. [Proviso to Sec 284 (4)].

(f) The Central Government may also order the company's costs on the application to be paid in whole or in part by the director concerned not withstanding that he is not a party to it. [Proviso to Sec 284 (4)].

(g) The Board of Directors is not entitled to appoint a person as a Director if he has been removed from his office under the provision of section 284 of the Companies Act, 1956. [proviso to Sec 284 (6) ]

## Question 68

*M/s ABC Ltd. had power under its memorandum to sell its undertaking to another company having similar objects. The Articles of the company contained a provision by which directors were empowered to sell or otherwise deal with the property of the company. The Shareholders passed an ordinary resolution for the sale of its assets on certain terms and required the directors to carry out the sale. The Directors refused to comply with the wishes of the shareholders where upon it was contended on behalf o the shareholders that they were the principal and directors being their agents were bound to give effect to their decision. Based on the above facts, decide the following issues, having regard to the provisions of the Companies Act, 1956 and case laws.*

*(i) Whether the contention of shareholders against the non-compliance of their wishes by the directors is tenable.*

*(ii) Can shareholders usurp the powers which by the articles are vested in the directors by passing a resolution in the general meeting? (November 2007)*

## Answer

### General Powers vested in the Board of Directors:

The provisions relating to the general powers which are vested are given under Section 291 of the Companies Act, 1956. As per this section, the Board of Directors of a company is entitled to exercise all such powers and to do all such acts and things as the company is authorized to exercise and do. This means the powers of the Board of Directors are co-extensive with those of the company. The proposition is, however subject to two conditions:

Firstly, the Board shall not do any act which is to be done by the company in general meeting. Secondly, the Board shall exercise all such powers subject to the provisions contained in the Companies Act, 1956 or in the Memorandum or the Articles of the Company or in any regulations made by the Company in general meeting. But no regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made.

It is the first and elementary principle of company law that when powers are vested in the Board of directors by the Articles of a company, they cannot be interfered with by the shareholders as such *(Murarka etc. Works Ltd. vs. Mohal Lal AIR (1961) Col 251).*

In exercising their powers the directors do not act as agent for the majority 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 above problem is based on decision given by the *Chancery Court in the case Automatic Self Cleansing Filter Syndicate Co. Ltd. Vs. Cunninghame (1906) 2ch 34 and this case also followed in India in MPLV Works Vs Murarka AIR 1961 Col 251.*

In view of above discussion, the contention of shareholders against the non-compliance of their wish by the directors is not tenable and shareholder cannot usurp the power which by articles vested in the directors by passing even a resolution of a numerical majority at the general meeting. 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, 1956.

### Question 69

*Mr. X was appointed as the Managing Director of ABC Ltd. for a period of 5 years w.e.f, 1st January, 2006. Since his work was found unsatisfactory. His services were terminated from 15th August, 2007 by paying compensation for the loss of office as provided in the agreement entered into by the company. Later, the company discovered that during his tenure of office Mr. X was guilty of many corrupt practices and that he should have been removed without payment of compensation. Advise the company whether the services of the Managing Director can be terminated without payment of compensation as provided in the agreement and whether the company can recover the amount already paid to Mr. X filing a suit.*

*(November 2007)*

### Answer

According to Section 318 of the Companies Act, 1956 a Managing Director is entitled to be paid compensation for loss of office. However, Section 318(3)(e) provides that no compensation is payable if the director concerned has been guilty of fraud or breach of trust or of gross negligence in or gross mismanagement in the conduct of the affairs of the Company. However, in the present case, compensation amount was paid and subsequently the misconduct on the part of the X was noticed by the company. In the case of *Bell Vs. Lever Bros (1932) Lever Bros* removed their managing director of a subsidiary by paying them compensation. It was afterwards discovered that during the tenure of office he had been guilty of the many breaches of duty and corrupt practices that he could have been removed without compensation. An action was then commenced to recover back the compensation money. It was held that Bell was not bound to refund the compensation money and to disclose any break of his fiduciary obligation so as to give the company an opportunity to dismiss him. Thus, in normal circumstances, ABC Ltd., is entitled to terminate the services of Mr. X as Managing Director without payment of compensation as he was guilty of many corrupt practices. In the present case, however, ABC Ltd. will not be able to recover the compensation money already paid to Mr. X the Managing Director.

## Question 70

*Mr. X appointed as the Managing Director of XYZ Ltd. w.e.f. 1st October, 2006. The company made an application to the Central Government for approval, as the remuneration proposed to be paid to Mr. X was beyond the limits laid down in schedule XIII to the Companies Act, 1956. The company started paying remuneration from the date of appointment and continued to do so till 31st March, 2007. The Central Government did not approve the remuneration as proposed by the company and restricted the same to a lower amount. On scrutiny of the accounts, it was noticed that the company till 31st March, 2007 has paid to Mr. X, a total sum of Rs. 1.20 lakhs in excess of the remuneration sanctioned by the Central Government. Explain with reference to the provisions of the Act whether Mr. X can keep the excess remuneration. Draft a resolution for waiver of recovery of the excess remuneration so paid by the company.* *(November 2007)*

## Answer

According to Section 309(5A) of the Companies Act, 1956, if any director draws any remuneration in excess of the remuneration sanctioned by the Central Government, he shall refund such excess remuneration to the company. The company shall not waive the recovery of any sum refundable to it unless permitted by the Central Government.

In the present case Mr. X cannot keep remuneration drawn by him which is in excess of the remuneration sanctioned by the Central Government, the Central Government permit the waiver of recovery of excess remuneration, the company may waive the recover of excess remuneration, and then Mr. X will have a right to retain the excess remuneration drawn by him.

Draft resolution for waiver of recovery of the excess remuneration:

"Resolved that subject to the approval of the central Government, consent of the company be and is hereby given waiving the recovery of an amount of Rs. 120,000 paid to Mr. X the director of the company, during the period 1st October, 2006 to 31st March, 2007 being in excess of the remuneration sanctioned by the Central Government vide letter no. ……… dated …………

Resolved further than an application be made to the Central Government and the company secretary be and is hereby authroised to take the necessary steps in this regard."

## Question 71

*The articles of association of DEF Ltd. mentioned in it that Mr. X and Mr. Y will act as directors of the company from the date of incorporation. The company was incorporated on 2nd January, 2007. The articles also provided that the directors will have to obtain qualification shares within one month from the date of appointment as director. Mr. X purchased the shares of the company on 28th February, 2007 and Mr. Y purchased on 28th March, 2007 thus violating the provisions contained in the articles. Having regard to the provisions of the companies Act. Examine the validity of the appointments of Mr. X and Mr. Y as directors.*

*(November 2007)*

## Answer

Without prejudice to the restrictions imposed by section 266, it shall be the duty of every director who is required by the articles of the company to hold a specified share qualification and whom is not already qualified in that respect, to obtain his qualification within two months after his appointment as director [Section 270(1)]

So it becomes incumbent on the part of every director to hold qualification share within the time specified and if he does not held the same at the time of his appointment as director he must acquire them within two months after his appointment as director. Any provision made in the articles of the company requiring a person proposed for directorship to hold qualification share either before appointment or within a shorter than two month after his appointment will be void.

Here the provision in the articles of association to hold shares within one month shall be void. Keeping the above provision in consideration the appointment of Mr. X will be valid as he acquired the share before the expiry of two months. As far the appointment of Mr. Y is concerned he has failed to acquire the share within two-month period. As per section of 283(1)(a) the office of director shall become vacant if he fails to obtain the shares within the time specified in section 270(1) therefore Mr. Y shall have to vacate his office. Here the date of incorporation is taken as the date of appointment.

## Question 72

*Primus Group of Companies has three Companies, viz., Primus Rolling Mills Ltd., Primus Steel Pipe Manufacturers ltd. and Primus marketing Company ltd. All the three Companies want to appoint Mr. Prem as their Managing Director. You are required to state with reference to the provisions of the Companies Act, 1956 whether such appointments are permissible.*

*(May 2008)*

## Answer

As per provisions of Section 316(1) and 316(2) of the Companies Act, 1956, no public company and no private company which is a subsidiary of a public company can appoint or employ a person as its managing director if such person is a managing director or manager of more than one other company, whether public company or private company which is a subsidiary of public company. In view of the above legal provisions, Mr. Prem can be appointed as a managing director of only two public companies and not three public companies.

However, Section 316(4) of the said Act provides an exception and states that the Central Government may, by order, permit any person to be appointed as a Managing Director of more than two companies, if the Central Government is satisfied that it is necessary that the companies should, for their proper working, function as a single unit and have a common Managing Director.

According to the exception provided, the Primus Group of Companies have to approach the Central Government and satisfy it about the necessity of having a common Managing Director for all the three companies. If the Central Government is satisfied and issues an order accepting the plea of the Group, then the Group can appoint Mr. Prem as Managing Director of all the three companies of the Group.

### Question 73

*Mr. Raj is director in 14 public limited companies as on 30th July, 2007 and continues to be so till 26th September, 2007. The following companies appoints Mr. Raj as a director at their respective Annual General Meetings held on dates mentioned against their names:*

*(1) MLP Ltd. (AGM held on 27th September, 2007)*

*(2) PAT Private Ltd. (AGM held on 25th September, 2007)*

*(3) Retail Traders Association (a company registered under Section 25 of the Companies Act, 1956 (AGM held on 26th September, 2007)*

*(4) KMC Ltd. (AGM held on 29th September, 2007)*

You are required to state with reference to the relevant provisions of the Companies Act, 1956 the options available to Mr. Raj in respect of accepting or not accepting the appointment of the above companies. *(May 2008)*

### Answer

Section 275 of the Companies Act, 1956 debars any person to hold office as a director of more than 15 companies simultaneously.

As per the provisions of Section 277(2) of the Companies Act, 1956 where a person holds directorship of 14 or less companies is appointed as a director of other companies and such appointments make the total number of his directorships more than 15, then the person concerned has to choose the directorships which he wishes to continue to hold or to accept so that the total number of directorships, old or new, henceforth to be held by him does not exceed 15.

The said section further provides that none of the new appointments shall be effective until such a choice is to be made and in case of failure of the person to make such a choice within 15 days of the day on which the last of the new appointments was made, all the new appointments shall become void.

Section 278 of the Companies Act, 1956 states that for the purpose of Section 275 and Section 277 the number of companies of which a person may be a director, following companies are not to be counted.

(a) A private company unless it is a subsidiary of a public company

(b) An unlimited company

(c) An association not carrying on business for profit or which prohibits the payment of dividend

(d) A company in which such person is only an alternate director.

In view of the abovementioned legal provisions, Mr. Raj who is already a director in 14 companies has to consider the following aspects.

As per provisions of Section 278 of the Companies Act, 1956 PAT Private Ltd. being a private company and Retail Traders Association being an association not carrying on business for profit and prohibiting payment of dividend by virtue of being a company registered under section 25 are not to be counted for the purpose of Section 277 read with Section 275.

Thus Mr. Raj can accept the appointment in PAT Private Ltd. and Retail Traders Association without any obstacle.

The appointment of Mr. Raj in the other two public companies along with the old directorships in 14 companies makes a total of 16 which is excess of 15 prescribed by Section 275. As per provisions of Section 277, Mr. Raj has to decide within 15 days from 29th September, 2007, the date on which the last appointment was made, as to the directorships which he wishes to continue hold or to accept so that the number of his total directorships does not exceed 15 and in case he fails to be decide within the said 15 days then his appointments as a director of MLP Ltd. and KMC Ltd. shall become void on the expiry of the said 15 days.

Note: A different view can also be taken to the extent that the appointment of Mr. Raj in MLP Ltd. on 26th September, 2007 will make the total number of directorships to 15 which is within the prescribed parameters. However, his appointment as Director of KMC Ltd. on 29th September, 2007 will make it 16 which is in excess of the permissible limit. Hence, the appointment in KMC Ltd. will become void and ineffective in case Mr. Raj does not decide about which of the two companies he should choose within 15 days.

## Question 74

*What do you understand by the term "Director Identification Number" (DIN) ? Describe the procedure to obtain the same as enumerated under the Companies Act, 1956 read with the relevant Rules.* *(May 2008)*

## Answer

Director Identification Number (DIN) is a Unique Identification Number given by the Ministry of Corporate Affairs. It is required to be obtained by every person who is intended to become a director of any company. DIN is a pre-requisite for filing various forms with the Registrar of Companies. The electronic system of the Ministry of Corporate Affairs will not allow to file / submit the forms if DIN of the signatory director is not mentioned in the form being filed / submitted.

In order to obtain DIN from the Ministry of Corporate Affairs following procedure is to be adopted:

(i) To check whether the computer system through which the DIN Application is being made has the requisite hardware and the software as well as the internet facility.

(ii) Using the internet facility, DIN Application Form has to be downloaded from the website of Ministry of Corporate Affairs

(iii) The DIN application form is to be filled up and submitted electronically

(iv) On electronic submission of the DIN application form, a provisional DIN will be generated and displayed on the said application form.

(v) Thereafter, the form is to be printed, signed and submitted to the Ministry of Corporate Affairs – DIN Cell along with following papers/documents

*(a) Passport size photograph of the applicant duly attested by a Magistrate or a Notary Public or a practicing Chartered Accountant or a practicing Company Secretary or a practicing Cost Accountant or a Gazetted Officer.*

*(b) Attested copy of an one of the following as a proof of identify*

(i) Passport

(ii) Election / Voter Identity card

(iii) Driving Licence

(iv) Income tax PAN card

(v) Ration Card

(vi) Any other document which will prove the identity of the applicant

*(c) Attested copy of any one of the following as a proof of residence*

(i) Passport

(ii) Election / voter identity card

(iii) Driving Licence

(iv) Ration Card

(v) Electricity Bill

(vi) Telephone Bill

(vii) Bank Account Statement

(viii) Any other document which will prove the identity of the applicant

On submission of the above, the DIN Cell of the Ministry of Corporate Affairs shall allot Final DIN and send an intimation letter to the applicant.

## Question 75

*Big Ball Ltd., a reputed Public Company, over the years, has performed excellently and its General Reserve is many times more than the paid up capital of the Company. The Chairman of the company came to know that a group of unscrupulous persons is cornering the shares of the company and may lodge them for transfer in their names. It is apprehended that such transfer may lead to change in the composition of Board of Directors which may be prejudicial to the Public interest.*

*You are required to state with reference to the provisions of the Companies Act, 1956 as to how Big Ball Ltd. can block the above stated transfer of shares (May 2008)*

## Answer

As per Section 250(4) of the Companies Act, 1956 where the Company Law Board (Company Law Board till the Company Law Tribunal becomes operational referred to as CLB hereinafter) has reasonable ground to believe that a transfer of shares in a company is likely to take place and the CLB is of the opinion that any such change would be prejudicial to the public interest, the CLB may, by an order, direct that any transfer of shares in the concerned company; during such period not exceeding three years, as may be specified in the order, shall be void.

As per Section 250(1) & (2) of the Companies Act, 1956, if the CLB is of the view that there are good reasons to find out the relevant facts about any shares and the CLB is of the opinion that such facts can not be found out unless the restrictions are imposed, as an interim measure, it may, by an order, direct that transfer of any; such shares shall be void and no voting right shall be exercised in respect of such shares.

However, the CLB is empowered to vary or rescind its order any time.

The facts given in the question squarely falls within the provisions of Section 250 of the Companies Act, 1956. The management of Big Ball ltd. may make a complaint to the CLB and convince it that the transfer of shares in favour of the group of unscrupulous persons would change the composition of the Board of Directors of the Company which shall be prejudicial to the public interest and if the CLB is convinced of the plea of the company, it may pass an order as stated above which would block the transfer of shares as stated in the question.

## Question 76

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

| | *As at 31.3.2006* | *As at 31.3.2007* | *As at 31.3.2008* |
|---|---|---|---|
| | *Rs.* | *Rs.* | *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 & 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 (as calculated in accordance with the provisions of Section 349 & 350 of the Companies Act, 1956* | *12,50,000* | *19,00,000* | *34,50,000* |

*In the ensuing Board Meeting schedule to be held on 5th May, 2008 among other items of agenda, following items are also appearing:*

*(i) To decide about borrowing from financial institutions on long terms basis.*

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

*Based on above information, you are required to find out as per 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 2008-09 without seeking the approval in general meeting. (May 2008)*

Answer

(i) Borrowing from Financial Institutions:

As per Section 293(1)(d) of the Companies Act, 1956, the Board of Directors of a public company or a private company which is a subsidiary of a public company without obtaining the approval of shareholders in a general meeting, can borrow the funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves. 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 May, 2008, the figures relevant for this purpose are the figures as per the Balance Sheet as at 31.03.2008. 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:

| | |
|---|---|
| Paid up capital | Rs. 7,500,000/- |
| General Reserve (being free reserve) | Rs. 5,000,000/- |
| Credit Balance in Profit & Loss Account (to be treated as free reserve) | Rs. 1,000,000/- |
| Debenture Redemption Reserve (this reserve is not to be considered since it is kept apart for specific purpose of debenture redemption) | ----- |
| Aggregate of paid up capital and free reserve | Rs. 13,500,000/- |
| Total borrowing power of the Board of Directors of the company. i.e., 100% of the aggregate of paid up capital and free reserves | Rs. 13,500,000/- |
| Less amount already borrowed as secured loans | Rs. 3,000,000/- |
| Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting | Rs. 10,500,000/- |

(ii) Contribution to Charitable Funds: As per Section 293(1)(e) of the Companies Act, 1956, the Board of Directors of a public company or a private company which is a subsidiary of a public company, without obtaining the approval of shareholders in a general meeting, can make contributions to charitable and other funds not directly related to the business of the company or the welfare of its employees upto an amount which, in a financial year, does not exceed Rs. 50,000/- or five per cent of its average net profits as determined in accordance with the provisions of Sections 349 and 350 of the Companies Act, 1956 during the three financial year immediately preceeding which ever is greater.

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 Section 349 and 350 of the Companies Act, 1956.

| | | |
|---|---|---|
| For the financial year ended 31.03.2006 | | Rs. 1,250,000/- |
| For the financial year ended 31.03.2007 | | Rs. 1,900,000/- |
| For the financial year ended 31.03.2008 | | Rs. 3,450,000/- |
| | TOTAL | Rs. 6,600,000/- |
| Average of net profits during three preceding financial years | | Rs. 2,200,000/- |
| Five per cent thereof | | Rs. 110,000/- |

Since this amount is higher than Rs. 50,000/- the Board of Directors of PTL Ltd. can make contribution to charitable funds upto Rs. 110,000/- during the financial year 2007-08 without obtaining the approval of shareholders in a general meeting.

## Question 77

*(i)* *Whether guarantee commission paid to a Director is remuneration to director requiring Central Government's permission when the amount of such commission exceeds the limit prescribed in Section 309 of the Companies Act, 1956.*

*(ii)* *BHP Ltd. wants to make the liability to its directors unlimited. You are required to state with reference to the provisions of the Companies Act, 1956 whether this can be done.*

*(iii)* *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, 2007 and such repayment has not been made till 5th May, 2008. Another company JKL Ltd. wants to appoint the said Mr. John as its director at its annual general meeting to the held on 6th May, 2008. You are required to state with reference to the provisions of the Companies Act, 1956 whether Mr. John can be appointed as a director of JKL Ltd.* *(May 2008)*

## Answer

(i) As per decision of the Hon'ble Delhi High Court in the case of *Sussen Textile Bearings Ltd. Vs. Union of India, [(1984)55 Com Cases 492]* guarantee commission paid to directors for giving surety against loans and credit facilities taken by the company from financial institutions is not a remuneration for any services rendered and therefore, permission of Central Government as envisaged under Section 309 of the Companies Act, 1956 is not necessary. The director giving guarantee does not render manual, clerical, technical, supervisory or administrative services. He gets the guarantee commission for the risk which he bears and that has nothing to do with his directorship. After the said decision, the then Department of Company Affairs also issued a circular in the year 1994 accepting the view expressed therein.

(ii) Section 323(1) of the Companies Act, 1956 states that a limited company may, if so authorized by its Articles of Association, by special resolution, alter is memorandum of association so as to render unlimited the liability of its directors or of any director or manager. Hence, by amending the Memorandum of Association of the company by way of passing a special resolution in a general meeting, BHP Ltd. can make the liability of directors unlimited.

(iii) Section 274(1) (g) of the Companies Act, 1956 states that where a person is a director of a public 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 public company for a period of five years from the date on which such public 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 78

*LMB Ltd., Kolkata is a multiproduct manufacturing company having paid up capital of Rs. 5.00 crores. In order to increase the product portfolio, the said company intends to procure certain machines and equipments worth Rs. 1.00 crore from a partnership firm, namely, M/s MLPK, in which the son of managing director of LMB Ltd. is a partner. The contract for purchase of said machines and equipments is to be placed before the board of directors of the company for its consideration.*

*In view of above facts, you are required to explain briefly the procedure under the provisions of the Companies Act, 1956 to be followed by the LMB Ltd., to enter into the said contract.*

*(May 2008)*

## Answer

As per provisions of section 297 of the Companies Act, 1956, when a Company enters into a contract in which some of the directors are interested, then consent of the Board of Directors of the Company is required to be obtained. In the present case since the Managing Director of LMB Ltd. is interested in the contract for the purchase of machines and equipments because of his son's partnership in the supplier firm, the same should be approved by the board of directors of the company.

Proviso to Section 297(1) states that in the case of a company having a paid-up capital of not less than rupees one crore, no such contract shall be entered into except with the previous approval of the Central Government. Since the paid up capital of LMB Ltd. is Rs. 5 crore, the company is required to take over prior approval of the Central Government.

For this purpose, following steps are required to be taken:

(i) Hold a board meeting and place the terms of the contract for consideration. The managing director should disclose the nature of his interest as required under Section 299 of the Companies Act, 1956.

(ii) The managing director should not participate in discussion when in the board meeting, the matter in respect of the abovementioned contract is being discussed. He must not also vote on the relevant resolution. Moreover, his presence shall also not be counted for determining the quorum of the board meeting. [Section 300 of the Companies Act. 1956]

(iii) The consent of the board of directors must be accorded by way of a resolution and not otherwise.

(iv) An application to the Central Government (by delegation to Regional Director) should be made in prescribed form (Form No. 24A). Following enclosures should be made with the said form:

   (a) a certified true copy of the board resolution approving the contract

   (b) a copy of the proposed agreement

   (c) a copy of the Memorandum and Articles of Association of the company

   (d) a copy of latest audited annual accounts with directors' and auditors' reports thereon.

   (e) bank draft or treasury challan evidencing the payment of prescribed fees.

(v) Necessary entries are to be made in the Register of Contracts (Section 301)

On receiving the approval from the Central Government (Regional Director), the company can proceed to enter into the contract for supply of machines and equipments with the firm M/s MLPK in which the son of Managing Director is a partner.

## Question 79

*The Articles of Association of Sunrise Ltd. provide that the qualification of a director shall be holding of at least 10 shares in the company. Mr. Rao has been appointed as a director in the said meeting on 1st May, 2008. Mr. Rao applied for 10 equity shares of the company on 30th July, 2008. The said shares were allotted to him on 20th August, 2008 when the Board meeting was held.*

*Discuss the relevant provisions of the Companies Act, 1956 in the matter of share qualification requirements and the consequences of non- compliance thereof. Also state whether Mr. Rao has complied with the requirements in this regard.* *(November 2008)*

## Answer

QUALIFICATION SHARES: The Companies Act, 1956 does not provide for any share qualification of any director but Regulation 66 of Table 'A' provides that a director must hold at least one share in the company. Usually, the articles of the company provide for holding qualification shares by a director. Where a share qualification has been prescribed in the Articles of a company which is a public company or a private company which is a subsidiary of a public company, the provisions of Section 270 of the Companies Act, 1956 is applicable where under a director must take his qualification shares within 2 months after his appointment. Any provision in the articles of the company shall be void in so far as it requires a person to hold the qualification shares before his appointment as a director or to obtain them within a shorter time than two months after his appointment as such. The nominal value of the qualification shares shall not exceed Rs.5000/- or the nominal value of one share where it exceed Rs.5000/.

A person acting as a director without acquiring qualification shares is punishable under Section 272 of the said Act. Moreover, a director who fails to hold qualification shares is also liable to vacate his office under Section 283 of the Companies Act, 1956.

In the instant case Mr. Rao was appointed as Director of Sunrise Limited on 1$^{st}$ may 2008. He applied for shares of the company on 30$^{th}$ July 2008 which were allotted only at the Board meeting held on 20$^{th}$ August 2008. It can not therefore be said that he held the shares before expiry of 2 months from the date of his appointment. In view of this Mr. Rao must vacate his office as director as provided in Section 283(1)(a).

## Question 80

*Mr. Wilson was appointed in ABC Ltd. as a director and he was to retire by rotation on 1$^{st}$ September, 2008. On account of some unavoidable reasons the annual general meeting of the company could not be held on the said date, nor the vacancy caused be retirement could be filled up at the adjourned meeting .State the relevant provisions of the Companies Act, 1956 and decide whether Mr. Wilson shall be deemed to be retired on 1$^{st}$ September, 2008 when the meeting was scheduled to be held or it will become a case of deemed reappointment..*

*(November 2008)*

## Answer

DEEMED REAPPOINTMENT OF DIRECTOR: Section 256 of the Companies Act, 1956 deals with deemed re-appointment of a retiring director. The vacancies caused by retirement of a director by rotation should be filled up at the same meeting or at an adjourned meeting. If it is not so done, the retiring director shall be deemed to have been reappointed at such adjourned meeting except in the following cases-

(i) at any previous meeting, a resolution for his reappointment was put to vote but was lost, or

(ii) the retiring director has, in writing expressed his unwillingness to continue, or

(iii) he is not qualified or is disqualified for the said appointment, or

(iv) a special or ordinary resolution is necessary for his appointment or reappointment by virtue of any provisions of the Companies Act 1956, or

(v) it is resolved to appoint two or more directors by a single resolution, or

(vi) it is resolved not to fill the vacancy.

In the instant case the above mentioned exceptions are not applicable and hence Mr. Wilson cannot be deemed to be retired. He is deemed to be re-appointed as director.

### Question 81

*The Board of Directors of M/s. ABC Limited and unlisted company having a paid up capital of Rs. 5 crores and preference share capital of Rs.1 crore and also 1100 small shareholders holding equity shares seeks your advice on the following:*

*(i) Is it necessary for the company to appoint a director to represent the' Small Shareholder'?*

*(ii) In case the company decides to appoint such a Director, the procedure to be followed by the company for such appointment and the period for which such appointment can be made.*

*(iii) Can such a Director be removed by the company before the expiry of his period of appointment without the consent of the 'Small Shareholders'?*

*Advise explaining the relevant provisions of the Companies Act and the rules.*

*(November 2008)*

### Answer

The provisions relating to small shareholders' director were inserted by the Companies Amendment Act, 2000 by inserting a proviso to Section 252(1). However this proviso will apply to a company if all the following conditions are satisfied:-

(i) the company is a public company.

(ii) the paid-up share capital of the company is five crore rupees or more,

(iii) the numbers of shareholder is 1000 or more (a "small shareholders "means a shareholder holding shares of nominal value of twenty thousand rupees or less).

In the given case, M/s ABC Limited satisfies all the conditions specified above. Therefore, appointment of small shareholders' director can be made by M/s ABC Limited. It is not mandatory that the company shall appoint a director to represent the small shareholders. However a company may act suo-moto to elect a small shareholders' director. Further a small shareholders' director may serve a notice on the company and the company shall be bound to act on such notice.

The procedure for appointment of small shareholders' directors is as follows:

Small shareholders intending to propose a person shall leave a notice of their intention with the company at least 14 days before the meeting under the signature of at least 100 small shareholders specifying name, address, shares held and folio number and particulars of share with differential rights as to dividend and voting, if any, of the person whose name is being proposed for the post of director and of other small shareholders proposing such person as a candidate for the post of director or small shareholders.

A person whose name has been proposed for the post of small shareholders' director shall sign, and file with the company, his consent in writing to act as a director. Tenure of such small shareholders' director shall be for a maximum period of 3 years subject to meeting the requirement of provisions of Companies Act, 1956 except that he need not have to retire by rotation.

The unlisted company may appoint such small shareholders' nominee subject to above conditions if majority of small shareholders recommend his candidature for the post of director in their meeting.

As per rule 6 (viii) of the Companies (Appointment of the Small Shareholders' Director) Rules, 2001, a small shareholders director shall have to vacate the office if he is removed in pursuance of Section 284. As per Section 284 a director shall be removed by an ordinary resolution passed in the general meeting after compliance of the procedural requirement of Section 284. There is nothing in proviso to Section 252(1) or in the Companies (Appointment of the Small Shareholders' Director) Rules, 2001 which requires obtaining consent of small shareholders before removing small shareholder directors from directorship under Section 284. Therefore a small shareholders director can be removed by the company before the expiry of the term without the consent of small shareholders.

## Question 82

*Mr. X is a director of several companies. He has approached the following companies in which he is a director for financial help to start his own personal business.*

*(i) Expandable Industries Ltd.*

*(ii) Expensive Gadgets Private Ltd.*

*(iii) Easy Finance Ltd.*

*The first named company has agreed to grant a loan of Rs. 50 lakhs. The second company also offered another loan of Rs. 50 lakhs .The third company has agreed to provide guarantee for the repayment of a loan sanctioned to Mr. X by a Private Bank to the tune of Rs. One crore. Advise Mr. X about the legal provisions that should be complied with under the Companies Act, 1956 and the consequences if there is a non – compliance. (November 2008)*

## Answer

According to Section 295 of the Companies Act, 1956 no public company shall directly or indirectly make any loan to or give any guarantee or provide any security in connection with a loan made by any other person to a director of the company without obtaining the previous approval of the Central Government. Thus M/s. Expandable Industries Ltd, being a public company has to take approval of the Central Government before the loan amount of Rs. 50 lakhs is disbursed. However no approval of the Central Government is required in the case of Expensive Gadgets Private Ltd. being a Private Company. However, if the said Private Company is a subsidiary of a Public Company, the approval of Central Government is required. In the case of Easy Finance Ltd. the approval of Central Government is required and thereafter only the transaction can be entered into without committing violation of the provision of the Companies Act, 1956. If there is any violation, Mr. X the director will vacate his office as a director as provided in Section 283 (1) (h) of the Act. The said violations is however compoundable under Section 621A of the Act.

# UNIT – 3 : ACCOUNTS

## Question 1

*(i) State the requirement under the Companies Act with regard to compliance of accounting standards and the disclosure to be made in case the profit and loss account and the Balance Sheet of the company do not comply with the accounting standards. What is the duty of the auditor of the company in this regard?*

*(ii) The Profit and Loss Account and Balance Sheet of AS Limited have been signed by two directors A and B. The board comprises of a third director C, who is also the managing director. The company has also employed a full time secretary. Examine whether the authentication of the financial statements is in accordance with law. (May, 2000)*

## Answer

(i) Accounting standards: With effect from 31.10.1998, the Companies (Amendment) Act, 1999 by inserting three new sub-sections in Section 211 has made it compulsory for profit and loss account and balance sheet of all companies to comply with the accounting standards recommended by the Institute of Chartered Accountants of India (ICAI) and prescribed by the Central Government in consultation with National Advisory Committee on Accounting Standards. So long such accounting standards are not prescribed by the Central Government, the standard of accounting specified by the ICAI will be deemed to be the Accounting Standards [Section 211(3C)].

Section 211(3B) also provides for compulsory disclosure by all companies in their profit and loss account and balance sheet, the deviation from the accounting standards, if any, and its reasons with the financial effect, if any arising due to such deviation.

Section 227(3)(d) makes it obligatory on the part of the auditors of the company to include a para in their report to the members of the company, stating whether in their opinion the profit and loss account and the balance sheet comply with the accounting standards referred to in Sub-section (3C) of Section 211. In case of non-compliance of accounting standards, the auditors are required to qualify their report.

(ii) Except in the case of a banking company, the balance sheet and profit and loss accounting of a company must be signed on behalf of the Board of directors by two directors and the manager or secretary, if any. If the company has a managing director, he should be one of the signing directors, as per Section 215. In the instant case, the profit and loss accounting and balance sheet have been signed by A and B, the directors. In view of Section 215 of the Companies Act, 1956, C, the managing director should be one of the two signing directors. Since the company has also employed a secretary, he should also sign the profit and loss account and balance sheet in addition to the managing director C, and one of the directors, either A or B.

## Question 2

*The Comptroller and Auditor-General of India made certain adverse comments on the audited financial statements of a government company. Explain with reference to the relevant provisions of the Companies Act, whether it is possible for the government company to revise the audited but unadopted financial statements in the light of the adverse comments made by the Comptroller and Auditor-General of India and also whether it is necessary for the board of directors to give explanations in the board's report in respect of such adverse comments.*

*(May, 2000)*

## Answer

Rectification of accounts after completion of audit: The Institute of Chartered Accountants (Compendium of Guidance Notes, September 1985) has opined that it is entirely within the competence of the Board of Directors to amend the accounts already audited. Hence the original accounting statements may be revised to remove reservations of Comptroller and Auditor General (C&AG). Such revised statements should be resubmitted to the auditors before placing them before the annual general meeting. The Institute has recommended that in such cases, the auditor should ensure that all copies of the original set are returned to him, and he should also make an adequate disclosure of the fact of revision of accounts in the amended set.

Explanation by Board of Directors: Section 217(3) imposes a duty on the Board of Directors of a company to submit give the fullest information and explanations in the Board's report regarding every reservation, qualification or adverse remark contained in the auditor's report. In the absence of any similar specific provision regarding the comments of C&AG on the audit report of a government company, the Board of directors of such a company is not bound to give information or explanation in respect of such comments.

Even the C&AG's comments would not have been required to be placed before the annual general meeting of a Government Company but for the express provisions contained in Section 619(5) of the Companies Act. Similar express provision would be necessary in the Act if it were intended that the provisions of Section 217(3) should also apply in the case of a Government Company. This is the view expressed by Department of Company Affairs in File No. 15/3/69 (G.C.). Hence the Board of Directors of a Government Company are not required to give explanations in the Board's Report.

## Question 3

*X Ltd. has a subsidiary company called Y Ltd. The financial year of the holding company is 31st March, whereas that of the subsidiary company ends on 30th June every year. The management of the holding company decides that the financial year of the subsidiary Company for the year 1.7.2000 to 30.6.2001 should be extended upto 31.3.2002, so that the financial years of the holding and subsidiary companies end on 31st March every year. Advise the management about the steps to be taken under the Companies Act to achieve the purpose.* *(May, 2001)*

## Answer

According to section 213 of the Companies Act, 1956, where it appears to the Central Government desirable for a holding company or a holding company's residuary to extend its financial year so that the subsidiary's financial year may end with that of the holding company, and for that purpose to postpone the submission of the relevant accounts to a general meeting, the Central Government may, on the application or with the consent of Board of Directors of the company whose financial year is to be extended, direct that in the case of that company, the submission of accounts to a general meeting, the holding of an annual general meeting or the making of an annual return, shall not be required to be submitted, held or made earlier than the dates specified in the direction, not with standing anything to the contrary in this Act or in any other Act for the time being in force. Thus the management of X Ltd. can make an application to the Central Government for extension of the financial year of the subsidiary for the year company 1.7.2000 to 31.6.2001 upto 31.3.2002. For this purpose the company should also pay the prescribed fee of Rs. 1000/- along with the application.

Steps to be taken: The Board meeting of the subsidiary Company must be convened and it must be decided to extend the financial year of the subsidiary Company for the year 1.7.2000 to 30.6.2001 upto 31.3.2002 so that it may end with the financial year of the holding company. Thereafter an application must be made to the Central Government under Section 213(1) seeking extension of financial year. The application may be made or a plain paper as no application form has been prescribed for this purpose. The application must be accompanied by requisites fee as laid down in the Companies (Fees on Application) Rules 1968.

## Question 4

*The Profit and Loss Account and Balance Sheet of a listed company have not been prepared in accordance with some of the applicable accounting standards. Examine the responsibility of the directors and auditors in this regard under the Companies Act, 1956.* *(May, 2003)*

## Answer

### Accounting Standards

According to Section 211 (3A) of the Companies Act, 1956 every balance sheet and profit and loss account of a company shall comply with the accounting standards. If the accounts are not prepared as per accounting standards, the company shall disclose in its balance sheet and profit and loss account the following:

(1) the deviation from the accounting standards

(2) the reasons for such deviation

(3) the financial effect, if any, of such deviation (section 211(3B)).

The persons responsible for the proper compliance of the above requirements under section 211 are:-

(i) the managing director or manager of the company, if any,

(ii) all officers and employees of the company and

(iii) if the company has no managing director or managers, every director of the company (Section 211(7) and (8) read with section 209 (6).

Hence the Managing Director/Directors must ensure that there is proper disclosure in case of non compliance with the accounting standards.

Further, the Board's report shall include a Directors' Responsibility Statement, indicating therein that on the preparation of the annual accounts, the applicable accounting standards had been followed a long with proper explanation relating to material departures.

*Auditors' responsibility.* The auditor shall state in his report, whether on his opinion the profit and loss account and balance sheet comply with accounting standards referred to in Section 211(3C). [Section 227 (3) (d)].

## Question 5

*The Board of Directors of a company propose to charge the Chief Accountant of the company with the duty of ensuring compliance with the provisions of the Companies Act, 1956 relating to maintenance of proper Books of account and preparation of Balance Sheet and Profit & Loss Account in accordance with the law. Draft a Board Resolution for this purpose.*

*What are the consequences in case of default, when such a resolution is passed?*

*Is it possible for the Board of Directors to pass such a resolution, when the company is managed by Managing Director?* *(November, 2003)*

## Answer

**Draft Board Resolution for Charging a person with the duty of Compliance with the requirements of Section 209 & 211 of the Companies Act.**

Resolved that pursuant to section 209(7) and 211(8) of the Companies Act, 1956, Mr./Ms._______ Chief Accountant of the company be and is hereby changed with the duty of seeing that the requirements of Sections 209 and 211 of the Companies Act, 1956 are duly and fully complied with.

Resolved further that the said Mr./Ms.__________ is hereby entrusted with the authority to do such Acts, through and deeds as may be necessary or expedient for the purpose of compliance with the requirements of the said Sections 209 and 211.

**Consequences in case of default:** According to Section 209(6), the following persons are responsible to ensure that the company duly complies with the provisions of Section 209:

(a) the managing director or managers of the company, if any;

(b) all officers and other employees of the company; or

(c) if the company has no managing director, every director of the company.

Penalty for default is imprisonment upto 6 months or fine upto Rs.10,000/- or both, if the persons mentioned above fail to take all reasonable steps to ensure that the provisions of Section 209 are duly complied with by the company or default has been committed by their own wilful Act. Further a person shall be sentenced to imprisonment only if the offence was committed wilfully [Section 205(5)].

In any penal proceedings, it shall be a defense to prove that a competent and reliable person was charged with the duty of seeing that these requirements are complied with and that he was in a position to discharge that duty [proviso to Section 205(5)]. The person so charged with responsibility of compliance with provisions of Section 209 is punishable with imprisonment upto 6 months or fine upto Rs.10, 000/- or both [Sections 205(7)]. Similar provisions are therein Section 211 [Section 211(7) and (8)]. Hence the above Board resolution makes the Chief Accountant responsible for compliance with the provisions of Section 209 and Section 211.

Even if the company is managed by Managing Director, it is possible for the Board of Directors to make the Chief Accountant responsible to ensure compliance with Sections 209 and 211 [Section 209(7) and Section 211(8)]. Managing Director may also charge the Chief Accountant with such duty by issuing a memo or office order.

## Question 6

*S Ltd. is a subsidiary company of H Ltd. The Financial year of H Ltd is from 1st April to 31st March, whereas the financial year of S Ltd. is 1st July to 30th June every year. This is now causing difficulties particularly in view of the requirement of reporting and circulating the consolidated annual accounts as required by Accounting Standard AS-21. The Board of Directors of H Ltd. decides that the accounting year of S Ltd. for the year 1st July, 2002 to 30th June, 2003 be extended from present 12 months to 21 months, i.e. 1st July, 2002 to 31st March, 2004, so that the financial years of the holding company and the subsidiary company end on the same date.*

*State the provisions of the Companies Act, 1956 in this respect and mention the steps to be taken in this regard.* *(November, 2003)*

## Answer

Section 213(1) of the Companies Act, 1956 states as follows:

Where it appears to the Central Government desirable for a holding company or a holding company's subsidiary to extend its financial year so that the subsidiary's financial year may end with that of the holding company, and for that purpose to postpone the submission of the relevant accounts to a general meeting, the Central Government may on the application or with the consent of the board of directors of the company whose financial year is to be extended, direct that in the case of that company, the submission of accounts to a general meeting, the holding of an annual general meeting or the making of an annual return, shall not be required to be submitted held or made earlier than the dates specified in the direction notwithstanding anything to the contrary in the Companies Act, 1956 or in any other Act for the time being in force.

Thus, the management can extend the financial year of S. Ltd from 12 months to 21 months as mentioned in the question.

Following steps are required to be taken for this purpose:

(i) To convene a Meeting of the Board of Directors of S Ltd where at the resolution for extending the financial year 1st July, 2002 to 30th June, 2003 (12 months) to 1st July, 2002 to 31st March, 2004 (21 months) is to be passed so that the year ending matches with the year ending of H Ltd.

(ii) To make an application under section 213(1) of the Companies Act, 1956 to the Central Government giving full details and specific reasons for seeking the extension in year ending. The application may be made on a plain paper as there is no prescribed form for this purpose.

(iii) To attach the following to the application:

  (a) A certified true copy of the last Balance Sheet and Profit and Loss Account of H Ltd. and S. Ltd.

  (b) A certified true copy of the Memorandum of Association and Articles of Association of both the Companies.

  (c) A certified true copy of the resolution of the Board of Directors proposing the extension of the financial year ending from 12 months to 21 months.

  (d) Requisite fee payable to the Central Government as per the Companies (Fees on Applications) Rules, 1999.

## Question 7

*The Annual General Meeting of M/s Robertson Ltd., for laying the Annual Accounts thereat for the year ended 31st March, 2004 was not held, as the accounts were not ready. In this context:*

*(i) Advise the company regarding compliance of the provisions of Section 220 of the Companies Act, 1956 for filing of copies of Annual Accounts with the Registrar of Companies.*

*(ii) Will it make any difference in case the Annual Accounts were duly laid before the AGM held on 27th September, 2004 but the same were not adopted by the shareholders?*

*(May 2005)*

## Answer

Under section 220(1) of the Companies Act, 1956, after the balance sheet and profit and loss account have been laid before the AGM, three copies thereof be filed with the Registrar of Companies, within 30 days from the date on which the Accounts were laid at the AGM. Where the AGM for any year has not been held, the Accounts shall be filed with the Registrar of Companies within 30 days from the latest date when the AGM ought to have been held in accordance with the provisions of the Act, namely, sections 166 and 210 of the Act. Under section 220(2), it is also provided that if AGM does not adopt the Annual Accounts or if the AGM for any year is not held, a statement of that fact and of the reasons shall be annexed to the accounts filed with the Registrar of Companies.

Accordingly,

(i) In the present case though AGM was not held, it ought to be held by 30.9.2004 under sections 166/210 of the Act. Thus, the balance sheet and profit and loss account for the year ended 31.3.2004 be filed with the Registrar of Companies by 29.10.2004 along with a statement that AGM was not held by 30.9.2004 as the accounts were not ready.

(ii) Since the AGM has been held in time on 27.9.2004, the balance sheet and profit and loss account as at 31.3.2004 be filed with the Registrar of Companies by 26.10.2004. A statement be also annexed to the balance sheet that the accounts were not adopted at the AGM held on 27.9.2004 giving reasons therefor.

## Question 8

*Mr. BPK was appointed as the sole selling agent of M/s KMP Ltd. with effect from 1st January, 2002 for a period of five years. Mr. BPK earned his remuneration as follows during the years 2002 to 2004:*

| *Year* | *Amount of remuneration* |
|---|---|
| *2002* | *Rs.4,41,000* |
| *2003* | *Rs.6,32,000* |
| *2004* | *Rs.7,45,000* |

*On and from 1st January, 2005, the sole selling agency agreement was terminated by M/s KMP Ltd. You are required to calculate the amount of compensation payable by the said company to Mr. BPK under the provisions of the Companies Act, 1956.*

*What would be your answer in a case where the said M/s KMP Ltd. was amalgamated with another company with effect from 1st January, 2005 and Mr. BPK refused to act as the sole selling agent of the amalgamated company after amalgamation.* *(May 2005)*

## Answer

As per provisions of section 294A(2) of the Companies Act, 1956, any compensation payable by a company to its sold selling agent for premature loss of office shall not exceed the remuneration which he would have earned if he would have been in office for the unexpired residue of his term, or for three years, which ever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which his office ceased or was terminated, or where he held his office for a period lesser than three years, then average remuneration actually earned by him during such lesser period.

Based on the above provision of the Companies Act, 1956, Mr. BPK is entitled to compensation for the unexpired residue of his term, i.e., for two years since it is shorter than three years. Such compensation shall be calculated on the basis of average remuneration received by him during the years 2002 to 2004. On the basis of figures given in the question, the amount of compensation shall be as follows:

| Year | Amount of remuneration (Rs.) |
|---|---|
| 2002 | 4,41,000/- |
| 2003 | 6,32,000/- |
| 2004 | 7,45,000/- |
| Total Remuneration | 18,18,000/- |
| Average Remuneration per annum | 6,06,000/- |
| Compensation payable to Mr. BPK for two years | 12,12,000/- |

As per provisions of section 294A(1) of the Companies Act, 1956, where the sole selling agent resigns his office in view of amalgamation with any other company and he is appointed as sole selling agent after such amalgamation, then he is not entitled to any compensation and the company is also prohibited from paying any compensation to the sole selling agent. Thus, in second case, Mr. BPK shall not be entitled to any compensation for premature loss of office since he himself has refused to act as the sole selling agent after amalgamation.

## Question 9

*Clever, a Director of ABC Ltd. Made default in filing of Annual Accounts and Annual Returns with the Registrar of Companies for a continuous period of three financial years ending 31st March, 2005. Referring to the provisions of the Companies Act, 1956 examine the validity of the following:*

*(i) Whether X can continue to be a Director of ABC Ltd. And also EF Ltd., where he is a Director. Also state whether he can be reappointed as a Director in ABC Ltd. as well as EF Ltd.*

*(ii) Would your answer be still the same in case X is a nominee Director of a Public Financial Institution ?*

*(iii) What would be your answer in case the defaulting company (i.e. ABC Ltd.) is a Private Company ?* *(May 2006)*

## Answer

In accordance with the provisions of Section 274(1)(g) a person shall not be capable of being appointed as director of a company if such person is already a director of a public company, which –

(A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999;

Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of 5 years from the date on which such public company, in which he is a director failed to file annual accounts and annual returns under this clause.

Applying the above provisions as contained in Section 274(1)(g), answers to the given questions are:

1. In the given case, Mr. Clever, the Director of ABC Ltd. is disqualified to be appointed as Director of other public companies for a period of 5 years from the date on which default has been committed.
2. In the second case, Mr. Clever, as a nominee of the Public Financial Institution, shall not be disqualified to be appointed as Director for the reason that the Public Financial Institutions and are exempted from the provisions of Section 274(1)(g) of the Companies Act, 1956.
3. A director of a private company is not disqualified even if that company is a defaulter in filing return.

   Mr. Clever does not cease to be a director in ABC Ltd. and EF Ltd. immediately because Section 283 which provides for 'vacation of office' has not been amended. He can continue as a director till his term ends. But he can be reappointed in the defaulting company ABC Ltd., but not in EF Ltd. as the disqualification applies only to 'any other public company'.

## Question 10

*(i) Mr. John has been appointed as Additional Director on the Board of MCX Ltd. on 12th January, 2006. Mr. John has filed his consent to Act as a Director, if appointed, only with the company. Examine with reference to the provisions of the Companies Act, 1956 whether he is also required to file his consent with the Registrar of Companies.*

*(ii) One of the members of ADB Ltd. has proposed the name of Mr. Fame for appointment as a Director of the Company in the Annual General Meeting and given a notice under Section 257 of the Companies Act, 1956. Mr. Fame is one of the partners of the Fame & Fame, Chartered Accountants, who are the retiring auditors of the company. But the audit of the company is being looked after by another partner of the firm. Examine whether Fame & Fame can be reappointed as auditors, if Mr. Fame is appointed as Director.*

*(May 2006)*

## Answer

(i) **Filing of consent under section 264:** Problem as asked in the question is based on the provisions of Section 264(1) and (2) of The Companies Act, 1956 and also the case ruling in Lalitbhai C. Kapadia Vs. Laljibhai B. Desai. Section 264(1) of the Companies Act, 1956 requires that a person proposed as a candidate for the office of director should file with the company his consent to act as a director, if appointed. Section 264(2) stipulates that a person shall not act as a director unless he has filed with the Registrar of Companies his consent in writing (Form No. 29) to act as such. Additional and alternate directors are not required to file consent under section 264(2) *(Lalitbhai C. Kapadia v. Laljibhai B. Desai (1973) 43 Comp. Cases 17).* Accordingly, applying the above provisions and the ruling of the case, John is not required to file his consent for accepting Additional Directorship.

(ii) Appointment of a partner of the company's auditors as a director: Problem as asked in the question is based on the provisions of Companies Act, 1956 as contained in Section 2(30) read with Section 226(3)(b) and (c). Accordingly, Mr. Fame is appointed as a director of the company 'Fame and Fame' cannot be reappointed as company's auditors. It is so because a director is an officer of the company within the meaning of section 2(30) of the Companies Act, 1956 and the audit firm becomes disqualified under section 226(3) (b) and (c) even if any of its partner is also an officer of the company. It is immaterial that the audit of the company is being looked after by another partner of the firm and not by Mr. Fame. Therefore, if Mr. Fame is appointed as a director of the company, 'Fame and Fame' cannot be reappointed as company's auditors.

## Question 11

*A group of shareholders has approached you for advice regarding the affairs of LPM Paper Mills Ltd. According to them, the management of the company is not carrying out its functions in accordance with the prudent commercial practice and if the affairs of the company are allowed to run in future in the same manner, the company's solvency would be in danger. They want that a Special Audit be conducted to find out the actual nature of the transactions.*

*(i) You are required to state with reference to the provisions of the Companies Act, 1956, as to when a special audit can be directed and by whom.*

*(ii) Draft an application to be submitted to the appropriate authority in this respect.*

*(November 2006)*

## Answer

(i) Provisions regarding Special Audit: Section 233A of the Companies Act, 1956 deals with the matter relating to Special Audit. The special audit can be ordered by Central Government under certain circumstances. The circumstances are enumerated below:

If the Central Government is of the opinion:

(i) that the affairs of any company are not being managed in accordance with sound business principles or prudent commercial practices; or

(ii) that any 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

(iii) that the financial position of any company is such as to endanger its solvency.

Thus, the group of shareholders can make a complaint to the Central Government requesting for conducting the special audit. If the Central Government is satisfied that there exist sufficient reasons, it may order a special audit to be carried out by a Chartered Accountant who may or may not be company's statutory auditor or who may or may not be in practice.

(ii) DRAFT APPLICATION Dated_________

To,

The Secretary,

Department of Company Affairs,

Ministry of Company Affairs,

Government of India,

(Address)

New Delhi

Sir,

We, the undersigned, the shareholders of LPM Paper Mills Ltd. would like to bring to your kind notice that for a long time the affairs of the said company are not being managed in accordance with sound business principles and prudent commercial practices.

We are of the view that certain expenditures which are being incurred by the company are not related to the business of the company and the company is not getting any benefit out of such expenses. Moreover, we have the apprehension that there are certain business transactions which are being entered into by the directors with the concerns which are owned by the relatives of the Directors and the prices charged for such transaction are not comparable with the prices charged by other parties for similar transactions. (Students may state any other circumstances also).

If such a state of affairs is allowed to be carried on for long, the financial position of the company will reach a stage where it will endanger its solvency.

We feel that the modus operandi of the transaction is such that it may be difficult for the regular statutory auditor to detect them in course of normal audit.

It is, therefore, prayed that the Central Government be pleased to appoint, pursuant to Section 233A of the Companies Act, 1956, a Special Auditor to properly audit the accounts of the Company and find the real nature of the transactions and determine the losses so far sustained and being sustained by the company on this account.

Yours faithfully,

1.
2.
3.
4.
5.

Shareholder

Question 12

*PNT Ltd. is a company, which is listed with Mumbai Stock Exchange. Its 18th Annual General Meeting was held at Mumbai on 30th September, 2005 in respect of financial year ended 31st March, 2005, whereat all the usual business required to be conducted by a company under the provisions of the Companies Act, 1956 were carried out. Following further information is also available:*

*(i) The Company has total 8 Directors (including the Chairman) out of which 2 Directors are not liable to retire by rotation.*

*(ii) The Company has its registered office at Mumbai and a branch at Kolkata.*

*(iii) From the audited annual accounts for year ended 31st March, 2005, it is observed that Directors have proposed a dividend of 20% on equity share capital.*

*(iv) 75% of the shares of the Company are held in dematerialized form and balance in physical form.*

*(v) The accounts of Kolkata Branch of the Company are audited by a firm of Chartered Accountants, who are not the Statutory Auditors of the Company.*

*Based on the above, you are required to draft the Minutes of the proceedings of the Annual General Meeting of PNT Ltd.* *(November 2006)*

Answer

PNT LIMITED

MINUTES OF THE PROCEEDING OF THE 18TH ANNUAL GENERAL MEETING OF THE MEMBERS OF THE COMPANY HELD AT _______________MUMBAI ON 30TH SEPTEMBER, 2005 AT _________ A.M.

PRESENT

| | |
|---|---|
| Mr.________________________ | Chairman & Managing Director |
| Mr. _______________________ | Wholetime Director |
| Mr. ___________________ | Director (Audit Committee Chairman) |
| Mr. _____________________ | Director |
| Mr.____________________ | Director |
| Mr.____________________ | Director |
| Mr.____________________ | Director |
| Mr.____________________ | Director |
| Mr. ____________________ | Member |
| Mr. ____________________ | Member |
| Mr. ____________________ | Member |
| Mr. ____________________ | Member |
| Mr. ____________________ | Member |

Mr. ____________________ Member (Through Proxy)
Mr. ____________________ Member (Through Proxy)
Mr. ____________________ Representative of____Limited U/s 187
Mr.____________________ Secretary

SUMMARY OF MEMBERS' ATTENDANCE:

1) In Person ______________ As per signatures obtained on attendance Slips

2) By Proxy __________As per signatures obtained on attendance Slips

Mr. ____________________, Chairman took the chair to conduct the Meeting.

The Chairman declared that________ valid proxies representing______Equity Shares have been received in the required form.

The Chairman further declared that necessary quorum being present, the meeting could proceed with the stipulated business.

The Register of Directors' Shareholding maintained under Section 307 of the Companies Act, 1956 was placed before the Meeting and was kept open and accessible to all concerned during the continuance of the Meeting.

With the consent of the members present, the Notice convening the Meeting was taken as read.

Since the Directors' Report and Audited Annual Accounts were circulated before hand, the same were taken as read with the permission of the members present.

Thereupon, at the direction of the Chairman, Secretary of the Company read out the Auditors' Report.

At this stage, the Chairman briefed the members about the affairs and activities of the Company.

ITEM NO.1

Adoption of Balance Sheet & Profit & Loss Accounts, Auditors' & Directors Report thereon:

The Chairman placed before the Meeting the Auditors' and the Directors' Report and the Audited Annual Accounts of the Company for the year ended 31st March, 2005 for consideration and adoption and proposed the following Ordinary Resolution, which was seconded by Mr._________________.

"RESOLVED THAT the Audited Balance Sheet as at 31st March, 2005 and the Profit & Loss account for the year ended on that date together with the Reports of the Auditors and that of the Directors thereon, as circulated among the members and placed before the meeting be and is hereby received, considered, approved and adopted."

The Chairman then invited the members for their comments. Some members participated in the discussions and sought some clarifications. The same were duly explained by the Chairman and the Audit Committee Chairman.

Thereafter, the Resolution was put to vote on a show of hands and the same was declared carried unanimously.

ITEM NO.2

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.______________ Seconded by Mr.______________

"RESOLVED THAT as recommended by the Directors, Dividend @ 20% on Equity Share for the year ended 31st March, 2005 on_______ Equity Shares of Rs.______ each, be and is hereby declared and the same be paid subject to the provisions of Section 206A of the Companies Act, 1956 to those members or their mandatees whose names stand registered on the Company's Register of Members:

(i) as Beneficial Owners as at the date of this Annual General Meeting as per the lists to be furnished by National Securities Depository Limited and the Central Depository Services (India) Ltd in respect of the shares held in Electronic form, and

(ii) as Members in the Register of Members of the Company after giving effect to valid share transfers in physical form lodged with the Company or the Registrar & Share Transfer Agent of the Company before the date of start of the Book Closing as announced.

The Resolution was put to vote on a show of hands and the same was declared carried unanimously.

ITEM NO.3

Election of Mr.______________as Director

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.____________________ Seconded by: Mr.______________

"RESOLVED THAT Mr.________________, Director, retiring by rotation, under the provisions of Article __________of the Articles of Association of the Company, being eligible, be and is hereby re-elected as a Director of the Company."

The Resolution was put to vote on a show of hands and was declared carried unanimously.

ITEM NO.4

Election of Mr.______________ as Director.

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.________________Seconded by Mr.__________________

"RESOLVED THAT Mr.______________, Director, retiring by rotation, under the provisions of Article__________ of the Articles of Association of the Company, being eligible, be and is hereby re-elected as a Director of the Company."

The Resolution was put to vote on a show of hands and was declared carried unanimously.

ITEM NO.5

(a) Appointment of M/s ________________as Auditors

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.________________ Seconded by: Mr.__________

"RESOLVED THAT pursuant to the provisions of Section 224A of the Companies Act, 1956, M/s ______________________, Chartered Accountants, be and are hereby re-appointed Auditors of the Company to hold office as such from the conclusion of this meeting until the conclusion of the next Annual General Meeting and the Board of Directors be and are hereby authorised to fix their remuneration and re-imbursement of out-of-pocket expenses as per recommendation of the Audit Committee.

The Resolution was put to vote on a show of hands and was declared carried unanimously.

(b) Appointment of M/s___________as Branch Auditors

Following resolution was proposed as Ordinary Resolution

*Proposed by: Mr.____________ Seconded by: Mr.________________*

"RESOLVED THAT pursuant to the provisions of Section 224A read with Section 228(3) of the Companies Act, 1956, M/s_____________________, Chartered Accountants be and are hereby re-appointed Branch Auditors of the Company's Kolkata Branch to hold office as such from the conclusion of this meeting until the conclusion of the next Annual General Meeting and the Board of Directors be and are hereby authorized to fix their remuneration and re-imbursement of out-of-pocket expenses as per recommendation of the Audit Committee.

The Resolution was put to vote on a show of hands and was declared carried unanimously.

There being no other business to transact, the meeting ended with a vote of thanks to the Chair.

Date:

CHAIRMAN

Question 13

*(i) Define the expression "Accounting Standards" within the meaning of Companies Act, 1956.*

(ii) XYZ Limited did not prepare its Balance Sheet as at 31$^{st}$ March, 2007 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 stat with reference to the provisions of the companies Act, 1956, the responsibilities of directors and statutory auditor of the company in this regard.

(May 2007)

## Answer

(i) As per sub-section (3c) of Section 211 of the Companies Act, 1956, the expression "accounting standards" means the standards of accounting recommended by the Institute of Chartered Accounts of India Constitution under the Chartered Accountants Act, 1949 as may be prescribed by the Central Government in consultation with the National Advisory Committee on Accounting Standards established under sub-section (1) of section 210 of the said Act.

Proviso to the above sub-section further the states that the standards of accounting specified by the Institute of Chartered Accountants of India shall be deemed to be the accounting standards until the according standards are prescribed by the Central Government under this sub-section.

(ii) Sub-Section (3A) of the said section states that every profit and loss account and balance sheet of the company shall comply with the accounting standards.

(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.

Accordingly 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) if the company does not have a managing director or manager, then every director of the company.

In view of 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 & loss account and the balance sheet.

Moreover, 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 have been followed along with proper explanation relating to material departures.

### 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 14

*Annual General Meeting of a Company has been concluded on 30th April, 2008. Now the Company is required to submit / file its Annual Return and Annual Accounts with Registrar of companies. You are required to state the procedure for such submission/filing. (May 2008)*

### Answer

The Annual Return of a company has to be filed with Registrar of Companies within sixty days from the day on which the Annual General Meeting of a company is held. This return is filed as an enclosure to Form No. 20B and is to be electronically submitted.

Similarly, Annual Accounts are to be electronically filed within 30 (thirty) days from the day on which the Annual General Meeting of a company is held. The Directors' Report, Auditors' Report, Balance Sheet and related schedules are enclosed to Form No. 23AC and the Profit and Loss Account and related schedules are enclosed to Form No. 23ACA.

Following procedure is to be followed for submitting / filing the above:

(i) To check whether the computer has the required hardware, software and the internet connection.

(ii) To download the forms, one by one, from the website of Ministry of Corporate Affairs.

(iii) To fill up the Company Identification Number (CIN), as a first step, in the forms and thereafter, by clicking the profile button, company's name is automatically filled. It is to be noted that at this time, the computer must remain connected to internet.

(iv) To fill up the desired information in the forms.

(v) To attach the Annual Return and Annual Accounts to the respective forms.

(vi) To check the forms with the help of the "check form" button provided in the forms.

(vii) To digitally sign the forms

(viii) To electronically submit / file the forms

(ix) To pay the filing fee either through credit card or cash / cheque on generation of challan.

(x) To check from the website of Ministry of Corporate Affairs, in due course, whether the forms submitted / filed have been approved.

### Question 15

*The Board of Directors of M/s PQR Ltd .have a practical problem. The registered office of the company is situated in a classified backward area of Maharashtra. The Board wants to keep the account books of the company 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. (November 2008)*

### Answer

According to Section 209 of the Companies Act, 1956 every company shall keep the books of accounts at its registered office. However, the books of account can be kept at such other places in India as the Board of directors may decide and when the Board of directors so decide, the company shall within 7 days of the decision file with the Registrar of Companies a notice in Form No. 23AA in writing giving full address of the other place. Thus in the present case, the company can follow the above procedure and keep its accounts book at Mumbai office.

# UNIT – 4: AUDIT

## Question 1

*The paid-up capital of XYZ Limited has been increased from Rs.4 crores to Rs.6 crores. The Board of Directors of XYZ Limited purpose to constitute an 'Audit Committee'. At present the board consists of 10 directors including a Managing Director. Draft a board resolution taking into account the requirements under the Companies Act relating to the constitution of the Audit Committee and the chairman of the audit Committee. XYZ Limited is not a listed public company.* *(May, 2002)*

## Answer

### Audit Committee

(1) As per section 292 A of Companies Act, 1956, every public company having paid up capital of Rs. 5 cores or more must constitute a committee of Board as 'Audit Committee'.

(2) The audit committee shall consist of minimum 3 directors. Out of the total members of committee, at least two-third shall be on executive directors, that is those who are not managing or whole time directors. The committee shall elect its own Chairman. Terms of reference will be specified in writing by the Board (Section 292A(2)).

(3) Draft Board resolution.

Resolved that, pursuant to section 292A of the Companies Act, 1956 an Audit committee consisting of the following directors be and is hereby constituted

1. Shri________, Nomineee of IFCI
2. Shri________, Nomineee of IDBI
3. Shri________,
4. Shri________,
5. Shri________, Managing Director

Further resolved that the Charmin of the Audit Committee shall be elected by its members from amongst themselves. Further resolved that the Audit Committee shall have the authority to investigate into any matter what may be prescribed under the said section 292 A and the following matters

1. ________________
2. ________________
3. ________________
4. ________________

## Question 2

*A group of shareholders approaches you for advice regarding the affairs of Aggressive Textiles 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. Advice, with reference to the provisions of the Companies Act, as to when a special audit can be directed and by whom. (May, 2001)*

## Answer

According to Section 233A of the Companies Act, 1956 the Central Government has the power to direct special audit in certain circumstances. They are:

(i) 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

(ii) 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

(iii) that the financial position of the company is such as to endanger its solvency.

Thus the group of shareholders can make a complaint about the affairs of Aggressive Textiles 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.

## Question 3

*(i) What is the liability of an auditor for failure to point out in his report that dividend is paid out of capital?*

*(ii) Can an auditor be disqualified for indebtedness in the following cases?*

*(a) Where he is recovering his fees on a progressive basis even though the job is not complete.*

*(b) Where the auditor's firm has purchased goods from the auditee company and not paid for them for over six months. (May, 2003)*

## Answer

(i) An auditor who is party to such payment of improper dividend to liable to proceedings by action or in case of winding up, to misfeasance summons and that the improperly paid dividend may be recovered from him with interest.

(ii) (a) The Auditor cannot be said to be indebted within the meaning of section 226 (3)(d) of the Companies Act, 1956.

(b) In this case the auditor of the company is said to be indebted if the amount outstanding from him regarding goods and services purchase form the company audited by him exceeds Rs.1000/- irrespective of the nature of purchase or period of credit allowed to other customer. The provisions regarding disqualification of auditor as contained in section 225 (3) (d) will be attracted. (Guidance Note on

Independence of Auditors). Also when the firm is indebted to the company each and every partner of the firm also is deemed to have been indebted.

Question 4

*A private company having a paid-up capital of Rs. 6 crores has been converted into a public company. The company proposes to constitute an Audit Committee. Draft a board resolution covering the following matters taking into account the provisions of the Companies Act, if any, in this regard:*

*(i) Members of the audit committee*

*(ii) Chairman of the audit committee*

*(iii) Quorum for a meeting of the audit committee*

*(iv) Any two main functions of the committee.* *(May, 2003)*

Answer

Draft Board Resolution – Audit Committee

Resolved that, pursuant to section 292 A of the Companies Act, 1956, an audit committee consisting of the following Directors be and is hereby constituted.

1. Shri __________, Nominee of IDBI
2. Shri __________, Nominee of ICICI
3. Shri __________, Nominee of State Bank of India
4. Shri __________,
5. Shri __________, Managing Director

Further, resolved that the Chairman of the Audit Committee shall be elected by its members from amongst themselves.

Further resolved that the quorum for a meeting of the Audit Committee shall be $1/3^{rd}$ of the total number of members or two directors (other than the Managing Director) whichever is higher.

Further resolved that the Audit Committee shall have the authority to investigate into any matter that may be prescribed under the said section 292 A and any other matter that may be referred to it by the Board from time to time.

Further resolved that the Audit Committee shall conduct discussion with the auditors periodically about internal control systems, the scope of audit including the observation of 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

## Question 5

*How would you deal with the following situations in the matter of appointment of Auditors?*

*(i) The shareholding of L.I.C. and U.T.I. increased from 23 per cent to 27 per cent of the subscribed share capital of the company after issue of notice of the Annual General Meeting, but before the date of the Annual General Meeting.*

*(ii) Ordinary resolution is passed at the Annual General Meeting of a company when a special resolution is required to be passed for appointment of Auditor? (November, 2003)*

## Answer

(i) Section 224A of the Companies Act, 1956 provides that in case of a company in which 25 per cent or more of the subscribed share capital is held whether simply or in any combination by: (i) a public financial institution or a Government Company or Central Government or any State Government; or (ii) Any financial or other institution established by any provincial or State Act in which a State Government holds not less than 51 per cent of the subscribed share capital or (iii) a nationalised bank or an insurance company carrying on general insurance business, the appointment of an auditor shall be made by a special resolution only.

Section 224A does not specify the date on which 25 percent of the subscribed capital must be held by the specified institution(s). The Department of Company Affairs has clarified that the material date is the date of the annual general meeting at which the special resolution is required to be passed. Thus, even though, the shareholding of LIC and UTI increased beyond 25% only after issue of notice, Section 224A shall be required to be complied with. Fresh notice of the meeting shall become necessary.

(ii) If the company fails to pass a Special Resolution where it is required to be so passed for appointment of auditor, it shall be deemed that no auditor(s) had been appointed by the company at its annual general meeting and the Central Government will be empowered to make the appointment [Section 224A(2)].

## Question 6

*Explain, how the auditor will be appointed in the following cases:*

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

*(ii) The Auditor of the company has resigned on 31$^{st}$ December, 2003, while the Financial year of the company ends on 31$^{st}$ March, 2004.*

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

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

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

*(c) Maharashtra State Financial Corporation (A Public Financial Institution) holding 8% of the subscribed capital in the company. (May, 2004)*

Answer

(i) 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. The provision for appointment of auditor by Central Government on the advice of Comptroller and Auditor General of India has been amended by the Companies (Amendment) Act, 2000 with effect from 13.12.2000.

(ii) 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.

(iii) 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-

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

(b) 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

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

In view of 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.

## Question 7

*State the procedure for the following, explaining the relevant provisions of the Companies Act, 1956:*

*(i) Appointment of First Auditor, when the Board of Directors did not appoint the First Auditor within one month from the date of registration of the company.*

*(ii) Removal of Statutory Auditor (appointed in last Annual General Meeting) before the expiry of his term.*

*What difference it would make, if the Auditor was First Auditor appointed by the Board of Directors? (November, 2004)*

## Answer

(i) Section 224(5) of the Companies Act, 1956 lays down that the first auditor of a company shall be appointed by the Board of Directors within one month of the date of registration of the company.

If the Board of Directors fails to exercise its power, the company in general meeting may appoint the first Auditor or Auditors.

Subsequently Auditor or Auditors of a company are appointed every year by the shareholders in annual general meeting by passing an ordinary resolution.

(ii) Auditor appointed in an Annual General Meeting may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval from the Central Government in that behalf [Section 224 (7)].

Further the company has to follow the following procedure prescribed in Section 225 (2) and (3) as explained below:

No special notice under section 225 (1) is required for a resolution in the general meeting to remove the auditor, hold the general meeting etc.

The auditor shall be informed of the Board's decision immediately. [Section 22(2)].

The auditor can make a representation. The copy of the representation should be sent to all the members to whom notice of meeting is sent. If the copy of the representation is not sent as it was received late or because of the company's fault, the auditor may insist that the representation may be read at the meeting. [Section 225(3)].

If company does not wish to send the representation to the members or read at the general meeting, the company has to apply to Central Government/Company Law Board. If Central Government/Company Law Board is satisfied that the right of representation is being misused by auditor to secure needless publicity for defamatory matter, the Central Government/Company Law Board may order that the representation need not be sent and the representation need not be read at the meeting. (Provisio to Section 225(3)].

An ordinary resolution is to be passed at the general meeting for the removal of the auditor.

The first auditors appointed by Board can be removed by the company at a general meeting. (Proviso (a) to Section 224 (5). The provisions in respect of removal as contained in Section 225 (2) & (3) are applicable for removal of first auditors also. (Section 225 (4). However, in case of removal of first auditor appointed by the Board of Directors, only an ordinary resolution is sufficient to remove the auditor and Central Government's approval is not required.

## Question 8

*What do you understand by Corporate Governance? Explain, how the provisions of the Companies Act, 1956 relating to Audit Committee will help in achieving some of the objectives of Corporate Governance.* *(May 2005)*

## Answer

### CORPORATE GOVERNANCE

The vast amount of literature available on the subject ensures that there exist innumerable definitions of corporate governance. To get a fair view on the subject it would be prudent to give a narrow as well as a broad definition of corporate governance.

In a narrow sense, corporate governance involves a set of relationships amongst the company's management, its board of directors, its shareholders, its auditors and other stakeholders. These relationships, which involve various rules and incentives, provide the structure through which the objectives of the company are set, and the means of attaining these objectives as well as monitoring performance are determined. Thus, the key aspects of good corporate governance include transparency of corporate structures and operations, the accountability of managers and the boards to shareholders, and corporate responsibility towards stakeholders.

In a broader sense, however, good corporate governance, the extent to which companies are run in an open and honest manner, is important for overall market confidence, the efficiency of capital allocation, the growth and development of countries' industrial bases, and ultimately the nations' overall wealth and welfare.

### AUDIT COMMITTEE

For better corporate governance, the concept of Audit Committee for companies was introduced by section 292A of the Companies Act, 1956. Every public company having paid up capital of not less than Rs.5.00 Crores must have an Audit Committee.

The auditors, the internal auditor, if any, and the director-in-charge of finance shall attend and participate at meetings of the Audit Committee [Section 292A(5)].

As per section 292A(6) of the said Act, the function of the Audit Committee includes the following:

(a) The Audit Committee should discuss with the auditors periodically about internal control systems, the scope of audit including the observations of the auditors.

(b) The Audit Committee should review half yearly and annual financial statements before submission to the Board.

(c) The Audit Committee should ensure compliance of internal control systems.

The Audit Committee shall have authority to investigate into any matter in relation to the items specified in this section or referred to it by the Board and for this purpose, shall have full access to information contained in the records of the company and external professional advice, if necessary. [Section 292A(7)].

The recommendations of the Audit Committee on any matter relating to financial management including the audit report, shall be binding on the Board and if the Board does not accept the recommendations of the Audit Committee, it shall record the reasons therefore and communicate such reasons to the shareholders. [Section 292A(8) & (9)].

The above provisions of law relating to powers and functions of the Audit Committee relating to financial statements will help in achieving one of the objectives of corporate governance, i.e., accountability and avoidance of poor financial reporting. It also ensures that the companies are managed in clean and transparent manner.

## Question 9

*A group of shareholders has approached you for advice regarding the affairs of LPM Paper Mills Ltd. According to them, the management of the company is not carrying out its functions in accordance with the prudent commercial practice and if the affairs of the company are allowed to run in future in the same manner, the company's solvency would be in danger. They want that a Special Audit be conducted to find out the actual nature of the transactions.*

*(i) You are required to state with reference to the provisions of the Companies Act, 1956, as to when a special audit can be directed and by whom. (November 2005)*

## Answer

**Provisions regarding Special Audit:** Section 233A of the Companies Act, 1956 deals with the matter relating to Special Audit. The special audit can be ordered by Central Government under certain circumstances. The circumstances are enumerated below:

If the Central Government is of the opinion:

(i) that the affairs of any company are not being managed in accordance with sound business principles or prudent commercial practices; or

(ii) that any 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

(iii) that the financial position of any company is such as to endanger its solvency.

Thus, the group of shareholders can make a complaint to the Central Government requesting for conducting the special audit. If the Central Government is satisfied that there exist sufficient reasons, it may order a special audit to be carried out by a Chartered Accountant who may or may not be company's statutory auditor or who may or may not be in practice.

## Question 10

*From the following information extracted from the Balance Sheet of VCD Ltd. as at 31st March, 2006, Board of Directors of the Company decide to grant a loan of Rs. 80 crores to another company JN Ltd.*

| | *Rs. (in crores)* |
|---|---|
| *Paid-up Share Capital:* | |
| *Equity Share Capital* | *50* |
| *Preference Share Capital* | *10* |
| *General Reserves* | *100* |
| *Debentures* | *5* |
| *Debenture Redemption Reserve* | *5* |

*The company has already given loans to the following companies:*

| | | |
|---|---|---|
| *(i)* | *Peters Ltd.* | *Rs. 5 crores* |
| *(ii)* | *Steel India Ltd.* | *Rs. 10 crores* |

*The Company has also given a corporate guarantee of Rs. 10 crores to NR & Co. Ltd.*

*Advise whether the Board can go ahead with the above proposal.* *(May 2006)*

## Answer

### Problem on Inter-Corporate Investment

In accordance with the provisions of the Companies Act, 1956, as contained in Section 372A, Companies Act, 1956 a company cannot grant any loans or inter corporate investment exceeding 60% of its paid up capital and free reserves or 100% of its free reserves, whichever is more.

In case of VCD Ltd. the position as at 31st March, 2006 is as under:

| | | |
|---|---|---|
| Paid-up share Capital: | Equity Share Capital : | Rs. 50 crores |
| | Preference Share Capital: | Rs. 10 crores |
| General Reserves | | Rs. 100 crores |

Total Rs. 160 crores. (60% of Rs. 160 crores = Rs. 96 crores)

100% of Reserves & Surplus (i.e. General Reserve) Rs. 100 crores.

As 100% of free reserves, i.e. Rs. 100 crores is more than 60% of paid up share capital (both Equity and Preference share Capital) and free reserves, i.e. Rs. 96 crores, therefore, the overall limit for release of loan is Rs. 100 crores.

The company has already granted loan / given guarantee as under:

| | | |
|---|---|---|
| (i) | Peters Ltd. | Rs. 5 crores |
| (ii) | Steel India Ltd. | Rs. 10 crores |
| (iii) | Corporate Guarantee | Rs. 10 crores |
| | Total | Rs. 25 crores |

Balance of limit upto which further loans/guarantee can be given = Rs. 100 crores – 25 crores = Rs. 75 crores

Therefore, the company can grant loan upto Rs. 75 crores to JN Ltd. Loan upto Rs. 80 crores as proposed can be given provided a special resolution in company's general meeting has been passed as required under Section 372A of the Companies Act, 1956. It may however, be noted that the special resolution as required must be passed through postal ballot in accordance with the rule 4 of the Companies (Passing of the Resolution by Postal Ballot) Rules, 2001.

### Question 11

*Ram & Company was appointed as auditor of ABC Ltd. at the Annual General Meeting held on 30th September, 2004. Can Ram & Co. continue as auditor of the company in case the next annual general meeting has not been held in time? What would be the position in case the next annual general meeting was held on 30th September, 2005, but adjourned without considering the business of appointment or re-appointment of auditor? (November 2006)*

### Answer

### Tenure of auditor

The tenure of an auditor is laid down in section 224(1) of the Companies Act, 1956. It is from the conclusion of the annual general meeting to the conclusion of the next annual general meeting. Therefore, the tenure of office of the auditor does not expire on the last date on which the annual general meeting was due to be held in terms of Section 166. Hence Ram & Co. can continue as auditor even if the AGM for the year 2005 has not been held in time.

In case AGM for 2005 was held on 30.9.05 that adjourned without considering the business of appointment or reappointment of auditor, the tenure of Ram and Co. will extend till the conclusion of the adjourned meeting.

### Question 12

*MNC Ltd., a company, whose paid up capital was Rs. 4.00 Crores, has issued rights 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, 1956 and the listing Agreement with the Stock Exchange. In case the company is not required to appoint any Audit Committee, state the provisions of the Companies Act, 1956 in respect of appointment of Audit Committee by a Company. (May 2007)*

### Answer

As per provision of section 292A of the Companies Act, 1956, a public company having a paid up capital of Rs. 5.00 Crores or more is are required to have an Audit Committee. Since, after the rights issue by MNC Ltd. its paid up capital has increased to Rs. 8.00 Crores, it is required to appoint an Audit Committee.

The relevant Board Resolution for appointment of an Audit Committee is as follows:

"Resolved that pursuant to the provision contained in section 292A of the companies Act 1956 and clause 49 of Listing Agreement with the Mumbai Stock Exchange, an Audit Committee of the Company be and is hereby constituted as under:

1. Mr. A -- An Independent Director.
2. Mr. B -- An Independent Director
3. Mr. C -- Director nominated by IDBI
4. Mr. D -- An Independent Director
5. Mr. FD -- 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 members from amongst themselves.

Further resolved that the quorum for a meeting of the Audit Committee shall be 1/3rd of the total number of members or two directors (other than the Managing Director), whichever is higher.

Further resolved that the Audit Committee shall comply with the following:

(1) The Audit Committee shall have meetings periodically as it may deem fit with at least three meeting in a year, viz., one meeting before finalization of annual accounts and one every six months.

(2) The Audit Committee shall invite such of the executives (and particularly the head of the finance function) to be present at the meeting of the Committee whenever required by it.

(3) The finance Director, head of internal audit and the auditors of the company shall attend and participate at the meeting without right to vote.

Further resolved that the audit Committee shall have the authority to investigate into nay matter that may be prescribed under the said section 292A of the Companies Act, 1956 and the matters as mentioned in the Listing Agreements entered into between the Company and the Mumbai Stock Exchange and all the matters as may be referred to it by the Board from time to time and for this purpose the Audit Committee shall have full access to information contained in the records of the Company and external professional advice, if necessary.

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 or communicated to the shareholders.

Further resolved that the Audit Committee have the minutes of its meetings drawn and approved by the Chairman of the Committee and the same be circulated to the members of the Board within thirty days from the date of such meeting.

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."

## Question 13

*The auditors of PQR Ltd. accepted the Certificate of the Manager, a person of acknowledge competence and high reputation, as to the value of the stock in trade. The stock was grossly overstated for several years in the balance sheets of the company. As a result of this over valuation dividends were paid out of capital. The Auditors did not examine the books of account very minutely. If they had done so and compared the amount of stock at the beginning of the year. With the purchases and sales during the year, they would have noticed the over valuation. The company subsequently went into liquidation and the auditors were sued to make good the loss caused by the wrongful payment of dividends relying on the balance sheets figures. Based on the above facts, you are required to decide. With reference to the provisions of the Companies Act, 1956 and the decided case laws, the following issues:*

*(i) Whether auditors of the company will be liable for the loss caused to the company by the wrongful payment of dividends based on the Balance Sheets duly audited by the Auditors.*

*(ii) What are statutory duties of the Auditors in this regard? (November 2007)*

## Answer

The answer of the problem given in question is mainly relates to the duties of the auditors. Section 227 of the Companies Act, 1956 provides that the main duty of the auditor is to make a report to the members of the company on the accounts examined by him and the balance sheet and the profit and loss account of the company and on every document which is annexed to the balance sheet or profit and loss account laid before the company in general meeting. The auditor owes a duty to the members to stake whether the accounts give a true and fair view of the affairs of the company at the end of the financial year and of the profit and loss account of the year.

The duty of an auditor is to give information in direct and express terms (*Crichton's Oil Co. Re (1902) 2ch 86)* and not merely to arouse inquiry. If he discovers that any illegal or improper payment papers to have been made, his duty will be to tape it public by reporting. The auditor occupies a fiduciary position in relation to the shareholders and in auditing the accounts maintained by the directors, he must act in the best interest of the shareholders who are in the position of beneficiaries.

But there is a limitation relating to perform the duties by the auditors. An auditor is not bound to be a detective, as loss laid to approach his work with suspicion or with a foregone conclusion that there is something wrong. He is a watchdog but not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and to rely upon their representations, provided he takes reasonable care. If there is anything calculated to excite suspicion, he should probe it to the bottom, but in the absence of any thing of that kind he is only bound to be reasonable cautious and careful.

The above problem is related to case of *Kingston Mill Co. Re (No 2) (1896) 2 ch 279*. In this case it was held that, the auditors were not liable. It is not auditor's duty to take stock. There many matters in which he may rely on the honesty and accuracy of others. Further they (auditors) do not guarantee the discovery of all frauds.

## Question 14

*A group of shareholders has approached you for advice regarding the affairs of LPM Paper Mills Ltd. According to them, the management of the company is not carrying out its functions in accordance with the prudent commercial practice and if the affairs of the company are allowed to run in future in the same manner, the company's solvency would be in danger. They want that a Special Audit be conducted to find out the actual nature of the transactions.*

*(i) You are required to state with reference to the provisions of the Companies Act, 1956, as to when a special audit can be directed and by whom ?*

*(ii) Draft an application to be submitted to the appropriate authority in this respect.*

*(May 2008)*

## Answer

(i) Provision regarding Special Audit: Section 233A of the Companies Act, 1956 deals with the matter relating to Special Audit. The Special Audit can be ordered by Central government if it is of the opinion:

(i) that the affairs of the company are not being managed in accordance with sound business principles or prudent commercial practices, or

(ii) 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

(iii) that the financial position of the company is such as to endanger its solvency.

Thus, the dissatisfied group of shareholders may make a complaint to the Central Government requesting for conducting the special audit. If the Central Government is satisfied that there exist sufficient reasons, it may order a special audit to be carried out by a Chartered Accountant who may or may not be company's statutory auditor or who may or may not be in practice.

(ii) DRAFT APPLICATION

Dated ………………………

To
The Secretary,
Ministry of Corporate Affairs,
Government of India,
New Delhi.

Sir,

We, the undersigned, the shareholders of LPM Paper Mills Ltd. would like to bring to your kind notice that for a long time the affairs of the said company are not being managed in accordance with sound business principles and prudent commercial practices.

We are of the view that certain expenditures which are being incurred by the company are not related to the business of the company and the company is not getting any benefit out of such expenses. Moreover, we have the apprehension that there are certain business transactions which are being entered into by the directors with the concerns which are owned by the relatives of the Directors and the prices charged for such transactions are not comparable with the prices charged by the other parties for similar transactions.

If such state of affairs is allowed to be carried on for long, the financial position of the company will reach a stage where it will endanger its solvency.

We feel that the modus operandi of the transaction is such that it may be difficult for the regular statutory auditor to detect them in course of normal audit.

It is, therefore, prayed that the Central Government be pleased to appoint, pursuant to Section 233A of the Companies Act, 1956, a Special Auditor to properly audit the accounts of the Company and find the real nature of the transactions and determine the losses so far sustained and being sustained by the company on this account.

Yours faithfully

1……………………………

2……………………………

3……………………………

4……………………………

5……………………………

(Shareholders)

Question 15

*Supra Limited, a private company, has been converted into a public company and under the provision of the of the Companies Act, 1956. The company proposes to constitute an audit committee. Taking into account the provisions of the Companies Act, 1956 draft a board resolution covering the following matters:*

*(i) Member of the audit committee.*

*(ii) Chairman of the audit committee.*

*(iii) Quorum for meeting of the said committee.*

*(iv) Any two functions of the said committee.* *(November 2008)*

Answer

AUDIT COMMITTEE –BOARD RESOLUTION:

"Resolved that pursuant to Section 292A of the Companies Act, 1956 an Audit Committee consisting of the following Directors be and is hereby constituted.

1. Mr. ---- nominee of IDBI
2. Mr. ---- nominee of ICICI
3. Mr. ---- nominee of the SBI.
4. Mr. ---
5. Mr. ----- Managing Director.

Further resolved that the Chairman of the Audit Committee shall be elected by its members from amongst themselves.

Further resolved that the quorum for a meeting of the Audit committee shall be 1/3rd of the total number of members or two directors (other than the Managing Director) whichever is higher.

Further resolved that the Audit Committee shall have the authority to investigate into any matter that may be prescribed under Section 292A of the Companies Act, 1956 and any other matter that may be referred to it by the Board from time to time.

Further resolved that the Audit committee shall conduct discussion with the auditors periodically about internal control systems, the scope of audit including the observation of 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".

# UNIT – 5: INVESTIGATION

## Question 1

*A majority of the Board of Directors of M/s High Value Infotech Ltd. have realised that some of the business activities carried out in the name of the company are not in the interest of either the company or its members. They want that the company should make an application to the Central Government to appoint an Inspector to carry out an investigation so as to find out the whole truth. Explain the steps that should be taken to achieve the purpose and draft the application.* *(November, 2001)*

## Answer

According to Section 237 of the Companies Act, 1956 the Central Government shall appoint one or more persons as inspectors to investigate the affairs of the company if the company by a special resolution or the court by an order declares that the affairs of the company should be investigated. The Central Government may also appoint an inspector if in the opinion of the Company Law Board, there are circumstances suggesting that:

(i) the business of the company is being conducted with intent to defraud creditors, members or any other persons.

(ii) the persons concerned in the formation of the company or the management of its affairs have been guilty of fraud, misfeasance or misconduct towards the company or its members.

(iii) the members have not been given all information with respect to its affairs.

Thus the directors of High Value Infotech Ltd have three options before them to get the company's affairs investigated. Firstly, they can get a special resolution passed in a general meeting of the company. Secondly they can approach the court with a petition so that the court directs the Central Government to order investigation. The directors can also approach the Company Law Board with a petition. However, the Central Government may order an investigation on the recommendation of the Company Law Board. Thus the Central Government has a discretionary power in the last case; whereas in the first two instances the Central Government has no such discretion and it has to order the investigation.

### Draft Application:

High Value Infotech Ltd. (Address)
Dated 1st April, 2001

The Secretary,
Department of Company Law Affairs,
New Delhi

Sir,

At a meeting of the shareholders of the company, the members have passed the following special resolution unanimously:

"Resolved that the Central Government be approached to appoint an Inspector to carry out an investigation whether the following activities carried out in the name of the Company are or are not in the interest of either the company or its members.

"(Name a couple of activities)"

The said unanimous resolution was passed at an extraordinary general meeting of the Company held on 10th March, 2001.

It is, therefore, prayed that the Central Government be pleased to appoint as per Section 237 of the Companies Act an inspector to investigate the affairs of the company regarding the matters mentioned in the above resolution and communicate its decision to the company.

Yours respectfully,

For and on behalf of High Value Infotech Ltd.

Secretary.

## Question 2

*A group of creditors of M/s XYZ Co. 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. (November, 2001)*

## Answer

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. [Section 234A(4)].

## Question 3

*Examine, with reference to the relevant provisions of the Companies Act, 1956, the validity/legality of the following:*

*(i) A meeting of the Board of Directors of OPQ Co. Ltd. due to be held on 30.9.2001 did not take place for want of quorum. As a result, the Company did not hold any Board meeting for the quarter ended 30.9.2001 and there is a complaint that the Company has violated the provisions of the Act in this regard.*

*(ii) M/s RST Computers Ltd. want to file its documents with the Registrar of Companies in computer print out form.*

*(iii) M/s XYZ Co. Ltd. held its Annual General Meeting beyond the permissible time limit and the legality of the documents filed by the Company has been questioned.*

*(November, 2001)*

## Answer

(i) According to the provisions contained in Section 288(2) of the Companies Act, 1956, the provisions of Section 285 relating to the holding of at least one Board meeting in a quarter cannot be deemed to have been contravened merely by reason of the fact that a Board meeting which had been called in compliance with the terms of the said section could not be held for want of a quorum. Thus the allegation that the company has contravened the provisions of Section 285 in the matter of holding the Board meeting is not correct.

(ii) M/s RST Companies Ltd., can file with the Registrar of companies floppy, diskette, etc. particularly in the case of bulky documents like annual return. Computer printout of information contained in such floppy etc. is seemed to be a document for the purposes of the Companies Act and the rules made thereunder [Section 610A(1)]. Further, notwithstanding anything contained in any other law for the time being in force, the computer print out is advisible as evidence of all legal proceedings without further proof or production of original. [Section 610A(1)] if the following conditions are satisfied:

(a) the information contained in the statement reproduces on paper or any other computer readable media.

(b) scanning the documents filed on computer media will be carried out and duly authenticated by the Registrar.

(c) the Registrar will take due care to preserve the computer media by duplicating, transferring, mastering or storage without loss of data.

(iii) It is not correct to say that once the time for holding the annual general meeting has expired, the meeting held after the prescribed time is void. Failure to hold the annual general meeting is punishable with fine only. Therefore, the legality of the meeting and the document filed pursuant to the meeting cannot be questioned merely because of the delay in holding the meeting.

## Question 4

*The Registrar of Companies, West Bengal has received a complaint from a group of creditors of a company. The complaint alleges that the Directors of the company, in order to prevent the unearthing of their embezzlement of company's funds, are engaged in falsification and destruction of original accounting books and records. The complaints urged the Registrar to seize the accounting books and records of the company so that the Directors may not be able to tamper the same. You are required to state the powers, if any, of the Registrar in this respect. .* *(May, 2004)*

## Answer

The powers of the Registrar of Companies in respect of seizure of books and records of any company is governed by section 234A of the Companies Act, 1956. Sub-section (1) of the said section provides that if, pursuant to the information in his possession, the Registrar has reasonable ground to believe that books and papers of a company may be destroyed, mutilated, altered, falsified or secreted, the Registrar may make an application to the Magistrate of First Class or the Presidency Magistrate, as the case may be, having jurisdiction for an order for the seizure of such books and records.

According to Section 234(2), the Magistrate, after considering the application and hearing the Registrar, may authorize the Registrar to do the following:

(i) To enter the place or places where such books and papers are kept.

(ii) To search the place or places in the manner as provides in the Magistrate's order.

(iii) To seize the books and papers as he considers necessary.

Section 234(3) authorises the Registrar to keep the seized books and papers for a period of thirty days, after which the same have to be returned to the person from whom the seizure was made. But the Registrar is empowered, before returning the said books and papers, to take copies of or extracts from them or place identification marks on them or deal with them in the manner he considers necessary.

Section 234(4) states that the Registrar, while conducting search and seizure, has to follow the provisions relating to search and seizure as prescribed in the Code of Criminal Procedure, 1898.

In view of the above provisions of section 234A of the Companies Act, 1956, the Registrar of Companies is empowered to seize the books and papers of the company against whom the complaint has been made by following the procedure laid down in the section.

## Question 5

*A majority of the Board of Directors of M/s Bulk Drugs Ltd. have reasons to believe that some of the business activities carried on in the name of the company are prima facie against the interests of the company and its members. They want the matter to be referred to Central Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil the truth. In this connection you are required to:*

*(i) State the steps required to be taken with reference to the provisions of the Companies Act, 1956.*

*(ii) Draft an application to be made to the Central Government.* *(May 2005)*

Answer

The case stated in the question relates to the provisions of section 237 of the Companies Act, 1956 dealing with appointment of Inspectors to investigate the affairs of a company and to report thereon.

Clause (a) of the said section provides that Central Government shall appoint one or more persons as inspectors to Investigate the affairs of a company if the company by way of a special resolution or the court by an order declares that the affairs of the company should be investigated.

Clause (b) of the said section states that the Central Government may appoint an Inspector if in the opinion of the Company Law Board (Now Tribunal), there are circumstances suggesting that:

(i) the business of the company is being conducted with intent to defraud the creditors, members or any other person

(ii) the person concerned in the formation of the company or the management of its affairs has been guilty of fraud, misfeasance or misconduct towards the company or its members.

(iii) the members have not been given all the information with respect to its affairs. (Central Government can on its own order investigation even if there is no order from the Company Law Board).

In view of the above stated legal provisions, M/s Bulk Drugs Ltd. have following options to get the company's affairs investigated by an Inspector appointed by Central Government under the said section 237:

(i) To get a special resolution passed in a general meeting and apply to the Central Government.

(ii) To approach the court with a petition requesting it to direct the Central Government for the desired purpose.

(iii) To approach the Company Law Board (Now Tribunal) with a petition requesting it to express its opinion on the affairs of the company and then bringing to the notice of the Central Government.

It may, however be noted that while in first two options, the Central Government is bound to act as per provisions of the said section 237 but it has discretionary powers in the case of the third options.

DRAFT APPLICATION

BULK DRUGS LTD.

(Address)

Dated_______________

To,
The Secretary,
Department of Company Affairs,
(Address)
New Delhi.

Sir,

At an Extra ordinary General Meeting of the shareholders of the company held on____(date)________ at the registered office of the company, the members have unanimously passed the following Special Resolution:

"RESOLVED that the Central Government be approached to appoint an Inspector pursuant to the provisions of section 237 of the Companies Act, 1956 to carry out an investigation whether the following activities carried out in the name of the company are or are not in the interest of the company or its members:

1. Granting of Interest-free Loans to certain parties
2. Purchase of Raw materials without complying with the procedure laid down by the Drug Controller."

"Resolved further that Mr._______________, the Secretary of the Company be and is hereby authorised to do the needful in the matter."

It is, therefore, prayed that the Central Government be pleased to appoint, pursuant to section 237 of the Companies Act, 1956, an Inspector to investigate the affairs of the Company regarding the matters mentioned in the Special Resolution quoted above and communicate its decision to the company.

The Challan evidencing the payment of prescribed fee as per Companies (Fees on Application) Rules, 1999 and other papers and documents as required by rules are enclosed.

Yours faithfully,

For BULK DRUGS LTD.

Secretary

## Question 6

*A majority of the Board of Directors of M/s Bulk Drugs Ltd. have reasons to believe that some of the business activities carried on in the name of the company and prima facie against the interest of the company and its members. They want the matter to be referred to Central*

*Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil and truth. In this connection you are required to:*

*(i) State the steps required to be taken with reference to the provisions of the Companies Act, 1956.*

*(ii) Draft an application to be made to the Central Government.* *(May 2007)*

## Answer

The case stated in the question relates to the provisions of Section 237 of the Companies Act, 1956 dealing with appointment of Inspectors to investigate the affairs of a company and to report thereon.

Clause (a) of the section 237 provides that Central Government shall appoint one or more person as Inspectors to investigate the affairs of a company if the company by way of a special resolution or the court by an order declares that the affairs of the company should be investigated.

Clause (b) of the said section further states that the Central Government may appoint an Inspector if in the opinion of the Company Law Board (Now Tribunal), there are circumstances suggesting that:

(i) the business of the company is being conducted with intent to defraud the creditors, members or any other person.

(ii) the person concerned in the formation of the company or the management of its affairs have been guilty of fraud, misfeasance or misconduct towards the company or its members.

(iii) the members have not been given all the information with respect to its affairs.

In view of the above stated legal provisions, M/s Bulk Drugs Ltd. have following options to get the company's affairs investigated by an inspector appointed by Central Government under the said Section 237:

*(i) To get a special resolution passed in a general meeting and apply to the Central Government.*

*(ii) To approach the court with a petition requesting it to direct the Central Government for the desired purpose.*

*(iii) To approach the Company Law Board (now Tribunal) with a petition requesting it to express its opinion on the affairs of the company and then bringing to the notice of the Central Government.*

It may, however, be noted that while in first two options, the Central Government is bound to act as per provisions of the said section 237 but it has discretionary powers in the case of the third option.

*DRAFT APPLICATION*

BULK DRUGS LTD.

(Address)

Dated _________________

*To,*

*The Secretary,*

*Department of Company Affairs,*

*(Address)*

*New Delhi*

*Sir,*

At an Extra-ordinary General Meeting of the shareholders of the company held on _______date___________ at the registered office of the company, the members have unanimously passed the following Special Resolution:

"RESOLVED that the Central Government be approached to appoint an Inspector pursuant to the provisions of section 237 of the Companies Act, 1956 to carry out an investigation whether the following activities carried out in the name of the company are or are not in the interest of the company or its members:

1. *Granting of interest-free loans to certain parties.*
2. *Purchase of Raw Materials without complying with the procedure laid down by the Drug Controller."*

"Resolved further that Mr. ___________, the Secretary of the Company be and is hereby authorized to do needful in the matter."

It is, therefore, prayed that the Central Government be please to appoint, pursuant to section 237 of the Companies Act, 1956, an inspector to investigate the affairs of the Company regarding the matters mentioned in the Special Resolution quoted above and communicate its decision to the company.

The Challan evidencing the payment of prescribed fee as per Companies (Fees on Application) Rules, 1999 and other papers & documents as required by rules are enclosed.

Yours faithfully,

For BULK DRUGS LTD.

Secretary

## Question 7

*An allegation was leveled against PQR Ltd. that the funds of the company are misused. Mr. Z, one of the Directors of the company wants to inspect the books of account of the company in order to ascertain whether the allegation was true. But since Mr. Z does not have the knowledge of accounting, he apponts Mr. A, his friend and a practicing Chartered Accountant to go through the books of accont of the company on his behalf. The company seeks your advice as to whether Mr. A may be allowed to inspect the books of account of the company on behalf of Mr. Z. You are required to give your advice to the company on behalf of Mr. Z. You are required to give your advice to the company keeping in view the provisions of the Companies Act, 1956.*

*What would be your advice if Mr. Z would have been a shareholder only and not a Director of the company ? (May 2007)*

## Answer

Section 209 (4) of the Companies Act 1956 provides that the books of account and other books and papers shall be open to inspection by any director during the business hours.

The right of inspection given by this sub-section is not so restricted that it can only be exercised personally by the director *in Vakharia Vs Supreme General Film Exchange CO. Ltd* it was held that a director is entitled to take inspection of accounts personally or through an agent provided that there is no reasonable objection to the person chosen and the agent undertakes not to utilize the information obtained by him for any purpose other than the purpose of his principal.

As the right of inspection is a statutory right given under this sub-section, a director who is prevented from or refused inspection may enforce his right through court.

As such, Mr. Z being the director, can appoint Mr., A to inspect the Books of accounts of the company.

*In case Mr. Z is the member of the company*

As per the provisions of the Act the board shall from time to time determine whether and to what extent and at what times and places and under what conditions or regulation, the accounts and books of the company, or any of them, shall be open to inspection of members not being directors. No member (Not being a director) shall have any right to inspection any account or books or document of the company except as conferred by law or authorized by the board or by the company in general meeting.

In case Mr. Z is a member of the company, he shall be able to inspect the books of account only if he is given such a right by ordinary resolution of the members or if authorized by the board. But even in such case Mr. Z would have to exercise the right personally and not through a proxy i.e. he can himself inspect the books but cannot ask Mr. A to inspect the books in his behalf.

# UNIT – 6 : INTER-CORPORATE LOANS & INVESTMENT

## Question 1

*Following is the latest audited Balance Sheet of XYZ Ltd.:*

| *Capital and Liabilities* | *Rs.* | *Assets* | *Rs.* |
|---|---|---|---|
| *Equity Share Capital* | *10,00,000* | *Goodwill* | *1,00,000* |
| *(10,000 shares of Rs.100 each)* | | *Land and Buildings* | *10,50,000* |
| *Less: Calls unpaid* | *10,000* | *Plant and Machinery* | *20,25,000* |
| | *9,90,000* | *Equity shares in A Ltd.* | *1,25,000* |
| *Preference Share Capital* | *1,50,000* | *Preference Shares in B Ltd.* | *50,000* |
| *Securities Premium a/c* | *1,50,000* | *Debentures in C Ltd.* | *1,00,000* |
| *Capital Redemption Reserve* | *2,25,000* | *Shares in P Ltd.* | *2,25,000* |
| *General Reserve* | *5,00,000* | *Capital in Z & Co.* | *1,00,000* |
| *Profit & Loss A/c* | *2,20,000* | *Current Assets* | *55,000* |
| *Sinking Profit Reserve* | *1,10,000* | | |
| *Dividend Equalisation Reserve* | *60,000* | | |
| *Loan from TICC* | *10,00,000* | | |
| *Deposits from S Ltd.* | *2,00,000* | | |
| *Current Liabilities* | *1,25,000* | | |
| *Provision for Taxation* | *1,00,000* | | |
| | *38,30,000* | | *38,30,000* |

*The following is the additional relevant information:*

*(i)* *Of the equity share capital, 3,000 shares have been issued as rights shares and 2,000 shares as bonus shares.*

*(ii)* *B Ltd. is subsidiary of XYZ Ltd. with 90% shareholding, whereas A Ltd. is wholly owned subsidiary of XYZ Ltd.*

*(iii)* *Z & Co. is a partnership firm.*

*The directors seek advice as to whether the following additional investments can be made by a decision taken in a Board Meeting:*

| | | *Rs.* |
|---|---|---|
| *(i)* | *Loan to A Ltd.* | *10,00,000* |
| *(ii)* | *Debentures in B Ltd.* | *2,25,000* |
| *(iii)* | *Purchase of shares of Shree Ltd. in the open market* | *95,000* |

*State reasons.* *(November, 2000)*

Answer

By virtue of Explanation (b) to Section 372A, no company shall, directly or indirectly,-

(a) make any loan to any other body corporate;

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

(c) acquire, by way of subscription, purchase or otherwise the securities of any other body corporate, exceeding sixty per cent of its paid-up share capital and free reserves, or hundred per cent of its free reserves, whichever is more. Hence, it becomes necessary to compute the paid-up capital and free reserves first.

| | |
|---|---|
| *Paid up Share Capital* | |
| Equity share capital | 10,00,000 |
| *Less:* Calls unpaid | 10,000 |
| | 9,90,000 |
| Preference share capital | 1,50,000 |
| | 11,40,000 |
| *Free reserves* | |
| Securities premium A/c | 1,50,000 |
| General reserve | 5,00,000 |
| Profit and Loss A/c | 2,20,000 |
| Dividend Equilisation Reserve | 60,000 |
| | 9,30,000 |

According to Explanation (b) to section 372A, 'Free reserves' means those reserves which, as per the latest audited balance sheet of the company, are free for distribution as dividend and shall include balance to the credit of the securities premium account but shall not include share application money.

Capital redemption reserve sinking fund are not available for free distribution of dividend and hence not included.

*Ceiling limits*

60% of paid-up capital and free reserves

= 60% of (11,40,000 & 9,30,000).
= 60% of 20,70,000 i.e. Rs.12,42,000
100% of free reserves = 9,30,000

60% of paid-up capital & free reserves being higher than 100% of free reserves, inter-corporate loans and investments may be made upto Rs.12,42,000.

*Investments as per the Balance Sheet*

| | |
|---|---|
| Preference Shares in B Ltd. | 50,000 |
| Debentures in C Ltd. | 1,00,000 |
| Shares in P Ltd. | 2,25,000 |
| | 3,75,000 |

Note: Equity shares in A Ltd are not considered, since by virtue of Section 372A(8)(e), acquisition of shares by a holding company in its wholly owned subsidiary are outside the purview of Section 372A.

*Additional investments within the purview of Section 372A:*

| | |
|---|---|
| Debentures in B Ltd. (loans including debentures | |
| As per explanation (a) to section 372 A) | 2,25,000 |
| Shares in Shree Ltd. | 95,000 |
| | 3,20,000 |

Note: Loan to A Ltd. A Ltd. being a wholly owned subsidiary, is to be excluded by virtue of section 372(8)(c).

*Total permissible investment*

| | |
|---|---|
| 60% of paid up capital and free reserves | 12,42,000 |
| *Less:* investments already made | 3,75,000 |
| Further investment possible | 8,67,000 |

Since the additional proposed investment is well within the above limit, the directors may by passing a resolution at a meeting of the Board, for which the consent of all the directors present at the meeting is obtained. Special resolution is not necessary and so also the prior approval of the financial institution like TIIC.

No loan or investment shall be made 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 referred to in section 4A, where any term loan is subsisting is obtained, however, the prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, alongwith the investments, loans, guarantee or security proposed to be made or given does not exceed the limit of sixty per cent specified in sub-section (1), if there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution. [Proviso to section 372A(2)].

## Question 2

*The Board of Directors of M/s Greenfield Projects Limited, a company whose shares are listed on the Delhi Stock Exchange propose to give loans to a sister company in excess of the limit prescribed under Section 372A(1) of the Companies Act, 1956. The next annual general meeting of the company is due only after six months. Since the board is anxious to complete the formalities quickly without waiting for the date of next annual general meeting, advise the Board about the steps to be taken to comply with the legal requirements under the Companies Act, 1956.* *(May, 2002)*

## Answer

### Loans in excess of limits laid down under section 372A, of the Companies Act, 1956

Loans above the ceiling can be made only with previous approval by a special resolution in general meeting [proviso 1 to section 372A(i)].

The following steps are to be taken by the company-

(i) According to rule 4 of the Companies (Passing of the Resolution by Postal Ballot) Rules 2001, postal ballot is mandatory in the case of a listed company for transacting a business relating to giving loans in excess of the limits prescribed under section 372 A(1). As the subject company is a listed company, the company must take steps for passing a special resolution through postal ballot in accordance with the aforesaid rules (Section 192A).

(ii) Notice of such resolution to be sent to members should indicate specific limits, particulars of company to which loan is to be given, specific sources of funding and such other details (third proviso to Section 372 A(1)].

(iii) In addition to special resolution, prior approval of Board of Directors is required to give loans. All directors present at the Board meeting must vote in favour of the resolution (Section 372A (2)).

(iv) Prior approval of public financial institutions from whom loans are taken is also required (section 372A(2)).

(v) The interest to be charged by the company shall not be less than the prevailing bank rate specified by RBI under section 49 of RBI Act. (Section 372A(3)).

(vi) The prescribed particulars must also be entered in the Register of loans maintained under section 372A(5).

(vii) The company must also file a copy of the special resolution with the Registrar of Companies (Section192).

## Question 3

*M/s Sharda Fertilizers Ltd. proposes to acquire equity shares of ABC Ltd. worth Rs.19 lakhs. On the basis of the following information advise Sharda Fertilizers Ltd. about the requirements to be complied with under Companies Act, 1956 for the proposed investment in ABC Ltd.*

| | Rs. |
|---|---|
| *Authorised Share Capital* | *50,00,000* |
| *Issued, subscribed and paid up Capital* | *25,00,000* |
| *Free Reserves* | *5,00,000* |

*(November, 2002)*

## Answer

The provisions regarding inter corporate loans and investments are contained in Section 372A of the Companies Act, 1956 which provide that no company shall directly or indirectly make loan or give guarantee or provide security and acquire by way of subscription, purchase or otherwise securities of any other body corporate exceeding 60% of its paid up capital and free reserves, or 100% of the free reserves whichever is more, without the previous approval of the members by way of special resolution in general meeting.

The amount of proposed investment by Sharda Fertilizers ltd., in the equity shares of ABC Ltd. for Rs. 19.00 lakhs may be considered in the following manner as per the financial data given in the question:

(i) 60% the paid-up capital and free reserves i.e. 60% (Rs. 25.00 lakhs + Rs. 5.00 lakhs)

(ii) 100% of the free reserves = Rs. 500 lakhs = Rs. 18.00 lakhs rupees

Hence the maximum permissible limit for the bank is only Rs. 18.00 lakhs. However, the Sharda Fertilizer purposes to invest Rs. 19.00 lakhs in the shares of ABC Ltd. which can only be done with the approval of the members by way of special resolution with general meeting.

Therefore, Sharda fertilizers in advised to comply with the following requirements:

(a) Checks the provisions of the Articles and Memorandum of the Company, regarding powers of the company and of its Board to make investment in other corporate body.

    If the powers are not available, take appropriate action to amend the Articles.

(b) Hold a Board meeting for consideration of the investment proposal and to call a general meeting of the members to obtain their approval by way of special resolution. The Board resolution must be passed for investment at the meeting of the Board with the consent of all the directors present. The nature of such general meeting should specifically indicate the following particulars in the explanatory statement:

    (i) The specific limit is not less than Rs. 19.00 lakhs.

    (ii) The particulars of ABC Co. Ltd.

    (iii) The purpose of investment

    (iv) Specification of the availability of funds of interest of directors, if any,

    (v) Any other material detail or disclosure of interest of directors, if any,

(c) Check that there has been no default on the part of the company in repayment of loan installment or interest thereon.

(d) Check that the company has not defaulted either directly or indirectly in complying with the provisions of Section 58A.

(e) After investment, make entry in the Register of Investment within 7 days from the date of investment.

(f) File Form No. 23 with the Registration within 30 days from the date of passing the resolution.

### Question 4

*ABC Forgings Limited proposes to make a loan of Rs.5 lakhs to PQR Limited, a company in which two Directors of ABC Forgings Limited hold 30 per cent of the total Equity Share Capital. The proposed loan together with the inter-corporate loans and investments already made do not exceed 60 per cent of paid-up share capital and 100 per cent of free reserves of ABC Forgings Limited.*

*Examine the above proposal with reference to the provisions of Section 372A of the Companies Act, 1956. Whether the provisions of Section 295 containing the marginal notes of 'Loans to Directors, etc.' would also be applicable in this case? (November, 2003)*

### Answer

Section's 295 and 372A: 'Marginal notes of Section 372A indicates that inter corporate loans are regulated by Section 372A. But, sometimes, loans to a body corporate may attract Section 295, if it is a body corporate in which the directors of the lending company are interested. Further, heading/marginal notes of Section 295 is Loan to directors, etc. Hence in the case of a loan to a body coporate by a public company, it is necessary to examine the applicability of both sections 295 and 372A.

In this case, two directors of the lending company (ABC Forgings Ltd. hold 30% of the total equity share capital (i.e. is more than 25% of total voting power) of the borrowing company i.e. PQR Ltd. Hence, the provisions of Section 295(1)(d) are attracted and the loan of Rs.5 lakhs cannot be made without obtaining the previous approval of the Central Government [Section 295(1)]. As the proposed loan, together with the loan, etc., already made do not exceed the prescribed limits under Section 372A(1), the Board is competent to make the loan to PQR Ltd. and special resolution is not required.

Hence, the Board is not competent to lend money to PQR Ltd without obtaining the approval of the Central Government under Section 295.

## Question 5

*Following information is available from the audited Balance Sheet as at 31st March, 2004 of ASK Ltd.:*

| | |
|---|---|
| *Share Capital:* | *Rs.* |
| *Equity Share Capital (5,00,000 shares of Rs.10 each fully paid up in cash)* | *50,00,000* |
| *Less: Calls in arrear* | *50,000* |
| | *49,50,000* |
| *Preference Share Capital* | *15,00,000* |
| *Share Application Money* | *10,00,000* |
| *Reserves and Surplus:* | |
| *Securities Premium* | *15,00,000* |
| *Capital Redemption Reserve* | *12,00,000* |
| *Fixed Assets Revaluation Reserve* | *10,50,000* |
| *Sinking Fund Reserve* | *11,00,000* |
| *General Reserve* | *40,00,000* |
| *Profit and Loss Account* | *22,00,000* |
| *Dividend Equalisation Reserve* | *6,00,000* |
| *Secured Loans:* | |
| *Cash Credit facility from Bank* | *1,00,00,000* |

*You are required to find out, explaining the relevant provisions of the Companies Act, 1956, the amount upto which the Board of Directors can invest in securities of other bodies corporate and/or give loans.* *(November, 2004)*

## Answer

According to the provisions of section 372A of the Companies Act, 1956, a public company and a private company, which is a subsidiary of the public company shall not, directly or indirectly:

(a) make any loan to any other body corporate

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

(c) acquire, by way of subscription, purchase or otherwise the securities of any other body corporate exceeding 60% of its Paid up Share Capital and free reserves or 100% of its free reserves, which more without prior authorization by way of a special resolution passed in a general meeting.(Section 372 A (1).

In order to arrive at the conclusion whether the directors of ASK Ltd. can, make the proposed investments without seeking approval from the shareholders, the amount upto which they can invest has to be arrived at. In the given case, the Paid up Share Capital and free reserves are as follows:

Paid up Share Capital:

| | |
|---|---|
| Equity Share Capital (500,000 shares of Rs.10/- each fully paid up in cash) | Rs. 50,00,000/- |
| Less: Calls in arrear | Rs. 50,000/- |
| | Rs.49,50,000/- |
| Add: Preference Share Capital | Rs.15,00,,000/- |
| Total of Paid up Share Capital | Rs.64,50,000/- |
| Free-Reserves: | |
| Securities Premium | Rs. 15,00,000/- |
| General Reserve | Rs. 40,00,000/- |
| Profit & Loss Account | Rs. 22,00,000/- |
| Dividend Equalisation Reserve | Rs. 6,00,000/- |
| Total Free Reserves | Rs. 83,00,000/- |
| Total of Paid up Share Capital and Free Reserves | Rs. 1,47,50,000/- |

As per explanation to the said section, "Free Reserves" means those reserves, which, as per audited balance sheet *of* the company, are free for distribution as dividend and shall include balance to the credit of the securities premium account but shall not include share application money. (explanation (b) to section 372A).

Accordingly, for the purpose of calculating the amount of Free Reserves, the amounts lying in the accounts of Share Application Money and reserves not available for distribution as dividend being Capital Redemption Reserve, Fixed Assets Revaluation Reserve and Sinking Fund Reserve are excluded.

Ceiling limit for investments:

| | |
|---|---|
| 60% *of* Paid up Share Capital and free reserves | |
| (i.e. 60% *of* Rs.14,750,000/-) | Rs. 88,50,000/- |
| 100% *of* Free Reserves (i.e.100% of Rs.*83*,00,000/-) | Rs. 83,00,000/- |

Since 60% of Paid up Share Capital and free reserves is Rs.88,50,000/- which is higher than 100% of Free Reserves, the directors *of* ASK Ltd. can advance loans and make investments in other bodies corporate upto a total limit of Rs. 88,50,000/- without obtaining prior approval from the shareholders. It may be noted that the amount of secured loan given in question has no relevance in determining the limit up to which investments/loans can be made.

### Question 6

*From the following information extracted from the Balance Sheet of VCD Ltd. as at 31st March, 2006, Board of Directors of the Company decide to grant a loan of Rs. 80 crores to another company JN Ltd.*

| | Rs. (in crores) |
|---|---|
| *Paid-up Share Capital:* | |
| *Equity Share Capital* | *50* |
| *Preference Share Capital* | *10* |
| *General Reserves* | *100* |
| *Debentures* | *5* |
| *Debenture Redemption Reserve* | *5* |

*The company has already given loans to the following companies:*

| | | |
|---|---|---|
| *(i)* | *Peters Ltd.* | *Rs. 5 crores* |
| *(ii)* | *Steel India Ltd.* | *Rs. 10 crores* |

*The Company has also given a corporate guarantee of Rs. 10 crores to NR & Co. Ltd.*

*Advise whether the Board can go ahead with the above proposal.* *( May 2006)*

### Answer

### Problem on Inter-Corporate Investment

In accordance with the provisions of the Companies Act, 1956, as contained in Section 372A, Companies Act, 1956 a company cannot grant any loans or inter corporate investment exceeding 60% of its paid up capital and free reserves or 100% of its free reserves, whichever is more.

In case of VCD Ltd. the position as at 31st March, 2006 is as under:

| | | |
|---|---|---|
| Paid-up share Capital: | Equity Share Capital : | Rs. 50 crores |
| | Preference Share Capital: | Rs. 10 crores |
| General Reserves | | Rs. 100 crores |

Total Rs. 160 crores. (60% of Rs. 160 crores = Rs. 96 crores)

100% of Reserves & Surplus (i.e. General Reserve) Rs. 100 crores.

As 100% of free reserves, i.e. Rs. 100 crores is more than 60% of paid up share capital (both Equity and Preference share Capital) and free reserves, i.e. Rs. 96 crores, therefore, the overall limit for release of loan is Rs. 100 crores.

The company has already granted loan / given guarantee as under:

| | | |
|---|---|---|
| (i) | Peters Ltd. | Rs. 5 crores |
| (ii) | Steel India Ltd. | Rs. 10 crores |
| (iii) | Corporate Guarantee | Rs. 10 crores |
| | Total | Rs. 25 crores |

Balance of limit upto which further loans/guarantee can be given = Rs. 100 crores – 25 crores = Rs. 75 crores

Therefore, the company can grant loan upto Rs. 75 crores to JN Ltd. Loan upto Rs. 80 crores as proposed can be given provided a special resolution in company's general meeting has been passed as required under Section 372A of the Companies Act, 1956. It may however, be noted that the special resolution as required must be passed through postal ballot in accordance with the rule 4 of the Companies (Passing of the Resolution by Postal Ballot) Rules, 2001.

Question 7

*Following information is available from the audited Balance Sheet as at 31st March, 2007 of ASK Ltd.:*

| *Capital & Liabilities* | *Rs.* | *Assets* | *Rs.* |
|---|---|---|---|
| *Share Capital:* | | *Fixed Assets:* | |
| *Equity Share Capital* | | *Goodwill* | *10,00,000* |
| *(5,00,000 shares of Rs. 10 each fully paid up in cash)* | | *Land & Buildings* | *75,00,000* |
| | | *Plant & Machinery* | *1,50,00,000* |
| | *50,00,000* | *Furniture & Other* | |
| *Less: Calls in arrear* | *50,000* | *Assets* | *2,50,000* |
| | *49,50,000* | *Investments:* | |
| Less: Calls in arrear | *15,00,000* | *Equity Shares in wholly owned Subsidiary Company -* | |
| *Share Application Money* | *10,00,000* | | |
| *Reserves & Surplus:* | | | |
| *Securities Premium* | *15,00,000* | *KMC Ltd.* | *12,50,000* |
| *Capital Redemption Reserve* | *12,00,000* | *Equity Shares representing 90% of MTC Ltd.* | |
| *Fixed Assets Revaluation Reserve* | *10,50,000* | *Share Capital of MTC Ltd.* | *4,50,000* |

| | | | |
|---|---|---|---|
| *General Reserve* | *40,00,000* | *Debentures in SKT Ltd.* | |
| *Profit and loss Account* | *22,00,000* | *SKT Ltd.* | *12,00,000* |
| *Dividend Eualisiation Reserve* | *6,00,000* | *Preference Shares in HUT Ltd.* | *5,00,000* |
| *Secured Loans:* | | | |
| *Cash credit facility from Bank* | *1,00,00,000* | *Capital account balance in Partnership Firm - BKP & Co.* | *8,00,000* |
| | | *Current Assets:* | |
| *Fixed Deposits (From general public maturing after 31.02.2007)* | *20,00,000* | *Stock and Book Debts* | *14,00,000* |
| *Current Liabilities & Provisions:* | | *Cash & Bank Balances* | *1,00,000* |
| *Current Liabilities* | *12,50,000* | *Loans & Advances:* | |
| *Provision for Taxation* | *10,00,000* | *Inter-corporate* | |
| | | *Deposits* | *25,00,000* |
| | | *Business Advances* | *14,00,000* |
| | *3,33,50,000* | | *3,33,50,000* |

*The directors of the company want to make further investments stated below by taking a decision in the meeting of Board of Directors without seeking approval of the shareholders :*

| | | |
|---|---|---|
| | | *Rs.* |
| *(a)* | *Loan to KMC Ltd.* | *25,00,000* |
| *(b)* | *Loan to MTC Ltd.* | *15,00,000* |
| *(c)* | *Purchase of further debentures in SKT Ltd.* | *8,00,000* |
| *(d)* | *Purchase of shares from the open market in Glaxo Ltd.* | *15,00,000* |

*You are required to state, with reference to the relevant provisions of the Companies Act, 1956, whether the directors can do so and mention the relevant calculations.* *(May 2007)*

## Answer

According to the provisions of section 372A of the Companies Act, 1956, a public company and private company, which is a subsidiary of the public company shall not, directly or indirectly:

(a) make any loan to any other body corporate.

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

(c) acquire, by way of subscription, purchase or otherwise the securities of any other body corporate.

exceeding 60% of its Paid up Share Capital and free reserves or 100% of its free reserves, whichever is more without prior authorization by way of a special resolution passed in a general meeting.

In order to arrive at the conclusion whether the directors of ASK Ltd. can make the proposed investments without seeking approval from the shareholders, the amount upto which they can invest has to be arrived at. In the given case, the Paid up Share Capital and free reserves are as follows:

Paid up Share Capital

| | |
|---|---|
| Equity Share Capital (500,000 shares of Rs. 10/- each fully paid up in cash) | Rs. 5,000,000/- |
| Less: Calls in arrear | Rs. 50,000/- |
| | Rs. 4,950,000/- |
| Preference Share Capital | Rs. 1,500,000/- |
| Total of Paid up Share Capital | Rs. 6,450,000/- |
| Free Reserves: | Rs. 1,500,000/- |
| | Rs. 4,000,000/- |
| | Rs. 2,2000,000/- |
| | Rs. 600,000/- |
| Total Free Reserves | Rs. 8,300,000/- |
| Total of paid up share capital and Free Reserves: | Rs. 14,750,000/- |

As per explanation to the said section, "Free Reserves" means those reserves which, as per the latest, audited balance sheet of the company, are free for distribution as dividend and shall include balance to the credit of the securities premium account but shall not include share application money.

Accordingly, for the purpose of calculating the amount of Free Reserves, the amounts lying in the accounts of Share Application Money and reserves not available for distribution as dividend being Capital Redemption Reserves, Fixed Assets Revaluation Reserve and Sinking Fund Reserve are excluded.

Ceiling limit for investments:

| | |
|---|---|
| 60% of Paid up Share Capital and free reserves (i.e., 60% of Rs. 14,750,000/-) | Rs. 88,50,000 |
| 100% of Free Reserves (i.e., 100% of Rs. 83,00,000/- | Rs. 83,00,000 |

Since 60% of Paid up Share Capital and free reserves is Rs. 88,50,000//- which is higher than 100% of Free Reserves, the directors of ASK Ltd. can advance loans and make investments in other bodies corporate upto a total limit of Rs. 88,50,000/- without obtaining prior approval from the shareholders.

For arriving at a decision for further investments, the extent of present investment is to be determined and the directors can make further loans and investments upto the residual amount.

The present investments and loans of ASK Ltd. calculated as per the provisions of section 372A of the Companies Act, 1956 are as follows:

Equity Shares in wholly owned 'Subsidiary Company – KMC Ltd.

(not to be counted since as per provisos of Section 372(8)(e), investments in wholly owned subsidiary company is outside the purview of this section)

| | |
|---|---|
| Equity Shares representing 90% of share capital of MTC Ltd. | Rs. 4,50,000/- |
| Debentures in SKT Ltd. | Rs. 12,00,000/- |
| Preference shares in HUT Ltd. | Rs. 5,00,000/- |
| Inter-corporate Deposits | Rs. 25,00,000/- |
| Total investments of ASK Ltd. within the meaning of Section 372A | Rs. 46,50,000/- |
| Limit upto which directors can make investments as calculated above | Rs. 88,50,000/- |
| Less existing investments | Rs. 46,50,000/- |
| further investments which directors can make without shareholders' special resolution | Rs. 42,00,000/- |

Proposed additional investments within the meaning of section 372 is to be calculated as follows:

| | | |
|---|---|---|
| (a) | Loan to KMC Ltd. | -- |
| | (Not to be counted since as per provisions of section 372 (8)( c ) Loan to Wholly owned subsidiary company is outside the purview of this section) | |
| (b) | Loan to MTC Ltd. | Rs 15,00, 000/- |
| (c) | Purchase of further debentures in SKT Ltd. | Rs 8,00,000/- |
| (d) | Purchase of share from the open market in Glaxo Ltd. | Rs 15,00,000/- |
| | | 38,00,000/- |

Since the proposed additional investment is within the amount permissible as calculated above, the directors, by passing a unanimous resolution in a Board Meeting, can make the proposed additional investment, Since the total investments do not exceed the limit as calculated above, the directors are not required to obtain the approval of shareholder, In absence of any term loan from any public financial institution, the question of their permission does not arise. Moreover, the fixed deposits from public are not yet due for repayment and hence there is no default on this account. In the light of above, it can be concluded that the directors can make the proposed investments.

## Question 8

*The Board of Directors of XYZ Ltd. has agreed in principal go grant 'loan' worth Rs. 38 lakhs to MNC ltd. on the basis of the following information. Advise XYZ Ltd. about the requirements to be complied with under the Companies Act, 1956 for the proposed inter-corporate loan to MNC Ltd.*

| | | | |
|---|---|---|---|
| *(i)* | *Authorized share capital* | *Rs.* | *1,00,00,000* |
| *(ii)* | *Issued, subscribed and paid up capital* | *Rs.* | *50,00,000* |
| *(iii)* | *Free reserves* | *Rs.* | *10,00,000* |

*(November 2007)*

## Answer

Inter corporate loans and investments are governed by the provisions of Section 372A of the Companies Act, 1956. As per this Section, a company can advance loans to other companies or invest in the securities, of other companies up to 60% of the paid-up capital and free reserves or upto 100% of free reserves, which is more. Further no loan or investment exceeding the said limits can be made by a company unless authorized by a previous special resolution passed in this regard.

First determine whether a special resolution is required for providing loans to MNC Ltd.

This can be determined as follows:

| | | |
|---|---|---|
| Paid up capital of the company | (A) | 50,00,000 |
| Free reserves | (B) | Rs. 10,00,000.00 |
| Aggregate of paid up capital and free reserves | (C) | Rs. 60,00,000.00 |
| 60% of aggregate of paid up capital and free reserves | (D) | Rs. 36,00,000.00 |

Higher of (B) or (D) i.e. the ceiling limit for incorporate loan and investment etc. without requiring a special resolution Rs. ,000.00

Proposed loans to MNC Ltd. Rs. 38,00,000.00

Since the proposed loan exceeds the ceiling limit a special resolution is required. The company shall adopt the following procedure for providing loan to MNC Ltd.

(i) Unanimous approval of the Board shall be obtained by passing a resolution at a Board meeting.

(ii) A special resolution shall be passed in the general meeting

The notice of special resolution shall stake the specific limits, particulars of the company to which loan is proposed to given, specific source of funding and other relevant details. The company shall file a copy of special with the registrar within 30 days of passing the special resolution. If the company is listed company, it shall pass the resolution by postal ballot as prescribed under Section 192A.

(iii) the company shall obtain the prior approval of the Public Financial Institution, if any, from whom it has taken a term loan.

(iv) the company can provide such loan to other companies only if no default in respect of public deposits is subsisting.

(v) the prescribed particulars shall be entered in the register maintained under Section 372A(5).

## Question 9

*Amar Textiles Ltd. is a company engaged in manufacture of fabrics. The Company has investments in shares of other bodies corporate including 70% shares in Amar Cotton Co. Ltd., and it has also advance loans to other bodies corporate. The aggregate of all the investments made and loans granted by Amar Textiles Ltd. exceeds 60% of its paid up share capital and free reserves and also exceeds 100% of its free reserves. In course of its business requirements, Amar Textiles Ltd. has obtained a term loan from Industrial Development Bank of India and is still subsisting. Now the Company wants to increase its holding from 70% to 80% of the equity share capital in Amar Cotton Co. Ltd. by purchase of additional 10% shares from other existing shareholders.*

*State the legal requirements to be complied with by Amar Textiles Ltd. under the provisions of the Companies Act, 1956 to give effect to the above proposal. Will answer be different in Amar Textiles Ltd. would have defaulted in payment of matured fixed deposits accepted by it from the public ? (May 2008)*

## Answer

Amar Cotton Co. Ltd. is not a wholly-owned subsidiary of Amar Textiles Ltd. and hence investments in such a subsidiary company is not covered by exemption under Section 372A(8) (e) of the Companies Act, 1956. As the aggregate of the investments in shares and loans granted to other bodies corporate exceeds 60% of the paid-up share capital and free reserves and also 100% of the free reserves, it is necessary for Amar Textiles Ltd., to pass a special resolution in the General Meeting before increasing its holding from 70% to 80%. [First proviso to Section 372A(1)]

The notice of special resolution must indicate clearly the specific limits, the particulars of the body corporate in which the investment is proposed to be made, the purpose of the investment, specific source of funding and such other details [third proviso to Section 372A(1)].

In the present case, Amar Textiles Ltd., obtained a term loan from Industrial Development Bank of India (IDBI) which is a public financial institution within the meaning of Section 4A of the Companies Act, 1956 and therefore the provisions of Section 372A(2) are attracted and such loan is still subsisting. The company is required to obtain prior approval of IDBI for making any further investment.

As required by provisions of Section 372(2), the investment proposal must be passed at the Board meeting by unanimous decision of all the directors present at the meeting.

The company must enter the prescribed particulars of investment in a register of investment within 7 days of making the investment. [Section 372A(5)]

The company must also take into consideration the guidelines, if any, prescribed by the Central Government under Section 372A(7) of the Companies Act, 1956.

If the company has defaulted in payment of matured fixed deposits accepted from the public, the company has violated the provisions of Section 58A(3A) of the Companies Act, 1956. Section 372A(4) of the said Act prohibits the company from making any additional investment till such default is subsisting. The company must make good the default under Section 58A(3A) in order to give effect to the proposed additional investment.

# UNIT – 7: ARBITRATION, COMPROMISES, ARRANGEMENT, RECONSTRUCTIONS.

## Question 1

*Answer the following with reference to a scheme of amalgamation of companies explaining the relevant provisions of the Companies Act, 1956:*

*(i) Whether companies being amalgamated must be companies registered in India.*

*(ii) What is the majority required for approving the scheme of amalgamation in a meeting of members of a company called as per directions of the court? Is the scheme to be approved by preference shareholders?*

*(iii) When will the court order dissolution of the transferor company? (May, 2000)*

## Answer

### Amalgamation

(i) A scheme of compromise or arrangement may provide for amalgamation of companies under Section 394 of the Companies Act, 1956. Section 394(4)(b) defines the 'transferee' and 'transferor' companies. While the 'transferee company' does not include any company other than a company within the meaning of the Companies Act, 1956 the transferor company includes any body corporate whether a company within the meaning of the Companies Act or not. Hence the scheme of amalgamation may provide for transfer of foreign companies to Indian companies.

(ii) Majority in number representing three-fourths in value of members or class of members, as the case may be, present and voting either in person or by proxy, where proxies are allowed under the rules made under Section 643 must approve the scheme or arrangement providing for amalgamation of companies [Section 391(2)]. Any member who though present at the meeting, does not vote for or against, but remains neutral, is not to be taken into consideration.

As the expression used is 'member', not only holders of equity shares but also preference shareholders will have to be taken into account and the value of their shares be included or, if the meeting of holders of preference shares and equity shares are ordered by the court to be held separately, the three-fourths majority of each class will have to be ascertained separately.

(iii) The scheme may provide for the dissolution, without winding up, of any transferor company [Section 394(1)]. The Court shall not order dissolution of any transferor company unless the official liquidator has, on scrutiny of the books and papers of the company, made a report to the court that the affairs of the company have not been conducted in a manner prejudicial to the interests of its members or to public interest [Second proviso to Section 394(2)].

## Question 2

*M/s Over-ambitions Consultants Ltd. had, in course of its operations over the years, acquired various other ventures like plantations and tourism businesses. With a view to consolidate its core business activities, the management decided to hive off its non-core activities by demerging them with an associate company. Advise briefly the steps the management should take to achieve the purpose of demerger.* *(November, 2001)*

## Answer

M/s Over Ambitions Constructions Ltd. can achieve its purpose of hiving off its plantations and tourism business activity by demerger process by obtaining the approval of the High Court as provided in Section 394 of the Companies Act, 1956.

The following steps are to be taken by M/s Over Ambitions Consultants Ltd.,

(1) Prepare a draft scheme under which the properties and liabilities of the company comprising of plantations and tourism will be transferred to the associate company known as the transferee company. The consideration for the transfer must be stated in the scheme. (exchange ratio).

(2) An application under section 391(1) must be made to the Court for an order convening meetings of creditors and/or members.

(3) Notice of the meeting must be sent to members/creditors as per the court's directions, The notice must be accompanies by a statement under section 393(1) setting forth the terms of the compromise or arrangement and explaining its effects etc.

(4) To hold the general meeting and pass that resolution approving the draft scheme of amalgamation subject to confirmation of the high court. Resolution must be passed by a majority in number representing 3/4$^{th}$ in value of the members as required under section 391.

(5) To move the High Court jointly with transferee company for approval of the scheme and for the purpose to supply it with material facts [proviso to section 391(2)]. The court shall give notice of the application to the Central Government and shall take into consideration the representation, if any, made by the Government before passing any order. (Section 394A).

(6) On receipt of the court's order, file the certified copy of the order, with the Registrar of Companies within 30 days after the making of the order [Section 394(3)]. Otherwise, it would not be effective.

(7) To proceed to effect the scheme as per the scheme of amalgamation approved and the directions given by the High Court.

## Question 3

*With a view to boost the share values, the Central Government wants to amalgamate two Public Limited Companies into a single company. The Government and Public Financial Institutions have substantial interest in both the companies. The two companies are in the* *business of tourism and running several hotels which are not making good profits and consequently the share prices are depressed. Examine the powers of the Central Government to amalgamate the two companies in public interest.* *(May, 2002)*

## Answer

According to section 396 (1) of the Companies Act, 1956 where the Central Government is satisfied that it is essential in public interest that the two public limited companies should amalgamate the said Government may be order notified in the Official Gazette, provide for the amalgamation of the said two companies into a single company with such constitution; with such property, powers, rights interest, authorities and privileges and with such liabilities duties and obligations as may be specified in the order. This power of Central Government is notwithstanding anything contained in sections 394 and 395 of the Act that deal with amalgamation and reconstruction of companies. The Central Government has also the power to pass and provide for any consequential incidental and supplementary provisions in connection with the amalgamation including the confirmation by or against the transferee company of any legal proceedings pending by or against any transferor company. Any member or creditor who is aggrieved by the order of the amalgamation resulting in any financial loss is entitled to compensation which will be assessed by such authority as may be prescribed. Any person aggrieved by the order of compensation can file an appeal to the Company Law Board within 30 days of the publication of the order of compensation. Any order passed by the Central Government under this section can be made only where the draft copy thereof is sent to both the companies who have right to make an appeal and the same has been either disposed of or no appeal has been filed within the time provided thereof. The Central Government has duty to make such modifications in the light of any suggestions and objections received. All copies of the orders made under this section shall be laid before both the Houses of Parliament as soon as the same has been made.

## Question 4

*M/s FMCG Ltd. proposes to acquire the majority shares of M/s Slow Industries Ltd. by way of Amalgamation. Briefly enumerate the steps that should be taken by the Transferee Company to achieve the objective under the Companies Act, 1956.* *(November, 2002)*

## Answer

FMCG LTD., the transferee company should take the following steps to achieve the objective of acquiring the majority shares of Show Industries Ltd. They are:

(i) to check up whether the memorandum of association of the transferee company contains the power of amalgamation. If not, to take steps to alter the objects clauses suitably to acquire the said power.

(ii) to prepare the draft scheme of amalgamation including the exchange ratio and get it approved by a meeting of the Board of Directors.

(iii) to apply to the High Court for direction to convene the general meeting by way of Judges' summons as provided in Companies (Court ) Rules 1959.

(iv) to send notice of general meeting to every member alongwith the details of the scheme of amalgamation.

(v) to hold the general meeting and to pass the resolution approving the draft scheme of amalgamation subject to the confirmation of the High Court. The resolution is to be passed by a majority in number representing 3/4th in value of the members as required by Section 391.

(vi) to move the High Court for approval of the scheme.

(vii) on receipt of the court order, to file the certified copy thereof to the Registrar of Companies within 30 days after making the order. [Section 394(3)].

(viii) A copy of the order of the court to be annexed to every copy of the memorandum issued after the certified copy of the order has been filed with the Registrar.

(ix) To effect the scheme of amalgamation as per the scheme approved and the directions given by the High Court and to allot shares of the transferee company to the shareholders of transferor company i.e., Slow Industries Ltd.

## Question 5

*Overambitious Limited became sick. The shareholders and creditors of the company passed resolutions in meetings convened by the company approving a scheme of reconstruction of the company. The scheme provides for sale of vacant land and utilisation of the sale proceeds for payment of outstanding wages, sales tax dues and repayment of part of the loan taken from the bank. The unsecured creditors will have to forego 50% of their claims against the company and receive debentures for the balance amount. Advise the directors about the steps to be taken to give. effect to the proposed scheme inspite of objections raised by a few shareholders and creditors.* *(May, 2003)*

## Answer

### Scheme of compromise or arrangement

The scheme provides for sacrifice on the part of creditors as they have to forego 50% of the amount due to them and accept debentures for the balance amount. The scheme also provides for sacrifice by members but the nature of sacrifice has not been stated in the problem. The company is sick and therefore it can be considered as a company liable to be wound up within the meaning of section 390(a) of the Companies Act, 1956. The proposed scheme involves as a compromise or arrangement with members and creditors and it attracts section 391.

While the company or any creditor or member can make application to the court under section 391, it is usual for the company to make an application. On such application, the court may order that a meeting of creditors and/or members be called and held as per directions of the court (Section 391(1)).

Company must arrange to send notice of meeting to every creditor/member containing a statement setting forth the terms of compromise or arrangement explaining its effect. Material interest of directors, M.D, or manager of the company in the scheme and the effect of scheme on their interest should be fully disclosed (Section 393(1)(a)). Advertisement issued by the company must comply with the requirements of Section 393(2). At the meetings convened as per directions of the court majority in number representing at least ¾ in value of creditors/members present and voting (either in person or proxy if allowed) must agree to compromise or arrangement.

Thereafter the company must present a petition to the court for confirmation of the compromise or arrangement [Companies (Court) Rules-79].

The notice of application made by the company will be served on the Central Government and the Court will take into consideration representation, if, any made by the Central Government (Section 394A). The Court will sanction the scheme, if it is satisfied that the company has disclosed all material facts relating to the company e.g. latest financial position, auditor's report on accounts of the company, pendancy of investigation of company, etc.

Copy of Court order must be filed with the Registrar of Companies and then only the order will come into effect (Section 391(3)). Copy of court order must be annexed to every Memorandum of Association issued thereafter. (Section 391(4)).

If the court sanctions the scheme, it will be binding on all members and creditors even those who were dissenting (Section 391(2)). *(S.K. Gupta vs K.P. Jain A/R 1979 SC 374).*

## Question 6

*ABC Company Limited was amalgamated with and merged in XYZ Company Limited. Some workers of ABC Company Limited refuse to join as workers of XYZ Company Limited and claim compensation for premature termination of service. XYZ Company Limited resists the claim on the ground that their services are transferred to XYZ Company Limited by the order of amalgamation and merger and, therefore, the workers must join service of XYZ Company Limited and cannot claim any compensation. Examine whether the workers' contention is correct. (November, 2003)*

## 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. [(1940) 3All 2k 549],* 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 ABC Co. Ltd will succeed against XYZ Co. Ltd.

## Question 7

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

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

*(ii) 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.*

*(iii) 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.*

*(May, 2004)*

Answer

Amalgamation of a foreign company with a company registered under the Companies Act

According to Section 394(4)(b), 'transferor 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 (NCLT).

Statement under section 393: Every notice sent to members or creditors to convene a meeting pursuant to High Court's (NCLT) 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 ordain 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.

Paper 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 8

*HPC Ltd. for a number of years was in various types of business. In order to exit from its non core business, its management decided to hive off the business of Food Processing by demerging the said business with an associate company, namely, BCD Ltd. You are required to advise briefly, with reference to the provisions of the Companies Act, 1956, the steps the management should take to give effect to the proposed demerger (November 2005)*

## Answer

HPC Ltd. can demerge its food processing business with an associate company, BCD Ltd. By obtaining the approval of Company Law Tribunal (CLT earlier such power was vested in High Court and the High Court can continue to exercise such power till the CLT becomes fully functional) as provided in section 394 of the Companies Act, 1956 for this purpose, HPC Ltd. is required to take the following steps:

(1) HPC Ltd., known as “Transferor Company” for this purpose, has to prepare a scheme under which its properties and liabilities in respect of food processing business will be transferred to BCD Ltd., known as “Transferee Company” for this purpose. Such scheme must contain the consideration for transfer, known as “Exchange Ratio”.

(2) An application under Section 391(1) of the said Act must be made to CLT for an order convening meetings of creditors and/or members.

(3) Notice(s) of the meeting(s) must be sent to members/creditors as per the direction of CLT. Such notice must be accompanied by a statement under Section 393(1) of the said Act setting forth the terms of the compromise or arrangement and explaining its effect in general and in particular, the effect on the interests of Managerial Personnel.

(4) To hold the said meetings and pass necessary resolution approving the scheme subject to the confirmation of CLT. It may be noted that the resolution must be passed by a majority in number representing ¾ in value of the members/creditors as required under Section 391(2) of the said Act.

(5) Thereafter, HPC Ltd. is required to move to CLT jointly with BCD Ltd. for approval of the scheme disclosing all material facts relating to the Company. (Proviso to section 391(2). CLT as required under section 394A shall give notice to the Central Government and shall take into consideration any representation received from Central Government before passing any order on the application made to it for approval of the scheme.

(6) On receipt of CLT’s order, HPC Ltd. is required to file a certified copy of the order with the Registrar of Companies (ROC) for registration within 30 days after making of the order by CLT. [(Section 394(3)]. This is very important since the non-filing of the order with ROC would make the approval order ineffective.

(7) Lastly, to proceed to give effect to the scheme as approved by CLT in the manner as directed by it.

Question 9

*Clever, a Director of ABC Ltd. Made default in filing of Annual Accounts and Annual Returns with the Registrar of Companies for a continuous period of three financial years ending 31st March, 2005. Referring to the provisions of the Companies Act, 1956 examine the validity of the following:*

*(i) Whether X can continue to be a Director of ABC Ltd. And also EF Ltd., where he is a Director. Also state whether he can be reappointed as a Director in ABC Ltd. as well as EF Ltd.*

*(ii) Would your answer be still the same in case X is a nominee Director of a Public Financial Institution?*

*(iii) What would be your answer in case the defaulting company (i.e. ABC Ltd.) is a Private Company? (May 2006)*

Answer

In accordance with the provisions of Section 274(1)(g) a person shall not be capable of being appointed as director of a company if such person is already a director of a public company, which –

(A) has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999;

Provided that such person shall not be eligible to be appointed as a director of any other public company for a period of 5 years from the date on which such public company, in which he is a director failed to file annual accounts and annual returns under this clause.

Applying the above provisions as contained in Section 274(1)(g), answers to the given questions are:

1. In the given case, Mr. Clever, the Director of ABC Ltd. is disqualified to be appointed as Director of other public companies for a period of 5 years from the date on which default has been committed.
2. In the second case, Mr. Clever, as a nominee of the Public Financial Institution, shall not be disqualified to be appointed as Director for the reason that the Public Financial Institutions and are exempted from the provisions of Section 274(1)(g) of the Companies Act, 1956.
3. A director of a private company is not disqualified even if that company is a defaulter in filing return.

   Mr. Clever does not cease to be a director in ABC Ltd. and EF Ltd. immediately because Section 283 which provides for 'vacation of office' has not been amended. He can continue as a director till his term ends. But he can be reappointed in the defaulting company ABC Ltd., but not in EF Ltd. as the disqualification applies only to 'any other public company'.

## Question 10

*The scheme of amalgamation was approved by overwhelming majority of the members of the merging companies, namely, ABC Ltd. and XYZ Ltd. at meetings called as per directors of the court. When the scheme of amalgamation was awaiting sanction of the court, the exchange ration was questioned by a small group of dissenting shareholders of ABC Ltd. The exchange ratio was fixed by a firm of reputed Chartered Accountants. Examine with reference to the court rulings, whether the dissenting shareholders will succeed. (November 2006)*

## Answer

### Exchange Ratio

In this case, the exchange ratio was fixed by a reputed firm of Chartered Accountants and the scheme of amalgamation was approved by overwhelming majority of members of both the merging companies i.e., ABC Ltd. and XYZ Ltd.

Courts (now NCLT) leave the aspect of share valuation to the expert valuers and shareholders, unless the person who challenges the valuations satisfies the court that the valuation is grossly unfair, the court will not disturb the scheme *(Piramal Spg. & Weaing Mills Ltd. in re (1980) 50 Comp. Cas. 514 (Bom)).*

*In Micheer H. Mafatlal Vs. Mafatlal Industries Ltd. ((1996) 87 Coup. Cas 792 (SC))* it was held that the Company Court exercises supervisory jurisdiction in sanctioning the scheme. It has no appellate jurisdiction over commercial window of majority of members of that class.

Further in *Kiritbhai Hirala & Patel Vs. Arvind Intex ltd. (2000) 28 SCL 130 (Guj),* it was held that the High Court cannot exercise the jurisdiction of an appellate court and interfere with the wishes of the requisite number of shareholders only because valuation figure could have been different had another method of valuation was followed. However, the court should interfere, if it finds that the scheme approved by majority in unconscionable, unfair or illegal.

In view of the above court rulings, the dissenting shareholders are not likely to succeed unless they are able to satisfy the court that the valuation is grossly unfair especially when the exchange rates is fixed by a reputed firm of Chartered Accountants.

Section 394A of the Companies Act, 1956 requires the court to give notice of every application made to it under section 391 or 394 to the Central Government. The Court should able into consideration the representations, if any, made to it by that government before passing any order. The Court is, however, not bound to accept the views of the Central Government. Thus objection of the Central Government as regards valuation of shares was rejected by the court in the face of views explained by two independent chartered accountants *(M.G. Investments & Industrial Co. Ltd. Vs. New Sherrocle Spinning & Manufacturing Co. Ltd.* Thus, unless the Central Government establishes that the exchange ratio was unfair or inequitable and not in public interest, the court will refuse to interfere.

## Question 11

*X Ltd. and Y Ltd. are two listed companies engaged in the business of telecommunication. The companies are not making profits and as such their share's market prices have gone* *down. A substantial portion of their share capital is held by Central Government as well as some Public Financial Corporations. In order to increase the share value, the Central Government wants to amalgamate the aforesaid two companies into a single company.*

*Examine the powers of Central Government to amalgamate the two companies in public interest as per the provisions of the Companies Act, 1956. (May 2007)*

Answer

According to section 396 (1) of the Companies Act 1956 where the Central Government is satisfied that it is essential in public interest that two public limited companies should amalgamate the said Government may, by order notified in the Official Gazette, provide for the amalgamation of the said two companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order. This power of Central Government is notwithstanding anything contained in section 394 and 395 of the Act that deal with amalgamation and reconstruction of companies. The Central Government has also the power to pass and provide for any consequential, incidental and supplementary provisions in connection with the amalgamation including the continuation by or against the transferee company of any legal proceedings pending by or against the transferor company. Any member or creditor who is aggrieve by the order of the amalgamation resulting in any financial loss is entitled to compensation, which will be assessed by such authority as, may be prescribed. Any person aggrieved by the order of compensation can file an appeal to the Company Law Board (now tribunal) within 30 days of the publication of the order of compensation. Any order passed by the central government under this section can be made only where the draft copy thereof is sent to both the companies who have right to make an appeal and the same has been either disposed of or no appeal has been filed within the time provided thereof . The Central Government has duty to make such modifications In the light of any suggestions and objections received. All copies of the orders made under this section shall be laid before both the houses of parliament as soon as the same has been made.

Question 12

*HPC Ltd. for a number of years was in various types of business. In order to exit from its non-core business, its management decided to hive off the business of food processing by demerging the said business with an associate company, namely BCD Ltd. You are required to advise briefly, with reference to the provisions of the Companies Act, 1956, the steps the management should take to give effect to the proposed demerger. (May 2008)*

Answer

HPC Ltd. can demerge its food processing business with an associate company, BCD Ltd. by obtaining the approval of National Company Law Tribunal (NCLT) [earlier such power was vested in High Court and the High Court can continue to exercise such power till the CLT becomes fully functional] as provided in Section 394 of the Companies Act, 1956. For this purpose, HPC Ltd. is required to take the following steps:

1. HPC Ltd., known as "transferor Company" for this purpose, has to prepare a scheme under which its properties and liabilities in respect of food processing business will be

transferred to BCD Ltd., known as "Transferee Company" for this purpose. Such scheme must contain the consideration for transfer, known as "Exchange Ratio".

2. An application under Section 391(1) of the said Act must be made to NCLT / High Court for an order convening meetings of creditors and / or members.
3. Notice(s) of the meeting(s) must be sent to members/creditors as per the direction of NCLT/ High Court. Such notice must be accompanied by a statement under Section 393(1) of the said Act setting forth the terms of the compromise or arrangement and explaining its effect in general and in particular, the effect on the interests of Managerial Personal.
4. To hold the said meetings and pass necessary resolution approving the scheme subject to the conformation of NCLT/ High Court. It may be noted that the resolution must be passed by a majority in number representing 3/4th in value of the members / creditors as required under Section 391(2) of the said Act.
5. Thereafter, HPC Ltd. is required to move to NCLT / High Court jointly with BCD Ltd. for approval of the scheme disclosing all material facts relating to the Company. [Proviso to Section 391(2)], the High Court as required under Section 394A shall give notice to the Central Government and shall take into consideration any representation received from Central Government before passing any order on the application made to it for approval of the scheme.
6. On receipt of NCLT's / High Court's order, HPC Ltd. is required to file a certified copy of the order with the Registrar of Companies (ROC) for registration within 30 days after making of the order by NCLT / High Court [Section 394(3)]. This is very important since the non-filing of the order with ROC would make the approval order ineffective.
7. Lastly, to proceed to give effect to the scheme as approved by NCLT / High Court in the manner as directed by it.

## Question 13

*Sunrise Company Limited was merged with Moonlight Company Limited on account of amalgamation. Some workers of sunrise Company Limited refused to join as workers of Moonlight Company Limited and claimed compensation on the ground of premature termination of their services. Moonlight Company Limited resists the claim of the workers on the ground that their services have been transferred to Moonlight Company Limited in view of the order of amalgamation and merger and hence the workers must join the service of Moonlight Company Limited and cannot claim any compensation.*

*State the powers of the court about the matters that would be considered while sanctioning the scheme of amalgamation under the provisions of the Companies Act, 1956. Decide whether the contention of the workers is justified.* *(November 2008)*

## Answer

While sanctioning the scheme of amalgamation, the Court under Section 394 of the Companies Act, 1956 may make provision for all or any of the following matters:

(i) The transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company.

(ii) The allotment by the transferee company of any shares, debenture etc, in that company which under the scheme are to be allotted by that company to any person.

(iii) The continuation of any legal proceedings by or against any transferor and transferee company.

(iv) The dissolution, without winding up of any transferor company.

(v) The provisions to be made for any persons who within such time and in such manner as the court directs, dissent from the scheme of amalgamation.

(vi) Such incidental matters as are necessary to secure that the amalgamation shall be fully and effectively carried out.

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. (1940 (3) all 2k 549) the House of Lords clearly stated that the workers are not furniture and their services can not be transferred without their consent. Thus the contention of the workers of Sunrise Company Limited against the Moonlight Company Limited is correct and justified.

# UNIT – 8 : PREVENTION OF OPPRESSION MIS-MANAGEMENT

## Question 1

*(i) 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 Company Law Board for relief against oppression and mismanagement?*

*(ii) It is alleged by said member that the Directors of the Company have misused their position in making certain inter-corporate deposits which are against the interests of the company. Will the Company Law Board entertain application containing such allegation in the case of a private company? (May, 2000)*

## Answer

(i) 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:

- (i) Not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less; or
- (ii) 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 (i) 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 then one-tenth of the company's share capital.

(ii) As regards the proprietary rights in inter-corporate loans by a private company, they are not closely regulated by Company Law as in the case of public companies. Though the Board of Directors are the best to judge and to take a commercial decision in this regard, if it is *mala fide*, it should be looked into. Therefore the CLB can look into the allegation lodged by the member.

## Question 2

*A group of shareholders of Deceptive Duplicating Machines Ltd. filed an application before the Company Law Board alleging various acts of fraud and mismanagement by Mr. Unscrupulous, the Managing Director, and his associates. During the course of hearings before the CLB, it was contended on behalf of the company that the alleged transactions had taken place long ago and that the Managing Director, who was responsible for such actions had already been removed and that there is no case before the CLB to interfere in the working of the company. The contention of the Applicants on the other hand is that though the fraudulent nature of the transactions is a thing of the past and though the Managing Director had been removed, yet the management of the company is still controlled by the henchmen of Mr. Unscrupulous. Discuss the powers of the Company Law Board in support of your answer. (May, 2001)*

### Answer

The power available to the shareholders to seek relief or remedy from the acts of oppression and mismanagement as stated in Sections 397 and 398 of the Companies Act, 1956 can be invoked only when the affairs of the company are being conducted in a manner oppressive to shareholders or prejudicial to the interest of the company. Thus at the time of making an application, there must be a continuing course or conduct of the affairs of the company, which is oppressive to any shareholder or shareholders or prejudicial to the interest of the company. It is this course of oppressive or prejudicial conduct which can be made the subject matter of a complaint in the application to CLB. The forgoing provisions of law (Section 397 & 398) do not confer any power on the Company Law Board to set aside or interfere with past and concluded transactions between the company and the shareholders or third parties which are no longer continuing wrongs or to award a compensation in respect of such concluded transactions. (*Seth Ganpatram Vs. Shri Satyaji Jubilee Cotton and Jute Mills Company Ltd. (1964) 34 comp. Case 777*). However, there are two exceptions to the above said general rule. The first one is provided in Section 402(f) which enables CLB to set at naught transactions amounting to fraudulent preference effected within 3 months before the date of application under Sections 397 and 398, even though they are no long continuing wrongs. The second one is provided in Section 406 which enables the CLB, on an application under Sections 397 and 398, to book delinquent directors, managers and other office bearers of the company and to enforce the company's claim against them if they have misapplied or retained the company's money or have committed any misfeasance or breach of trust in relation to the company. It is necessary for the petitioners to establish that the matter complained falls under either of these exceptions and mere statement that the management of the Company still controlled by the Hechmen of Mr. Unscrupulous is not enough.

### Question 3

*A group of shareholders holding more than 15% of the paid-up capital of M/s Fraudulent Traders ltd. have filed a petition before the Company Law Board alleging various acts of illegal, invalid and irregular transactions entered into in the name of the company. Examine the merits of the petition in the light of judicial pronouncements made in this regard.*

*(November, 2001)*

### Answer

M/s Continuous Conflicts Ltd. is a company controlled by two family groups. The first family group has four directors, namely, Mr. A, Mr. B, Mr. C and Mr. D on the board of directors. The second family group has two representatives Mr. X and Mr. Y on the board. Because of internal family troubles, the first group, by virtue of its majority shareholding removed both Mr. X and Mr. Y as the directors of the company. Aggrieved by this action the second group is planning to move an application before the Company Law Board. You have been approached for advice. Advise as to the eligibility restrictions regarding filing the application and the chances of getting relief from the Company Law Board, assuming that there is no other material on record in support of oppression of the minority group.

## Question 4

*M/s Continuous Conflicts Ltd. is a company controlled by two family groups. The first family group has four directors, namely, Mr. A, Mr. B, Mr. C and Mr. D on the board of directors. The second family group has two representatives Mr. X and Mr. Y on the board. Because of internal family troubles, the first group, by virtue of its majority shareholding removed both Mr. X and Mr. Y as the directors of the company. Aggrieved by this action the second group is planning to move an application before the Company Law Board. You have been approached for advice. Advise as to the eligibility restrictions regarding filing the application and the chances of getting relief from the Company Law Board, assuming that there is no other material on record in support of oppression of the minority group (May, 2002)*

## Answer

The management of any company registered under the Companies Act, 1956 is based on the principle of majority rule and the voting power of every member depends upon the number of shares held by them. Thus one single individual holding the majority shares can overrule the views of the other members who may be more in numerical numbers but not in voting power. However, certain rights have been given to minority shareholders who complain that the affairs of the company are being conducted in a manner oppressive to any member or members. In such an event, the minority shareholders can apply to the Company Law Board for relief against oppression and mismanagement. The eligibility restriction for filing an application to the Company Law Board are contained in Section 399 of the Companies Act. According to the said section, the application to CLB can be made in the case of a company having share capital, by not less than one hundred members or not less than one-tenth of the total number of members whichever is less or members holding not less than one-tenth of the issued share capital provided, the applicants have paid all calls and other dues on their respective shares. In the case of a company not having the share capital, the application can be filed by members holding not less than one-fifth of the total number of members.

In the present case the majority group have removed the minority directors from the board. The election and removal of directors is the prerogative of the members and such an act cannot be per se treated as oppressive to the minority shareholders, unless there is an allegation of mismanagement to the detriment of the shareholders. The application under section 397/398 requires to prove oppressive conduct to their members in their capacity as members. Thus the minority group consisting of two directors Mr. X and Mr.Y will not be able to successfully prosecute the case against the majority directors in the absence of any material or record in support of oppression and mismanagement of the minority group.

## Question 5

*There are eight shareholders in M/s Supra Private Ltd. Mr. Shyam who is holding less than one-tenth of the Share Capital of the company seeks your advice whether he can apply to the Company Law Board for relief against oppression and Mismanagement. Advise.*

*(November, 2002)*

## Answer

### Petition to Company Law Board

Under Section 399 (1) (a) of the Companies Act, 1956, in the case of a company having share capital, the following members have right to apply to the Company Law Board under Section 397 or 398.

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

(b) Any number of members holding not less than one-tenth of the issued share capital of the company provided that the applicants have paid all calls and other sums due on their respective shares.

In the instant case, since there are eight share holders, as per (b) above, 10% of 8, i.e. 1 satisfies the condition laid down in section 399 mentioned above. In view of this Mr. Shyam can present a petition to the Company Law Board, regardless of the fact that he hold less than one-tenth of the Company's share capital.

Further, a single member can present a petition to the Company Law Board under section 401 of the Act, if authorised by the Central Government.

## Question 6

*A group of shareholders of Badwill Machineries Ltd. filed an application before the Company Law Board (CLB) alleging various acts of fraud and mismanagement by Mr. Bigfish, the Managing Director of his associates. During the course of hearing before the CLB, the authorised representative of the said company contended that the alleged transactions had taken place several years ago and the company has already removed the Managing Director, who was responsible for such transactions and hence there is no case before the CLB to interfere in the working of the company. Against the submissions on behalf of the company, the applicants submitted that although the fraudulent transactions were done in past and the Managing Director has been removed, but the company is still controlled by the persons, who are in league with the erstwhile Managing Director and are working as his henchmen.*

*State the merits of the applicants' arguments and the powers of the CLB. (November, 2003)*

## Answer

The power available to the shareholder to seek relief or remedy from acts of oppression and mismanagement as stated in section 397 and 398 of the Companies Act, 1956 can be invoked only when the affairs of the company are being conducted in a manner oppressive to the shareholders or prejudicial to the interest of the company. Thus at the time of making an application, there must be a continuing course or conduct of the affairs of the company, which is oppressive to the shareholders or prejudicial to the interest of the company.

It is this course of oppressive or prejudicial conduct which can be made subject matter of a complaint in the application to the Company Law Board (CLB). The provisions of sections 397 and 398 of the Companies Act, 1956 do not confer any power on the CLB to set aside or interfere with the past and concluded transactions between the Company and the shareholders or third parties which are no longer continuing wrongs or to award a compensation in respect of such concluded transactions *[Seth Ganpatram vs. Shri Satyaji Jubilee Cotton and Jute Mills Co. Ltd. (1964) 34 Company Cases 777].*

However, the above mentioned general rule is subject to following exceptions:

(i) As per clause (f) of section 402 of the Companies Act, 1956, the CLB can set aside any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under sections 397 and 398 of the said Act, even though they are no longer continuing wrongs.

(ii) As per provisions of section 406 read with Schedule XI to the Companies Act, 1956, the CLB, on an application made to it under sections 397 and 398 of the said Act, has power to book the delinquent directors, managers and other office bearers of the company and to enforce the company's claim against them if they have misplaced or retained the company's money or have committed any misfeasance or breach of trust in relation to the company.

In the light of the above legal position, it is necessary for the petitioning shareholders to establish that the subject matter of the complaint falls within the scope of any of the above mentioned exceptions and a mere allegation that the affairs of the company is still controlled by the persons who are in league with the erstwhile Managing Director and are working as his henchmen is not sufficient.

### Question 7

*The issued subscribed and paid-up share capital of ABC Nidhi Company Limited is Rs.10 lakhs consisting of 90,000 Equity shares of Rs.10 each fully paid up a nd 10,000 Preference shares of Rs.10 each fully paid up. Out of 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.*

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

*(May, 2004)*

### Answer

### Oppression and Mismanagement

Section 399 Companies Act, 1956 stipulates that the following members of a company shall have the right to apply under Section 397 or 398 in the case of a company having a share capital-

(1) not less than 100 members of the company or not less than one-tenth of the total number of members, whichever is less or.

(2) any member or members holding not less than one-tenth (10 per cent or more) of the issued share capital of the company, provided that the applicants have paid all calls and others sums due on their shares.

The language of Section 399 using the words 'members' and 'issued share capital' seems to suggest that preference shareholders are also eligible to make an application under section 397/398. On this case 450 members including the preference shareholders applied for relief under sections 397 and 398 and hence the number of members exceeds the prescribed minimum of 100 members, the petition is maintainable. [In this connection it is pertinent to note the language used in Section 408 is members of the company holding not less than one-tenth of the total *voting power*). In this case, the company is a Nidhi company, where persons having transactions with the company as depositors or borrowers allotted are generally preference shares.

It has been held in *Rajahmundry Electric Supply Corporation vs. A. Nageshwara Rao 26 Comp. (as 91(SC)* that validity of petition under Section 397 must be judged on the facts as they were on date of presentation and subsequent withdrawal of consent by some members does not affect the petition. Hence, even if the preference shareholders have subsequently withdrawn their consent, the petition is maintainable.

### Question 8

*Advise M/s Super Specialities 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 ordinary directors of the company;*

*(iii) Payment of remuneration to an ordinary director for rendering professional services; and*

*Payment of remuneration of Rs.40,000 per month to the whole time director of the company running in loss and having an effective capital of Rs.95.00 lacs. (May 2005).*

### Answer

(i) Under Schedule XIII, Part I, Paragraph (c) of the Companies Act, 1956, a person shall be eligible for appointment as Managing Director who has attained the age of 70 years where his appointment is approved by a Special resolution passed by the company in the general meeting. In that case, approval of the Central Government is not required.

(ii) Under Section 309(4)(b) of the Companies Act, 1956 ordinary directors may be paid commission if the company by special resolution authorise such payment not exceeding 1% of net profit, if the company has MD/WTD/Manager or upto 3% of the net profits in any other case. Further, under section 309(7) of the Act, Special resolution shall not remain in force for a period of more than 5 years at a time.

Second proviso to section 309(4) states that a company in general meeting may, with the approval of the Central Government, authorise the payment of such remuneration at a rate exceeding one per cent or, as the case may be, three per cent of its net profits.

Thus, in the present case, commission of 4% of net profits of the company per annum can only be paid to the ordinary directors with the approval of the Central Government

(iii) Under proviso to section 309(1) of the Act, any remuneration for services rendered to any director in any other capacity shall not be so included if-

(a) the services rendered are of a professional nature, and

(b) in the opinion of the Central Government, the director possesses the requisite qualification for the practice of the profession.

In that case, approval of the Central Government will not be required for payment of any remuneration to the concerned director.

(iv) In terms of section II of Part II of Schedule XIII of the Act, approval of the Central Government is not required for payment of monthly remuneration upto Rs.75,000/- in case of a company with effective capital of less than Rs.1 crore and having no profit or its profits are inadequate, to its managerial persons, provided -

(1) the payment of remuneration is approved by the Remuneration Committee;

(2) the company has not defaulted in repayment of its debts, including public deposits or debentures or interest payable thereon for a continuous period of 30 days in the preceding year before the date of such appointment.

Thus, in the given case, the company may pay the remuneration of Rs.40,000 P.M. to its WTD without approval of the Central Government subject to the above restrictions.

## Question 9

*The Central Government came into possession of certain facts and documents, which indicated that some of the managerial personnel of a Company concerned with the management of the affairs thereof are acting in a manner, which is not desirable and if allowed to carry on, it is likely to cause serious injury to the interest of the trade, industry and business to which the company pertains. You are required to state the circumstances and manner in which the Central Government can initiate the process of removal of managerial personnel under the provisions of the Companies Act, 1956.* *(November 2005)*

## Answer

As per provisions of Section 388B of the Companies Act, 1956, if in the opinion of the Central Government, there are circumstances suggesting:

(a) that any person concerned in the conduct and management of the affairs of a company is or has been in connection therewith guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or breach of trust; or

(b) that the business of a company is not or has not been conducted and managed by such person in accordance with sound business principles or prudent commercial practices, or

(c) that a company is or has been conducted and managed by such person in a manner which is likely to cause or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or

(d) that the business of a company is or has been conducted and managed by such person with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose or in a manner prejudicial to public interest.

Then, in any of the above circumstances the Central Government may state a case in the form of an application against the such person and refer the same to the Company Law Tribunal with a request that the Company Law Tribunal may enquire into the case and record a decision as to whether or not such person is a fit and proper person to hold the office of Director or any other office connected with the conduct and management of any company.

The Company Law Tribunal is empowered to record its decision under the provisions of Section 388D of the Companies Act, 1956 and such decision shall be recorded by it after concluding the hearing of the case in which such person shall join as the respondent.

Section 388E of the Companies Act, 1956 states that the Central Government shall, by order, remove from office any director or any other person concerned in the conduct and management of the affairs of a company, against whom a decision of the Company Law Tribunal under Section 388D has been recorded.

NOTE: Powers of the Company Law Board has been transferred to the National Company Law Tribunal by the Companies (Second Amendment) Act, 2002 and assented by the President of India on 13.01.2003. This will take effect from the date of full enforcement. Till then, powers being currently exercised by the Company Law Board shall continue to be exercised.

## Question 10

*Messrs Ahimsa Private Limited was incorporated in the year 2001 under the Companies Act, 1956 by 3 brothers, namely, Amit, Anil and Akhlesh. All the three were Promoter-directors named in the Articles of Association and subscribed for 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course, the company started earning substantial profits. Due to greed of money, the two brothers, namely, Amit and Anil, joined hands together to assume complete control of the company, leaving their brother, Akhlesh in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from 66 2/3% to 90%, while the shareholding of Akhelesh got reduced from the erstwhile 33⅓% to 10%. No notice of any Board Meeting was sent to Akhlesh, who was sidelined and was also removed as a Director.*

*Aggrieved by the decisions taken by; his two brothers at his back, Akhlesh seeks your advice for taking out appropriate proceedings before the court or judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filing his case.*

*(November 2006)*

Answer

Under Section 397 of the Companies Act, 1956 on an application by any member of a company, the Company Law Board (Tribunal as per amended provision which has not come into force) is of the opinion that –

(i) the company's affairs are being conducted in a manner which is prejudicial to public interest or in a manner oppressive to any member(s); and

(ii) to wind up the company would unfairly prejudice such member(s), but that otherwise the facts justify winding up of the company on just and equitable ground,

The CLB may, with a view to bringing to and end the mattes complained of, make such order as it thinks fit.

As per section 399, a member holding 10% shares is entitled to file such a petition.

In the present case, Mr. Akhlesh was holding 33⅓% shares in the company which is nothing but a quasi partnership and was participating in the management. By further allotment of shares in a clandestine manner and without the consent of Mr. Akhilesh, his shareholding was reduced to 10% while the shareholding of his brothers stood at 90%. This is a serious act of oppression of Akhlesh, a minority shareholder. On similar facts, it was held by Supreme Court in *Dale & Carrington Invt. Private Ltd. Vs. P.K. Prathpan, (2004) 122 Comp cases 175(SC)* that assuming meetings of board of directors did take place, the manner in which the shares were issued in favour of R without informing other shareholders about it and without offering them to any other shareholder, was totally mala fide and the sole object of R in this was to gain control of the company by becoming a majority shareholder. This was clearly an act of oppression on the part of R. The only relief that has to be granted in the present case was to undo the advantage gained by R through his manipulation and fraud. The allotment of all the additional shares in favour of R had to be set aside.

Section 397 protects the rights of shareholders and not as a director. It has, however, been held by CLB in a number of cases that in a family company like the present one, removal of the promoter–director is also an act of oppression.

In the facts and circumstances of this case, Akhlesh is advised to file a petition under Section 397 of the Act. Being a 10% shareholder he is entitled to file the petition, before the Principal Bench of Company Law Board at New Delhi. He may seek the following reliefs:

(i) the alleged allotment of further shares be declared null and void and set aside;

(ii) the alleged removal of the petitioner, Mr. Akhlesh be declared as null and void and set aside;

(iii) The Board of Directors be re-constituted with the petitioner and his two brothers and an independent person, as the Chairman of the board of directors to be appointed by the Company Law Board with casting vote;

(iv) the petitioner may be appointed as Managing director of the company having substantial powers of management.

## Question 11

*Messrs Ahimsa Private Limited was incorporated in the year 2001 under the Companies Act, 1956 by 3 brothers, namely, Amit, Anil and Akhlesh. All the three were Promoter-directors named in the Articles of Association and subscribed for 100 shares each in the company through Memorandum of Association. Thereafter, from time to time, further shares were allotted in proportion of one-third to each of them and in due course, the company started earning substantial profits. Due to greed of money, the two brothers, namely, Amit and Anil, joined hands together to assume complete control of the company, leaving their brother, Akhlesh in lurch. Both the brothers got further shares allotted to themselves, thereby their joint shareholding increased from 66 2/3% to 90%, while the shareholding of Akhelesh got reduced from the erstwhile 33⅓% to 10%. No notice of any Board Meeting was sent to Akhlesh, who was sidelined and was also removed as a Director.*

*Aggrieved by the decisions taken by; his two brothers at his back, Akhlesh seeks your advice for taking out appropriate proceedings before the court or judicial authority of competent jurisdiction. Also suggest the nature of reliefs he may claim while filing his case.*

*(November2006)*

## Answer

Under Section 397 of the Companies Act, 1956 on an application by any member of a company, the Company Law Board (Tribunal as per amended provision which has not come into force) is of the opinion that –

(i) the company's affairs are being conducted in a manner which is prejudicial to public interest or in a manner oppressive to any member(s); and

(ii) to wind up the company would unfairly prejudice such member(s), but that otherwise the facts justify winding up of the company on just and equitable ground,

The CLB may, with a view to bringing to and end the mattes complained of, make such order as it thinks fit.

As per section 399, a member holding 10% shares is entitled to file such a petition.

In the present case, Mr. Akhlesh was holding 33⅓% shares in the company which is nothing but a quasi partnership and was participating in the management. By further allotment of shares in a clandestine manner and without the consent of Mr. Akhilesh, his shareholding was reduced to 10% while the shareholding of his brothers stood at 90%. This is a serious act of oppression of Akhlesh, a minority shareholder. On similar facts, it was held by Supreme Court in *Dale & Carrington Invt. Private Ltd. Vs. P.K. Prathpan, (2004) 122 Comp cases 175(SC)* that assuming meetings of board of directors did take place, the manner in which the shares were issued in favour of R without informing other shareholders about it and without offering them to any other shareholder, was totally mala fide and the sole object of R in this was to gain control of the company by becoming a majority shareholder. This was clearly an act of oppression on the part of R. The only relief that has to be granted in the present case was to undo the advantage gained by R through his manipulation and fraud. The allotment of all the additional shares in favour of R had to be set aside.

Section 397 protects the rights of shareholders and not as a director. It has, however, been held by CLB in a number of cases that in a family company like the present one, removal of the promoter–director is also an act of oppression.

In the facts and circumstances of this case, Akhlesh is advised to file a petition under Section 397 of the Act. Being a 10% shareholder he is entitled to file the petition, before the Principal Bench of Company Law Board at New Delhi. He may seek the following reliefs:

(i) the alleged allotment of further shares be declared null and void and set aside;

(ii) the alleged removal of the petitioner, Mr. Akhlesh be declared as null and void and set aside;

(iii) The Board of Directors be re-constituted with the petitioner and his two brothers and an independent person, as the Chairman of the board of directors to be appointed by the Company Law Board with casting vote;

(iv) the petitioner may be appointed as Managing director of the company having substantial powers of management.

## Question 12

*60% shares of Indo-French Ltd. are held by French Group and balance by an Indian Group. As per articles of association of the company both groups had equal managerial powers. The relationship between the two groups soured and the operations of the company reached a deadlock. The Indian Group approached the Company Law Tribunal (Company Law Board till Company Law Tribunal becomes functional, referred to as CLB hereinafter) for action against the French Group for oppression. Based on these facts, you are required to decide, with reference to the provisions of the Companies Act, 1956 and/or the decided case laws, the following issues:*

*(i) Whether the contention of oppression against the French Group by the Indian Group is tenable?*

*(ii) What are the powers of the CLB in this regard?* *(May 2007)*

## Answer

(i) Section 397 of the Companies Act, 1956 deals with the remedy in a situation when the affairs of the company are being conducted in a manner oppressive to a shareholder or shareholders. This means that some of the shareholders must be in such a position that they can be oppressed by other shareholders or the management. In the present case a s given in the question, both the Indian Group and the French Group are equally strong and none is able to oppress the other. The situation stated in the question is a deadlock but it can not be termed as oppression. Since it is not a case of winding up of the company, the relief under the said section 397 is not available to the Indian Group. *[Gnanasambandam v. Tamilnad Transporters (Coimbators) p. Ltd. (1971) 41 Comp. Cas. 26]* In view of the position discussed, the contention of the Indian Group is not tenable.

(ii) The powers of the Company Law Tribunal (Company Law Board till National Company Law Tribunal becomes functional) referred to as CLB hereinafter) under the provisions of section 397 of the Companies Act 1956, are discretionary in character. Apart from the general powers envisaged therein, the CLB under section 402 (b) of the said Act, may order the purchase of the shares of one group by the other group. In the case of *Yashovardhan Saboo Vs. Groz Beckert Saboo Ltd. 1933 1 Comp. L.J. 20,* the presiding officer ordered the foreign group to buy out the shares of the minority group at the fair price with deadlock and the matters are not sorted out by any other means, an order for winding up of the company may also be made under the jest and equitable clause, *[Kishan Kumar Ahuja Vs. Suresh Kumar Ahuja]*. Thus, if the Indian Group of the French Group fail to buy out the shares of the other group, the CLB may order the winding up of the company.

## Question 13

*M/s. City Hospital Private Ltd. has two groups of Directors. A dispute arose between the two groups out of which one group controlled the majority of shares. A very serious situation arose in the administration of the company's affairs when the minority group ousted the lawful Board of Directors from the possession and control of the management of the company's factory and workshop. Books of account and statutory records were held by the minority group and consequently the annual accounts could not be prepared for two years. The majority group applied to the company law board for relief under sections 397 and 398 of the Companies Act. You are required to decide with reference to the provisions of the said Act, the following issues:*

*(i) Can majority of shareholders apply to the Company Law Board for relief against the oppression by the minority shareholders?*

*(ii) Whether Company Law Board can grant relief in such circumstances.* *(November 2007)*

## Answer

(i) The case started in the question relates to the provisions of sections 397 and 398 of the companies Act, 1956 with regard to remedy available to majority shareholders.

Where the majority is prevented from protecting itself by controlling the directors at general body meetings, the majority becomes an artificial minority entitled to claim protection under Section 397 and 398 *(V. Sebastean, Dr V City Hospital (Pvt.) ltd. (1985) 57 Comp. case 453 (Ker)]* Thus the remedy under Section 397 and 398 is confined not to an oppressed minority of the shareholders alone; an oppressed majority may also apply to the Company Law Board against their oppression from the side minority shareholders. In *Sindhri Iron Foundry (Pvt.) Ltd. Re (1963) 78 E. to N. 118*, issue and allotment of a number of shares in a company whereby an admitted majority of shareholders was reduced to a minority was struck down. While granting relief to a majority group, Mitra J observed in their case;

"If the Court (now the Company Law Board) finds that the company's interest is being seriously prejudiced by the activities of one or the other group of shareholders, that two different registered offices at two different addresses have been set up, that tow rival boards are holding meetings, that the company's business property and assets have passed into hands of unauthorized persons who have taken wrongful possession and who claim to be the shareholders and directors, there is no reason why the Court (now the company Law Board) should not make appropriate orders to put an end to such matters".

(ii) Relief by the Company Law Board: The Company Law Board may give relief if its is of opinion:

1. that the company's affairs are being conducted (a) in a manner prejudicial to public interest, or

   (b) in a manner oppressive to any member or members;

2. that the facts justify the compulsory winding up order on the ground that it is just and equitable that the company should be wound up;

3. that to wind up the company would unfairly prejudice the applicants.

On being satisfied about the above requirements, the Company Law Board may pass such order as it thinks fit with a view to bring an end to the matters complained of this provision would help salvage an otherwise sound concern which would have been, but for this principle, forced to into winding up.

## Question 14

*M/s Continuous Conflicts Ltd. is a company controlled by two family groups. The first family groups has four directors namely Mr. A, Mr. B, Mr. C and Mr. D on the Board of Directors. The second group has two representatives Mr. X and Mr. Y on the board. Both the groups hold shares in the company according to their directorships viz., the first group of 4 directors hold 67% of the share capital and the second group of 2 directors hold 33% of the share capital. Because of internal family troubles, the first group, by virtue of its majority shareholding removes both Mr. x and Mr. Y as the directors of the company.. Aggrieved by this action,, the second group Is planning to move an application before the Company Law Board .You have been approached for advice.*

*Advise as to the eligibility restrictions regarding filing the application and the chances of getting relief from the Company Law Board, assuming that there is no other material on record in support of oppression of the minority group.* *(November 2008)*

## Answer

The management of any company registered under the Companies Act, 1956 is based on the principle of majority rule and the voting power of every member depends upon the number of shares held by them. Thus one single individual holding majority shares can overrule the view of the other member who may be more in numerical numbers but not in voting powers. However certain rights have been given to minority shareholders who complained that the affairs of the company are being conducted in a manner oppressive to any member or members. In such an event the minority shareholder can apply to the Company Law Board (now Tribunal) for relief against oppression and mismanagement.

The eligibility restriction for filling an application to the Company Law Board (now Tribunal) is contained in Section 399 of the Companies Act, 1956. According to the said Section the application to Company Law Board (now Tribunal) can be made in the case of the company having share capital, by not less than 100 members or not less than $1/10^{th}$ of the total number of members whichever is less or members holding not less than $1/10^{th}$ of the issued share capital provided the applicants have paid all calls and other dues on their respective shares. In case of a company not having share capital, the application can be filed by members holding not less than $1/5^{th}$ of the total number of members.

In the present case the majority group has removed the minority directors from the board. The election and removal of directors is the prerogative of the members and such an act cannot be perse treated as oppressive to the minority shareholder, unless there is an allegation of mismanagement to the detriment of the minority shareholders. The application under Section 397/398 requires to prove oppressive conduct to their members in their capacity as members. Thus the minority group consisting of two directors Mr. X and Mr. Y will not be able to successfully prosecute the case against the majority directors in the absence of any material or record in support of oppression and mismanagement of minority group. They have, however the right to file the petition before the Company Law Board as they fulfil the requirements laid down in Section 399.

# UNIT – 9: COMPANY SECERETARY

## Question 1

*The Articles of Association of M/s Deep Company Ltd. provided that Mr. Ramesh Roy will be the First Secretary of the Company for a period of three years and shall draw a salary of Rs.30,000 per month. After six months of the appointment the company appointed another Secretary. Can Mr. Ramesh challenge the order of the Company? What is the Legal position? (November, 2002)*

## Answer

No, Mr. Ramesh Roy cannot challenge this order of the company. The first secretary of the Company may be named in the Articles. The person so named may be called upon to assist the promoters in all preliminary work. But a clause in the Articles naming the Secretary does not constitute a contract between the Secretary and the company. Articles constitute a contract between members and the company. Outsiders have nothing to do with the Article. Even if the articles say that Mr. Ramesh Roy shall be the first Secretary of the company for three years on a monthly salary of Rs. 30,000, Mr. Ramesh Roy will not a be able to sue the company for the directors appointing another person as secretary after incorporation of the Company.

Hence, the Secretary who has been acting pro-tem in the preliminary stages of the company's existence, whether named in the articles or not, must immediately after incorporation, get his appointment confirmed by a board resolution and should preferably enter into a separate service agreement with the promoters regarding his remuneration and guarantee of its payment.

## Question 2

*M/s BEF Ltd., a public limited company is having a paid up share capital of Rs.2.50 crores. Whether it is obligatory for the company to have a whole-time secretary? Will it make any difference, if the capital of the said BEF Ltd. was Rs.1.50 crores? If yes, what other formality would have to be complied by it under the provisions of the Companies Act, 1956.*

*(November, 2004)*

## Answer

Section 383A of the Companies Act, 1956 provides that every company having a paid up capital not less than the prescribed limit (presently the limit being Rs.2.00 crores) shall have a whole time secretary. The Secretary must be a member of the Institute of Company Secretaries of India.

In view of the provision of the said section 383A, the Company, namely, BEF Ltd is under statutory obligation to have whole time Secretary since its paid up capital exceeds Rs.2.00 crores. In case, the paid up capital of BEF Ltd is less than Rs.2.00 crores, it is not necessary for it to have whole-time secretary.

Since, its capital, as per second part of question, is Rs.1.50 crores, it is not required to have whole-time secretary.

However, the proviso to section 383A(i) of the Companies Act, 1956 requires that in case of a company having paid up share capital of Rs.10.00 Lacs or more, it has to file with Registrar of Companies, a certificate obtained from a Secretary in whole time practice. This certificate is called Compliance Certificate. This is to be attached to the Report of Board of Directors under Section 217 of the Companies Act, 1956. The certificate is to be filed with Registrar of Companies within 30 days from the date of holding of the Annual General Meeting each year.

## Question 3

*Mr. Adam, a 15% shareholder of a company and other shareholders have lost confidence in the Managing Director (MD) of the company. He is a director not liable to retire by rotation and was re-appointed as Managing Director for 5 years w.e.f. 1.4.2005 in the last Annual General Meeting of the company.*

*Mr. Adam seeks your advise to remove the MD after following the procedure laid down under the Companies Act, 1956.*

*(i) Specify the steps to be taken by Mr. Adam and the Company in his behalf;*

*(ii) Draft a suitable resolution to be passed for removal of MD;*

*(iii) Is it necessary to state reasons to support the resolution for his removal?*

*(November 2006)*

## Answer

(i) Under Section 284 of the Companies Act, 1956, a company may, by ordinary resolution, remove a director before the expiry of his tenure. For the purpose, special notice from a shareholder (Mr. Adam in the present case) shall be required to be given to the company for moving a resolution to remove a director. On receipt of notice, the company shall forthwith send a copy thereof to the director concerned (MD in the present case) and he shall be entitled to be heard on the proposed resolution at the meeting. Copy of the representation, if any, made by the director be also sent to all members of the company to whom notice of the general meeting is normally sent. In case, the representation is received too late, the same shall be read at the meeting. The representation need not be sent if the Company Law Board is satisfied that it will cause needless publicity for defamatory matter.

Under Section 190, special notice of the intention to move the resolution shall be given not less than 14 days before the meeting.

In the present case, if the AGM is due to be held, Mr. Adam may send the special notice 14 days before the AGM. Otherwise, he may request the company to convent EGM under section 169 for consideration of the special notice and resolution for removal of MD. He already holds more than 10% shares in the company.

Once the ordinary resolution is passed in the general meeting, MD will cease to be a director of the company and consequently MD of the company.

(ii) Mr. Adam may give special notice of his intention to move the following resolution, as ordinary resolution: "RESOLVED THAT Mr. ……………., Managing Director of the Company be and is hereby removed as a director of the company under Section 284 of the Companies Act, 1956 with immediate effect."

(iii) A statement of reasons is not necessary to support the resolution for removal of a director. *LIC vs. Escorts Ltd. (1986) 59 Comp. Cases 548(SC)*

# UNIT – 10 : WINDING-UP

## Question 1

*M/s XYZ Limited was wound up with effect from 15.3.2000 by an order of the court. Mr.A, who ceases to be a member of the company from 1.6.1999, has received a notice from the liquidator that he should deposit a sum of Rs. 5,000 as his contribution towards the liability on the shares previously held by him. In this context explain whether Mr. A can be called a contributory and whether he can be made liable and whether there is any limitation on his liability.* *(May, 2000)*

## Answer

Contributory is a term used in the case of winding up of a company. A contributory can be a past or present member and is liable to contribute to the assets of the company in the event of winding up. In the present case Mr. A ceased to be a member of the company when it went into liquidation from 15.3.2000. Thus Mr. A will be treated as a past member. He will not be required to contribute to the assets of the company if the following conditions are fulfilled:

(a) If Mr. A had ceased to be a member of the company for a period of one year or upwards before the commencement of the winding up. In this case since one year has not elapsed, Mr. A will liable to contribute to the assets of the company.

(b) If the debt or liability of the company was contracted or incurred after he ceased to be a member.

(c) If the present members are able to satisfy the contributions required to be made by them under the Act.

In any case, the liability of the past or present member cannot exceed the unpaid amount on the shares and if the shares are full paid up no contribution is required to be made by the members past or present [Section 426 of Companies Act, 1956].

## Question 2

*What are the steps to be taken for winding up in a case, where the company is solvent, but the business for which it was formed has been completed.* *(November, 2000)*

## Answer

In this case the company is proposed to be wound up as the business for which it was formed has been complied. As the company is solvent, the voluntary winding up can be member's voluntary winding up and for this purpose the following steps are to be taken:

(1) All the directors or atleast majority of directors have to make declaration at the meeting of Board of Directors that they have made full enquiry into the affairs of the company and they are of the opinion that the company has no debts at all or it will be able to pay all its debts within three years from the date of commencement of winding up proceedings [section 488(1) Companies Act, 1956]. Such declaration should be made within five

weeks preceding the date of general meeting where winding up petition is proposed to be passed.

(2) The declaration should be filed with Registrar of Companies before the date of general meeting. The declaration should be accompanied by report of auditors of the company giving profit and loss account for the period commencing from date upto which last accounts were prepared and ending with latest practicable date before the making of declaration. A balance sheet on that date should also be prepared. [Section 488(2)].

(3) Next, the company has to pass at its general meeting a resolution called 'resolution for voluntary winding up'. Ordinary resolution will do in this case, if the articles provide that the company is to be dissolved on completion of the business (section 484). Otherwise, special resolution is required.

(4) At this meeting or any meeting subsequent thereto, one or more liquidators are to be appointed and their remuneration should be fixed. (Section 490).

(5) After the resolution is passed, company must give notice of such resolution by advertisement within 14 days in Official Gazette and also in some newspaper circulating in the District where the registered office is situated. (Section 485).

(6) Under section 494, the company has to give notice of appointment of the liquidator to the Registrar of Companies.

(7) The voluntary winding up commences at the time when the resolution for voluntary winding up is passed. (Section 486).

## Question 3

*The High Court at Mumbai appointed the Official Liquidator as the Liquidator of Imprudent Engineering Company Ltd. Some of the creditors have brought to the notice of the Liquidator that though the company is in liquidation for the past several years, nothing worthwhile has been done to speed up the winding up and no documents have been filed to indicate the progress of Liquidation. Examine in this connection the nature and periodicity of returns required to be field by the Liquidator in terms of the provisions contained in the Companies Act.* *(May, 2001)*

## Answer

According to Section 462(1) of the Companies Act, 1956 read with Rule 298 of the companies (Court) Rules the Official Liquidator is required to fill the accounts of M/s Imprudent Engineering Company Ltd., with the Court twice a year, one made upto 31$^{st}$ March and the second upto 30$^{th}$ September, within 3 months of closing the accounts. The accounts should be drawn up in Form No. 144 of the Rules. Further according to Rule 302, the accounts should be audited by a Chartered Accountant appointed by the Court or if the Court so directs by the Examiner of the Local Fund Accounts of the State concerned. A copy of the accounts so filed by the Official Liquidator with the court is open to inspection by any creditor, contributory or any person interested.

Where the winding up is not concluded within one year after commencement, the official liquidator is required within 2 months after the expiry of the year and thereafter until the winding up is concluded, once every year to file his statement in the prescribed form No. 148 (Rule 311) in Court. A copy thereof shall also be filed with the Registrar (Rule 511).

## Question 4

*Reckless Constructions Ltd. has gone into liquidation, because of the inability of the company to pay its debts. During the course of winding up a proposal was put forward by the previous management to revive the working of the company through a scheme of arrangement between the company and its creditors. As per the scheme, all the creditors have to forego fifty per cent of their dues. The company approaches you for advice. Discuss the steps that have to be taken by the company in this regard.* *(May, 2001)*

## Answer

As per the provisions contained in Section 517 of the Companies Act, 1956 M/s Reckless construction Ltd. can enter into a scheme of arrangement with the creditors, even though the company is in liquidation. According to the said section, the scheme of arrangement will be binding on the company and its creditors provided it has been approved by a special resolution of the company and agreed to by three fourths in number and value of the creditors. Any creditor or contributory may, however, within three weeks from the completion of the arrangement appeal to the court and the court may amend., vary, confirm or set aside the arrangement. The company should take the following steps in this regard:

(i) to get the draft scheme of arrangement approved by the Board of Directors.

(ii) to apply to the Court for directions to convene the meetings of the members/ creditors.

(iii) to hold the general meeting and pass the required special resolution.

(iv) to move the High Court for approval of the scheme.

(v) on receipt of the court's order, to file the certified copy of the order with the Registrar of Companies.

## Question 5

*A listed Public Company was ordered to be wound up by the order of the Bombay High Court. While ordering the winding up, the Court ordered the Official Liquidator to submit a preliminary report to the Court as per the provisions contained in the Companies Act. State briefly the details to be given in the preliminary report of the Official Liquidator.* *(November, 2001)*

## Answer

As soon as the winding up order is received by the official Liquidator, a preliminary report is required to be submitted to the court. This report should be submitted as soon as the Liquidator receives the Statement of Affairs from the persons who were directors of the company at the time of winding up. There is a time limit of six months within which the official Liquidator is required to submit his preliminary report to the court.

The preliminary report should contain the following details:

(i) The amount of capital issued, subscribed and paid up.

(ii) The estimated amount of assets and liabilities giving separately (a) cash and negotiable securities; (b) debts due from contributories; (c) debts due to the company and securities, if any, available in respect thereof; (d) moveable and immovable properties belonging to the company; (e) unpaid calls.

(iii) If the company has failed, the causes of the failure.

(iv) The opinion of the Liquidator as to whether any further enquiry is desirable as to any matter relating to promotion, formation or failure of the company or the conduct of the business thereof.

The Official Liquidator has also the power to make a further report if in his opinion the company was formed with a view to commit a fraud or a fraud has been committed in respect of any matter which in his opinion is desirable to bring to the notice of the court.

## Question 6

*The Directors of M/s HIJ Company Ltd. desire to proceed for voluntary winding up of the company and hence they are required to File 'Declaration of Solvency'. Your advice is sought about the procedure to be followed for the said purpose. (November, 2002)*

## Answer

### Declaration of Solvency

Chapter III of part VII of the Companies Act, 1956 deals with "Voluntary winding up" of companies and in this relation section 488 of the said Act provides for filing of "declaration of solvency" on the part of the directors of the company when there is proposal for voluntary winding up of the company.

The analysis of Section 488 of the Companies Act, 1956 discloses that a declaration of solvency contains the following features -

1. It is declaration duly supported by an affidavit, verified by a competent authority.
2. The declaration is made by the directors or where there are more than two directors, by the majority of the directors.
3. A meeting of Board of Directors is required for the purpose.
4. There is recital on the part of the Directors that they have made full inquiry into the affairs of the company and
5. That they have formed opinion that the company has no debts or that if it will be able to pay its debt in full within a period not exceeding three years from the date of commencement of winding up as may be specified in the said declaration.

In order that the above declaration in valid, it should be made within five weeks immediately preceding the date of passing the resolution for winding up of the company and must be delivered to the Registrar before that date. Further, the said declaration should be accompanied by a copy of the auditors report on the profit and loss account of the company for the period commencing from the date of the last audited accounts upto a date practicable immediately before the date of the declaration and a balance sheet on the last mentioned date and also a statement of company's assets and liabilities as on the date of the declaration made out in accordance with the requirements laid down by clause (2) of section 488 of the Companies Act, 1956.

A false declaration of a solvency makes the directors, liable under clause (3) and (4) of section 488 of the Companies Act, 1956.

## Question 7

*By an order of the Court M/s ABC Limited was wound up with effect from 15.3.2002. Mr. Gupta, who ceased to be a member of the Company from 1.6.2001 received a notice from the liquidator to deposit a sum of Rs.15,000 as his contribution towards the liability on the shares previously held by him. Mr. Gupta seeks your opinion about his liability. (November, 2002)*

## Answer

### Liability of Contributory

'Contributory' is a term used in the case of winding up of a company. A Contributory can be past or present member and is liable to contribute to the assets of the company in the event of winding up.

In the instant case, Mr. Gupta ceased to be a member of the Company when it went into liquidation from 15.3.2002. Thus, Mr. Gupta will be treated as a past member. He will not be required to contribute to the assets of the company if the following conditions are fulfilled:

(1) If Mr. Gupta had ceased to be a member of the company for a period of one year or upwards before the commencement of the winding up. In this case, since one year has not elapsed, Mr. Gupta will be liable to contribute to the assets of the company.

(2) If the debt or liability of the company was contracted or incurred after he ceased to be a member.

(3) If the present members are able to satisfy the contributions required to be made by them under the Act.

In any case, the liability of the past or present member cannot exceed the unpaid amount on the shares and if the shares are fully paid up, no contribution is required to be made by the members past or present.

## Question 8

*MIs XYZ Limited is being wound up by the Court. The official liquidator after realisation of the assets has an amount of Rs. 56,00,000 at his disposal towards payment of creditors of the company. Details of creditors are as under:*

| | | Rs. |
|---|---|---|
| *(i)* | *Dues to secured creditors* | *40,00,000* |
| *(ii)* | *Dues to workers* | *30,00,000* |
| *(iii)* | *Taxes and duties payable to Government authorities* | *4,00,000* |
| *(iv)* | *Unsecured creditors* | *80,00,000* |

*Since the available amount is insufficient to meet the claims of all the creditors, explain the procedure to be followed for payment of dues as provided in the Companies Act, 1956, assuming that the company has created a charge on all the assets of the company in favour of the secured creditors.*

## Answer

Section 530 of the Companies Act, 1956 lays down the procedure for payment of debts out of available funds with the Official Liquidator. However, Section 529A provides for overriding of the preferential payments as mentioned in Section 530. According to Section 529A, not withstanding anything contained in other provisions of this Act or any other law for the time being in force, in the winding up of a company ,

(a) workmen's dues; and

(b) debts due to secured creditors, shall be paid in priority to all other debts.

The above debts have to be paid in full unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

In this light of the legal provisions explained, the funds available with the Official Liquidator are not even sufficient to meet fully the dues payable to secured creditors and workers. Thus, tax dues to the tune of Rs.4,00,000 payable to Government authorities will not get any payment even though they are to be considered as preferential payments as per section 530 of the Act. The secured creditors dues and workmen dues will get abated equally and they get Rs. 32 lakhs and Rs.24 lakhs respectively. The other creditors will get nothing.

## Question 9

*A Company created a floating charge of its Current Assets in favour of a Bank to secure a Current Account, which was in debit of Rs.5 lakhs and also to secure further Working Capital facilities provided by the bank. The charge created on 1st January, 2003 was duly registered with the registrar of Companies. The bank advanced Rs.10 lakhs subsequent to the creation of charge. The company has gone into voluntary liquidation pursuant to a resolution passed on 1st September, 2003. Examine the validity of the floating charge in case it is a creditors' voluntary winding up, but there is no fraudulent preference. Would your answer be different, if it was a member's voluntary winding up?* *(May, 2004)*

## Answer

### Effect of floating charge in Winding-up

Section 534, Companies Act, 1956 deals with effect of floating charge. Where a company is being wound up, a floating charge created on the assets of the company within 12 months prior to the commencement of winding up will be valid only to the extent of money advanced at the time of creating charge or subsequent to creating charge, plus interest at 5% or such other rate notified by the Central Government in this behalf. In other words, floating charge created for pre-existing debt will be invalid. This section does not, however, affect companies which can prove that after the creating of the floating charge, they were in quiet solvent condition.

The voluntary winding up commences at the time when the resolution for voluntary winding up is passed by the company (Section 486).

Members' voluntary winding up is permissible only when the company is solvent and declaration of solvency is made (Section 488). If declaration of solvency is not made, the winding up would be termed as creditors' voluntary winding up.

In this case, the floating charge was created within 12 months preceding the commencement of winding up and hence the provisions of Section 534 are attracted. In the question, there is no fraudulent preference and hence it is not necessary to examine the applicability of Section 531. In the case of creditors' voluntary winding up, the company cannot be considered as solvent. In view of the position explained above the floating charge is valid only to the extent of advances made subsequent to the creation of charge i.e. Rs.10 lakhs plus interest at 5%.

In the case of members' voluntary winding up, the position is different. As the company is solvent, the floating charge is valid for the entire debt of Rs.15 lakhs including the pre-existing debt of Rs.5 lakh (at the time of creation of charge).

## Question 10

*A majority of the Board of Directors of M/s Bulk Drugs Ltd. have reasons to believe that some of the business activities carried on in the name of the company are prima facie against the interests of the company and its members. They want the matter to be referred to Central Government in the form of an application for appointment of an Inspector to reach to the bottom of the matter and unveil the truth. In this connection you are required to:*

*(i) State the steps required to be taken with reference to the provisions of the Companies Act, 1956.*

*(ii) Draft an application to be made to the Central Government* *(May2005)*

## Answer

The case stated in the question relates to the provisions of section 237 of the Companies Act, 1956 dealing with appointment of Inspectors to investigate the affairs of a company and to report thereon.

Clause (a) of the said section provides that Central Government shall appoint one or more persons as inspectors to Investigate the affairs of a company if the company by way of a special resolution or the court by an order declares that the affairs of the company should be investigated.

Clause (b) of the said section states that the Central Government may appoint an Inspector if in the opinion of the Company Law Board (Now Tribunal), there are circumstances suggesting that:

(i) the business of the company is being conducted with intent to defraud the creditors, members or any other person

(ii) the person concerned in the formation of the company or the management of its affairs has been guilty of fraud, misfeasance or misconduct towards the company or its members.

(iii) the members have not been given all the information with respect to its affairs. (Central Government can on its own order investigation even if there is no order from the Company Law Board).

In view of the above stated legal provisions, M/s Bulk Drugs Ltd. have following options to get the company's affairs investigated by an Inspector appointed by Central Government under the said section 237:

(i) To get a special resolution passed in a general meeting and apply to the Central Government.

(ii) To approach the court with a petition requesting it to direct the Central Government for the desired purpose.

(iii) To approach the Company Law Board (Now Tribunal) with a petition requesting it to express its opinion on the affairs of the company and then bringing to the notice of the Central Government.

It may, however be noted that while in first two options, the Central Government is bound to act as per provisions of the said section 237 but it has discretionary powers in the case of the third options.

DRAFT APPLICATION

BULK DRUGS LTD.

(Address)

Dated_______________

To,
The Secretary,
Department of Company Affairs,
(Address)
New Delhi.

Sir,

At an Extra ordinary General Meeting of the shareholders of the company held on____(date)________ at the registered office of the company, the members have unanimously passed the following Special Resolution:

"RESOLVED that the Central Government be approached to appoint an Inspector pursuant to the provisions of section 237 of the Companies Act, 1956 to carry out an investigation whether the following activities carried out in the name of the company are or are not in the interest of the company or its members:

1. Granting of Interest-free Loans to certain parties
2. Purchase of Raw materials without complying with the procedure laid down by the Drug Controller."

"Resolved further that Mr._______________, the Secretary of the Company be and is hereby authorised to do the needful in the matter."

It is, therefore, prayed that the Central Government be pleased to appoint, pursuant to section 237 of the Companies Act, 1956, an Inspector to investigate the affairs of the Company regarding the matters mentioned in the Special Resolution quoted above and communicate its decision to the company.

The Challan evidencing the payment of prescribed fee as per Companies (Fees on Application) Rules, 1999 and other papers and documents as required by rules are enclosed.

Yours faithfully,

For BULK DRUGS LTD.

Secretary

## Question 11

*The official liquidator of ABC Limited (in liquidation) instituted misfeasance proceedings under section 543 of the Companies Act, 1956 against 'A', a director of the company in liquidation. During the pendancy of misfeasance proceedings 'A' died.*

*What is meant by Misfeasance ? Is it possible for the official liquidator to implede the legal representatives or 'A' and continue the proceeding against them ? (November 2006)*

## Answer

### Misfeasance

The term 'misfeasance' has not been defined in the Companies Act, 1956. It can be considered as an act or omission in the nature of breach of trust in relation to the company which causes losses or injuring to the company. Although loss to the company has not been expressely stated in Section 543 nevertheless such 'loss' has to be implied in case of misapplication or retainer. Only such an act of misfeasance as results in the loss to the company will fall within the ambit of section 543.

As regards the second question (ii) in case of death of the directors, the Supreme Court held that the proceedings commenced against the delinquent director of a company liquidation under section 543 can be continued after his death against his legal representatives and the amount declared to be due in such misfeasance proceeding can be realized from the estate of the deceased on the hands of his legal representatives. The Court further held that the legal representatives would not, however, be liable for any sum beyond the value of the estate of the deceased in their hands *(Official Liquidator, Supreme Bank ltd. V.P.A. Tendolkar (1973) 43 Comp. (Case 382) (Official Liquidator vs. Parthasarthy Sinha (1983) 53. Comp. Case (SC) (3c))*. Hence the misfeasance proceeding can be continued against the legal representatives of A.

## Question 12

*Worthless Ltd. has gone into liquidation because of the inability of the company to ay its debts. During the course of winding up, a proposal was put forward by the previous management to receive the working of the company through a scheme of arrangement between the company and its creditors. As per the scheme, all the creditors have to forego fifty percent of their dues. Some of the creditors have voiced their opposition to the said scheme. The company approaches you for advice. State the steps that have to be taken by the company in this regard.* *(November 2007)*

## Answer

As per Section 517

(1) any arrangement entered into between a company about to be, or in the course of being would up and its creditors shall, subject to the right to appeal under this section, be binding on the company and on the creditors if it is sanctioned by a special resolution of the company and acceded to by three-fourths in number and value of the creditors.

(2) any creditor or contributory may, within three weeks from the completion of the arrangement, appeal to the court (now Tribunal) against it and the (now tribunal) may thereupon, as it thinks just, amend, vary, confirm or set aside the arrangement.

Thus, the company may enter into a scheme of arrangement with the creditors by the procedure given below:

The draft scheme of arrangement shall be considered and approved by the board of director.

The company shall apply to the court for directions to convene the meetings of the members and creditors

A general meeting of the company shall be held and the special resolution approving the scheme of arrangement shall be passed.

A meeting of creditors shall be held whereat the scheme shall be agreed to by ¾ in number and value of the creditors. The company shall approach the court (Tribunal) for approval of the scheme.

On receipt of the courts (Tribunal) order, the company shall file a certified copy of the courts (Tribunal) order with the registrar.

Question 13

*M/s. Info-tech Overtrading Ltd. was ordered to be wound up compulsory by an order dated 15th October, 2007 of the Delhi High Court. The official liquidator who has taken control for the assets and other records of the company has noticed the following:*

*(i) The Managing Director of the company has sold certain properties belonging to the company to a private company in which his son was interested causing loss to the company to the extent of Rs. 50 lakhs. The sale took place on 0th May, 2007.*

*(ii) The company created a floating charge on 1st January, 2007 in favour of a private bank for the overdraft facility to the extent of Rs. 5 crores, by hypothecating the current assets viz., stocks and book debts.*

*Examine what action the official liquidator can take in this matter. Having regard to the provisions of the Companies Act, 1956. (November 2007)*

Answer

The official liquidator can invoke the provisions contained in Section 531 of the companies Act, 1956 to recover the sale of assets of the company. According to Section 581, any transfer of property, movable or immovable made within 6 months before the commencement of winding up will be deemed to be a fraudulent preference and hence invalid in the eyes of laws. Since in the present case, the sale of immovable property took place on 10th May, 2007 and the company went into liquidation on 15th October, 2007 i.e., within 6 months before the winding up of the company and since the sale has resulted in a loss of Rs. 50 lakhs to the company. The official liquidator will be able to succeed in proving the case under Section 531 by way of fraudulent preference as the property was sold to a private company in which the son of the ex-managing was interested.

According to Section 534 of the Companies Act, any floating charge created within 12 months of the commencement of the winding up will be treated s invalid unless it is proved that the company immediately after the creation of charge was solvent. In the present case it may be difficult for the Bank, the chargeholder to prove that the company was solvent after the creation of the floating charge. The charge holder i.e., the Bank is however, entitled to recover from the company. The amount advanced alongwith 5% interest. Further preferential debts under Section 530 will have priority over debts secured by a floating charge. The official liquidated may thus prove that the floating charge created by the company is invalid.

*Question 14*

*OGC Ltd. was a supplier of Raw Materials to SAM Ltd., which could not make payment to OGC Ltd. owing to huge losses and financial constraints. Ultimately, SAM Ltd, went into liquidation and Official Liquidator was appointed. OGC Ltd. filed a suit for recovery of its dues. The Court awarded a decree in favour of OGC Ltd. Armed with the Court's decree, OGC Ltd. approached the Official Liquidator to pay the amount to it in preference over dues of the workmen. The workmen protested the demand of OGC Ltd. and contended that their dues rank pari passu with the Secured Creditors and will override all other claims of other creditors even where a decree has been passed.*

*You are required to ascertain the validity of the argument of the workmen in the light of the provisions of the Companies Act, 1956 and the decide cases on the subject. (May 2008)*

## Answer

The problem given in the question is covered by the provisions of Section 529A of Companies Act, 1956 read with Sections 529 and 530 of the said Act. The effect of combined reading of these sections is that the workmen of the company become secured creditors by operation of law to the extent of the workmen's dues and are entitled to proportional payment along with other secured creditors. If there is no secured creditor then the workmen of the company become unsecured preferential creditors under the said Section 529A to the extent of workmen's dues. The purpose of the said section 529A is to ensure that the workmen should not be deprived of their legitimate claims on the event of the liquidation of the company and the assets of the company would remain charged for the payment of workmen's dues and such charge will be pari passu with the charge of other secured creditors. There is no other statutory provision overriding the claim of the secured creditors except the said Section 529A.

Thus under the said Section 529A, the dues of the workmen and debt due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues.

Thus, the law is very much clear in this respect and the Hon'ble Supreme Court of India held in the case of UCO Bank [(1994) 81 Comp. Case 780] that the provisions of Section 529A of the Companies Act, 1956 will override all other claims of the creditors even where a decree has been passed by a court.

In view of the above stated legal position, the contention of the workmen of SAM Ltd. is valid and the Official Liquidator will have to pay their dues as provided in Section 529A of the Act.

## Question 15

*Mars India Limited, a company incorporated under the Companies Act, 1956 is being wound up by the court. After realization of the assets of the company, the official liquidator has an amount or Rs. 70,00,000 at his disposal towards payment of creditors of the said company. The details of creditors are as follows:*

| | | |
|---|---|---|
| *(i)* | *Unsecured creditors* | *50,00,000* |
| *(ii)* | *Taxes and duties payable to Government* | *5,00,000* |
| *(iii)* | *Dues to workers* | *30,00,000* |
| *(iv)* | *Dues to secured creditors* | *40,00,000* |

*The available amount with the liquidator, obviously, is not sufficient to meet the claims of all the creditors. Moreover, the company had already created a charge on all the assets of the company in favour of the secured creditors. Explain the procedure to be followed by the liquidator for payment of dues as provided in the Companies Act, 1956. (November 2008)*

## UNIT – 11 : GENERAL PROVISIONS

### Question 1

*XYZ Limited decided to terminate the services of Mr. X, who was employed as sales manager. It is apprehended by the company that the sales manager may not vacate the company's flat at Bombay. What action can be taken by the company under the Companies Act to regain possession of the flat? Is it necessary take such action under the Companies Act before terminating the services of Mr. X? Will it make any difference if the flat is not owned by the company but taken on lease? (May, 2000)*

### Answer

**Wrongful withholding of property:** The company can take action under Section 630 of the Companies Act, 1956 if the sales manager refuses to vacate the residential accommodation provided by the company.

According to section 630, it is an offence if any officer or employee of a company (a) wrongfully obtains possession of any property of a company or (b) having any such property in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by the Act and such an offence is punishable with fine which may extend to Rs. 1,000 [Section 630(1)]. Further, the Court trying the offence may also order such officer or employee to deliver to the company, any such property wrongfully obtained or wrongfully withheld, within a time fixed by the Court. Non-compliance with the court's order is an offence punishable with imprisonment for a term which may extend to two years [Section 630(2)].

So the company can file a complaint under section 630 as it provides speedy relief to the company.

Though the expression used in section 630 is not 'past or present officer or employee', it has been held by the Supreme Court that the term 'officer or employee' in Section 630 applies not only to existing officers or employees of a company but also to past officers or employees if such officer or employee either (a) wrongfully obtains possession of any property of the company or (b) having obtained such property during the course of his employment withholds the same after the termination of his employment *[Baldev Krishna Sahi v. Shipping Corporation of India Ltd. (1988) 63 comp. Cases 63-1].* In view of this Supreme Court's decision, it is possible to initiate action under section 630 even after terminating the services of Mr. X.

It is not necessary that the property in question should be actually owned by the company. Even if the company exercises only a leasehold right, the provisions of Section 630 can be involved *[P.V. George v. Jayems Engineering Co. (P) Ltd. (1990) 2 Comp. LJ 62 (Mad.)]*.

### Question 2

*On the basis of the information given below, advise M/s XYZ Ltd. about the provisions applicable for the appointment of Auditors.*

| | |
|---|---|
| *Date of Incorporation* | *3.10.2002* |
| *Date of Receipt of Certificate of Commencement of Business* | *18.10.2002* |

| | *Nominal value of Equity shares held (Rs. In Lakhs)* |
|---|---|
| *Uttar Pradesh Government* | *11,600* |
| *Central Government* | *8,000* |
| *Bharat Heavy Electricals Ltd. (A Corporation controlled by the Central Government)* | *8,000* |
| *Private Sector Companies* | *8,800* |
| *Indian Mutual Funds* | *4,000* |
| *Foreign Financial Institutions* | *4,000* |
| *Individual Members* | *3,600* |
| *Total* | *48,000* |

*(November, 2002)*

## Answer

On the basis of the information given in the question the following is the share holding pattern in respect of XYZ Ltd.

| | *Percentage* | *Nominal Value of Share (in Lakh Rs.)* |
|---|---|---|
| Uttar Pradesh Government | 24.1 | 11,600 |
| Central Government | 16.7 | 8,000 |
| Bharat Heavy Electricals (BHEL) | 16.7 | 8,000 |
| | 57.5 | 27,600 |

Section 619 B(c) of the Companies Act, 1956 inter alia provides that provisions of Section 619 shall also apply to companies in which not less than fifty one percent of the paid-up share capital is held by the Central Government, one or more State Governments and one or more Government Companies though such companies themselves are not government companies. Thus the auditor of such companies can be appointed only by the comptroller and Auditor General of India as per Section 619. In the case of XYZ Ltd., 57.5% of the share capital is held by the combination of Central Government, the State Government of Uttar Pradesh and Bharat Heavy Electrical Ltd. (BHEL), a (Government company). Thus the appointment of the auditors of XYZ Ltd. will be regulated by the provisions of Section 619 and accordingly the auditors can be appointed by the Comptroller and Auditor General of India.

## Question 3

*Examine with reference to the provisions of the Companies Act, 1956 whether the following companies can be treated as foreign companies:*

*(i) A company incorporated outside India having a share registration office at Mumbai.*

*(ii) Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.* *(May, 2003)*

## Answer

"Foreign company" as per Section 591 of the Companies Act 1956, means a company incorporated outside India but having a place of business in India. Accordingly, to qualify as 'foreign company' a company must have both the following features:

(a) it should be a company incorporated outside India; and

(b) it should have a place of business in India.

As to what amount to having a place of business in India, Section 602 (e) provides that the expression 'place of business' includes a share transfer or share registration office.

Thus a company incorporated outside India having a share registration office at Mumbai is a foreign company.

But, the company incorporated in Singapore for the purpose of carrying on business in Singapore is not a foreign Company. Its incorporation by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India.

## Question 4

*Sunflow Limited decided to terminate the services of Mr. Ram, who was employed as Sales Manager. However, the company feels that the Sales Manager may not vacate the company's flat at Mumbai. What action can be taken by the company under the Companies Act, 1956 to regain possession of the flat? Is it necessary to take such action under the Companies Act before terminating the services of Mr. Ram? Will it make any difference, if the flat is not owned by the company, but taken on lease?* *(November, 2003)*

## Answer

The Company can take action under Section 630 of the Companies Act, 1956 if the Sales Manager refuses to vacate the premises provided by the company. According to Section 630, it is an offence if any officer or employee of a company:

(a) Wrongfully obtains possession of any property of a company or

(b) Having any such property in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the Articles and authorized by the Act and such an offence is punishable with fine upto Rs.10,000/-. Further, the court may also order such officer or employee to deliver to the company. Any such property wrongly obtained or wrongly withheld within a tune fixed by the court. Non-compliance of such an order is an offence punishable with imprisonment upto two years [Section 630(2)].

So the company can file a complaint under Section 630 as it provides speedy relief.

It has been held by the Supreme Court that the term 'officer or employee' in section 630 applies to both existing and past officers or employees if such officers or employees either (a) wrongfully obtain possession of any property if the company or (b) having obtained such property during the course of employment withhold the same after termination of employment. *[Baldev Krishna Sahi vs. Shipping Corporation of India Ltd (1988)].* It is, therefore, possible to initiate action even after termination of services of Ram.

It is not necessary that the property in question should be owned by the company. Even if the company exercises only a leasehold right, the provisions of section 630 can be invoked *[P.V. George vs. Jayems Engineering Co. (P) Ltd. 1990].*

## Question 5

*Super Chemicals Private Limited has discontinued its business since 1992. Its entire capital has been lost. It has some liabilities, but negligible assets. The company has been regular in filing annual Returns and Balance Sheets. The Directors propose to apply to the Registrar of Companies for striking the name of the company under Section 560 of the Companies Act, 1956 on the ground that it is a defunct company.*

*State the circumstances under which the name of the company can be struck off under Section 560 of the Act and the steps to be taken by the Directors of the Company to get the name of the company struck off.* *(November, 2003)*

## Answer

### Striking off defunct company

Where the Registrar of companies has reasonable cause to believe that a company is not carrying on business or in operation, he shall send to the company by post a letter inquiring whether the company is carrying on business or in operation (Section 560(1). If no reply is received from the company within one month, Registrar will send another letter to the company by registered post [Section 560(2)].

If the Registrar either receives an answer from the company to the effect that it is not carrying on business or in operation or does not receive any reply from the company after second letter, the Registrar will publish a notice in official Gazette that the name of the company will be struck off and company dissolved, unless cause is shown to the contrary within 3 months from the date of notice. [Section 560(2) and (3)].

If no reply is received or no cause is shown within 3 months, Registrar will publish notice in Official Gazette that the company's name has been struck off. Company shall stand dissolved from the date of publication of Official Gazette [Section 560(5)].

This power can be exercised by Registrar even in the case of company being wound up, if he has reasons to believe that no liquidator is acting or the company is completely wound up or any returns required to be made to Registrar have not been made for 6 months [Section 560(4)].

Hence a defunct company can be struck off from the Register of Companies by the Registrar by following the procedure laid down in Section 560.

However, the company in this case, which is admittedly not carrying on any business since 1992 must follow the procedure laid down by Department's Circular No. 9/7/83-CL III dated 17.2.1987 to enable the Registrar of Companies to remove the name of the company under Section 560.

The company should make an application to the Registrar accompanied by the following documents:

(1) An affidavit of at least 2 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.

(3) 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 from the Register under Section 560.

The Department of Company Affairs simplified the procedure for removal of defunct companies vide Circular letter No. 17/78/2001-CLV dated 25.3.2003. This simplified procedure was in operation till 30.09.2005. But the essential condition that the assets and liabilities of the company should be zero must be fulfilled [Dept's Clarification No. 17/78/2001 - CLV dated 17.4.2003].

Hence the company must first take steps to realise all the assets and pay all the liabilities and make it 'Nil'. Thereafter, the company may apply to Registrar of Companies along with 'Nil' balance sheet, affidavit and indemnity bond.

## Question 6

*(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. (November, 2004)*

## Answer

(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'.

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.

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.

## Question 7

*PNT Ltd. is a company, which is listed with Mumbai Stock Exchange. Its 18$^{th}$ Annual General Meeting was held at Mumbai on 30$^{th}$ September, 2005 in respect of financial year ended 31$^{st}$ March, 2005, whereat all the usual business required to be conducted by a company under the provisions of the Companies Act, 1956 were carried out. Following further information is also available:*

*(i) The Company has total 8 Directors (including the Chairman) out of which 2 Directors are not liable to retire by rotation.*

*(ii) The Company has its registered office at Mumbai and a branch at Kolkata.*

*(iii) From the audited annual accounts for year ended 31$^{st}$ March, 2005, it is observed that Directors have proposed a dividend of 20% on equity share capital.*

*(iv) 75% of the shares of the Company are held in dematerialized form and balance in physical form.*

*(v) The accounts of Kolkata Branch of the Company are audited by a firm of Chartered Accountants, who are not the Statutory Auditors of the Company.*

*Based on the above, you are required to draft the Minutes of the proceedings of the Annual General Meeting of PNT Ltd.* *(November 2006)*

## Answer

PNT LIMITED

MINUTES OF THE PROCEEDING OF THE 18$^{TH}$ ANNUAL GENERAL MEETING OF THE MEMBERS OF THE COMPANY HELD AT _______________MUMBAI ON 30$^{TH}$ SEPTEMBER, 2005 AT _________ A.M.

PRESENT

Mr.________________________ Chairman & Managing Director

Mr. _______________________ Wholetime Director

Mr. ___________________ Director (Audit Committee Chairman)

Mr. _____________________ Director

Mr.____________________ Director

Mr.____________________ Director

Mr.____________________ Director

Mr.____________________ Director

Mr. ____________________ Member

Mr. ____________________ Member

Mr. ____________________ Member

Mr. ____________________ Member

Mr. ____________________ Member

Mr. ____________________ Member (Through Proxy)

Mr. ____________________ Member (Through Proxy)

Mr. ____________________ Representative of____Limited U/s 187

Mr.____________________ Secretary

SUMMARY OF MEMBERS' ATTENDANCE:

1) In Person ______________ As per signatures obtained on attendance Slips

2) By Proxy __________As per signatures obtained on attendance Slips

Mr. ____________________, Chairman took the chair to conduct the Meeting.

The Chairman declared that________ valid proxies representing______Equity Shares have been received in the required form.

The Chairman further declared that necessary quorum being present, the meeting could proceed with the stipulated business.

The Register of Directors' Shareholding maintained under Section 307 of the Companies Act, 1956 was placed before the Meeting and was kept open and accessible to all concerned during the continuance of the Meeting.

With the consent of the members present, the Notice convening the Meeting was taken as read.

Since the Directors' Report and Audited Annual Accounts were circulated before hand, the same were taken as read with the permission of the members present.

Thereupon, at the direction of the Chairman, Secretary of the Company read out the Auditors' Report.

At this stage, the Chairman briefed the members about the affairs and activities of the Company.

ITEM NO.1

Adoption of Balance Sheet & Profit & Loss Accounts, Auditors' & Directors Report thereon:

The Chairman placed before the Meeting the Auditors' and the Directors' Report and the Audited Annual Accounts of the Company for the year ended 31st March, 2005 for consideration and adoption and proposed the following Ordinary Resolution, which was seconded by Mr._________________.

"RESOLVED THAT the Audited Balance Sheet as at 31st March, 2005 and the Profit & Loss account for the year ended on that date together with the Reports of the Auditors and that of the Directors thereon, as circulated among the members and placed before the meeting be and is hereby received, considered, approved and adopted."

The Chairman then invited the members for their comments. Some members participated in the discussions and sought some clarifications. The same were duly explained by the Chairman and the Audit Committee Chairman.

Thereafter, the Resolution was put to vote on a show of hands and the same was declared carried unanimously.

ITEM NO.2

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr._____________ Seconded by Mr._____________

"RESOLVED THAT as recommended by the Directors, Dividend @ 20% on Equity Share for the year ended 31st March, 2005 on_______ Equity Shares of Rs.______ each, be and is hereby declared and the same be paid subject to the provisions of Section 206A of the Companies Act, 1956 to those members or their mandatees whose names stand registered on the Company's Register of Members:

i) as Beneficial Owners as at the date of this Annual General Meeting as per the lists to be furnished by National Securities Depository Limited and the Central Depository Services (India) Ltd in respect of the shares held in Electronic form, and

ii) as Members in the Register of Members of the Company after giving effect to valid share transfers in physical form lodged with the Company or the Registrar & Share Transfer Agent of the Company before the date of start of the Book Closing as announced.

The Resolution was put to vote on a show of hands and the same was declared carried unanimously.

ITEM NO.3

Election of Mr.____________as Director

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.___________________ Seconded by: Mr.______________

"RESOLVED THAT Mr.______________, Director, retiring by rotation, under the provisions of Article __________of the Articles of Association of the Company, being eligible, be and is hereby re-elected as a Director of the Company."

The Resolution was put to vote on a show of hands and was declared carried unanimously.

ITEM NO.4

Election of Mr.______________ as Director.

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr._______________Seconded by Mr._________________

"RESOLVED THAT Mr.______________, Director, retiring by rotation, under the provisions of Article__________ of the Articles of Association of the Company, being eligible, be and is hereby re-elected as a Director of the Company."

The Resolution was put to vote on a show of hands and was declared carried unanimously.

ITEM NO.5

(a) Appointment of M/s _________________as Auditors

Following resolution was proposed as Ordinary Resolution

Proposed by: Mr.________________ Seconded by: Mr.__________

"RESOLVED THAT pursuant to the provisions of Section 224A of the Companies Act, 1956, M/s ______________________, Chartered Accountants, be and are hereby re-appointed Auditors of the Company to hold office as such from the conclusion of this meeting until the conclusion of the next Annual General Meeting and the Board of Directors be and are hereby authorised to fix their remuneration and re-imbursement of out-of-pocket expenses as per recommendation of the Audit Committee.

The Resolution was put to vote on a show of hands and was declared carried unanimously.

(b) Appointment of M/s___________as Branch Auditors

Following resolution was proposed as Ordinary Resolution

*Proposed by: Mr.____________ Seconded by: Mr.________________*

"RESOLVED THAT pursuant to the provisions of Section 224A read with Section 228(3) of the Companies Act, 1956, M/s_____________________, Chartered

Accountants be and are hereby re-appointed Branch Auditors of the Company's Kolkata Branch to hold office as such from the conclusion of this meeting until the conclusion of the next Annual General Meeting and the Board of Directors be and are hereby authorized to fix their remuneration and re-imbursement of out-of-pocket expenses as per recommendation of the Audit Committee.

The Resolution was put to vote on a show of hands and was declared carried unanimously.

There being no other business to transact, the meeting ended with a vote of thanks to the Chair.

Date: CHAIRMAN

Question 8

*State the provisions of the Companies Act, 1956 in respect of appointment of Auditor in the following cases:*

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

*(ii) A public limited company at whose annual general meeting hold on 30th November, 2006 in respect its accounting year ended on 30th June, 2006, the auditor was appointed to hold office as such till the conclusion of its next annual general meeting, but whose auditor has resigned on 15th March, 2007.*

*(iii) A company whose shareholders include the following:*

*(a) Bank of Baroda (a nationalized bank) holding 12% of the Subscribed capital in the Company.*

*(b) National Insurance Co. Ltd. (carrying on general insurance business) holding 10% of the Subscribed capital in the Company.*

*(c) Maharashtra State Financial Corporation (a public financial institution) holding 8% of the Subscribed capital in the Company.* *(May 2007)*

Answer

(i) 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 on the advice of Comptroller and Auditor General of India. The provision for appointment of auditor by Central Government of the advice of Comptroller and Auditor General of India has been amended by the Companies (Amendment) Act, 2000 with effect from 13.12.2000.

(ii) 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 nay casual vacancy in the office of an auditor, but proviso thereto states that were 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 registration by the auditor, the company is required to convene and hold a general meeting and appoint the auditor thereat.

(iii) The case of appointment of auditor of a company who's 25% or more of the Subscribed capital is held by Government, financial institution, nationalized banks. General insurance companies are governed by the provisions of section 224A of the Companies Act, 1956. According to the provision 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-

(a) a public financial institution or a Government Company or Central Government or any state Government, or

(b) any financial or other institution established by any Provincial or State Act which a State Government holds not less than fifty-one per cent of the subscribed share capital, or

(c) a nationalized 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 or auditors shall be made by a special resolution.

In view of the above provisions of the companies Act, 1956, since the combined holding of the nationalized 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 auditors in the Annual general Meeting by passing a special resolution.

## Question 9

*M/s Flyover Constructions Ltd. has to recruit 2,000 Civil Engineers on contract basis for a period of 5 years. The company entered into an agreement with the employees that each employee will have to deposit Rs. 50,000 as security which sum will be returned on completion of 3 years of contract of service. The company wants to utilize the fund so collected in their business. Advise the company with reference to Companies Act in the matter of collection and utilization of money received from employees as security deposit. (November 2007)*

## Answer

Section 417 of the Companies Act, 1956 provides that

(1) any money or security deposited with a company by any of its employee in pursuance of his contract of service with the company shall be kept or deposited by the company within fifteen days from the date of deposit.

(i) in a post office savings bank account, or

(ii) in a special account to be opened by the company for the purpose in the state bank of India or in a scheduled bank, or

(iii) where the company itself is a scheduled bank, in a special account to be opened by the company for the purpose either in itself or in the state bank of India or in any other scheduled bank.

(2) No portion of such moneys or securities shall be utilized by the company except for the purposes agreed to in the contracts of service.

(3) A receipt for moneys deposited with a company by its employee shall not be deemed to be security within the meaning of this section; and the moneys themselves shall accordingly be deposited as provided in sub-section (1).

So the company cannot utilize the money so collected. It will have to deposit the money in the special accounts as referred in the section.

## Question 10

M/s Joel Ltd. was incorporated in London with a paid up capital of 10 million pounds. Mr. Y an Indian citizen holds 25% of the paid up capital. M/s. X Ltd. a company registered in India holds 30% of the paid up capital of Joel ltd. M/s. Joel Ltd. has recently established a share transfer office at New Delhi. The company seeks your advice as to what formalities it should observe as a foreign company under Companies Act, 1956. State briefly the requirements relating to filing of accounts with the Registrar of Companies by the foreign company in respect of its global business as well as Indian business. (November 2007)

## Answer

As per section 591 companies falling under the following two classes shall be known as foreign companies namely:

(i) companies incorporated outside India which, after the commencement of this act, establish a place of business within India, and

(ii) companies incorporated outside India which have, before the commencement of this act, established a place of business within India and continue to have an established place of business within India at the commencement of this act.

(2) notwithstanding anything contained in sub-section (1), where not less than fifty percent of the paid up share capital (whether equity or preference or partly equity and partly preference) of a company incorporated outside Indian and having an established place of business in India, is held by one or more citizens of Indian or by one or more bodies corporate incorporated in India, or by one or more citizens of Indian and one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India.

Here as more than 50% of the paid-up capital is held by Indian citizen and Indian company M/s Joel Ltd. shall be treated as Indian company. It shall have to comply with such provision of the act as may be prescribed as if it were a company incorporated in India.

Jeet Ltd. has to submit the following document with the registrar of companies with 30 days of establishment of business in India.

(a) a certified copy of the charter, statues, or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company; and, if the instrument is not in the English language, a certified translation thereof.

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company, containing the particulars mentioned in sub-section (2).

(d) the name and address or the names and addresses of the some one or more persons resident in India, authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company; and

(e) the full address of the office of the company in India which is t be deemed its principal place of business in India.

Section 594 provides for the requirements of accounts of foreign company. As per this section

(1) Every foreign company shall, in every calendar year –

(a) make out a balance sheet and profit and loss account I such form containing such particulars and including or having annexed or attached thereto such documents (including, in particular documents relating to every subsidiary of the foreign company) as under the provisions of this act it would, if it had been a company within the meaning of this act, have been required to make out land lay before the company in general meeting; and

(b) deliver three copies of those documents to the registrar;

Provided that the Central Government may, by notification in the official gazette, direct that, in the case of any foreign company or class of foreign companies the requirements of clause (a) shall not apply, or shall apply subject to such exceptions and modifications as may be specified in the notification.

(2) If any such document as is mentioned in sub-section (1) is not in the English language, there shall be annexed to it a certified translation thereof.

(3) Every foreign company shall send to the registrar with the documents required to be delivered to him under sub-section (1), three copies of a list in the prescribed form of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in sub-section (1) is made out.

## Question 11

*Mountbay company Limited decided to terminate the services of Mr. Gopal who was employed as Sales Manager. The Company, however, feels that the Sales Manager may not vacate the company's flat at Delhi. What action can be taken by the company under the Companies act,* *1956 to regain possession of the flat? Is it necessary to take such action before terminating the services of Mr. Gopal? Will it make any difference, if the flat is not owned by the company, but taken on lease? (November 2008)*

## Answer

ACTION AGAINST SALES MANAGER:

The company can take action under Section 630 of the Companies Act, 1956 if the sales manager refuses to vacate the premises provided by the company. According to Section 630, it is an offence if any officer or employee of a company

(1) wrongfully obtains possession of any property of a company or

(2) having any such property in his possession wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorized by the Act and such an offence is punishable with fine up to Rs. 10000/. Further the court may also order such officer or employee to deliver to the company any such property wrongly obtained or wrongfully withheld within a time fixed by the court

So the company can file a complaint under Section 630 as it provides speedy relief. Section 630 covers either existing as well as past officers or employees. Thus, action may also be initiated after termination of the services of Mr. Gopal.

It is not necessary that the property in question should be owned by the company. Even if the company exercises only a leasehold right, the provisions of Section 630 can be invoked.

## Question 12

*M/s X Ltd. and its two directors have received a show cause notice from the Registrar of Companies, Mumbai as to why prosecution proceedings should not be launched against them for violation of he provisions of Section 297 of the Companies Act, 1956 in not obtaining the previous approval of the Central Government in respect of a contract entered into by the company with a firm in which one of the directors of the company is interested as a partner. The company seeks your help. Advise the company the steps that should be taken to avoid prosecution proceedings, assuming that they have committed the offence. (November 2008)*

## Answer

To avoid prosecutions proceedings by the Registrar of Companies, Mumbai the company and its directors can file a compounding application with the Registrar of Companies as provided in Section 621A of the Companies Act, 1956.

In the said compounding applications, they have to admit the charge that the provisions of Section 297 have been violated and that the said default has been made good subsequently. For this purpose, the company should file an application for approval under Section 297 and this power of Central Government has been delegated to the Regional Directors. The power to compound the offence is with the Company Law Board if the maximum fine for the penalty exceeds Rs. 50,000 and if it is below Rs. 50,000 the power to compound is with the Regional Director. The company and its directors have to file the compounding application with the

Registrar of Companies who in turn will forward the compounding applications along with his report either to the Company Law Board or to the Regional Director as the case may be. Once the compounding is done, the Regional Director after examination of the relevant factors approves the proposal and approval of the Central Government is conveyed.

## Question 13

*Ashes Ltd is a company incorporated outside India. 50% of its preference share capital and 20% of its equity share capital is held by companies incorporated in India. It issued prospectus inviting subscriptions in India for its shares but did not state the country in which it is incorporated.*

*Examine*

*(i) Is the prospectus of the company valid?*

*(ii) What is none of the shares (preference and equity) were held by Companies Incorporated in India?*

*(iii) What other disclosures and required to be made by a Foreign Company?*

*(November 2008)*

## Answer

Section 591(2) of the Companies Act, 1956, provides that where not less than fifty per cent of the paid up share capital (whether equity or preference or partly equity and partly preference) of a company incorporated outside India and having an established place of business in India, is held by one or more citizens of India or by one or more bodies corporate incorporated in India, or by one or more citizens of India and one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act as may be prescribed with regard to the business carried on by it in India, as if it were a company incorporated in India.

(i) As 50% of the preference share capital and 20% of the equity share capital of Ashes Ltd. is held by companies incorporated in India, it shall be treated as if it were a company incorporated in India. As such it is not necessary for Ashes Ltd. to comply with the provisions relating to foreign companies. So the prospectus of the company shall be valid.

(ii) If none of the shares (preference and equity) were held by companies incorporated in India, Ashes Ltd. would be a foreign company within the meaning of Section 591 of the Act. Section 595 of the Act provides that every foreign company shall in every prospectus inviting subscriptions in India for its shares or debentures, state the country in which the company in incorporated. As Ashes Ltd. did not mention the name of the country in which it is incorporated, the prospectus shall not be valid.

(iii) Section 595 of the Act provides for the following additional disclosures to be made by a foreign company:

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

*(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill heads and letter paper, and in all notices, and other official publications of the company; and*

*(c) If the liability of the members of the company is limited, cause notice of the fact-*

- to be stated in every such prospectus as aforesaid and in all business letters, bill heads ,letter paper, notices, advertisements and other official publications of the company, in legible English characters; and
- to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the languages or one of the language in general use in the locality in which the office or place is situated.

## Question 14

*As per the terms of the agreement of service between NOC Ltd. and its employees, an amount equal to 12.5% of the salary shall be transferred to the recognized Provident Fund and shall be payable to the employee either on retirement or termination, as the case may be. An amount equal to 12.5% of the salary shall be contributed by the company to the recognized provident fund.*

*Mr. A earning Rs. 3000 p.m. has been working with the company since the last four years. Due to some personal reasons Mr. A is in need of Rs. 100,000 and wants to obtain as advance the amount standing to the credit in the fund. With reference to the provisions of the Companies Act, 1956 advice as regards the following:*

(i) When and where should the money so collected by the company be deposited?

(ii) Can Mr. A obtain the advance from his accumulated contribution to recognized Provident Fund? (November 2008)

## Answer

Section 418 of the Companies Act, 1956 dealing with the provident fund of the employees provides that:

(1) Where a provident fund has been constituted by a company for its employees or any class of its employees, all moneys contributed to such fund (whether by the company or by the employees) or received or accruing by way of interest or otherwise to such fund shall, within fifteen days from the date of contribution, receipt or accrual, as the case may be either-

*(a) be deposited-*

(i) in a post office saving bank account, or

(ii) in a special account to be opened by the company for the purpose in the State Bank of India or in a Scheduled Bank, or

(iii) Where the company itself is a Scheduled Bank, in a special account to be opened by the company for the purpose either in itself or in the State Bank of India or in any other Scheduled Bank; or

*(b) be invested in the securities mentioned or referred to in clauses (a) to (e) of Section 20 of the Indian Trusts Act, 1882 (2 of 1882).*

(2) Notwithstanding anything to the contrary in the rules of any provident fund to which sub-section (1) applies or in any contract between a company and its employees, no employee shall be entitled to receive, in respect of such portion of the amount to is credit in such fund as is invested in accordance with the provisions of sub-section (1), interest at a rate exceeding the rate of interest yielded by such investment.

(3) Nothing in sub-section (1) shall affect any rights of an employee under the rules of a provident fund to obtain advances from or to withdraw money standing to his credit in the fund, where the fund is a recognized provident fund.

*(i) So the money collected by NOC Ltd. from its employees will have to be deposited in any of the following:*

(a) in a post office saving bank account, or

(b) in a special account to be opened by the company for the purpose in the State Bank of India or in a Scheduled Bank, or

(c) be invested in securities mentioned or referred to in clauses (a) to (e) of Section 20 of the Indian Trusts Act, 1882 (2 of 1882 ).

*(ii) As per the provision of Section 418 (3), Mr. A can obtain advances from or withdraw money standing to his credit in the fund provided the fund is a recognized provident fund.*

# UNIT – 12 : SOLE SELLING AGENTS

## Question 1

*Randhir was appointed as the sole selling agent of S Ltd. for a period of five years in a general meeting of the company. Exactly after one a nd half years, S Ltd. was amalgamated with another company A Ltd. Randhir was not appointed as the sole selling agent of A Ltd. S Ltd. paid Randhir Rs.6 lacs as selling agency commission during the said one and half years. Is Randhir entitled to any compensation and if yes, what is the quantum? (November, 2000)*

## Answer

Section 294A prohibits payment of compensation to the sold selling agent for the loss of his office in the following cases:

(i) Where the appointment of the sold selling agent ceases to be valid by virtue of section 294(2A).

(ii) where he resigns his office as a result of reconstruction or amalgamation of the company and is appointed as the sole selling agent of the reconstructed company or the body corporate resulting from the amalgamation.

(iii) where he resigns his office otherwise than in the circumstances envisaged in the foregoing clause

(iv) where he has been guilty of fraud or breach of trust in relation to, or of gross negligence in the conduct of his duty as the sole selling agent; and

(v) where he has instigated or taken part directly or indirectly in bringing about the termination of the sold selling agency.

In this case, Randhir has not been appointed as the sole selling agent of A Ltd. None of the other prohibitions also apply. Hence Randhir would be entitled to compensation.

The amount of compensation payable for the loss of office must in no case exceed the remuneration which he would have earned, he had been in office for the unexpired resdue of his term, or for 3 years, whichever is shorter. The amount thereof is to be calculated on the basis of the average remuneration actually earned by him during a period of 3 years immediately proceeding the date on which he had ceased to be in office or his appointment was terminated. In case he had held his office for a period lesser than 3 years, the basis would be the average remuneration that he had earned during such shorter period. The average remuneration earned is 6/1.5=4 lacs. The compensation payable would be 4x3=Rs.12 lacs.

## Question 2

*On 1st January, 2001 the Board of Directors of XL Co. Ltd. appointed Mr. Y as Sole Selling Agent of the Company for a period of five years. On 6th February, 2001 XL Co. Ltd. in its General Meeting disapproved the appointment of Mr. Y as Sole Selling Agent of the Company. Explain:*

*(a) Is Mr. Y entitled to payment of compensation for Loss of Office?*

*(b) Are there some other circumstances when compensation for loss of office is prohibited to a Sole Selling Agent? (November, 2002)*

## Answer

(i) According to Section 294(2)of the Companies Act, 1956, the Board of Directors of XL Ltd. "shall not appoint a sole selling agent for any area except subject to the condition that the appointment shall cease to be valid if it is not approved by the company in the first general meeting held after the date on which the appointment is made".

It has been held that the appointment of a sole selling agent must be made by the company in its general meeting and such clause must be inserted as a mandatory condition in all appointments of sole selling agents; an appointment without such a clause being inserted is void ab-intio (Arante manufacturing Corp. vs. Bright Bills Private Ltd. 1967 Comp/ Case 759 Shelagram Jhaigharia vs. National Co. Ltd. 1965 Comp. Cas. 706) If the company in the general meeting disapproves the appointment it shall become invalid form the date of the general meeting.

In the given case, assuming that the general meeting of XL Co. Ltd. held on February 6, 2001 was their first general meeting after January 1 , 2001 and the disapproval of the company, in this meeting will make the appointment of Mr. Y as sole selling agent invalid w.e.f. February 6, 2001.

(ii) Section 294(A) prohibits payment of compensation to the sole selling agent for the loss of his office in the following cases in addition to the one discussed in part (2) above :

(a) Where the sole selling agent resigns his office as a result of reconstruction or amalgamation of the company, and is appointed as the sole selling agent of the reconstructed company or the body corporate resulting from the amalgamation.

(b) Where the sole selling agent resigns his office otherwise than in the circumstances envisages in the foregoing clause (i)

(c) Where a sole selling agent has been found to be guilty of fraud or breach of trust in relation to, or of gross negligence in the conduct of his duty as the sole selling agent.

(d) Where the sole selling agent has investigated or taken part directly or indirectly in bringing about the termination of the sole selling agency.

## Question 3

*Ram and Co. Ltd. having paid up share capital of Rs. 40 lakhs appointed on 1st January, 1995 Lakshman and Co. Pvt. Ltd. as sole selling agent for a period of 5 years with effect from 1st January, 1995 with the approval of the company in general meeting. The directors of Lakshman and Co. Pvt. Ltd. were holding 40,000 equity shares of Rs. 10 each fully paid-up in Ram and Co. Ltd. since 1st December, 1994.*

*State with reasons whether the appointment is valid. Will your answer be different, if Lakshman and Co. Pvt. Ltd. had acquired the aforesaid shares only on 1st December, 1995?*

*(May, 2003)*

## Answer

Under section 294AA. no company can except with the prior approval of the Central Government, appoint any individual, firm or body corporate, who or which has a substantial interest in the company as sole selling agent of that company. A person holding paid-up capital exceeding Rs.5 lakhs or 5% of the paid-up capital of the company whichever is less is deemed to have substantial interest in that body corporate [Explanation to Section 294AA].

Thus Ram & Co. should have obtained prior approval of the Central Government for appointing Lakshman & Co. Pvt Ltd as sole selling agents as the latter holds 10% of the paid-up capital of the former company. The appointment is accordingly not valid.

The situation shall be different if shares were acquired by Lakshman & Co. on 1st December 1995. According to a clarification issued by the Department of Company Affairs, if the provisions of Section 294AA(2) are not attracted to the appointment of selling agents at the time of entering into the agreement with them, it will not be obligatory on the company to comply with the said provision for continuance of said appointment for the remaining duration of the current tenure, even if the provisions of section 294AA(2), became applicable after the appointment due to sole selling agents acquiring substantial interest.

However Lakshman & Co. Ltd can continue as sole selling agents for period of 5 years i.e. upto 31st December, 1999, if it acquired the shares only on 1st December 1995 i.e after its appointment on 1st January 1995.

## Question 4

*Mr. BPK was appointed as the sole selling agent of M/s KMP Ltd. with effect from 1st January, 2002 for a period of five years. Mr. BPK earned his remuneration as follows during the years 2002 to 2004:*

| *Year* | *Amount of remuneration* |
|---|---|
| *2002* | *Rs.4,41,000* |
| *2003* | *Rs.6,32,000* |
| *2004* | *Rs.7,45,000* |

*On and from 1st January, 2005, the sole selling agency agreement was terminated by M/s KMP Ltd. You are required to calculate the amount of compensation payable by the said company to Mr. BPK under the provisions of the Companies Act, 1956.*

*What would be your answer in a case where the said M/s KMP Ltd. was amalgamated with another company with effect from 1st January, 2005 and Mr. BPK refused to act as the sole selling agent of the amalgamated company after amalgamation.* *(May 2005)*

## Answer

As per provisions of section 294A(2) of the Companies Act, 1956, any compensation payable by a company to its sold selling agent for premature loss of office shall not exceed the remuneration which he would have earned if he would have been in office for the unexpired residue of his term, or for three years, which ever is shorter, calculated on the basis of the average remuneration actually earned by him during a period of three years immediately preceding the date on which his office ceased or was terminated, or where he held his office for a period lesser than three years, then average remuneration actually earned by him during such lesser period.

Based on the above provision of the Companies Act, 1956, Mr. BPK is entitled to compensation for the unexpired residue of his term, i.e., for two years since it is shorter than three years. Such compensation shall be calculated on the basis of average remuneration received by him during the years 2002 to 2004. On the basis of figures given in the question, the amount of compensation shall be as follows:

| Year | Amount of remuneration (Rs.) |
|---|---|
| 2002 | 4,41,000/- |
| 2003 | 6,32,000/- |
| 2004 | 7,45,000/- |
| Total Remuneration | 18,18,000/- |
| Average Remuneration per annum | 6,06,000/- |
| Compensation payable to Mr. BPK for two years | 12,12,000/- |

As per provisions of section 294A(1) of the Companies Act, 1956, where the sole selling agent resigns his office in view of amalgamation with any other company and he is appointed as sole selling agent after such amalgamation, then he is not entitled to any compensation and the company is also prohibited from paying any compensation to the sole selling agent. Thus, in second case, Mr. BPK shall not be entitled to any compensation for premature loss of office since he himself has refused to act as the sole selling agent after amalgamation.

## Question 5

*Draft an application to be submitted to the appropriate authority in this respect.*

*(November 2005)*

Answer

DRAFT APPLICATION Dated_________

To,

The Secretary,

Department of Company Affairs,

Ministry of Company Affairs,

Government of India,

(Address)

New Delhi

Sir,

We, the undersigned, the shareholders of LPM Paper Mills Ltd. would like to bring to your kind notice that for a long time the affairs of the said company are not being managed in accordance with sound business principles and prudent commercial practices.

We are of the view that certain expenditures which are being incurred by the company are not related to the business of the company and the company is not getting any benefit out of such expenses. Moreover, we have the apprehension that there are certain business transactions which are being entered into by the directors with the concerns which are owned by the relatives of the Directors and the prices charged for such transaction are not comparable with the prices charged by other parties for similar transactions. (Students may state any other circumstances also).

If such a state of affairs is allowed to be carried on for long, the financial position of the company will reach a stage where it will endanger its solvency.

We feel that the modus operandi of the transaction is such that it may be difficult for the regular statutory auditor to detect them in course of normal audit.

It is, therefore, prayed that the Central Government be pleased to appoint, pursuant to Section 233A of the Companies Act, 1956, a Special Auditor to properly audit the accounts of the Company and find the real nature of the transactions and determine the losses so far sustained and being sustained by the company on this account.

Yours faithfully,

1.
2.
3.
4.
5…………

Shareholder

## Question 6

*M/s FAB Electronics Ltd. (FEL) has appointed four private companies as its selling agents for sale of its white goods in the four regions of the country. A complaint has been made to the Registrar of Companies, new Delhi that the four selling agents are in fact functioning as sole selling agents and that the terms and conditions of their appointment are not in the interest of FEL. Advise FEL about the provisions of the Companies Act and the action that may be taken by the authorities under the Act.* *(November 2007)*

## Answer

According to Section 294(6) of the Companies Act, 1956 where a company has more selling agents than one, by whatever name called and it appears to the Central Government that it is necessary to obtain information about the terms and conditions and appointment of such agents for the purpose of determining whether any of those selling agents are in fact working as sole selling agents. The Central Government has the power to call for such information as may be necessary to find out the correct position. On the basis of the information obtained, the Central Government may by an order declare that selling agents be the sole selling agent for the area so related with effect from such date as may be specified in the order. From the date so specified in the order, the appointment of the sole selling agent shall be regulated by the terms and conditions as may be varied by the Central Government. It shall be the duty of the company to furnish all information and documents and refusal to do so will involve penalty which may extend upto Rs. 50,000/-. Thus it is imperative for the company to furnish all the information and documents in its possession to the Registrar of Companies or any authority making any enquiry in this regard that the selling agents are not functioning as sole selling agents.

## Question 7

*The Board of Directors of ACE Limited having a paid up share capital of Rs. 70 lakhs reappointed Bre Ltd. As sole selling agent for a period of 5 years W.E.F. 2 May, 2007. The Directors of BRE Ltd. were holding fully paid up shares of face value of Rs. 3 lakhs. In ACE Ltd. the reappointment was approved by the company in the next AGM held on 30th September, 2007 but Central Government approval was not obtained until 31st December, 2007. Give your opinion explaining the relevant provision of the Companies Act, 1956.*

*(i) Is the reappointment of the sole selling agent in order?*

*(ii) Will your opinion be different if the directors of BRE Ltd. do not hold any shares in ACE Ltd?*

*(iii) If the reappointment is valid. When will the reappointment take effect from?*

*(November 2008)*

## Answer

Section 294AA of the Companies Act, 1956 contains the powers of Central Government to prohibit the appointment of Sole Selling Agents in certain cases. The section further provides that no company shall 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 (Section 294AA (2)).

Also no company having a paid up share capital of rupees fifty lakhs or more shall appoint a Sole Selling Agent except with the consent of the company accorded by a Special Resolution and the approval of the Central Government (Section 294AA(3)). Section 294AA (7) provides that if the company in general meeting disapproves the appointment referred to in sub-section (3), such appointment shall, notwithstanding anything contained in sub-section (6), cease to have effect from the date of the general meeting.

The explanation to this section provides that "appointment" includes "re-appointment " and "substantial interest " in relation to a body corporate, means the beneficial interest held by such body corporate or one or more of its directors or any relative of such director, whether singly or taken together, in the shares of the company , the aggregate amount paid up on which exceeds five lakhs of rupees or five per cent of the paid up share capital of the company, whichever is the lesser.

(i) So the re- appointment of BRE Ltd. as sole selling agent is in order as general meeting approval was obtained by way of special resolution. Further, ACE Ltd. has to obtain the approval of the Central Government as required under Section 294AA (3) and the same was also obtained by 31st December 2007.

(ii) No, even if BRE Ltd. does not hold any shares in ACE Ltd. the appointment shall remain valid as ACE Ltd has obtained the approval of the Central Government under Section 294AA(3).

(iii) Effective date of reappointment is the date from which he is re appointed by the company. As such the re-appointment shall be valid from 2nd May 2007.

# UNIT – 13 : PRODUCER COMPANY

## Question 1

*XYZ Producer Company Limited was incorporated on 1st April, 2003. At present it has got 200 members and its board consists of 10 Directors. The Board of Directors of the company seeks your advice on the following proposals:*

*(i) Appointment of one expert Director and one Additional Director by the Board for a period of four years.*

*(ii) Loan of Rs.10,000 to Mr. X, a Director of the company repayable within a period of six months.*

*(iii) Donation of Rs.10,000 to a Political Party.*

*Advise the Board of Directors explaining the relevant provisions of the Companies Act, 1956 .*

*(May, 2004)*

## Answer

### Producer Company

**Appointment of expert director or additional director:** Section 581P(6), Companies Act, 1956 empowers the Board of Directors of a producer company to cooperate one or more expert directors or an additional director not exceeding one fifth of the total number of directors for such period as the Board may deem of it. But the maximum period shall not exceed the period specified in the Articles of the company (Proviso 2 to Section 581P(6).

The number of directors proposed to be co-opted is only 2 and it does not exceed one-fifth of the total number of directors. They can hold office for the period specified by the Board provided it does not exceed the period specified in the Articles (Section 260 stipulating that the additional director can hold office only upto the date of the next annual general meeting is not applicable to a producer company). Hence the proposed appointment of one expert director and one additional director is in order.

**Loan to a director:** Section 581ZK empowers the Board of Directors to provide financial assistance to the members of the producer company subject to the provisions made in articles and also subject to certain conditions laid down in 581ZK(b). But any loan or advance to any director or his relative shall be granted only after the approval by the members in general meeting. (Proviso to Section 581ZK).

In view of the above, the directors must convene the general meeting and get the approval of the members before granting the proposed loan of Rs.10,000 to X, a director of the company (According to Section 581C(5)a producer company is a private limited company and there is no limit to the number of its members. Hence, Section 295 is not applicable to a producer company).

**Donation to a Political Party:** Producer company shall not make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material (Second proviso to Section 581ZK). As the donation to a political party is prohibited, the company cannot donate Rs.10,000 to a political party.

## Question 2

*(i) An Interstate Cooperative Society has been incorporated on 1st May, 2004 as a Producer Company under the provisions of the Companies Act, 1956. Give your comments on its proposal to have 18 directors on its Board after incorporation as a Producer Company.*

*(ii) A Producer Company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 1956 in this regard.*

*(iii) What are the modes of investment, from and out of its general reserves, available to a Producer Company formed and registered under Section 581C of the Companies Act, 1956. (November, 2004)*

## Answer

(i) As per provisions of section 581-O *of* the Companies Act, 1956, any Producer Company can not have more than fifteen directors. However, by way of a proviso, the said section further provides that in the case of an inter-State co-operative society which is incorporated as a Producer Company, may have more than fifteen directors for a period *of* one year from the date of its incorporation as a Producer Company.

In view of the above provisions of the Companies Act, 1956 the proposal to have 18 directors by the Producer Company after its incorporation as such, is a valid proposition, but since it is incorporated on 1st May, 2004, it can have more than 15 directors for one year only from the date of its incorporation

(ii) As per provisions of section 581ZJ of the Companies act 1956, any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalisation of amounts from general reserves referred to in section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.

(iii) As per Producer Companies (General Reserves) Rules. 2003 issued by the Department *of* Company Affairs, Ministry *of* Finance, Government of India on 7th August, 2003 a producer company formed and registered under section 581C of the Companies Act, 1956, shall make investments from and out of its general reserves in the following manner, namely:-

(a) in approved securities, fixed deposits, units and bonds issued by the Central or State Governments or cooperative societies or scheduled bank; or

(b) in a co-operative bank, state co-operative bank, co-operative land development bank or central co-operative bank; or

(c) with any other scheduled bank; or

(d) in any of the securities specified in section 20 *of* the Indian Trusts Act, 1882; or

(e) in the shares or securities *of* any other multi-state co-operative society or any co-operative society; or

(f) in the shares, securities or assets *of* a public financial institutions specified under section 4A of the Companies Act, 1956.

## Question 3

*(i) An Interstate Cooperative Society has been incorporated on 1st May, 2004 as a Producer Company under the provisions of the Companies Act, 1956. Give your comments on its proposal to have 18 directors on its Board after incorporation as a Producer Company.*

*(ii) A Producer Company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 1956 in this regard.*

*(iii) What are the modes of investment, from and out of its general reserves, available to a Producer Company formed and registered under Section 581C of the Companies Act, 1956. (November, 2004)*

## Answer

(i) As per provisions of section 581-O *of* the Companies Act, 1956, any Producer Company can not have more than fifteen directors. However, by way of a proviso, the said section further provides that in the case of an inter-State co-operative society which is incorporated as a Producer Company, may have more than fifteen directors for a period *of* one year from the date of its incorporation as a Producer Company.

In view of the above provisions of the Companies Act, 1956 the proposal to have 18 directors by the Producer Company after its incorporation as such, is a valid proposition, but since it is incorporated on 1st May, 2004, it can have more than 15 directors for one year only from the date of its incorporation

(ii) As per provisions of section 581ZJ of the Companies act 1956, any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalisation of amounts from general reserves referred to in section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.

(iii) As per Producer Companies (General Reserves) Rules. 2003 issued by the Department *of* Company Affairs, Ministry *of* Finance, Government of India on 7th August, 2003 a producer company formed and registered under section 581C of the Companies Act, 1956, shall make investments from and out of its general reserves in the following manner, namely:-

(a) in approved securities, fixed deposits, units and bonds issued by the Central or State Governments or cooperative societies or scheduled bank; or

(b) in a co-operative bank, state co-operative bank, co-operative land development bank or central co-operative bank; or

(c) with any other scheduled bank; or

(d) in any of the securities specified in section 20 *of* the Indian Trusts Act, 1882; or

(e) in the shares or securities *of* any other multi-state co-operative society or any co-operative society; or

(f) in the shares, securities or assets *of* a public financial institutions specified under section 4A of the Companies Act, 1956.

## Question 4

*(i) A two year old Producer Company registered under Section 581C of the Companies Act, 1956 wants to donate some amount. The Chief Executive of the Producer Company has approached you to advise him as to how and for what purposes the donation can be made by such company. Also state the monetary restrictions, if any, laid down in the Companies Act, 1956 on making donations by a Producer Company. You are informed that as per the Profit & Loss account of the Producer Company for its last accounting year, net profit was Rs.20.00 lacs.*

*(ii) Is it obligatory for every producer company to appoint a whole time secretary under the provisions of the Companies Act, 1956? (May 2005)*

## Answer

(i) As per provisions of section 581 ZH of the Companies Act, 1956, a Producer Company may, by special resolution, make donation or subscription to any institution or individual for the following purposes:-

(a) For promoting the social and economic welfare of Producer Members or Producers or general public; or

(b) For promoting the mutual assistance principles.

Thus as per the above stated provisions of the Companies Act, 1956, a Producer Company may make a donation by passing a special resolution and for the above mentioned purposes.

The 1$^{st}$ Proviso to the said section 581ZH lays down the monetary limit for making the donation by a Producer Company. According to the said proviso the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the Producer Company in the financial year immediately preceding the financial year in which the donation or subscription was made.

Since the net profit of the Producer Company as per its last profit & loss account was Rs.20.00 lacs, it can make a total donation of Rs.60,000/- in this year being three percent thereof.

(ii) Under section 581X of the Companies Act, 1956 every Producer Company having an average turnover exceeding Rs.5 crores in each of three consecutive financial years shall have a whole time secretary who is a member of ICSI.

Question 5

*(i) The existing Inter-state Cooperative Society seeks your advice regarding the papers to be submitted to the Registrar of Companies for its registration as a Producer Company under the provisions of the Companies Act, 1956. You are required to prepare a list of such papers.*

*(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. (November 2005)*

Answer

(i) As per Section 581J of the Companies Act, 1956, any Inter-State Co-operative Society with objects not confined to one State may make an application to the Registrar of Companies for registration as Producer Company.

The application for registration as a producer Company is to be submitted along with the following:

(a) a copy of the special resolution, of not less than two-third of total members of Inter-State Co-operative Society, for its incorporation as a Producer Company under the Companies Act:

(b) a statement showing:

*(i) Names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such inter-State Co-operative Society, and*

*(ii) list of members of such Inter-State Co-operative Society;*

(c) a statement indicating that the Inter-State Co-operative Society is engaged in any one or more of the objects specified in Section 581B of the Companies Act, 1956;

(d) a declaration by two or more directors of the Inter-state co-operative society certifying that particulars given in the above statements are correct.

(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.

## Question 6

*(i) The existing Inter-state Cooperative Society seeks your advice regarding the papers to be submitted to the Registrar of Companies for its registration as a Producer Company under the provisions of the Companies Act, 1956. You are required to prepare a list of such papers.*

*(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. (November 2005)*

## Answer

(i) As per Section 581J of the Companies Act, 1956, any Inter-State Co-operative Society with objects not confined to one State may make an application to the Registrar of Companies for registration as Producer Company.

The application for registration as a producer Company is to be submitted along with the following:

(a) a copy of the special resolution, of not less than two-third of total members of Inter-State Co-operative Society, for its incorporation as a Producer Company under the Companies Act:

(b) a statement showing:

*(i) Names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such inter-State Co-operative Society, and*

*(ii) list of members of such Inter-State Co-operative Society;*

(c) a statement indicating that the Inter-State Co-operative Society is engaged in any one or more of the objects specified in Section 581B of the Companies Act, 1956;

(d) a declaration by two or more directors of the Inter-state co-operative society certifying that particulars given in the above statements are correct.

(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.

Question 7

*The Central Government came into possession of certain facts and documents, which indicated that some of the managerial personnel of a Company concerned with the management of the affairs thereof are acting in a manner, which is not desirable and if allowed to carry on, it is likely to cause serious injury to the interest of the trade, industry and business to which the company pertains. You are required to state the circumstances and manner in which the Central Government can initiate the process of removal of managerial personnel under the provisions of the Companies Act, 1956. (November 2005)*

Answer

(i) As per Section 581J of the Companies Act, 1956, any Inter-State Co-operative Society with objects not confined to one State may make an application to the Registrar of Companies for registration as Producer Company.

The application for registration as a producer Company is to be submitted along with the following:

(a) a copy of the special resolution, of not less than two-third of total members of Inter-State Co-operative Society, for its incorporation as a Producer Company under the Companies Act:

(b) a statement showing:

*(i) Names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such inter-State Co-operative Society, and*

*(ii) list of members of such Inter-State Co-operative Society;*

(c) a statement indicating that the Inter-State Co-operative Society is engaged in any one or more of the objects specified in Section 581B of the Companies Act, 1956;

(d) a declaration by two or more directors of the Inter-state co-operative society certifying that particulars given in the above statements are correct.

(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.

## Question 8

*The Executive Committee of an Inter-state Co-operative society decides to convert the society into a 'Producer Company' under the provisions of the Companies Act, 1956. You being a practicing Chartered Accountant are approached by the society for advice. Advise the society on the following matters:*

*(i) The steps to be taken for conversion of the society into a 'Producer Company'.*

*(ii) Manner in which voting rights of members of Producer company after conversion may be exercised.* *(May 2006)*

## Answer

Conversion of inter state cooperative society into producer company steps to be taken and manner in which voting rights of members after conversion to be exercised. [Section 581J and 581D The Companies (Amendment) Act, 2002.]

As a practicing Chartered Accountant the following advise can be given to the inter-state society which wants to get converted into a 'Producer company' under the provisions of Companies (Amendment) Act, 2002.

1. Steps to be taken for conversion (Section 58IJ):

   Any inter-state cooperative society having objects for multiplicity for states may make an application to the Registrar for registration as producer company. Such application should be accompanied by –

   (a) A copy of the special resolution, of not less than 2/3rd of total member of Inter-State Cooperative Society, for its incorporation as a producer company.

   (b) A Statement showing : (i) names and address or the occupation of the directors and Chief Executive, if any, by whatever name called, of such inter-state cooperative society; and (ii) list of members of such inter-state cooperative society.

   (c) A statement indicating that the inter-state cooperative society is engaged in any one or more of the objects specified in Section 581B.

   (d) A declaration by two or more directors of the inter-state cooperative society certifying that particulars given in clauses (a) to (c) given above are correct.

   The word "Producer Company Ltd." should form part of its name to show its identity. On compliance with the requirements of the Act, the Registrar shall, within a period of 30 days of the receipt of application, certify under his hand that the society applying for registration is registered and thereby incorporated as a producer company.

   Upon registration as a producer company, the Registrar of Companies who registers the company is required to intimate the Registrar with whom the erstwhile inter-State cooperative society was earlier registered for appropriate deletion of the society from its register.

2. Manner in which voting rights of members can be exercised (Section 581Z):

   Section 581Z of the Companies Act, 1956 states that subject to the provisions of sub-sections (1) and (3) of Section 581D, every member shall have one vote and in the case of equality of votes, the chairman or the person presiding shall have a casting vote except in the case of election of the chairman. As regards the voting rights it may be noted that:

   1. Where individual is a member of the producer company, he has one vote irrespective of the size of his holding.

   2. Where both individuals and producer institutions are members – single vote for every member.

   3. Where membership is confined to producer institutions only, in the first year of registration of the company, the voting rights shall be based on the size of the shareholding of the member institution and in the following years it will be based on

participation by the respective institutions in the business of the producer company in the previous year (as may be specified in the Articles),

4. A producer company, may, if authorized by the Articles, restrict the voting rights to active members of the producer company, and

5. Casting vote can be cast by the presiding member (Chairman) in case of equality of votes on any resolution (except for election of the Chairman).

## Question 9

*The Executive Committee of an Inter-state Co-operative society decides to convert the society into a 'Producer Company' under the provisions of the Companies Act, 1956. You being a practicing Chartered Accountant are approached by the society for advice. Advise the society on the following matters:*

*(i) The steps to be taken for conversion of the society into a 'Producer Company'.*

*(ii) Manner in which voting rights of members of Producer company after conversion may be exercised.* *(May 2006)*

## Answer

Conversion of inter state cooperative society into producer company steps to be taken and manner in which voting rights of members after conversion to be exercised. [Section 581J and 581D The Companies (Amendment) Act, 2002.]

As a practicing Chartered Accountant the following advise can be given to the inter-state society which wants to get converted into a 'Producer company' under the provisions of Companies (Amendment) Act, 2002.

1. Steps to be taken for conversion (Section 58IJ):

   Any inter-state cooperative society having objects for multiplicity for states may make an application to the Registrar for registration as producer company. Such application should be accompanied by –

   (a) A copy of the special resolution, of not less than 2/3rd of total member of Inter-State Cooperative Society, for its incorporation as a producer company.

   (b) A Statement showing : (i) names and address or the occupation of the directors and Chief Executive, if any, by whatever name called, of such inter-state cooperative society; and (ii) list of members of such inter-state cooperative society.

   (c) A statement indicating that the inter-state cooperative society is engaged in any one or more of the objects specified in Section 581B.

   (d) A declaration by two or more directors of the inter-state cooperative society certifying that particulars given in clauses (a) to (c) given above are correct.

   The word "Producer Company Ltd." should form part of its name to show its identity. On compliance with the requirements of the Act, the Registrar shall, within a period of 30 days of the receipt of application, certify under his hand that the society applying for registration is registered and thereby incorporated as a producer company.

Upon registration as a producer company, the Registrar of Companies who registers the company is required to intimate the Registrar with whom the erstwhile inter-State cooperative society was earlier registered for appropriate deletion of the society from its register.

2. Manner in which voting rights of members can be exercised (Section 581Z):

Section 581Z of the Companies Act, 1956 states that subject to the provisions of sub-sections (1) and (3) of Section 581D, every member shall have one vote and in the case of equality of votes, the chairman or the person presiding shall have a casting vote except in the case of election of the chairman. As regards the voting rights it may be noted that:

1. Where individual is a member of the producer company, he has one vote irrespective of the size of his holding.
2. Where both individuals and producer institutions are members – single vote for every member.
3. Where membership is confined to producer institutions only, in the first year of registration of the company, the voting rights shall be based on the size of the shareholding of the member institution and in the following years it will be based on participation by the respective institutions in the business of the producer company in the previous year (as may be specified in the Articles),
4. A producer company, may, if authorized by the Articles, restrict the voting rights to active members of the producer company, and
5. Casting vote can be cast by the presiding member (Chairman) in case of equality of votes on any resolution (except for election of the Chairman).

Question 10

*(i) A two year old Producer Company registered under Section 581C of the Companies Act, 1956 wants to donate some amount. The Chief Executive of the producer Company hs approached you to advise him as to how and for what purposes the donation can be made by such company. Also state the monetary restrictions, if any, laid down in the Companies Act, 1956 on making donations by a Producer Company. You are informed that as per the profit and loss account of the Producer Company for its last account year the profit was Rs. 20.00 lacs.*

*(ii) State the powers and functions of the Board of Directors of a Producer Company as enumerated in the Companies Act, 1956. (May, 2007)*

Answer

(i) As per provisions of section 581-ZH of the Companies, Act, 1956, a Producer Company may, by special resolution, make donation or subscription to any institution or individual for the following purposes-

(a) For promoting the social and economic welfare of Producer Members of producers of general public; or

(b) For promoting the mutual assistance principles

Thus as per the above stated provisions of the Companies Act, 1956, a Producer Company may make a donation by passing a special resolution and for the above mentioned purposed.

The 1st proviso to the said section 581-ZH lays down the monetary limit for making the donation by Producer Company. According to the said proviso the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the Producer Company in the financial year immediately proceeding the financial year in which the donation or subscription was made.

Since the net profit of the Producer Company as per its last profit & loss account was Rs. 20.00 lacs, it can make a total donation of Rs. 60,000/- in this year being three percent thereof.

(ii) Sub-section (3) of section 581-R of the Companies Act, 1956 states that all the powers specified in sub-section (1) and (2) shall be exercised by the Board, by means of resolution passed at its meeting on behalf of the Producer Company.

Sub-section (1) of the said section states that subject to the provisions of this Act and articles, the Board of directors of a Producer Company shall exercise all such powers and to do all such acts and things, as that company is authorized so to do.

Sub-section (2) of the said section states that such powers of the Board of Directors of a Producer Company May include all or any of the following matters, Namely:-

(a) determination of the dividends payable;

(b) determination of the quantum of withheld price and recommend patronage to be approved at general meeting;

(c) admission of new Members;

(d) pursue and formulate the organizational policy, objectives, establish specific long-term and annual objectives, and approve corporate strategies and financial plans;

(e) appointment of a Chief Executive and such other officers of the Producer Company, as may be specified in the articles;

(f) exercise superintendence, direction and control over Chief Executive and other officers appointed by it;

(g) cause proper books of account to be maintained; prepare annual accounts to be placed before the annual general meeting with the auditor's report and the replies on qualifications, if any, made by the auditors.

(h) acquisition or disposal of property of the Producer Company in its ordinary course of business;

(i) investment of the funds of the Producer Company in its ordinary course of its business;

(j) sanction any loan or advance, in connection with the business activities of the Producer Company to any Member, not being a director or his relative;

(k) take such other measures or do such other acts as may be required in the discharge of its functions or exercise of its powers

## Question 11

*Mr. Z an expert in modern agriculture practices is willing to lend his services as a director of M/s. Lord Krishna Cotton Producer Company Ltd. registered under Section 581C of the Companies Act, 1956. Advise Mr. Z as to how he can be appointed as a director including (1) The total number of directors that can be appointed (2) The tenure of the directors (3) The time limit within which the appointment should be made (4) the co-option of directors and (5) the voting powers of such co-opted directors.* *(November 2007)*

## Answer

According to Section 581P of the Companies Act, 1956 the members who sign the memorandum and the articles and designated as first directors and shall given the affairs of the company until the directors are appointed at the Annual General Meeting. According to Section 581-0 every producer company shall have at least five and not more than fifteen directors. The election of directors shall be conducted within 90 days from the date of registration of the producer company. In the case of Inter-state co-operative society the election shall be held within a period of 360 days. The period of office of director shall be not less than one year and not exceeding 5 years as may be specified in the articles. The directors are normally elected and appointed by the members in the Annual General Meeting. The Board may also co-opt one or more expert directors as an additional directors. Such directors cannot exceed $1/5^{th}$ of the total number of directors. The expert directors shall not have the right to vote in the election of Chairman but shall be eligible to be elected as Chairman if it is provided by the articles. The maximum period for which such experts are appointed as directors will be as provided in the articles of association and it cannot exceed 5 years. Thus Mr. Z can be appointed as expert director but he will not have any voting right in the election of chairman of the Board of Directors. Him tenure of office can be between one to five years.

## Question 12

*(i) An inter-state co-operative society has been incorporated on 1st May, 2008 as a Producer Company under the provisions of the Companies Act,, 1956. Give your comments on its proposal to have 18 directors on its Board after incorporation as a Producer Company.*

*(ii) Mr. Zameen, a member of a Producer Company, wants to transfer his shares. You are required to state as to how he can transfer his shares under the provisions of the Companies Act, 1956.*

*(iii) A Producer Company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 1956 in this regard.*

*(iv) What are the modes of investment, from and out of its general reserves, available to a Producer Company formed and registered under Section 581C of the Companies Act, 1956? (May 2008)*

## Answer

(i) As per provisions of Section 581-O of the Companies Act, 1956, any producer Company can not have more than fifteen directors. However, by way of a proviso, the said section further provides that in the case of an inter-state cooperative society which is incorporated as a Producer Company, may have more than fifteen directors for a period of one year from the date of its incorporation as a Producer Company.

In view of the above provisions of the Companies Act, 1956 the proposal to have 18 directors by the Producer Company after its incorporation as such, is a valid proposition, but since it is incorporated on 1st May, 2008, it can have more than 15 directors for one year only from the date of its incorporation.

(ii) According to the provisions of Section 581ZD(1) and (2) of the Companies Act, 1956, the shares of a member of a Producer Company shall not be transferable but a member of a Producer Company may after obtaining the previous approval of the Board, transfer the whole or part of his shares along with any special rights, to an active member at par value.

Based on the above provisions relating to the transfer of shares of a member in a Producer Company, Mr. Zameen has to obtain prior approval of the Board and then transfer his shares to an active member of the Producer Company at par value.

(iii) As per provisions of Section 581ZJ of the Companies Act, 1956, any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalization of amounts from general reserves referred to in Section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.

(iv) As per Producer Companies (General Reserves) Rules, 2003 issued by the Department of Company Affairs, Ministry of Finance, Government of India on 7th August, 2003, a producer company formed and registered under Section 581C of the Companies Act, 1956, shall make investments from and out of its general reserves in the following manner namely:

(a) in approved securities, fixed deposits, units and bonds issued by the Central or State governments of cooperative societies or scheduled banks; or

(b) in a co-operative bank, State co-operative Bank, co-operative land development bank or Central co-operative bank; or

(c) with any other schedule bank; or

(d) in any of the securities specified in Section 20 of the Indian Trusts Act, 1882; or

(e) in the shares or securities of any other multi-State Co-operative society or any co-operative society; or

(f) in the shares, securities or assets of a public financial institutions specified under Section 4A of the Companies Act, 1956 specified.

Further, Section 581ZL of the Act provides that the general reserves of any producer company shall be invested to secure the highest returns available from approved securities. A producer company may, for promotion of its objectives acquire the shares of another producer company. Again a producer company, either by itself or together with its subsidiaries may invest in the shares of any other company, other than a producer company for an amount not exceeding thirty per cent of the aggregate of its paid up capital and free reserves. Provided that a producer company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits specified in the section. All investments by a producer company may be made if such investments are consistent with the objects of the producer company.

NOTE

# CHAPTER 2

## THE FOREIGN EXCHANGE MANAGEMENT ACT, 1999

### Question 1

*Explain the meaning of the term "Current Account Transaction" and the right of a citizen to obtain Foreign Exchange under the Foreign Exchange Management Act, 1999. (May, 2001)*

### Answer

The term "current account transaction" is defined in Section 2(j) of Foreign Exchange Management Act, 1999. It means a transaction other than a capital account transaction and includes:

(i) payments due in connection with foreign trade in the ordinary course of business.

(ii) payments due as interest on loans and as net income from investments.

(iii) remittances for living expenses of parents, spouse and children residing abroad and

(iv) expenses in connection with foreign travel education and medical care of parents, spouse and children.

According to Section 5 of FEMA, 1999 any citizen may sell or draw foreign exchange to or from an authorised person if such sale or drawl is a current account transaction. Provided that the Central Government may in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed.

Further, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction subject to the provisions of section 6(2).

### Question 2

*Mr. X, an Indian national has failed to realise and repatriate foreign exchange worth more than Rs.2 crores. Mr. X having realised that he had committed a contravention of the provisions of the Foreign Exchange Management Act, 1999, desires to compound the said offence. Advise Mr. X. (November, 2001)*

### Answer

Because of his failure to realise and repatriate foreign exchange, Mr. X has contravened the provisions of section 8 of FEMA and he is liable to the penalties leviable under Section 13, followed by adjudication proceedings. Section 15 of FEMA permits the offending party to compound the contravention within 180 days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officers of the Reserve Bank of India as may be authorised in this behalf by the Central Government in such manner as may be prescribed. No contravention shall be compounded unless the amount involved in such contravention is quantifiable. Where a contravention has been compounded, no proceeding can continue or be initiated against the person in respect of the contravention so compounded.

### Question 3

*Mr. G., an Indian national desires to obtain Foreign Exchange on current account transactions for the following purposes:*

*(i) Payment of commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian Company.*

*(ii) Remittance of hiring charges of transponder.*

*(iii) Remittance for use of trade mark in India.*

*Advise G whether he can obtain Foreign Exchange and, if so, under what conditions?*

*(November, 2001)*

### Answer

Under Section 5 of Foreign Exchange Management Act, 1999, certain rules have been framed for drawal of foreign exchange on current account. According to the said rules, drawal of foreign exchange for certain transactions is prohibited. In respect of certain transactions drawal of foreign exchange is permissible with the prior approval of Central Government. In respect of some of the transaction, prior permission of RBI is sufficient for drawal of foreign exchange.

(i) In respect of item No.1 i.e. Payment of Commission on exports made towards equity investment in wholly owned subsidiary abroad of an Indian company is prohibited.

(ii) Drawal of foreign exchange for remittance of hiring charges of transponder, can be made with the prior approval of the Central Government.

(iii) So far as remittance for use of Trade Mark in India is concerned, the necessary foreign exchange can be obtained with the prior permission of the Reserve Bank of India.

In the case of (ii) & (iii) above, approval of concerned authority is not required if the payment is made out of funds held in Resident Foreign Currency (RFC) Account or Exchange Earner's Foreign Currency (EEFC) Account of the remitter. Further foreign Exchange can be drawn only from an authorised person.

### Question 4

*(a) According to Foreign Exchange Management Act, 1999, a person resident in India shall take all reasonable steps to repatriate to India any amount of foreign exchange earned and accrued to him. What is meant by the expression 'Repatriate to India'? State the*

*cases where foreign exchange can be held or need not be repatriated to India by a resident in India.*

*(b) Explain the meaning of the term "Adjudicating Authority" under the Foreign Exchange Management Act, 1999, the powers available with the said authority to pass orders imposing penalty and enforce the same in relation to violation of any provision of FEMA by Mr. Dubious, a resident in India.*

*(c) (i) How will you determine whether a particular business unit like a factory or office is a 'person resident in India' under Foreign Exchange Management Act, 1999?*

*(ii) 'Printex Computer' is a Singapore based company having several business units all over the world. It has a unit for manufacturing computer printers with its Headquarters in Pune. It has a Branch in Dubai which is controlled by the Headquarters in Pune. What would be the residential status under FEMA, 1999 of printer units in Pune and that of Dubai branch? (May, 2002)*

Answer

(a) The word "repatriate to India" is defined in section 2(y) of the FEMA, Act 1999. 'Repatriate to India' means the realized foreign exchange should be sold to an authorised person in India in exchange for rupees. It also includes the holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank and includes use of the realised amount for discharge of a debts or liability denominated in foreign exchange.

*Exemption from holding/repatriation.*

Section 4 of the FEMA, 1999 prohibits holding of foreign exchange by a resident in India. Section 8 requires that foreign exchange earned by a resident in India is realised and repatriated to India.

However, in the following cases, the foreign exchange can be held or need not be repatriated to India:-

1. Possession of foreign currency – possession of foreign currency or foreign coins upto limit prescribed by RBI is permitted (section 9(a))

2. Foreign currency account – Foreign currency account can be held and operated by such persons and within such limits as specified by RBI (Section 9(b))

3 Foreign currency acquired before July 1947 – Foreign exchange acquired or received before 8th July 1947 or income arising or accruing thereon can be held outside India (section 9(c))

4. Gift or inheritance – If such foreign exchange is acquired as a gift or inheritance, that exchange and income arising therefrom can be held as foreign exchange in India or held abroad and need not be repatriated (Section 9(d)).

5. Foreign exchange acquired abroad – Foreign exchange acquired from employment, business, trade, vocation, services honorarium, gifts, inheritance, or any other

legitimate means can be held as foreign exchange in India or it need not be repatriated to India subject to limits specified by RBI (Section 9(e))

6. Any other receipts specified by RBI (Section 9(f))

(b) Adjudicating authority

According to Section 2(a) of FEMA, 1999, 'Adjudicating Authority' means an officer authorised under section 16(i)

*Power of adjudicating authority:* Persons committing an offence under FEMA are liable to penalty. An adjudicating authority appointed by the Central Government under FEMA can impose any penalty for violation of any provision of FEMA or contravention of any rule, regulation, directions or orders issued under the powers conferred by the Act. Their jurisdiction will be prescribed by the Central Government (section 16(1) & (2)). The Adjudicating Authority can hold inquiry only on receiving a complaint form an authorised officer (Section 16(3)).

They have to follow principles of natural justice by giving opportunity to Mr. Dubious of making representation. The adjudicating authority should endeavor to dispose off the complaint within one year (Section 16(6))

The adjudicating authority can impose penalty upto thrice the sum involved in such contravention where the amount is quantifiable. If the amount is not quantifiable, penalty upto Rs. 2 lakhs can be imposed. If contravention is of continuing nature, further penalty upto Rs 5,000 per day during which the default continues can be imposed [Section 13(i)].

The Adjudicating Authority adjudicating the contravention can also order confiscation of any currency, security or any other money or property in respect of which the contravention has taken place. He can also direct that foreign exchange holdings of any person committing the contravention shall be brought back to India or retained outside as per directions (Section 13(2)).

Enforcement of orders of adjudicating authority.

Person on whom penalty is imposed is required to make payment within 90 days of receipt of notice. If such payment is not made, he is liable to civil imprisonment (Section 14(i)). Such civil imprisonment can be upto 6 months, if demand is for less than Rs. 1 crore. If demand exceeds Rs. 1 crore, civil imprisonment can be upto 3 years. If he pays the amount, he shall be released. Order for arrest and detention cannot be made unless a show cause notice is issued to the defaulter. However, arrest can be made without show cause notice, if adjudicating authority is satisfied (a) that the defaulter has dishonesty transferred, concealed or removed his property or he is refusing or neglecting to pay even if he has means to pay [Section 14(2) (b)] and (b) he is likely to abscond the local limits [Section14(3)].

If a person to whom show cause notice is issued does not appear before Adjudicating authority, warrant of arrest can be issued [Section 14 (4)].

(c) (i) Person resident in India

Section 2 of FEMA,1999 defines the term "person resident in India". According to Section 2 (iii), all business units in India will be "resident in India" even though these units are owned or controlled by a person resident outside India.

Similarly all business units outside India will be 'resident in India' provided the business units are either owned or controlled by a person resident in India [Section 2(v) (iv)]. It is necessary to determine the residential status of the person who owns or controls the business unit.

(ii) Printex Computer being a Singapore based company would be person resident outside India [(Section 2(w)] Section 2 (u) defines 'person' under clause (viii) thereof, as person would include any agency, office or branch owned or controlled by such person. The term such person appears to refer to a person who is included in clause (i) to (vi). Accordingly printex unit in Pune, being a branch of a company would be a 'person'.

Section 2(v) defines a person resident in India. Under clause (iii) thereof person resident in India would include an office, branch or agency in India owned or controlled by a person resident outside India. Printex unit in Pune is owned or controlled by a person resident outside India, and hence it, would be a 'person resident in India.'

However, Dubai Branch though not owned is controlled by Print unit in Pune which is a person resident in India. Hence prima facie, it may be possible to hold a view that the Dubai Branch is a person resident in India.

Question 5

*(a) Mr. Ram had resided in India during the Financial Year 1999-2000 for less than 183 days. He again came to India on 1st May, 2000 for Higher studies and business and stayed upto 15th July, 2001. State under the Foreign Exchange Management Act, 1999.*

*(i) If Mr. Ram can be considered 'person Resident in India' during the Financial year 2000-2001 and*

*(ii) Is citizenship relevant for determining such a status?*

*(b) Mr. Ramesh of Nagpur wants to travel to Nepal and for this purpose proposes to draw Foreign Exchange. Specify.*

*(i) Can Mr. Ramesh draw any Foreign Exchange for his journey?*

*(ii) What are the purposes for which Foreign Exchange drawal is not allowed for Current Account Transaction? (November, 2002)*

Answer

(a) (i) No. Mr. Ram cannot be considered 'Person resident in India' during the financial year 2000-2001 notwithstanding the purpose or duration of his stay in India during

2000-2001. An individual has to be present in India for more than 182 days in the preceding financial year. Mr. Ram does not satisfy this condition for the financial year 2000-2001.

(ii) No. Citizenship is no more relevant for determining the status.

(b) (i) No. According to the rules, drawl of foreign exchange is not allowed for travel to Nepal or Bhutan.

(ii) Following are the transactions (current account) for which drawl of foreign exchange is prohibited.

1. *Remittance of interest income on funds held in Nonresident Special Rupee (NRSR) Account Scheme.*
2. *Transactions with a person resident in Nepal or Bhutan (unless specifically exempted by RBI by general/special order).*
3. *Remittance out of lottery winnings.*
4. *Remittance of income from racing/ riding etc. or any other hobby.*
5. *Remittance for purchase of lottery tickets, banned/ prescribed magazines, football, pools etc.*
6. *Payment of commission on exports made towards equity investment in joint ventures/wholly owned subsidiaries aboard of Indian Companies.*
7. *Remittance of dividend by any company to which the requirement of dividend balancing is applicable.*
8. *Payment of commission on export under Rupee State Credit Route.*
9. *Payment related to 'Call Back Services' of telephones.*

Question 6

*(a) Examine whether the following branches can be considered as a 'Person resident in India' under Foreign Exchange Management Act, 1999:*

*(i) ABC Limited, a company incorporated in India established a branch at London on 1st January, 2003.*

*(ii) M/s XYZ, a foreign company, established a branch at New Delhi on 1st January, 2003. The branch at New Delhi controls a branch at Colombo.*

*(b) Mr. Ramesh is an exporter of goods and services. Explain briefly his duties under Foreign Exchange Management Act, 1999 with regard to the following:*

*(i) Furnishing of information relating to such exports.*

*(ii) Realisation and repatriation of foreign exchange on such exports.* *(May, 2003)*

Answer

(a) Person resident in India (Foreign Exchange Management Act, 1999):

(i) Any person or body corporate registered or incorporated body in India is a resident in India [section 2(v)(ii)]. 'Person' includes a company [section 2(u)]. An office, branches or agency outside India owned or controlled by a person resident in India is a person resident in India. [Section 2(v)(iv)].

In view of the above provisions in FEMA, 1999 London branch established by ABC Ltd, a company incorporated in India, is a 'person resident in India' under the Act from the date of establishment i.e. 1st January, 2003.

(ii) According to Section 2(v)(iii) of FEMA, 1999 an office, branch or agency in India owned or controlled by a person resident outside India is a person resident in India'. Only a body corporate registered or incorporated in India is a 'person resident in India'. According to section 2(w), 'person resident outside India' means a person who is not resident in India. Hence M/s XYZ, foreign company is a 'resident outside India. But the branch at New Delhi owned by M/s XYZ is a 'resident in India' within the meaning of section 2(v) (iii) from the date of establishment i.e. 1st January, 2003. The branch at Colombo controlled by the branch at New Delhi referred to in the question is a person 'resident in India' within the meaning of section 2(v)(iii) read with section 2(v)(iv).

(b) Duty of every exporter of goods and services under FEMA, 1999:

(i) *Furnishing of Information:-* Every exporter of goods is required the furnish to RBI or other prescribed authority a declaration containing true and correct material particulars, including the amount representing full export value. If full exportable value is not ascertainable at the time of export due to prevailing market conditions, the exporter shall indicate the amount he expects to share indicate the amount he expects to receive on sale of goods in a market outside India. The exporter of goods shall also furnish to RBI such other information as may be required by RBI for the purpose of ensuring realization of export proceeds by such exporter [section 7(i)].

RBI can direct any exporter to comply with prescribed requirements to ensure that full export value of the goods or such reduced value of the goods as RBI determines, is received without delay [section 7(2)]. Every exporter of services shall furnish to RBI or other prescribed authority a declaration containing true and correct material particulars in relation to payment of such services [section 7(3)].

(ii) *Realisation and repatriation of foreign exchange:* Where any amount of foreign exchange is due or has accrued to any resident in India, such person shall take all reasonable steps to realize and repatriate to India the foreign exchange within such period and in such manner as may be specified by RBI (section 8). Mr. Ramesh as an exporter of goods and services must comply with the requirements of section 7 and 8 of FEMA, 1999 and also with the requirements under Foreign Exchange Management (Export of Goods and Services) Regulations, 2000.

## Question 7

*Mr. Ram, citizen of India, left India for employment in U.S.A. on 1st June, 2002. Mr. Ram purchased a flat at New Delhi for Rs.15 lakhs in September, 2003. His brother, Mr. Gopal employed in New Delhi, also purchased a flat in the same building in September, 2003 for Rs.15 lakhs. Mr. Gopal's flat was financed by a loan from a Housing Finance Company and the loan was guaranteed by Mr. Ram.*

*Examine with reference to the provisions of Foreign Exchange Management Act, 1999 whether purchase of flat and guarantee by Mr. Ram are Capital Account transactions and whether these transactions are permissible. (November, 2003)*

## Answer

### Capital account transactions

Section 2(e) of Foreign Exchange Management Act, 1999 states that 'capital account transactions' means (a) a transaction which alters the assets or liabilities, including contingent liabilities, outside India of person's resident in India (b) a transaction which alters assets or liabilities in India of persons resident outside India and includes transactions referred to in Section 6(3). According to the said definition, a transaction which alters the contingent liability will be considered as capital account transaction in the case of person resident in India, but it is not so in the case of person resident outside India.

Purchase of immovable property by Mr. Ram in India is a capital account transaction. It has also been specifically provided in Section 6(3)(i) as a capital account transaction.

Guarantee will be considered as a capital account transaction in the following cases:

(1) Guarantee in respect of any debt, obligation or other liability incurred by a person resident in India and owed to a person resident outside India.

(2) Guarantee in respect of any liability, debt or other obligation incurred by a person resident outside India.

In this case, Mr. Ram, a resident outside India gives a guarantee in respect of a debt incurred by a person resident in India and owed to a person resident in India. Hence, it would appear that guarantee by Mr. Ram cannot be considered as a capital account transaction within the meaning of Section 2(e), particularly because it is a contingent liability.

All capital account transactions are prohibited unless specifically permitted. RBI is empowered to issue regulations in this regard [Section 6(3)]. Permissible capital account transactions by persons resident outside India are given in Schedule II to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. According to the said regulations both the purchase of immovable property by Mr. Ram and guarantee by Mr. Ram are permissible.

Question 8

*(a) Mr. Sane, an Indian National desires to obtain Foreign Exchange for the following purposes:*

*(i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.*

*(ii) US Dollar 1,00,000 for sending a cultural troupe on a tour of U.S.A.*

*(iii) US Dollar 50,000 for meeting the expenses of his business tour to Europe.*

*Advise him whether he can get Foreign Exchange and if so, under what conditions?*

*(b) Explain the restrictions, if any, under Foreign Exchange Management Act, 1999 in respect of the following issue and transfer of shares:*

*(i) Issue of Equity Shares of Rs.1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non-repatriation basis. The shares are issued by M/s ABC Knitwear Limited to finance the modernization of its plant.*

*(ii) A Non-resident Indian, who is holding Equity shares in M/s DEF Textiles Limited, proposes to sell some shares to another Non-resident Indian for a consideration of Rs.50 lakhs and also transfer shares of face value of Rs.25 lakhs to a person resident in India by way of Gift. (May, 2004)*

Answer

(a) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

(i) In respect of item No.(i), i.e., remittance out of lottery winnings, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Sane can not withdraw Foreign Exchange for this purpose.

(ii) Foreign Exchange for meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and Culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Sane can withdraw the Foreign Exchange after obtaining such permission.

(iii) The type of payment as envisaged in Item No.(iii) is covered under third Schedule to the Foreign Exchange Management (Current Account Transactions)

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised

Person as defined in Section 2(c) read with section 10 of the to the Foreign Exchange Management Act, 1999.

(b) Issue of equity shares to NRI's and transfer of shares by NRIs are capital account transactions.

RBI may in consultation with the Central Government specify any class or classes of transactions which are permissible (Section 6(2)(a).

According to Regulation 3(1) of the Foreign Exchange Management (Permissible capital Account Transactions) Regulations, 2000 issued by RBI Investment in India by a person resident outside India is a permissible capital account transactions (Schedule II).

Further RBI is empowered under Section 6(3)(b) to prohibit, restrict or regulate, by regulations, transfer or issue of any security by a person resident outside India. In exercise of these powers RBI issued Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations 2000.

According to Regulation 5(3)(ii) of the said regulations a NRI may purchase shares of an Indian Company which is not engaged in Print Media Sector on non-repatriation basis without any limit (para 2 of Schedule 4). The shares may be issued by the company either by public issue or private placement. The only condition is that the amount of consideration for purchase of shares shall be paid by way of inward remittance through normal banking channels from abroad or out of funds held in NRE/FCNR/NRO/NRSR/N&NR account maintained with an authorized dealer or as the case may be with an authorised bank in India (Para 3 of Schedule 4).

Transfer of shares of an Indian Company by a person resident outside India.

Regulation 9(2)(ii) of Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 permits NRI to transfer by way of sale the shares held by him to another NRI. Further according to Regulation 9(2)(iii) a person resident outside India may transfer any security held by him, to a person resident in India by way of gift. There are no restrictions in this regard.

Hence the proposed sale of shares to NRI and transfer to a persons resident in India by way of gift are permissible under FEMA.

Indian company can issue the above shares and record in its books the above transfer (Regulation 4).

## Question 9

*(a) (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) Forex Dealers Ltd. is an Authorised Person within the meaning of Foreign Exchange Management Act, 1999. Reserve Bank of India issued certain directions to the said*

*Authorised Person to file certain returns, which it failed to file. You are required to state the penal provisions to which the said Authorised Person has exposed itself.*

*(November, 2004)*

*(b) (i) Mr. Sekhar resided for a period of 150 days in India during the Financial year 2003-2004 and thereafter went abroad. He came back to India on 1st April, 2004 as an employee of a business organization. What would be his residential status during the financial year 2004-2005?*

*(ii) Mr. Atul, an Indian National desires to obtain Foreign Exchange for the following purposes:*

*(a) Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.*

*(b) US Dollar 10,000 for remitting as commission to his agent in U.S.A. for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. Atul by way of foreign currency inward remittance amounting to US Dollar 1,00,000.*

*Advise him, if he can get the Foreign Exchange and under what conditions.*

*(November, 2004)*

Answer

(a) (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) Section 11(3) of the Foreign Exchange Management Act, 1999 stated that where any Authorised person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person a penalty which may extend to ten thousand rupees and in the case of continuing contraventions with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Since as per the facts given in the question, the Authorised person, namely, Forex Dealers Ltd., has failed to file the returns as directed by the Reserve Bank of India. According to the above provisions, it has exposed itself to a penalty which may extend to ten thousand rupees and in the case of continuing contraventions in the nature of failure to file the returns, with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

(b) (i) According to the provisions of section 2(v) of the Foreign Exchange Management Act, 1999, a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of more than 182 days during the preceding financial year. In the given case, Mr. Sekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2003-2004. Hence he cannot be considered as a "Person Resident in India" during the financial year 2004-2005 irrespective of the purpose or duration of his stay.

(ii) Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, drawal of Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions prior permission of Reserve Bank of India is required.

In respect of item (a), i.e. remittance to Nepal, such remittance is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Atul cannot withdraw Foreign Exchange for this purpose.

The type of payment as envisaged in item (b) is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for withdrawing foreign Exchange exceeding 5% (five percent) of the inward remittance as commission to agent abroad for sale of commercial plot in India Mr. Atul will require the prior permission of the Reserve Bank of India.

Current Account Transactions have been liberalized by RBI, Foreign Exchange Department with effect from 24.02.2004 vide A.P. (DIR Series) Circular No.76 dated 24.02.2004. Now authorized persons (authorized dealers) are authorized to allow freely such remittances ((i.e.) commission to agents abroad for sale of commercial plots) up to USD 25000 or 5 per cent of inward remittance per transaction, whichever is higher. As the amount to be remitted is only USD 10,000, authorized person (authorized dealer) may be approached for permission.

## Question 10

*(i) MKP Limited, an Indian company having its Registered Office at Mumbai, India established a branch at New York U.S.A. on 1st April, 2004.*

*(ii) WIP Ltd., a company incorporated and registered in London established a branch at Chandigarh in India on 1st April, 2004.*

*(iii) WIP Ltd.'s Singapore branch which is controlled by its Chandigarh branch (May 2005)*

## Answer

(i) As per provisions of section 2(v)(ii) of the Foreign Exchange Management Act, 1999 (FEMA) any person or body corporate registered or incorporated in India is a "Person resident in India". As per section 2(v) of the said Act the term "person" includes a company. Section 2(v)(iv) of the said Act states that an office, branch or agency outside India owned or controlled by a person resident in India is a "Person resident in India".

In the light of the above provisions of FEMA, the residential status of the New York branch of MKP Ltd is that of a "Person resident in India" from the date of its establishment since it is owned by a person, i.e., a company, resident in India.

(ii) As per provisions of section 2(v)(iii) of the Foreign Exchange Management Act, 1999 (FEMA) an office, branch or agency in India owned or controlled by a person resident outside India is a "Person resident in India". Section 2(w) of the said Act states that a person who is not resident in India is a "Person resident outside India".

On application of the above provisions of FEMA, it can be concluded that WIP Ltd. is a "Person resident outside India" and since it owns a branch in Chandigarh, India, the residential status of the said Chandigarh branch is that of a "Person resident in India" from the date of its establishment.

(iii) As per provisions of section 2(v)(iv) of the Foreign Exchange Management Act, 1999 (FEMA) an office, branch or agency outside India owned or controlled by a person resident in India is a "Person resident in India". Here, the Singapore branch of WIP Ltd. is controlled by its Chandigarh branch which is a "Person resident in India". Therefore, the residential status of the Singapore branch of WIP Ltd. shall be that of a "Person resident in India".

## Question 11

*Mr. F, an Indian National desires to obtain foreign exchange for the following purposes:*

*(i) Payment of US $10,000 as commission on exports under Rupee State Credit Route.*

*(ii) US $ 30,000 for a business trip to U.K.*

*(iii) Remittance of US $ 2,00,000 for payment as prize money to the winning team in a Hockey Tournament to be held in Australia.*

*Advise him, if he can get the Foreign Exchange and under what condition (May 2005)*

## Answer

Under provisions of section 5 of the Foreign Exchange Management Act, 1999 certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions in prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central Government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required:

(i) In respect of item No. (i), i.e., payment of commission on exports under Rupee State Credit Route, such payment is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000.

(ii) Foreign Exchange for business trip upto US$ 25,000 can be obtained by any person. If a person wants to exceed this limit, then prior permission of Reserve Bank of India is required as per Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. In respect of item (ii), since the amount involved is more than US $ 25,000, Mr. F can obtain the foreign exchange after getting the permission of Reserve Bank of India.

(iii) The type of payment as envisaged in item No.(iii) is covered under Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for remitting of prize money exceeding US$ 1,00,000 for sports activity abroad other than International, National or State level body will require the prior permission of the Central Government. (Ministry of Human Resource Development – Department of Youth Affairs and Sports). Since the amount involved in item No. (iii) of the question is more than US$ 1,00,000 and Mr. F is not an International, National or State level body, he has to obtain the permission of the Central Government before remitting the prize money of US$ 2,00,000.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with section 10 of the to the Foreign Exchange Management Act, 1999.

## Question 12

*(a) Explain the meaning of "Capital Account Transaction" under the Foreign Exchange Management Act, 1999. State whether there are any restrictions in respect of the following transactions:*

*(i) Drawal of Foreign Exchange for payments due on account of amortisation of loans in ordinary course of business.*

*(ii) Purchase by a person resident outside India of shares of a company in India engaged in plantation activities.*

*(b) TKM Exporters of New Delhi are engaged in Export Business. It made certain exports, but failed to realize and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999 (FEMA). Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeals. You are required to advise on the matter.* *(November 2005)*

Answer

(a) As per provisions of section 2(e) of the Foreign Exchange Management Act, 1999 (FEMA) "Capital Account Transaction" means a transaction which alters (a) the assets and liabilities, including the contingent liabilities, outside India of persons resident in India or (b) the assets and liabilities in India of persons resident outside India.

It also includes the following as stated in section 6(3) of FEMA:

(i) Transfer or issue of any foreign security by a person resident in India.

(ii) Transfer or issue of any security by a person resident outside India.

(iii) Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India.

(iv) Any borrowing or lending in foreign exchange in whatever form or by whatever name called.

(v) Any borrowing or lending in India rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India.

(vi) Deposits between persons resident in India and persons resident outside India.

(vii) Export, import or holding of currency or currency notes.

(viii) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India.

(ix) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.

(x) Giving a guarantee or surely in respect of any debt, obligation or other liability incurred (a) by a person resident in India and owed to a person resident outside India or (b) by a person resident outside India.

(i) Amortisation of Loans:

Under provisions of FEMA, 1999 subject to Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 as amended by Foreign Exchange Management (Permissible Capital Account Transactions) (Amendment) Regulations, 2004 all capital account transactions are prohibited unless permitted by proviso to section 6(2) of FEMA. The proviso specifically permits drawal of foreign exchange for payments due on account of amortisation of loans in ordinary course of business. Hence, there is no restriction in FEMA in this regard.

(ii) Purchase of Shares of Company engaged in Plantation activities:

According to Section 6(2) of FEMA, 1999 the Reserve Bank of India is empowered to specify in consultation with the Central Government, the classes of capital account transactions which are permissible and the limits upto which the foreign exchange shall be admissible for such transactions. Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 completely prohibits certain capital account transactions. One such transaction is foreign investment in India in any company, firm or proprietary concern engaged in or proposed to be engaged in agriculture or plantation activities. Hence, purchase by a person resident outside India of shares of a company in India engaged in plantation activities in not permissible.

(b) Sections 17 and 19 of FEMA, 1999 provide for appeals against orders of Adjudicating Authority. If Adjudicating Authority is Assistant Director of the Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for Foreign Exchange. However, if the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

Appeal to Special Director (Appeals)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under Section 17 within 45 days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there were sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass his order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

Appeal to Appellate Tribunal

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange under section 19 of FEMA within 45 days from the date on which the copy of the order made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the appellant has to deposit the amount of such penalty with the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass a reasoned order.

It may be noted that the Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

Question 13

*(a) State which kind of approval is required for the following transactions under the Foreign Exchange Management Act, 1999:*

*(i) X, a Film Star, wants to perform alongwith associates in New York on the occasion of Diwali for Indians residing at New York. Foreign Exchange drawal to the extent of US dollars 20,000 is required for this purpose.*

*(ii) F International Ltd. has purchased the trade mark from a Foreign Company to establish retail business chain in India as a joint venture at a consolidated price of US dollars 500,000 which is to be paid in Foreign currency of that country.*

*(iii) R wants to get his heart surgery done at UK. Up to what limit Foreign Exchange can be drawn by him and what are the approvals required?*

*(iv) L wants to pursue a course in Fashion design in Paris. The Foreign Exchange drawal is US dollars 20,000 towards tuition fees and US dollars 30,000 for incidental and stay expenses for studying abroad.*

*(b) A French Manufacturing Company desirous of setting up its branch office at Pune, seeks your advice on the objects for which the company may be allowed to set up the desired branch office. Advise the company about the procedure as required under the Foreign Exchange Management Act, 1999 to be followed in this regards (May 2006)*

Answer

(a) Approval to the following transactions under FEMA, 1999:

(i) Foreign Exchange drawals for cultural tours require prior permission/approval of the Government of India irrespective of the amount of foreign exchange required. Therefore, in the given case X, the Film Star is required to seek permission of the Government of India.

(ii) In this case prior permission/approval of RBI is required for purchasing trade mark from a foreign company where purchase consideration is to be paid in foreign currency. Therefore, F International Ltd. needs prior permission of RBI.

(iii) Remittance in foreign exchange for medical treatment abroad requires prior permission/approval of RBI when the expenditure in foreign currency exceeds the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment. Therefore, R can draw foreign exchange up to the estimate of hospital/doctor abroad or estimate from doctor in India in that field of treatment and prior permission/approval of RBI is required.

(iv) Release of foreign exchange for education abroad is permitted up to US$ 1,00,000 on self declaration basis. Therefore, L can draw foreign exchange on self declaration basis for pursuing a course in fashion design in Paris.

(b) Setting up a branch office at Pune by a French company – Objects and the procedure under the FEMA, 1999:

Since setting up a branch office by a foreign company in India involves foreign exchange, permission of RBI is required. Following are the objects for which RBI permits companies engaged in manufacturing and trading activities abroad to set up Branch Office in India:

1. To represent the parent company/other foreign companies in various matters in India e.g. acting as buying/selling agents in India.

2. To conduct research work in the area in which the parent company is engaged.

3. To undertake export and import trading activities.
4. To promote possible technical and financial collaborations between the Indian companies and overseas companies.
5. Rendering professional or consultancy services.
6. Rendering services in information technology and development of software in India.
7. Rendering technical support to the products supplied by the partner/group companies.

Steps / procedure:

1. Foreign company can set up Branch Offices in India after obtaining approval from RBI.
2. The office can act as a channel of communication between Head Office abroad and parties in India. It is not allowed to undertake any business activity in India and cannot earn any income in India. Expenses of such offices are to be met entirely through inward remittances of foreign exchange from the Head Office abroad.
3. Permission to set up such office is initially granted for a period of 3 years and this may be extended from time to time by the Regional Office in whose jurisdiction the office is set up.
4. The representative office will have to file an annual activity certificate etc. from a Chartered Accountant to the concerned Regional Office of the RBI.
5. Application is required to be made in Form FNC-1.

## Question 14

*Mr. Loma, an Indian National desires to obtain foreign exchange for the following purposes:*

*(a) Payment to be made for securing insurance for health from a company abroad.*

*(b) Payment of commission on exports under Rupee State Credit Route.*

*(c) Gift remittance exceeding US Dollars 10,000.*

*Advise him whether he can get foreign exchange and if so, under what condition?*

*(November 2006)*

## Answer

Under provision of Section 5 of FEMA 1999, certain Rules have been made for drawl of foreign exchange for current account transitions. As per these rules, foreign exchange for some of the current account transaction is prohibited. As regards some other current account transaction foreign exchange can be drawn with prior permission of the Central Government while in case of some other current account transaction, the prior permission of Reserve Bank of India is required.

1. The payment required to be made for securing insurance for health from a company abroad as referred in item 1 can be made after obtaining permission from Central

Government of India, as prescribed in Second Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. Hence Mr. LOMA can draw foreign exchange after obtaining such permission.

2. As regards item no. 2 i.e., the payment of commission on export under Rupee State Credit Route, such payment is prohibited as referred in First Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. Hence Mr. LOMA cannot withdraw for the said purpose.

3. The item referred here is covered by Third Schedule to Foreign Exchange Management (Current Account Transaction) Rules 2000. As per this schedule, gift remittance exceeding USD 5,000 per beneficiary per annum requires permission of RBI. Since the amount involved here is more than USD 5000, Mr. LOMA can draw foreign exchange after permission from RBI.

   In all the cases, where remittance of foreign exchange is allowed either by general or specific permission, the remitter has to obtain the foreign exchange from an authorized person as defined in Section 2(c) read with section 10 of FEMA, 1999.

## Question 15

*Mrs. Kamala, a resident in India is likely to inherit an immovable property in U.S.A. from her father, who is a resident outside India. Advise Mrs. Kamla about the restrictions, if any, in this regard under the Foreign Exchange Management Act, 1999 explaining the relevant provisions of the Act. Will your answer be different, if she is likely to inherit foreign securities?*

*(November 2006)*

## Answer

(i) 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.

(ii) Section 2(i) of Competition Act, 2002 defines 'goods' as follows:

   'Goods' means goods as defined the Sale of Goods Act, 1930 and includes –

   (a) products manufactured, processed or mined;

   (b) debentures, stock and shares after allotment

(c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Hence, debentures and shares can be considered as 'goods' within the meaning of section 2(i) of Competition Act, 2002 only after allotment and not before allotment.

## Question 16

*(i)* *Tomco Ltd. A vehicles manufacturing company situate at Pune, Maharastra 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)* *Forex Dealers Ltd. Is an Authorised Person within the meaning of Foreign Exchange Management Act, 1999. Reserve Bank of India issued certain directions to the said Authorised person to file certain returns which it failed to file. You are required to state the penal provisions to which the said Authorised Person has exposed itself.*

*(May 2007)*

## Answer

(i) Under provisions of section 7 of the Foreign Exchange Management Act, 199 certain 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.

Accordingly if Tomco Ltd. wants to accept the order for dispatching 100 trucks to Italy on lease, it has to take prior permission of the Reserve Bank of India.

(ii) In accordance with the provisions of the Foreign Exchange Management Act, 1999 as contained in section 11(3), stated that where any authorized person contravenes any direction given by the Reserve Bank of India under the said Act or fails to file any return as directed by the Reserve Bank of India, the Reserve Bank of India may, after giving reasonable opportunity of being heard, impose on Authorised Person a penalty which may extend to ten thousand rupees and in the case of continuing contraventions with an additional penalty which may extend to two thousand rupees for every day during which such contravention continues.

Since as per the facts given in the question, the Authorized person, namely, Forex Dealers Ltd., has failed to file the return as directed by the Reserve Bank of India, according to the above provisions if has exposed itself to a penalty which may extend to Rs. 10,000 and in the case of continuing contraventions in the nature of failure to file the return, with an additional penalty which may extend to Rs. 2,000 for every day during which such contravention continues.

Question 17

*(i)* *Mr. Sekhar resided in India for a period of 150 days in India during the financial year 2006-07 and thereafter went abroad. He came back to India on 1st April, 2007 as an employee of a business organization. What would be his residential status during the financial year 2007-2008?*

*(ii)* *Mr. Atul, an Indian National desires to obtain foreign exchange for the following purposes:*

*(a) Remittance of US Dollar 10,000 for payment for goods purchased from a party situated in Nepal.*

*(b) US Dollar 10,000 for remitting as commission to his agent in USA for sale of commercial plot situated near Bangalore, consideration in respect of which was received by Mr. Atul by way of foreign currency inward remittance amounting to US Dollar 1,00,000.*

*Advise him, if he can get the Foreign Exchange and under what conditions. (May 2007)*

Answer

(i) In accordance with the provisions of Section 2(v) of the Foreign Exchange Management Act, 1999, as contained in section 2(v) a person in order to qualify for the purpose of being treated as a "Person Resident in India" in any financial year, must reside in India for a period of ore than 182 days during the preceding financial year. In the given case, Mr. Sekhar has resided in India for a period of only 150 days, i.e., less than 182 days, during the financial year 2006-2007. Hence he cannot be considered as a "Person Resident in India" during the financial year 2007-2008 irrespective of the purpose or duration of his stay.

(ii) In accordance with the provisions the Foreign Exchange Management Act, 1999 as contained in Section 5, certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, drawal Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current account transactions, Foreign Exchange can be drawn with prior permission of the Central government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.

(a) In respect of item (a), i.e., remittance to Nepal, such remittance is prohibited and the same is included in First Schedule to be Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Atul cannot withdraw Foreign Exchange for this purpose.

(b) The type of payment as envisaged in item (b) is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules 2000 and for withdrawing foreign Exchange exceeding 5% (five percent) of the inward remittance as commission to agent abroad for sale of commercial plot in India, Mr. Atul will require the prior permission of the Reserve Bank of India.

## Question 18

*Examine with reference to the provisions of the Foreign Exchange Management Act, 1999, the residential status of the branches mentioned below:*

*(i) NNM Ltd. an Indian Company having its registered office at Mumbai, India established a branch at New York USA on 1st April, 2005.*

*(ii) DDI Ltd. a company incorporated and registered in London established a branch at Kanpur in India on 1st April 2005.*

*(iii) DDI Ltd. has a branch office at Singapore which is controlled by its Kanpur branch.*

*(November 2007)*

## Answer

As per Section 2(u) of the Foreign Exchange Management Act, 1999, 'person' includes the following:

- A Company
- Any agency, office or branch owned by a 'person'

Section 2(v) defines a 'person resident in India as to include:

Any person or body corporate registered or incorporated in India

An office, branch or agency in India owned or controlled by a person resident outside India

An office, branch or agency in India owned or controlled by a person resident in India.

Considering the provisions of the two section, the residential status is as follows:

NNM Ltd. as well as the New York branch of NNM Ltd. is a 'person'. Therefore, the residential status under FEMA shall be determined for each of them separately.

NNM ltd. is incorporated in India. Therefore, it is a 'person resident in India'.

NNM ltd. (a person resident in India) has established a branch outside India. Therefore, the New York branch of NNM ltd. falls under the clause 'an office', branch or agency outside India owned or controlled by a person resident in India and so the New York branch is a 'person resident in India'.

(a) DDI Ltd. (a foreign company) does not fall under any of the clauses of the definition of a 'person resident in India'. Therefore, DDI Ltd. is a 'person resident outside India'.

(b) The Kanpur branch of DDI Ltd. is a person resident in India' since it falls under the clause 'an office, branch or agency in India owned or controlled by a person resident outside India'.

(111) the Singapore branch of DDI Ltd., though not owned, is controlled by the Kanpur branch. The Singapore branch is a 'person resident in India' since it falls under the clause 'an office, branch or agency outside India owned or controlled by a person resident in India.

## Question 19

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

*(i) Investment by person resident in India in Foreign Securities.*

*(ii) Foreign currency loans raised in India and abroad by a person resident in India.*

*(iii) Export, import and holding of currency / currency notes.*

*(iv) Investment in a Nidhi Company.* *(November 2007)*

## Answer

### Meaning of Capital Account Transaction

It means a transaction which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of a person resident outside India, and includes transactions referred to in sub-section (3) of Section 6 of FEMA Act, 1999.

The Reserve Bank of India has formed Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. The provisions of these regulations are as under

### Categories of Capital Account Transactions:

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

(1) Permissible capital account transaction of persons resident in India (schedule 1)

(2) Permissible Capital transactions of persons resident outside India (schedule II).

(3) Prohibited capital account transactions.

A person resident in India may enter into any of the following capital account transactions provided the regulations specified by the Reserve Bank of India in respect of such capital account transactions are complied with.

In view of the above provisions: among five capital account transaction of question first three i.e. (i), (ii) and (iii) are permissible capital account transactions and rest two i.e., (iv) and v are prohibited capital transactions.

## Question 20

*TKM Exporter of New Delhi are engaged in Export Business. It made certain exports but failed to realise and repatriate to India the foreign exchange due on its exports. The Adjudicating Authority imposed a penalty under the provisions of Foreign Exchange Management Act, 1999 (FEMA). Being aggrieved by this penalty, the said exporter seeks your advice as to the authority to which appeal can be made and the time limit for making such appeals. You are required to advise on the matter.* *(May 2008)*

## Answer

Sections 17 and 19 of Foreign Exchange Management Act 1999 provide for appeals against orders of Adjudicating Authority. If the Adjudicating Authority is Assistant Director of Enforcement or Deputy Director of Enforcement, appeal will lie to Special Director (Appeals). Further appeal shall lie with Appellate Tribunal for foreign Exchange. However, the Adjudicating Authority is senior to the Assistant Director of Enforcement or Deputy Director of Enforcement, then the appeal shall lie directly to the Appellate Tribunal.

### Appeal to Special Director (Appeals)

Appeal against order of Assistant Director of Enforcement or Deputy Director of Enforcement can be filed with Special Director (Appeals) under Section 17 of the said act within 45 days from the date on which the copy of the order made by the Adjudication Authority is received by the aggrieved person. The Special Director (Appeals) can condone the delay in filing the appeal if he is satisfied that there were sufficient cause for not filing the appeal within the stipulated time. Special Director (Appeals) will hear the parties and then pass his order. Copy of the order shall be sent to the concerned parties and the Adjudicating Authority.

### Appeal to Appellate Tribunal

Appeal against the order of Adjudicating Authority being senior to Assistant Director of Enforcement or Deputy Director of Enforcement or against the order of Special Director (Appeals) can be made to the Appellate Tribunal for Foreign Exchange under Section 19 of Foreign Exchange Management Act, 1999 within 45 days from the date on which the copy of the order made by such Adjudicating Authority or Special Director (Appeals) is received by the aggrieved person. In this case also, the delay can be condoned by the Appellate Tribunal. In case of an appeal against the order imposing penalty, the appellant has to deposit the amount of such penalty with the authority prescribed by the Central Government. However, the Appellate Tribunal may waive such deposit to mitigate the likely hardship that may be caused to the appellant. After hearing of the appeal, the Appellate Tribunal shall pass a reasoned order.

It may be noted that the Tribunal is the final fact finding authority and no appeal lies against the facts determined by the Tribunal.

## Question 21

*Mr. Kale, an Indian National desires to obtain foreign exchange for the following purposes:*

*(i) Remittance of US Dollar 50,000 out of winnings on a lottery ticket.*

*(ii) US Dollar 100,000 for sending a tour of a cultural group to USA.*

*(iii) US Dollar 50,000 for meeting the expenses of his business tour to Europe.*

*Advise him, if he can get the Foreign Exchange and under what conditions.* *(May 2008)*

## Answer

Under provisions of Section 5 of the Foreign Exchange Management Act, 1999 certain rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current Account transactions, Foreign Exchange can be drawn with prior permission of the Central government or Reserve Bank of India.

(i) Remittance out of lottery winnings, is prohibited and the same is included in First Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence Mr. Kale cannot withdraw Foreign Exchange for this purpose.

(ii) Foreign Exchange or meeting expenses of cultural tour can be withdrawn by any person after obtaining permission from Government of India, Ministry of Human Resources Development, (Department of Education and culture) as prescribed in Second Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, in respect of item (ii), Mr. Kale can withdraw the Foreign Exchange after obtaining such permission.

(iii) The type of payment as envisaged is covered under Third Schedule to the Foreign Exchange Management (Current Account Transactions) Rules, 2000 and for withdrawing foreign Exchange exceeding US Dollar 25,000 for a business tour irrespective of period of stay Mr. Kale will require the prior permission of the Reserve Bank of India.

In all the cases, where remittance of Foreign Exchange is allowed, either by general or specific permission, the remitter has to obtain the Foreign Exchange from an Authorised Person as defined in Section 2(c) read with Section 10 of the Foreign Exchange Management Act, 1999.

## Question 22

*Mr. Guilt an Indian National realizes that a penalty may be imposed upon him for violation of the provisions of the Foreign Exchange Management Act, 1999. He therefore desires to compound his offences. Advise Mr. Guilt about the process and procedure of compounding of the offence.* *(November 2008)*

## Answer

Sections 15 of Foreign Exchange Management Act, 1999 (FEMA) authorizes the Reserve Bank of India and Enforcement Directorate to compound contravention on an application made by any person who has committed contravention. The process and procedure of compounding is as under:

- An application for compounding of a contravention under the FEMA may be submitted to the compounding authority either on being advised of a contravention or either through a memorandum or suo moto on being made or becoming aware of the contravention. The application should be as per format in the Foreign Exchange (Compounding proceeding) Rules.

- Application for compounding in prescribed form together with a copy of the memorandum wherever applicable with the prescribed fee has to be submitted with relevant facts and supporting documents to the compounding authority.
- The compounding authority may call for any information/record or any other documents relevant to the compounding proceedings.
- Where additional information/documents are called for, such information shall be submitted within thirty days or such additional period as may be given by the compounding authority from the date of the said letter. In case the contravener fails to submit additional information/document called for within the specified period, the application for compounding will be liable for rejection.
- On receipt of the application for compounding, the proceeding would be concluded and the order issued by the compounding authority within 180 days from the date of the receipt of the application for compounding.
- The sum for which contravention has been compounded shall be paid within 15 days from the date of order of compounding.
- The payment towards application fee and the sum for which contravention has been compounded shall be paid by demand draft in favour of compounding authority.

Thus Mr. Guilt will have to follow the above procedure for compounding his offences.

## Question 23

*Mr. Amit, a citizen of India, left India for employment in Australia on 1st June, 2007. Mr. Amit purchased a flat at New Delhi for Rs.15 lakhs in September, 2008. His brother, Mr. Sumit employed in New Delhi, also purchased a flat in the same building in September, 2008 for Rs. 15 lakhs. Mr. Sumit 's flat was financed by a loan from a housing finance company and the loan was guaranteed by Mr. Amit. Examine with reference to the provisions of Foreign Exchange Management Act, 1999, whether purchase of flat and guarantee by Mr. Amit are capital account transactions and whether these transactions are permissible.*

*(November 2008)*

## Answer

A "capital account transaction" means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India. It also includes following transactions referred to in sub-section (3) of Section 6 of Foreign Exchange Management Act 1999:

(a) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;

(b) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred-

Thus purchase of flat at New Delhi and giving of guarantee would be considered as capital account transactions.

A capital account transaction is not permissible, unless otherwise provided in the Act, Rules or Regulations made there under, or with the general or special permission of Reserve Bank of India.

In the case referred, Mr. Amit left India for employment in Australia on 1st June 2007. Therefore, he becomes a person resident outside India from June 2007.

The purchase of flat by Mr. Amit is a capital account transaction. This is permissible in accordance with the regulation framed in this behalf i.e. The Foreign Exchange Management (Acquisition And Transfer Of Immovable Property In India) Regulation, 2000. The Foreign Exchange Management (Acquisition and Transfer of Immovable property In India) Regulation, 2000 imposes restrictions on a person resident outside India from acquiring immovable property in India provided he fulfills both the following conditions:

(a) the person resident outside India is citizen of India and

(b) the immovable property acquired in India is not agricultural/plantation or farmhouse.

Therefore the purchase of flat by Mr. Amit is permissible under FEMA.

Guarantee involves a long term commitment which alters the assets and liabilities of a person and therefore it is considered as a “capital account transaction’ and thus restricted under FEMA. Accordingly Mr. Amit can give a guarantee to the housing finance company in respect of purchase of flat by Mr. Sumit with the permission of Reserve Bank of India.

# NOTE

# CHAPTER 3

## THE COMPETITION ACT, 2002

Question 1

*How will the Chairperson and other members of the Competition Commission of India be appointed? State whether the Chairperson shall be only a person, who has been or is qualified to be, a Judge of a High Court.* *(November, 2003)*

Answer

Competition Commission of India

The Competition Commission of India shall consist of a Chairperson and not less than two and not more than ten other members to be appointed by the Central Government (Section 8) while the appointment is made by the Central Government, the Chairperson and other members shall be selected in the manner as may be prescribed (Section 9). [The Government prescribed rules on 4.4.2003 in this regard]. But according to proviso to 8(I), the Central Government shall appoint the chairperson and a member during the first year of the establishment of commission.

The Chairperson and every other member shall be a person of ability, integrity and standing and who has been, or is qualified to be, a Judge of a High Court or has special knowledge of, and professional experience of not less than 15 years in international trade, economics, business, commerce, law, finance accountancy, management, industry, public affairs, administration or in any other matter which, on the opinion of the Central Government may be useful to the commission [Section 8(2)]. As the qualification prescribed in the Act is the same for chairperson and other members, chairperson of commission may or may not be a judicial person.

Question 2

*An understanding has been reached among the manufacturers of cement to control the price of cement, but the understanding is not in writing and it is also not intended to be enforced by legal proceedings.*

Examine whether the above understanding can be considered as an 'Agreement' with the meaning of Section 2(b) of the Competition Act, 2002. (May, 2004)

## Answer

### Agreement

'Agreement' includes any arrangement or understanding or action in concert:

(i) Whether or not, such arrangement, understanding or action is formal or in writing or

(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings. [Section 2(b)].

In view of the above definition of 'agreement', an understanding reached by the cement manufacturers to control the price of cement will be an 'agreement' within the meaning of Section 2(b) of the Competition Act, 2002 even though the understanding is not in writing and it is not intended to be enforceable by legal proceedings.

## Question 3

*Poly Ltd., (hereinafter referred to as "Seller"), manufacturer of footwears entered into an agreement with City Traders (hereinafter referred to as "purchaser"), for sale of its products. The agreement includes, among others, the following clauses:*

*(i) That the Purchaser shall not deal with goods, products, articles, by whatever name called, manufactured by any person other than the Seller.*

*(ii) That the Purchaser shall not sale the goods manufactured by the Seller outside the municipal limits of the city of Secunderabad.*

*(iii) That the Purchaser shall sale the goods manufactured by the Seller at the price as embossed on the price label of the footwear. However, the purchaser is allowed to sale the footwear at prices lower than those embossed on the price label.*

*You are required to examine with relevant provisions of the Competition Act 2002, the validity of the above clauses. (November, 2004)*

## Answer

Provisions of section 3(1) of the Competition Act, 2002 prohibits any agreement for goods and/or services that may have an appreciable adverse effect on competition in India.

Provisions of section 3(2) of the said Act states that any agreement entered into in contravention of provision of section 3(1) of the said Act shall be void.

Sections 3(3) and 3(4) of the said Act enumerates the types of the agreements which are to be treated as contravening the provisions of the said section 3(1). According to section 3(4) of the said Act, any agreement among enterprises or persons at different stages of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services including the following shall be treated as agreements in contravention of the said section 3(1):

(a) tie-in-arrangement ;

(b) exclusive supply agreement ;

(c) exclusive distribution agreement ;

(d) refusal to deal

(e) re-sale price maintenance

The clauses of the agreement given in the question are covered by above mentioned provisions Clause at Sr. No.(i) comes under exclusive supply agreement; Clause at Sr. No.(ii) comes under exclusive distribution agreement and Clause at Sr. No.(iii) is covered by re-sale price maintenance.

Explanations to said section 3(4) explains the above terms.

According to Explanation (b), exclusive supply agreement includes any agreement restricting in any manner, the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

According to Explanation (c), exclusive distribution agreement includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

According to Explanation (e), "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the price stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

In view of the above provisions of the Competition Act, 2002, validity of the clauses of the agreement as given in the question can be determined as follows:

Clause (i) restricts the purchaser to deal in the goods of manufacturers other than the seller. Hence this is in contravention of the provisions of section 3(1) of the said Act.

Clause (ii) restricts the purchaser to sell the goods within a specified area. Hence this is in contravention of the provisions of section 3(1) of the said Act

Clause (iii) stipulates the resale price, but it allows the purchaser to sell the goods at lower prices than the stipulated prices. Hence this is a valid clause.

But, the law states that any such agreement containing any of the prohibited clause shall be void. Therefore, even if the agreement contains some valid clauses, it shall still be termed as void if it contains even one prohibited clause.

## Question 4

*Mr. MKP was a member of the Competition Commission of India. He ceased to be such member on 31st March, 2005. Thereafter, he was offered the post of Executive Director with appropriate remuneration and perquisites in the following organisations to join his duties on and from 1st July, 2005:*

*(i) HLL Ltd., a private sector public limited company, whose case was disposed off by the Competition Commission under the provisions of the Competition Act, 2005 in the month of February, 2005.*

*(ii) Life Insurance Corporation of India.*

*You are required to state with relevant provisions of the Competition Act, 2002 the option available to Mr. MKP in respect of accepting the above offers. (May 2005)*

## Answer

The Chairperson and other Members shall not, for a period of one year from the date on which they cease to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act. (Section 12 of the Competition Act, 2002)

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

Based on the above provisions of the Competition Act, 2002, Mr. MKP will not be able to accept the offer of HLL Ltd. for one year from the date of his cessation as a member of the Competition Commission since the said company was a party to the proceedings before the Commission.

However, since Life Insurance Corporation of India is a Corporation established under the Central Act, the above restriction does not apply and Mr. MKP can accept the offer to join as the Executive Director of the said corporation with effect from 1st July, 2005.

## Question 5

*(i) In a proceeding before the Competition Commission of India involving two pharmaceutical companies, the plaintiff requested the presiding officer to call upon the services of experts from the pharmaceutical sector to determine the truth of the allegations leveled by it against the respondent. The respondent opposed the request on the ground that such action can not be taken by the Competition Commission. You are required to state with reference to the provisions of the Competition Act, 2002, whether the contention of the respondent is tenable.*

*(ii) The Central Government has formed an opinion that Mr. CBM (a member of the Competition Commission of India) has acquired such financial interest that it may affect prejudicially his functions as a member of the Competition Commission and it wants to remove him from his office. You are required to state with reference to the provisions of the Competition Act, 2002, whether the Central Government can do so and if yes, how?*

*(November 2005)*

## Answer

(i) As per provisions of Section 36(4) of the Competition Act, 2002, the Competition Commission may call upon such experts from the fields of economics, commerce, accountancy, international trade or other disciplines as it deems necessary, to assist the Commission in the conduct of any enquiry or proceeding before it. As per Regulation 54 of the Competition Commission (General) Regulations, 2004 made by the Commission under Section 64 of the Competition Act, 2002, it may draw up a panel of such experts.

In view of the above stated specific powers given to the Competition Commission, it can call upon the services of an expert from the pharmaceutical sector to determine the truth of the allegations levelled by the plaintiff against the respondent. Hence, the contention of the respondent is not tenable.

(ii) Section 11(2) of the Competition Act, 2002 empower the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission. However, provisions of Section 11(3) of the said Act puts some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office on the above ground it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office on such ground.

Thus, the Central Government can remove a member of Competition from his office by following the above procedure.

## Question 6

*Examine with reference to the relevant provisions of the Competition Act, 2002 the following:*

*(i) Whether a Government Department supplying water for irrigation to the Agriculturists after levying charges for water supplied (and not a water tax) can be considered as an 'Enterprise'.*

*(ii) Whether a person purchasing goods not for personal use, but for resale can be considered as a 'consumer.'* *(May 2006)*

## Answer

**Enterprise:** The term 'enterprise' is defined in Section 2(h) of Competition Act, 2002. Accordingly 'enterprise' means a person or a department of the Government, who or which is engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services of any kind. But the term does not include any activity of the Government relatable to sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Certain specific activities of Government departments like dealing with atomic energy, etc,. and sovereign functions of the Government (like police, defence, etc.) are excluded from the purview of the said terms. Hence, a Government department engaged in the activity of providing service in the form of supply of water for irrigation to the agriculturists after levying charges can be considered as an 'enterprise' within the meaning of Section 2(h) of Competition Act, 2002.

Consumer: The term ‘consumer’ is defined in Section 2(f) of Competition Act, 2002. Accordingly ‘consumer’ means any person who buys any goods for a consideration, which has been paid or promised or partly paid and partly promised, whether such purchase of goods is for resale or for any commercial purpose or for personal use.

Hence, it is not necessary that a person must purchase the goods for personal use in order to be considered as a ‘consumer’ under Competition Act, 2002. Even a person purchasing goods for resale or for any commercial purpose will also be considered as a ‘Consumer’ within the meaning of Section 2(f) of Competition Act, 2002.

Question 7

*(i)* *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.*

*(ii)* *ABC Ltd. made an initial public offer of certain number of equity shares. Examine whether these shares can be considered as ‘Goods’ under the Competition Act, 2002 before allotment.* *(November 2006)*

Answer

(i) 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.

(ii) Section 2(i) of Competition Act, 2002 defines ‘goods’ as follows:

‘Goods’ means goods as defined the Sale of Goods Act, 1930 and includes –

(a) products manufactured, processed or mined;

(b) debentures, stock and shares after allotment

(c) in relation to goods supplied, distributed or controlled in India, goods imported into India.

Hence, debentures and shares can be considered as ‘goods’ within the meaning of section 2(i) of Competition Act, 2002 only after allotment and not before allotment.

Question 8

*(i) Hon'ble Justice Mr. HCJ, a retired High Court Judge, attained the Age 61 years on 31st December, 2004. The Central Government appointed him as the Chairperson of the Competition Commission of India with effect from 1st January, 2005. You are required to state, with reference to the provisions of the Competition Act, 2002, the term for which he may be appointed as Chairperson of the Competition Commission of India. Whether he can be reappointed as such and till when he can remain as Chairperson of the Competition Commission of India ?*

*(ii) After ceasing to be a member of the Competition Commission of India with effect from 31st March, 2007, Mr. MKP was offered the post of Executive Director with appropriate remuneration and perquisites in the following organizations with effect from 1st April, 2007:*

*(a) HLL Ltd. a private sector public limited company, whose case was disposed off by the Competition Commission under the provisions of the Competition Act, 2002 in the month of February, 2007.*

*(b) Life Insurance Corporation of India.*

*You are required to state with relevant provisions of the Competition Act, 2002, the option available to Mr. MKP in respect of accepting the offers. (May 2007)*

Answer

(i) According to Section 10(1) of the Competition Act, 2002, the Chairperson and every other Member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment.

Provided that no Chairperson or other Member shall hold office as such after he has attained, -

(a) in the case of the Chairperson, the age of sixty-seven years;

(b) in the case of any other Member, the age of sixty-five years.

Based on the above provisions of the Competition Act, 2002, it can be concluded that Hon'ble retired Justice Mr. HCJ can be appointed as the Chairperson of the Competition Commission of India by the Central Government initially for a period of five years and he can also be re-appointed after his initial term of five years is over. But since he shall be attaining the age of 67 years as on 31st December, 2010, he will have to step down from the post on his attaining the age of 67 years.

(ii) In accordance with the provisions of the Competition Act, 2002 as contained in Section 12, the Chairperson and other Members shall not, for a period of one year from the date on which they ceased to hold office, accept any employment in, or connected with the management or administration of, any enterprise which has been a party to a proceeding before the Commission under this Act:

Provided that nothing contained in this section shall apply to any employment under the Central Government or a State Government or local authority or in any statutory authority or any corporation established by or under any Central, State or Provincial Act or a Government company as declined in section 617 of the Companies Act, 1956 (1 of 1956).

Based on the above provisions of the Competition Act, 2002, Mr. MKP will not be able to accept the offer of HLL Ltd. for one year from the date of his cessation as a member of the Competition Commission since in a case of the said company, it was a party to the proceedings before the Commission.

However, since Life Insurance Corporation of India is a Corporation established under the Central Act, the above restriction does not apply and Mr. MKP can accept the offer to join as the Executive Director of the said corporation with effect from 1st April, 2007.

## Question 9

*(i)* *An arrangement has been made among the Cotton producers that the cotton produced by them will not be sold to mills below a certain price. The arrangement was in writing but it was not intended to be enforced by legal proceeding. Examine whether the above arrangement can be considered as an agreement within the meaning of Section 2(b) of the Competition Act, 2002.*

*(ii)* *The Central Government has formed the opinion that Mr. CBM (A member of the Competition Commission of India) has abused his position which may be prejudicial to public interest as a member of the commission. Examine the powers of the Central Government in this regard* *(November 2007)*

## Answer

(i) As per Section 2(b) of Competition Act, 2002 an 'agreement' includes any arrangement or understanding or action in concert, -

- Whether or not, such a arrangement or understanding or action is formal or in writing; or
- Whether or not, such a arrangement or understanding or action is intended to be enforceable by legal proceedings.

In the given case the understanding reached among the cotton produces not to sell below a certain price shall amount to an agreement as defined under Section 2(b) notwithstanding the fact that arrangement is writing but no intended to enforce by legal proceeding.

(ii) Section 11(2) (e) of the Competition Act, 2002 empowers the Central Government to remove by an order, a member of the Competition Commission of India from his office if such member has abused his position as to render his continuance in office prejudicial as a member of competition commission. However provision of Section 11(3) of the said act puts some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, Central Government wants to remove a member or the Competition Commission from his office on the above ground, it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed form his office on such ground. Thus the Central Government can remove a member of Competition Commission from his office by following the above procedure.

Question 10

(i) *In a proceeding before the Competition Commission of India involving two Pharmaceutical companies, the plaintiff requested the presiding officer to call upon the services of experts from the pharmaceutical sector to determine the truth of the allegations leveled by it against the respondent. The respondent opposed the request on the ground that such action cannot be taken by the Competition Commission. You are required to state with reference to the provisions of the Competition Act, 2002, whether the contention of the respondent is tenable.*

(ii) *The Central Government has formed as opinion that Mr. CBM (a member of the Competition Commission of India) has acquired such financial interest that it may affect prejudicially his functions as a member of the Competition Commission and it wants to remove him from his office. You are required to state with reference to the provisions of the Competition Act, 2002, whether the Central Government can do so and if yes, how?*

*(May 2008)*

Answer

(i) As per provisions of Section 36(4) of the Competition Act, 2002 the Competition Commission may call upon such experts from the fields of economics, commerce, accountancy, international trade or other disciplines as it deems necessary, to assist the Commission in the conduct of any enquiry or proceeding before it. As per Regulation 54 of the Competition Commission (General) Regulations, 2004 made by the Commission under Section 64 of the Competition Act, 2002, it may draw up a panel of such experts.

In view of the above stated specific powers given to the Competition Commission, it can call upon the services of an expert from the pharmaceutical sector to determine the truth of the allegations leveled by the plaintiff against the respondent. Hence, the contention of the respondent is not tenable.

(ii) Provisions of Section 11(2) of the Competition Act, 2002 empower the Central Government to remove, by an order, a member of the Competition Commission of India from his office if such member has acquired such financial interest as is likely to affect prejudicially his functions as a Member of the Competition Commission. However, provisions of Section 11(3) of the said Act put some restrictions on such powers of the Central Government. According to this section, in case as stated in the question, the Central Government wants to remove a member of the Competition Commission from his office, it has to make a reference to the Supreme Court. The Supreme Court shall hold an enquiry in accordance with the procedure formulated by it and then report that the member in question ought to be removed from his office.

Thus, the Central Government can remove a member of Competition Commission from his office by following the above procedure.

## Question 11

*The Competition Commission of India has received a complaint that M/s. XYZ company has been abusing its dominant position in the food processing industry. Explain briefly the factors that will be considered by the commission to ascertain whether M/s. XYZ company enjoys a dominant position in the industry.* *(November 2008)*

## Answer

The Competition Commission while inquiring whether the enterprise XYZ Company enjoys a dominant position or not under Section 4 of the Competition Act, 2002 will take the following factors into account:

(a) market share of the enterprise

(b) size and resources of the enterprise

(c) size and importance of the competitors

(d) economic power of the enterprise including commercial advantages over competitors.

(e) vertical integration of the enterprises or sale or service net work of such enterprises.

(f) dependence of consumers on the enterprise.

(g) monopoly or dominant position whether acquired as result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise.

(h) entry barriers including barriers such as regulatory barriers, financial risk , high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or services for consumers.

(i) countervailing buying power.

(j) market structure and size of market .

(k) social obligations and size of market.

(l) relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition.

(m) any other factor which the commission may consider relevant for the inquiry.

# CHAPTER 4

## THE SECURITIES CONTRACTS (REGULATION) ACT, 1956

Question 1

*(a) (i) Delhi Stock Exchange wants to establish additional Trading Floor. Explain briefly the meaning of and procedure for establishing additional Trading Floor.*

*(ii) Complaints of unethical practices have been received against members of the Governing Body of a Recognized Stock Exchange. Examine whether the Government has any power to take action against the Governing Body of the said exchange.*

*(b) The application filed by M/s XYZ Ltd. for the listing of its securities has been Rejected by the Mumbai Stock Exchange. Advise the company regarding the steps it can take against the rejection.* *(November, 2002)*

Answer

(a) (i) According to Section 13 A of Securities Contracts (Regulation) Act 1956, a Stock Exchange may establish additional trading floor with the prior approval of the Securities Exchange Board of India in accordance with the terms and conditions stipulated by the said Board.

For the purpose of this section 'Additional Trading Floor' means a trading ring or trading facility offered by a recognized stock exchange outside its area of operation to enable the investor to buy and sell securities through such trading floor under the regulatory frame work of that Stock Exchange.

(ii) Section 11, of the Securities Contracts (Regulation) Act, 1956 deals with the powers of the Central Government to supersede the Governing body of a recognized Stock Exchange. The Central Government may serve on a governing body a written notice specifying the reasons and after giving an opportunity to the governing body to be heard, may, by notification in the Official Gazette, declare the governing body as superseded. The Central Government after superseding the governing body may appoint any person or persons to exercise and perform all the powers and duties of governing body. It may also appoint one of such nominees as Chairman.

(b) Yes XYZ Ltd. can appeal against refusal of stock exchange to list the securities. Section 22 of Securities Contracts (Regulation) Act 1956 deals with this. According to section:

where a recognized stock exchange refuses listing to a company, it has to furnish reasons for refusal to the company. Section 73(1) of the Companies Act, 1956 specifies the time period within which stock exchange has to grant listing permission. If exchange fails to do so within the time limit or refuses to list, the company may with in 15 days make an appeal to the Central Government. The Central Government may after hearing the Stock Exchange vary or set aside the decision of the Stock Exchange, or grant permission for listing.

However, no appeal under this section shall be allowed after the commencement of Securities Laws (Second Amendment) Act 1999 since appeal before Securities Appellate Tribunal is permitted under Section 22A.

Where a Stock Exchange refuses listing or is unable to grant listing within time frame prescribed, company is entitled to appeal to Securities Appellate Tribunal (SAT). SAT may, after hearing the exchange vary or set aside exchange's order or grant or refuse. (Section 22A).

## Question 2

*(a) M/s AB & Company, a member of a recognised stock exchange propose 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.*

*(b) Rampur Stock Exchange wants to get itself recognize. Explain':*

*(i) Who enjoys the power to recognize stock exchange?*

*(ii) What information will have to be provided with the application for recognition?*

*(May, 2003)*

## Answer

(a) 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 on 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).

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

(b) (i) Power to recognize Stock Exchange vests with Central Government. However, Central Government has delegated the powers to SEBI vide its notification No.F.No.1/57/SE/93 dated 13.9.94. (Section 3 of Securities Contracts (Regulation) Act, 1956).

(ii) Application for recognition must be accompanied with Bye-Laws, Rules, Regulations which must contain specific details on:

1. Constitution, powers of management and manner of transacting business by the Governing Body of the Stock Exchange.
2. Powers and duties of the offer bearers of Stock Exchange.
3. Various classes of Members, qualification of membership and the exclusion, suspension, expulsion and re-admission of members.
4. The procedure for registration of Partnerships as members to stock exchange and rules of nomination of anthorised representatives.

Membership provisions, composition of Board Powers of Governing Board are defined in the Articles of the Exchange. Rules governing Listing Trading and Settlement, Penalties and Prohibitions, Disciplinary Actions and Defaults are defined in Bye-Laws of the Exchange.

Question 3

*(a) Mr. Patel has transferred his shares of a listed company registered in his name to Mr. Mehta. Mr. Mehta has failed to get the shares registered in his name before the company declared and paid the dividend on the shares. Examine with reference to the provisions of Securities Contracts (Regulation) Act, 1956 whether Mr. Patel is entitled to retain the dividend even though he has transferred the shares before declaration of dividend.*

*(b) SEBI is of the opinion that in the interest of investors it is desirable to amend the rules of XYZ Stock Exchange prohibiting the appointment of the broker-member as President of the stock exchange. Explain with reference to the provisions of the Securities Contracts (Regulation) Act, 1956 whether it is possible for SEBI to amend the rules of the Stock Exchange, if the rules are not amended by the stock exchange. (November, 2003)*

Answer

(a) Title to dividends: Section 27(1) of Securities Contracts (Regulation) Act, 1956 provides that a holder of security can legally receive and retain any dividend declared by the company even if he has transferred the security for valuable consideration. However, he (i.e. holder of security who is a transferor) cannot receive or retain the dividend if the transfer deed with all other documents required for transfer are lodged with the company within 15 days of the date on which the dividend became due.

The period of 15 days shall be extended as follows: - (1) In case of death of the transferee by the actual period taken by his legal representative to establish his claim to the dividend. (2) In case of loss of the transfer deed by theft or any other cause beyond the control of the transferee, by the actual period taken for the replacement thereof and (3) In case of delay in the lodging of any security and other documents relating to the transfer due to causes connected with the post, by the actual period of delay (Explanation to Section 27(1) of SCRA).

In view of the above, Mr. Patel is entitled to retain the dividend received by him if the transferee, Mr. Mehta has not lodged the transfer deed with the company within 15 days of the date on which the dividend became due or the extended period as per explanation to Section 27(1).

However, Section 27(1) will not affect the right of the transferee to enforce his rights, if any against the transferor or any other person, if the company refuses to register the transfer of security in the name of the transferee.

(b) Power of Central Government/SEBI to direct rules to be made or to make rules: Central Government is empowered under Section 8 of the Securities Contracts (Regulation) Act, 1956 to issue written order directing all or any of the recognized stock exchanges to make any rules or to amend any rules already made within 2 months from the date of the order in respect of matters specified in Section 3(2). One of the matters specified in Section 3(2) is the governing body of stock exchange, its constitution and powers of management and the manner in which its business is to be transacted. Hence, the Central Government is empowered to direct the Stock Exchange in respect of prohibition of broker-member being appointed as president of the stock exchange. According to the notification issued by the Central Government under Section 29A, this power is also exercisable by SEBI.

If any recognized stock exchange fails or neglects to comply with any order made by SEBI within 2 months, SEBI may itself make the rules made, either in the form prepared in the order or with such modifications thereof as may be agreed to between the stock exchange and SEBI. The amended rules should be published in the Gazette of India and also in the Official Gazette of the State in which the principal office of the recognized stock exchange is situate. After such publication, the rules will be valid, as if they had been made or amended by the stock exchange itself.

Hence SEBI can issue directions to the recognized stock exchange to amend the rules and if the said stock exchange does not take steps for amending the rules, SEBI may amend the rules on its own by following the procedure laid down in Section 8.

Question 4

*(a) Securities and Exchange Board of India received serious complaints against the Affairs of a Member of a Stock Exchange. Explain the powers of SEBI under Securities Contracts (Regulation) Act, 1956 to make enquiries and to take action, if necessary, against the member of a Stock Exchange.*

*(b) The governing body of City Stock Exchange Association Ltd. is desirous of putting various restrictions on voting rights of its members to be exercised in a meeting and on*

*their right to appoint a proxy. You are required to state whether the same is permissible. Also state the role of Central Government in this respect.* *(May, 2004)*

Answer

(a) Disciplinary action against members of Stock Exchange: SEBI can exercise the following powers under Securities Contracts (Regulation) Act, 1956 on receipt of serious complaints against the affairs of a member of a stock exchange.

(i) SEBI may, if it is satisfied that it is in the interest of the trade or in the public interest, by order in writing call upon the member of the stock exchange to furnish in writing information or explanation in respect of the matter under inquiry [Section 6(3)(a)].

(ii) SEBI instead of calling for information, may either appoint one or more persons to make an enquiry or direct the governing body of stock exchange to make inquiry and submit its report to SEBI [Section 6(3)(b)].

In case of adverse fundings, SEBI can direct stock exchange to take disciplinary action against the member such as fine, expulsion from membership, suspension from membership for a specified period and any other penalty of a like nature not involving the payment of money. Bye-laws of the stock exchange usually provide for such punishment [Section 9(3)(b)]. Stock exchange is under obligation to take the action as directed.

(b) As per Section 7A(1) of the Securities Contracts (Regulation) Act, 1956 a recognized stock exchange may make rules or amend any rules made by it in respect of voting rights of its members and also on appointment of proxy. The restrictions can be put in respect of the following matters:

(a) The restriction of voting rights to the members only in respect of any matter placed before the stock exchange at any meeting.

(b) The regulation of any voting rights in respect of any matter placed before the stock exchange at any meeting so that each member may be entitled to have one vote only, irrespective of his share of the paid up equity capital of the stock exchange.

(c) The restriction on the right of a member to appoint another person as his proxy to attend and vote at a meeting of the stock exchange.

(d) Such incidental, consequential and supplementary matters as may be necessary to give effect to the matters as stated in (a), (b) and /or (c) above.

As per section 7(A)(2) of the said Act, the role of the Central Government in respect of the restriction placed by the stock exchange as stated above is as follows:

(i) Approval of the proposed changes by the stock exchange.

(ii) Publishing the same in the Official Gazette.

(iii) To make such modification in the proposed changes as it deems fit.

## Question 5

*The Rural Electrification Corporation, New Delhi issued 6 years bonds to public directly and not through any Stock Exchange. Whether the Rural Electrification Corporation can do so? Is it not a violation of Securities Contracts (Regulation) Act, 1956? (November, 2004)*

## Answer

In order to prevent undesirable transactions in securities and to promote healthy stock market, the Securities Contract (Regulation) Act, 1956 was enacted. Stock Exchanges are recognized under the Act. Section 73 of the Companies Act, 1956 lays down that offer of shares or debentures to public for subscription shall be only after the permission of the Stock Exchange. Section 28 of the Securities Contract (Regulation) Act, 1956 says that the provisions of the Act shall not apply to the Government, the Reserve Bank of India, any local authority or any corporation set-up by a special law or any person who has effected any transaction with or through the agency of any such authority as stated above. The Rural Electrification Corporation is a corporation established under a special statute enacted by the Parliament. Therefore, the Corporation need not require permission of any Stock Exchange. It is exempted. There is no violation of the provisions of the Act of 1956 because according to section 28 provisions are not applicable to this corporation.

## Question 6

*Working of City Stock Exchange Association Ltd., is not being carried on by its Governing Board in public interest. On receipt of representations from various Investors and Investors' Association, the Central Government is thinking to withdraw the recognition granted to the said Stock Exchange. You are required to state the circumstances and procedure for withdrawal of such recognition as per the provisions of Securities Contracts (Regulation) Act, 1956 in this regard. Also state the effect of such withdrawal on the contracts outstanding on the date of withdrawal. (May 2005)*

## Answer

Section 5 of the Securities Contracts (Regulation) Act, 1956 empowers the Central government to withdraw the recognition granted to a Stock Exchange. The circumstances and procedure to be followed for withdrawal of such recognition is stated below:

(i) If, considering the interest of the trade or the public interest, the Central Government is of the opinion that the recognition granted to a stock exchange should be withdrawn, the Central Government shall serve a written notice of the governing body of the stock exchange.

(ii) The said notice shall specify the reasons for the proposed withdrawal of the recognition.

(iii) The governing body of the stock exchange shall be afforded an opportunity of being heard by the Central Government.

(iv) Even after hearing the governing body, the Central Government is satisfied that the recognition granted to the stock exchange should be withdrawn, the Central Government may, by way of a notification in the Official Gazette, withdraw the recognition granted to the stock exchange.

The proviso to the said section 5 states that no such withdrawal shall affect the validity of any contract entered into or made prior to the date of notification withdrawing the recognition and the Central Government may, after consultation with the stock exchange, make such provision as it deems fit in the notification of withdrawal or in any subsequent notification for the due performance of any contracts outstanding on that date.

## Question 7

*Delhi Stock Exchange has refused to grant listing of the shares of ABC Limited but the Exchange has not disclosed any reason therefore. The company wants to challenge the decision of the Stock Exchange in the Civil Court.*

*Advise the company pursuant to relevant provisions of the Securities Contracts (Regulation) Act, 1956.* *(May 2005)*

## Answer

Under section 22A of the Securities Contracts (Regulation) Act, 1956 where a recognised Stock Exchange refuses to list the securities of any public company, the company shall be entitled to be furnished with reasons for such refusal. If aggrieved, the company may appeal to the Securities Appellate Tribunal:

(i) within 15 days from the date on which the reasons for such refusal are furnished to it, or

(ii) where the Stock Exchange has omitted or failed to dispose of within the time specified in section 73(1A) of the Companies Act, 1956 (i.e., before the expiry of ten weeks from the date of closing of the subscription list as per prospectus) within 15 days from the expiry of the specified time or within such further period not exceeding one month as Securities Appellate Tribunal may allow.

In terms of section 22E of the Act, Civil Court has no jurisdiction to entertain any suit in respect of this matter.

The company may be advised accordingly.

## Question 8

*Describe the provisions of the Securities Contracts (Regulation) Act, 1956 regarding the powers of the Central Government to supersede the Governing Body of a recognized Stock Exchange and the consequences of such supersession.* *(November 2005)*

## Answer

According to the provisions of section 11 of the Securities Contracts (Regulation) Act, 1956, where the Central Government is of opinion that the governing body of any recognized stock exchange should be superseded, then notwithstanding any thing contained in any other law for the time being in force, the Central Government may serve on the governing body a written notice that the Central Government is considering the supersession of the governing body for the reasons specified in the notice. After giving an opportunity to the governing body of such Stock Exchange to be heard in the matter, the Central Government may, by notification in the Official Gazette, declare the governing body of such Stock Exchange to be superseded.

The Central Government may appoint any person or persons to exercise and perform all the powers and duties of the governing body. If more than one person is so appointed, one of them may be the Chairman and another as the Vice-Chairman. Such person or persons shall hold office for such period as may be specified in the Notification and the Central Government may vary such period by way of another Notification.

On the publication of the notification in the Official Gazette, following are the consequences:

(i) The members of the governing body of such Stock Exchange ceases to hold office as such members on and from the date of notification.

(ii) The person or persons appointed by the Central Government may exercise and perform all the powers and duties of the governing body which has been so superseded.

(iii) The property of the Stock Exchange as deemed necessary and so specified in writing by such person or persons to carry on the business of the Stock Exchange shall vest in such person or persons.

## Question 9

*(i) Delhi Stock Exchange wants to establish additional trading floor. Advise.*

*(ii) Complaints of unethical practices have been received against members of a recognized Stock Exchange by the Government. Examine whether the government has any power to suspend the business of such a recognized Stock Exchange.* *(November 2005)*

## Answer

(i) According to Section 13A of Securities Contracts (Regulation) Act, 1956, a Stock Exchange may establish additional trading floor with the prior approval of the Securities Exchange Board of India with the terms and conditions stipulated by the said Board. 'Additional Trading Floor' means a trading facility offered by a recognized stock exchange outside its area of operation to enable the investors to buy and sell securities through such trading floor under the regulatory frame work of that Stock-Exchange.

(ii) Section 12 of the Securities Contracts (Regulation) Act, 1956 deals with the powers of the Central Government to suspend business of recognized Stock Exchange. Central Government, if it deems fit, is vested with power to suspend business for a period not exceeding 7 days by notification in Gazette. Central Government also have power to extend this period by a like notification. However, such power can be exercised by the Central Government, if it is of opinion that an emergency has arisen and it is expedient so to do.

### Question 10

*On 31st March, 2006 D holds certain securities issued under 'Collective Investment Scheme.' His name appears in the books of the scheme. He has transferred these securities to another person for a consideration. The transferee lodged the instrument of transfer with the authorities one month after the date on which the income on these securities became due. Examining the provisions of the Securities Contracts (Regulation) Act, 1956 state:*

*(i) Whether D is entitled to receive and retain the income on these securities for the financial year ended 31st March, 2006 in the given case?*

*(ii) Would your answer be still the same in case the transferee lodged the instrument of transfer with the authorities 14 days after the date on which the income on these securities became due? (May 2006)*

### Answer

### Transfer of securities under Collective Investment Scheme under the Securities Contracts (Regulation) Act, 1956 (Section 27A)

Problem as asked in the question is based on the provisions of Section 27A of the Securities Contracts (Regulation) Act, 1956, wherein it shall be lawful for the holder of any securities, being units or the other instruments issued by collective investment scheme, whose name appears on the books of the scheme, issuing the said security to receive and retain any income in respect of units issued by the scheme in respect thereof for any year, notwithstanding that the said security, being units issued by the scheme, has already been transferred by him for consideration, unless the transferee who claims the income in respect of units issued by the scheme from the transferor has lodged the security and all other documents relating to the transfer which may be required by the scheme with the scheme for being registered in his name within 15 days of the date on which the income in respect of units or other instruments issued under the scheme became due. The period of 15 days can be extended in certain contingencies as stated in Explanation to Section 27A (1).

Applying the above provisions in the given case:

(i) the holder of securities (i.e. D, the transferor) has right to receive or retain the income on these securities for the financial year ended 31st March, 2006, since the instrument for transfer was lodged one month after the date on which the income became due.

(ii) The answer in the second case would differ. The holder (i.e. D, the transferor) cannot receive and retain the income since the instruments for transfer was lodged with the company within the statutory period of 15 days by the transferee.

### Question 11

*The Executive Committee of a recognized Stock Exchange desires to transfer certain duties and functions of a clearing house to a recently set up Clearing Corporation, incorporated as a company under the Companies Act, 1956. Examining the provisions of the Securities Contracts (Regulation) Act, 1956:*

*(i) State the purpose for which such transfer of duties and functions can be made to Clearing Corporation.*

*(ii) What is the procedure to be adopted for such transfer of duties and functions?*

*(May 2006)*

## Answer

### Transfer of certain duties and functions of a clearing house by a stock exchange to clearing corporation under the Securities Contracts (Regulation) Act, 1956 (Section 8A)

### Purposes:

A recognized stock exchange may, with the prior approval of the Securities and Exchange Board of India, transfer the duties and functions of a clearing house to a clearing corporation, being a company incorporated under the Companies Act, 1956 for the purpose of:

(i) the periodical settlement of contracts and differences thereunder,

(ii) the delivery of, and payments for, securities;

(iii) any other matter incidental to, or connected with, such transfer.

### Procedure:

1. Every clearing corporation shall for the purpose of transfer of the duties and functions of a clearing house to clearing corporation make bye-laws and submit the same to the SEBI for approval.
2. The SEBI may, on being satisfied that it is in the interest of the trade and also in the public interest to transfer the duties and functions of a clearing house to a clearing corporation, grant approval to the bye-laws submitted to it under sub-section (2) and approve transfer of the duties and functions of a clearing house to a clearing corporation.
3. The provisions of Sections 4 to 12 shall, as far as may be, apply to a clearing corporation as they apply in relation to a recognized stock exchange.

## Question 12

*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. ( November 2006)*

## Answer

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.

### Question 13

*Explain the powers, which can be exercised by the Securities and Exchange Board of India under the Securities Contracts (Regulation) Act, 1956, while approving the schemes for corporatisation and demutualization submitted by recognized stock exchanges, so that there is segregation of ownership and management from the trading rights of members of such stock exchanges.* *(November 2006)*

### Answer

### Corporatisation and Demutalisation – Power of SEBI under SCRA, 1956

SEBI has been empowered under sub-section (2) of Section 4B of Securities Contracts (Regulation) Act, 1956 to approve the scheme of corporatisation and demutalisation with or without modification. SEBI can reject the proposed scheme if it is satisfied that it would not be in the interest of the trade and also in the public interest to approve the scheme. Besides these general powers, SEBI has got certain specific powers under Section 4B(6). SEBI, while approving the scheme, may, by an order in writing restrict

(a) the voting rights of the shareholders who are also stock-brokers of the recognized stock exchange.

(b) the right of shareholders in a stockbroker of the recognized stock exchange to appoint the representatives on the governing board of the stock exchange.

(c) the maximum number of representatives of the stock-broker of the recognized stock exchange to be appointed on the governing board of the stock exchange shall not exceed one-forth of the total strength of the governing body.

On receipt of approval of scheme, stock exchange will issue shares to public within 12 months so that at least 51% equity shares are with public other than shareholders having trading rights. SEBI can extend the period upto another 12 months [Section 4B(8)].

## Question 14

*Describe the provisions of the Securities Contracts (Regulation) Act, 1956 regarding the powers of the Central Government to supersede the Governing Body of a recognized Stock Exchange and the consequences of such supersession.* *(May 2007)*

## Answer

In accordance with the provisions of Section 11 of the Securities Contracts (Regulation) Act, 1956, where the Central Government is of opinion that the governing body of any recognized stock exchange should be superseded, then notwithstanding anything contained in any other law for the time being in force, the Central Government may serve on the governing body a written notice that the Central Government is considering the supersession of the governing body for the reasons specified in the notice. After giving an opportunity to the governing body of such Stock Exchange to be heard in the matter, the Central Government may, by notification in the Official Gazette, declared the governing body of such Stock Exchange to be superseded.

The Central Government may appoint any person or persons to exercise and perform all the powers and duties of the governing body. If more than one person is so appointed, one of them may be the Chairman and another as the Vice-chairman. Such person shall hold office for such period as may be specified in the Notification and the Central Government may vary such period by way of another Notification.

On the publication of the notification in the Official Gazette, following are the consequences:

(i) the members of the governing body of such Stock Exchange ceases to hold office as such members on and from the date of notification.

(ii) The person or persons appointed by the Central Government may exercise and perform all the powers and duties of the governing body which has been so superseded.

(iii) The property of the Stock Exchange as deemed necessary and so specified in writing by such person or persons to carry on the business of Stock Exchange shall vest in such person or persons.

## Question 15

*SEBI is of the opinion that in the interest of investors, it is desirable to amend the rules of RSP Stock Exchange prohibiting the appointment of the broker-member as President of the Stock Exchange. Explain briefly with reference to the provisions of Securities Contracts (Regulation) Act, 1956, whether it is possible for SEBI to amend the rules of the Stock Exchange, if the Stock Exchange does not change the rules.* *(May 2007)*

## Answer

In accordance with the provisions of section 8 of Securities Contracts (Regulation) Act, 1956, The Central Government is empowered to issue written order directing all or any of the recognized stock exchange to make any rules or to amend any rules already made within two months from the date of the order in respect of matters specified in section 3(2) of the said

Act. One of the matters specified in the said section 3(2) is the governing body of stock exchange, its constitution and powers of management and the manner in which its business is to be transacted. Hence, the Central Government is empowered to direct the stock exchange in respect of prohibition on broker-member being appointed as President of the stock exchange. According to notification issued by Central Government under section 29A of the said Act, this power is also exercisable by SEBI.

If any recognized stock exchange fails or neglects to comply with any order made by SEBI with in two months, SEBI may itself make the rules or amend the rules made by stock exchange either in the form proposed in the order or with such modification thereof as may be agreed to between SEBI and the stock exchange. The amended rules are required to be notified in the Gazette of India and in the Gazette of the State where the principal office of the stock exchange is situated. After such publication, the rules shall be valid as if the same were made or amended by the recognized stock exchange itself.

Accordingly of the above provisions of Securities Contracts (Regulation) Act, 1956, SEBI can issue directions to RSP Stock Exchange to amend the rules and if the said stock exchange does not comply with the above, SEBI can amend the rules on its own.

## Question 16

*PQR Ltd. is holding 33% of the paid up equity capital of Koya Stock Exchange. The company appoints MNL Ltd. as its proxy who is not a member of the Koya Stock Exchange, to attend the vote at the meeting of the stock exchange. Examine whether the Koya Stock Exchange can restrict the appointment of MNL ltd. as proxy for PQR Ltd. and further restrict, the voting rights of PQR Ltd. in the Koya Stock Exchange.* *(November 2007)*

## Answer

Section 7(a) of the Securities (Contracts) Regulation Act, 1956 provides that a recognised stock exchange is empowered to amend rules to provide for all or any of the following matters:

(a) Restriction of voting right to members only.

(b) Regulation of voting rights by specifying that each member is entitled to one vote only irrespective of number of shares held.

(c) Restriction on right of members to appoint proxy.

As such Koya Stock Exchange can restrict the appointment of MNL Ltd., as proxy, if rules of the exchange so provide. If it is not so provided, rules may be amended and after getting approval of the Central Government regarding amendment, it can restrict appointment of proxies.

Koya Stock Exchange can also restrict the voting rights of PQR Ltd. as proxy if rules of the exchange so provide. If it is not so provided, rules maybe amended and after getting approval of Central Government regarding amendment, it can restrict appointment of proxies.

Koya Stock Exchange can also restrict the voting rights of PQR Ltd.

## Question 17

*Working of City Stock Exchange Association Ltd., is not being carried on by its governing Board in public interest. On receipt of representations from various investors and Investors' Association, the Central government is thinking to withdraw the recognition granted to the said Stock Exchange. You are required to state the circumstances the procedure for withdrawal of such recognition as per the provisions of Securities Contracts (Regulation) Act, 1956 in this regard. Also state the effect of such withdrawal on the contracts outstanding on the date of withdrawal.* *(May 2008)*

## Answer

Section 5 of the Securities Contracts (Regulation) Act, 1956 empowers the Central Government to withdraw the recognition granted to a stock exchange. The circumstances and procedure to be followed for withdrawal of such recognition is stated below

(i) if considering the interest of the trade or the public interest, the Central government is of the opinion that the recognition granted to a stock exchange should be withdrawn, the Central Government shall serve a written notice on the governing body of the stock exchange.

(ii) The said notice shall specify the reasons for the proposed withdrawal of the recognition.

(iii) The governing body of the stock exchange shall be afforded an opportunity of being heard by the Central Government.

(iv) Even after hearing the governing body, the Central Government is satisfied that the recognition granted to the stock exchange should be withdrawn; the Central Government may, by way of a notification in the Official Gazette, withdraw the recognition granted to the stock exchange.

The proviso to the said section 5 states that no such withdrawal shall affect the validity of any contract entered into or made prior to the date of notification withdrawing the recognition and the Central Government may, after consultation with the stock exchange, make such provision as it deems fit in the notification of withdrawal or in any subsequent notification for the due performance of any contracts outstanding on that date.

## Question 18

*The Executive Committee of a recognized stock exchange desires to transfer certain duties and functions of a clearing house to a recently set up clearing corporation, incorporated as a company under the companies Act,1956, examining the provisions of The Securities Contract (Regulation) Act, 1956. State the purposes for which such transfer of duties and functions can be made to clearing corporation.*

*What is the procedure to be adopted for such transfer of duties and functions?*

*(November 2008)*

Answer

A recognized stock exchange may, with the prior approval of the Securities Exchange Board of India, transfer the duties and functions of a clearing house to a clearing corporation, being a company incorporated under the Companies Act, 1956 for the purpose of:

(a) The periodical settlement of contracts and differences there under

(b) The delivery of, and payment for, securities;

(c) Any other matter incidental to, or connected with, such transfer

PROCEDURE

Every clearing corporation shall for the purpose of transfer of the duties and functions of a clearing house to clearing corporation, make byelaws and submit the same to the SEBI for approval.

The SEBI may, on being satisfied that it is in the interest of the trade and also in the public interest to transfer the duties and functions of the clearing house to a clearing corporation, grant approval to the byelaws submitted to it under sub-section (2) of Section 8A of the Securities Contracts (Regulation) Act, 1956 and approve transfer of the duties and function of a clearing house to a clearing corporation.

The provision of Sections 4 to 12 of the said act shall as far as may be apply to a clearing corporation as they apply in relation to a recognized stock exchange.

Question 19

*Mr. Bansal holds certain securities on 31st March, 2008, issued in his favour under the "Collective Investment Scheme." For a consideration, Mr. Bansal transferred the said securities in favour of another person. One month after the date on which the income on these securities became due, the transferee lodged the instrument of transfer. Decide in the light of the provisions of the Securities Contracts (Regulation) Act, 1956.*

*(i) Whether in the given case Mr. Bansal is entitled to receive and retain the income on these securities for the financial year ended 31st March, 2008?*

*(ii) What would be your answer in case the transferee lodged the instrument of transfer 10 days after the date on which the income on these securities became due?*

*(November 2008)*

Answer

TRANSFER OF SECURITIES:

The problem as asked in the question is based on the provisions of Section 27A of the Securities contracts (Regulation ) Act, 1956, wherein it shall be lawful for the holder of any securities, being units or the other instruments issued by collective investment scheme, whose name appears on the books of the scheme, issuing the said security to receive and retain any income in respect of units issued by the scheme in respect thereof for any year, notwithstanding that the said security, being units issued by the scheme, has already been transferred by him for consideration, unless the transferee who claims the income in respect of units issued by the scheme from the transferor has lodged the security and all other documents relating to the transfer which may be required by the scheme with the scheme for being registered in his name within 15 days of the date on which the income in respect of units or other instruments issued under the scheme become due. The period of 15 day can be extended in certain contingencies as stated in explanation to Section 27A (1) of the said Act.

Thus,

(i) the holder of the securities i.e Mr. Bansal, the transferor has right to receive or retain the income of the said securities for the financial year ended 31st March 2008, since the instrument for transfer was lodged one month after the date on which the income became due.

(ii) the answer in the second case would differ. The holder i.e. Mr. Bansal, the transferor can not receive and retain the income since the instrument for transfer was lodged with the company within the statutory period of 15 days by the transferee. Accordingly the transferee would be entitled to receive the income on these securities.

# CHAPTER 5

# THE SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992

## PART I

### Question 1

*What are the default for which a stock-broker may be penalized under the provisions of Securities and Exchange Board of India Act,1992 in respect of his dealings with the investors? State the factors that must be taken into account by the adjudicating officer while determining the quantum of penalty in such cases.* *(May, 2000)*

### Answer

**Penalty for default in case of stock brokers:** Section 15F of Securities and Exchange Board of India Act, 1992 provides for penalty for default in case of stock brokers. If any person who, is registered, as a stock broker under this Act:

(a) fails to issue contract notes in the form and in the manner specified by the stock exchange of which such broker is a member, he shall be liable to a penalty not exceeding five times the amount for which the contract note was required to be issued by that broker.

(b) fails to deliver any security or fails to make payment of the amount due to the investor in the manner or within the period specified in the regulations, 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.

(c) charges an amount of brokerage which is on excess of the brokerage specified in the regulations, he shall be liable to a penalty of one lakh rupees or five times the amount of brokerage charged in excess of the specified brokerage, whichever is higher.

**Factors to be taken into account by the adjudicating officer:** Section 15J of SEBI Act stipulates that the following factors shall be taken into account by the adjudicating officer while adjudging the quantum of penalty:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable as a result of the default.

(b) the amount of loss caused to an investor or group of investors as a result of the default.

(c) the repetitive nature of the default.

## Question 2

*What provision has been made under Section 15G of the SEBI Act, 1992, in connection with penalty for insider trading? (November, 2000)*

## Answer

If any insider who:

(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate on any stock exchange on the basis of any unpublished price sensitive information; or

(ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary course of business or under any law; or

(iii) counsels, or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information,

shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher. [Section 15, SEBI Act, 1992].

## Question 3

*A group of investors are upset with the functioning of two leading stock brokers of Calcutta Stock Exchange and want to make a complaint to SEBI for intervention and redressal of their grievances. Explain briefly the purpose of establishing SEBI and what type of defaults by the stock brokers come within the purview of SEBI Act, 1992. (May, 2002)*

## Answer

The Securities and Exchange Board of India (SEBI) was established primarily for the purpose of (1) to protect the interests of investors in securities (ii) to promote the development of securities market (iii) to regulate the securities market and (iv) for matters connected therewith and incidental thereto.

The following defaults by stock brokers come within the purview of SEBI Act:

(a) any failure on the part of the stock broker to issue contract notes in the form and in the manner specified by the Stock Exchange.

(b) any failure on the part of the broker to deliver any security or to make payment of the amount due to the investor in the manner or within the period specified in the regulations.

(c) any collection of charges by way of brokerage in excess of the brokerage as specified in the regulations. (Section 15 F, SEBI Act, 1992.)

Question 4

(a) *On the complaint of Mr. Kamlesh Gupta, after enquiry SEBI finds that Mr. P. Mehta a Chief Executive Officer of the Company, on the basis of unpublished price sensitive information, has indulged in the trading of the securities of that company. Explain, on the basis of the said finding, what action can SEBI take against Mr. P. Mehra under the Securities and Exchange Board of India Act, 1992.*

(b) *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. (May, 2002)*

Answer

(a) Section 15G of the Securities and Exchange Board of India (SEBI) Act, 1992 deals with penalty for Insider Trading. According to this, if any insider

(i) either on his own behalf or on behalf of any other person, deals in securities of a body corporate on any stock exchange on the basis of any unpublished price sensitive information; or

(ii) communicates any unpublished price sensitive information to any person, with or without his request for such information except as required in the ordinary cause of business or under any law, or

(iii) counsels or procures for, any other person to deal in any securities of any body corporate on the basis of unpublished price sensitive information,

shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher.

As such SEBI can, after following the prescribed procedure, impose a penalty on Mr. P.Mehra. The maximum penalty that SEBI can impose is Rupees twenty-five crores or three times the amount of profits made out of insider trading, whichever is higher.

(b) 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 rupes 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 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 High 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 High 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 High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal with in the said period, allow it to be filed within a further period not exceeding 60 days.

## Question 5

*SEBI received a complaint from an investor that he has not received the payment due to him from a registered stock broker. Explain the action that can be taken by SEBI against the stock broker under the provisions of Securities and Exchange Board of India Act, 1992 and the factors that will be taken into account while taking such action.* *(May, 2003)*

## Answer

The registered stock broker is liable to a penalty under section 15F of SEBI Act, 1992 in respect of certain defaults. According to section 15F (b), if a registered stock broker fails to make payment of the amount due to the investor in the manner or within the period specified in the regulations, he shall be liable to a penalty of one lakh rupees for each day during which such failure continues or one crore ruppes, whichever is less [SEBI (Amendment) Act, 2002].

For the purpose of adjudging under section 15 F, SEBI shall appoint any of its officers not below the rank of Division Chief to be an adjudicating officer for holding an enquiry in the prescribed manner after giving the person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty. While holding an inquiry, the adjudicating officer has certain powers laid down in Section 15I(2).

While adjudging quantum of penalty under section 15J, the adjudicating officer shall have due regard to the following factors:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the defaults.

(b) the amount of loss to an investor or group of investors as a result of the default.

(c) the repetitive nature of the default.

Taking into consideration the above factors, the adjudicating officer may levy a maximum penalty as prescribed in Section 15F for default by the concern stock broker in making the payment to the investor.

## Question 6

*Mr. Raman, an investor is not satisfied with the dealings of his stock broker who is registered with Delhi Stock Exchange. Mr. Raman approaches you to guide him regarding the avenues available to him for making a complaint against the stock broker under Securities and Exchange Board of India Act, 1992 and also the grounds on which such complaint can be made. You are required to briefly explain the answer to his queries. (November, 2003)*

## Answer

Securities and Exchange Board of India (SEBI) was established for regulating the various aspects of stock market. One of its function is to register and regulate the stock brokers. In the light of this, Mr. Raman is advised that the complaint against the erring stock broker may be submitted to SEBI.

The grounds on which or the defaults for which complaints may be made to SEBI are as follows:

(a) Any failure on the part of the stock broker to issue contract notes in the form and manner specified by the stock exchange of which the stock broker is a member.

(b) Any failure to deliver any security or any failure to make payment of the amount due to the investor in the manner within the period specified in the regulations.

(c) Any collection of charges by way of brokerage which is in excess of the brokerage specified in the regulations.

## Question 7

*Explain briefly the powers of SEBI under Securities and Exchange Board of India Act, 1992 to seize the records of a Stock broker or other Intermediaries associated with Securities Market.*

*(May, 2004)*

## Answer

### Seizure of records

Section 11C was inserted by SEBI (Amendment) Act, 2002. Where SEBI has reasonable grounds to believe that (a) transactions in securities are being dealt with in a manner detrimental to the investors or securities market or (b) any intermediary or any person associated with securities has violated provisions of SEBI Act, rules, regulations or directions issued by SEBI, SEBI can appoint an investigating Authority to investigate the affairs of such intermediary/person and report matter thereon to the Board [Section 11C (1)].

If Investigating Authority is of the opinion that the records are likely to be destroyed or mutilated or secreted or altered, he can make application to Judicial Magistrate of First Class for an order of seizure of such books, registers, other documents and record [Section 11C(8). The Magistrate can authorize Investigating Authority to enter premises search and seize records. But Magistrate will authorize seizure of records of a listed company or company intending to be listed only if it is indulging in insider trading or market manipulation [11C(9)]. The seized records will be kept by Investigating Authority till conclusion of investigation and then return it to person concerned after placing identification marks on them [11C(10)].

## Question 8

*SEBI received complaints from some investors alleging that ABC Ltd. And some brokers are indulging in price manipulation in the shares of ABC Ltd. Explain the powers that can be exercised by SEBI under the Securities and Exchange Board of India Act, 1992 in case the allegations are found to be correct.* *(May, 2006)*

## Answer

SEBI Act, 1992: Price manipulation in the shares of ABC Ltd. can be considered as fraudulent and unfair trade practices relating to securities market. In this case SEBI may exercise the following powers under Section 11(4) of securities and Exchange Board of India Act, 1992.

(i) Suspend the trading of any security (in this case the securities of ABC Ltd.) in a recognized stock exchange.

(ii) Restrain persons (in this case ABC Ltd.) from accessing the securities market. It can also prohibit any person associated with securities market (i.e. brokers who have indulged in price manipulation) to buy, sale or deal in securities market.

SEBI may issue the above orders for reasons to be recorded in writing. SEBI shall, either before or after passing such orders give an opportunity of hearing to company and brokers concerned (proviso 2 to Section 11(4))

SEBI may also appoint an adjudicating officer who may levy penalty under Section 15 HA after holding an enquiry in the prescribed manner. According to Section 15HA if any person indulges in fraudulent and unfair trade practices relating to securities, he shall be leviable to a penalty of Rs. 25 crores or 3 times the amount of profits made out of such practices, whichever is higher.

Prohibition on manipulation and deceptive practices: Further according to Section 12A, no person shall directly or indirectly indulge in following (i.e.) (a) using in manipulative or deceptive device in connection with purchase, sale or securities listed (b) Employ any scheme or device to defraud in connection with dealing in securities which are listed (c) engage in an act which would operate as fraud on deceit upon any person in connection with dealing in securities which are listed. SEBI may impose penalty upto Rs. 1 crore on any person who fails to comply with any provisions of SEBI Act (Section 15 HB).

Question 9

*State the circumstances under which Securities and Exchange Board of India may exercise the following powers:*

*(i)* *Prohibit a company from issuing prospectus, any offer document or advertisement soliciting money from public for the issue of securities.*

(*ii*) *Pass* cease and desist order in respect of any listed company.

*Explain the remedies available under Securities and Exchange Board of India Act, 1992 to companies aggrieved by the above orders of SEBI (November 2006)*

Answer

Power of SEBI and remedies available to aggrieved persons: Section 11 of SEBI Act, 1992 specifies that the basic duty of SEBI is to protect the interests of investors in securities and regulate the securities market. The certain measures which can be taken by SEBI are to fulfill its objectives are listed in Section 11, 11A, 11 AA, 11B, 11C and 11 D. Section 11 A(2)(b)(i) specifically empowers SEBI to prohibit any company from issuing prospectus, any offer document or advertisement soliciting money from the public for the issue of securities by general or special order if such prohibition is necessary to the purpose of protection of investors.

According to proviso to Section 11 D, SEBI can issue cease and desist order in respect of any listed company only if SEBI has reasonable grounds to believe that such company has indulged on insider trading or market manipulation and not otherwise.

Aggrieved companies may appeal against orders of SEBI made under SEBI Act, rules or regulations to Securities Appellate Tribunal (SAT) under Section15T (1)(a). Such appeal should be filed within 45 days from the date on which a copy of the order of SEBI is received by the company. It shall be in the prescribed form accompanied by prescribed fees. Delay in filing appeal can be condoned by SAT for sufficient reasons (Section 15 T(3) Efforts will be made by SAT to dispose of appeal within 6 months [Section 15T(6)].

If the company is aggrieved by the order of SAT, further appeal against the order of SAT can be made to Supreme Court within 60 days from the date of communication of the order on any question of law arising out of such order. The period can be extended by Supreme Court upto further 60 days if sufficient cause is shown (Section 15Z).

Thus, appeal lies only on question of law. As far as facts are concerned, decision of SAT is final. Further, Section 20 A bars jurisdiction of civil court in respect of orders issued by SEBI.

Question 10

*As on 31$^{st}$ December, 2006, following information and figures are noticed from the Annual Accounts for the year ended 31$^{st}$ March, 2006 of CAS Ltd., a Company listed with the Stock Exchange, Mumbai:*

*(i)* *Authorised Share Capital Rs. 20.22 Crores comprising of 2 Crore Equity Shares of Rs. 10 each.*

*(ii) Paid up Share Capital Rs. 9.00 Crores comprising of 80 lac Equity Shares of Rs. 10 each fully paid up and 20 lac Equity Shares of Rs. 10 each called and paid upto Rs. 5 each. The total paid up capital is paid up in cash.*

*(iii) Securities Premium Account Rs. 20.00 Crores.*

*(iv) 5 lac Full Convertible Debentures of Rs. 100 each. These debentures are due for conversion on 31st March, 2007 in full into fully paid Equity Shares of Rs. 10 each in the ratio of one Debenture: two Equity Shares.*

*(v) General Reserve Rs. 30.00 crores.*

*(vi) Fixed Assets Revaluation Reserve Rs. 10.00 crores.*

*(vii) Outstanding Liabilities in respect of Bonus to Employees & workers Rs. 25.00 lacs.*

*(viii) Outstanding Liabilities in respect of Interest payable on Public Deposits comprising of Fixed Deposits from general public Rs. 15.00 lacs.*

*Following other information is gathered from the books of account and other records of the said Company for the period upto 31st December, 2006:*

*(a) The partly paid shares were made fully paid prior to 30th June, 2006.*

*(b) Bonus to employees and workers was paid on 15th September, 2006.*

*(c) Interest on Public Deposits was outstanding on 31st December, 2006.*

*The Directors of CAS Ltd. Wants to issue Bonus Shares on or after 1st April, 2007 in ratio of 1:1. Advise the Directors on the matter with reference to the guidelines issued by Securities and Exchange Board of India on Bonus Issue. (May 2007)*

## Answer

According to Guidelines issued by Securities & Exchange Board of India on Bonus Issue, a listed Company proposing to issue bonus shares has to comply with the following:

(i) Pending the conversion of Fully Convertible Debentures (FCDs) / Partly Convertible Debentures (PCDs), the Company cannot issue shares by way or bonus unless similar benefit is extended to the holders of FCDs / PCDs through reservation of shares and the shares so reserved may be issued at the time of conversion of FCDs / PCDs on the same terms on which the bonus issues were made.

(ii) The bonus issue is made out of free reserve built out of genuine profits or securities premium collected in cash only.

(iii) Fixed Assets Revaluation Reserves are not capitalized for the purpose of bonus issue.

(iv) The bonus issue is not made in lieu of dividend.

(v) The bonus issue can be made only after any partly paid shares are made fully paid.

(vi) The Company should not have defaulted in payment of interest or principal in respect of fixed deposits and interest on existing debentures or principal on redemption.

(vii) The Company should have sufficient reasons to believe that it has not defaulted in respect of the payment of statutory dues like contribution to P.F., Gratuity and bonus to employees etc.

(viii) The Board of Directors' proposal to make bonus issue is implemented within six months from the date of approval by the Board of Directors and the same can not be revoked.

(ix) The bonus issue must be permitted by the Articles of Association and if the Articles ofAssociation does not contain such a clause, then first the same should be suitably amended.

(x) If Authorised Capital is not sufficient to accommodate the post bonus issue paid up capital, the capital clause of the Memorandum of Association should be suitably amended.

(xi) A compliance certificate by the Company duly countersigned by the statutory auditor or company secretary in practice is to be submitted to SEBI.

Based on the abovementioned guidelines of SEBI, the Board of Directors is advised as follows:

(a) Check the Articles of Association whether it allows the issue of bonus shares. If not, the Articles of Association should be amended to include the relevant clause.

(b) The Paid up Share Capital of the Company as on $31^{st}$ March, 2006 was Rs. 9.00 Crores and after the partly paid shares were made fully paid, the paid up share capital became Rs. 10.00 Crores. Moreover, after the conversion of 5 lac FCDs, the paid up capital will increase by 10 lac shares of Rs. 10/- each, that means the paid up capital shall become 11.00 Cores as on $31^{st}$ March, 2007. The Directors want to make bonus issue in the ratio of 1:1. Therefore, the post bonus issue paid up capital shall become Rs. 22.00 crores. But the Authorised Share Capital is only Rs. 20.00 Crores, hence, the Directors are required to take steps to increase the authorized capital to at least Rs. 22.00 crores.

(c) The Company is having sufficient amount in General Reserve and Securities Premium Account and the Directors can use from Any/both of thse accounts for bonus issue. But they should not utilize any amount from the Fixed Assets Revaluation reserve.

(d) Since the Bonus to employees and workers have been paid within the time allowed by the Payment of Bonus Act, the requirement of the SEBI Guidelines have been fulfilled.

(e) The default in paying the interest on fixed deposits should be rectified by paying the necessary amount as provided in the Companies (Acceptance of Deposit Rules) 1975.

(f) The Directors should pass necessary resolution in the meeting of Board of Directors and take further steps to issue the bonus shares within six months from the passing of such resolution.

(g) After the issue of bonus shares, the company should forward a compliance certificate duly counter signed by its statutory auditor or a company secretary in practice to SEBI.

## Question 11

*(i) What do you understand by the term "Price Sensitive Information" as contemplated in the Securities and Exchange Board of India Act, 1992 ? What are the information which can be deemed to be "Price Sensitive Information".*

*(ii) MGR Ltd. wants to issue certain shares on preferential basis and has sought your advise in respect of pricing the shares for such issues. You are required to state the Guidelines issued by Securities and Exchange Board of India in respect of pricing of the issue of shares on a preferential basis. (May 2008)*

## Answer

(i) Any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of securities of the company, is referred to as "Price Sensitive Information".

The following can be deemed to be "Price Sensitive Information":

(i) Periodical financial results of the company

(ii) intended declaration of dividends (both interim and final)

(iii) issue of securities or buy-back of securities

(iv) any major expansion plans or execution of new projects

(v) Amalgamation or merger or takeovers

(vi) disposal of the whole or substantial part of the undertaking

(vii) any significant changes in policies, plans or operations of the company.

(ii) According to the Securities and Exchange Board of India (Disclosure and investor Protection) Guidelines, 2000 the issue of shares on a preferential basis can be made at a price not less than the higher of the following:

(i) the average of the weekly high and low of the closing prices of the related shares quoted on the stock exchange during the six months preceding the relevant date;

or

(ii) the average of the weekly high and low of the closing prices of the related shares quoted on a stock exchange during the two weeks preceding the relevant date.

For the purpose of above, "relevant date" means the date thirty days prior to the date on which the meeting of General Body of shareholders is held, in terms of Section 81(1A) of the Companies Act, 1956 to consider the proposed issue.

## Question 12

*Mr. DB is a member of RPA Ltd. He obtains an order against the company for redressal of his grievances against the company. But the company fails to redress the grievances of DB within the time fixed by the SEBI. The Board thereafter imposed penalty upon the company U/s 15C* *of the SEBI Act. RPL Ltd. seeks your advice whether it has any remedy against the order of SEBI. Advise.* *(November 2008)*

Answer

Section 15C of Securities Exchange Board of India Act, 1992 lays down that if any listed company or any person who is registered as an intermediary, after having been called upon by the board in writing, to redress the grievances of investors, fails to redress such grievances within the time specified by the board, such company or intermediary 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.

RPA limited was penalized under the provisions of above-mentioned section. Now two remedies are available to RPA limited in this matter:

(i) Appeal to the Securities Appellate Tribunal: Section 15T 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 of forty-five days 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 15Z of the SEBI Act, 1992 provides that any person aggrieved by any decision or an 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 an order to him on any question of 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.

PART II

Question on SEBI (DIP) guidelines 2000 given here are for reference only. Answers have not been given as the guidelines are subject to changes from time to time. Students are advised to refer either the Study material or visit the Sebi's Web Site www.sebi.gov.in

Question 1

*What is the specific advantage of Book-building process in connection with issue of securities by a company? State the guidelines issued by SEBI in this regard in respect of the following* *matters:*

*(i) Determination of issue price and that of successful bidders.*

*(ii) Reservation for individual investors who have not participated in the bidding process and basis of allotment to such investors. (May, 2000)*

Question 2

*The Balance Sheet of M/s Get Rich Quick Ltd. as at 31.3.2001 disclosed the following details:*

| | | |
|---|---|---|
| *(i)* | *Share Capital* | *Rs. 150 crores* |
| *(ii)* | *Reserves and Surplus* | *Rs. 750 crores* |

*The company has issued in the year 1996, fully convertible debentures of Rs.100 crores, which are due for conversion in the year 2001. The company proposes to issue bonus shares in the ratio of 1 : 1. Explain briefly the SEBI guidelines to be followed by the company*

*(May, 2001)*

Question 3

*M/s Ambitious Financiers Ltd., an existing unlisted Public Company, is planning to issue to the public five lakhs fully convertible debentures of Rs. 100 each. Explain the eligibility norms to be fulfilled by the company as per SEBI guidelines before making the issue. (May, 2001)*

Question 4

*State briefly the guidelines issued by SEBI for compliance by the companies making an initial public offer of equity shares or any other security convertible at a later date into equity shares proposing to list them on the Over the Counter Exchange of India. (November, 2001)*

Question 5

*M/s Herbal Pharma Limited, a listed company, decides to make a public issue of equity shares. Explain briefly the eligibility norms prescribed by SEBI guidelines to be complied with by the company. (May, 2002)*

Question 6

*Super Chemicals Limited, a closely held unlisted company, is in need of about Rs. 20 crores for financing its expansion programme. The company has not declared any dividend so far though it has made good profits from the commencement of commercial operations on 1st January, 1995. The paid-up capital of the company was increased to Rs. 3.5 crores on 1st April, 1998. The net worth of the company as per latest audited Balance Sheet as at 31st March, 2002 is Rs. 5 crores. The company seeks your advice as to its eligibility to raise Rs. 20 crores through public issue of equity shares at a premium. Advise with reference to relevant guidelines issued by SEBI. (May, 2003)*

### Question 7

*Following information and figures are noticed from the Annual Accounts for the year ended 31st March, 2003 of MNP Limited, a listed company:*

*(i)* *Authorised Shares Capital Rs.10 crores comprising of one crore Equity shares of Rs.10 each.*

*(ii)* *Paid-up Share Capital of Rs.4.5 crores comprising of 40,00,000 Equity shares of Rs.10 each fully paid-up and 10,00,000 Equity shares of Rs.10 each called and paid-up to Rs.5 each. The total paid-up capital is paid up in cash.*

*(iii)* *Securities Premium Account Rs.10 crores.*

*(iv)* *2,50,000 fully convertible debentures of Rs.100 each. These debentures are due for conversion on 30th June, 2003 in full into fully paid Equity shares of Rs.10 each in the ratio of two equity shares for one debenture.*

*(v)* *General Reserve Rs.15 crores.*

*(vi)* Fixed asset revaluation reserves Rs.2.5 crores.

*It was further ascertained that the partly paid shares were made fully paid by 30th June, 2003.*

*The Directors of MNP Limited propose to issue bonus shares in the ratio of 1:1.*

*Advise the Directors on the matter with reference to the guidelines issued by SEBI on bonus issue. What will be your advice, if the company has defaulted in the matter of payment of interest on fixed deposits?* *(November, 2003)*

### Question 8

*An unlisted Company, having paid-up Share Capital of Rs.3 crores consisting of 30,00,000 Equity Shares of Rs. 10 each fully paid-up, proposes to make an initial Public offer of 90,000 Equity Shares of Rs.10 each at a premium of Rs.5 per share, in July, 2004. The promoters acquired 10,00,000 shares on 1st January, 2000 and another 10,00,000 shares on 1st January, 2004 at face value:*

*(i)* *What should be the minimum contribution that should be made by the promoters of the above company in order to comply with the guidelines issued by SEBI?*

*(ii)* *State also the period for which the promoters are required in excess of the enquired minimum contribution.* *(May, 2004)*

### Question 9

*The Annual Accounts of CALM Ltd., a listed company from for the year ended 31st March, 2003 were finalized on 31st May, 2004. The Company had a paid up capital of Rs.50.00 Lacs and free reserves of Rs.100.00 Lacs. The Company did not have any accumulated losses. The Board of Directors of the Company wishes to make a public issue of Equity Shares* *amounting to Rs. 10.00 Crores comprising of offer to public through offer document, firm allotment and promoters contribution. State, how this can be done under SEBI Guidelines.*

*What would be your answer in the following cases:*

*(a) If CALM Ltd. was a Private Sector Bank known as CALM Bank Ltd.*

*(b) If the issue of above mentioned Rs.10.00 Crores was a right issue (November, 2004)*

Question 10

*(a) As on 31st December, 2004, following information and figures are noticed from the Annual Accounts for the year ended 31st March, 2004 of SKP Ltd., a Company listed with The Stock Exchange, Mumbai:*

*(i) Authorised Share Capital Rs.20.00 Crores comprising of 2 Crore Equity Shares of Rs.10 each.*

*(ii) Paid up Share Capital Rs.9.00 Crores comprising of 80 lac Equity Shares of Rs.10 each fully paid up and 20 lac Equity Shares of Rs.10 each called and paid up to Rs.5 each. The total paid up capital is paid up in cash.*

*(iii) Securities Premium Account Rs.20.00 Crores.*

*(iv) 5 lac Fully Convertible Debentures of Rs.100 each. These debentures are due for conversion on 31st March, 2005 in full into fully paid Equity Shares of Rs.10 each in the ratio of one Debenture: two Equity Shares.*

*(v) General Reserve Rs.30.00 Crores.*

*(vi) Fixed Assets Revaluation Reserve Rs.10.00 Crores.*

*(vii) Outstanding Liabilities in respect of Bonus to Employees and Workers Rs.25.00 lacs.*

*(viii) Outstanding Liabilities in respect of Interest payable on Public Deposits comprising of Fixed Deposits from general public Rs.15.00 lacs.*

*Following other information is gathered from the books of account and other records of the said Company for the period upto 31st December, 2004:*

*(a) The partly paid shares were made fully paid prior to 30th September, 2004.*

*(b) Bonus to employees and workers was paid on 15th September, 2004.*

*(c) Interest on Public Deposits was outstanding on 31st December, 2004.*

*The Directors of SKP Ltd. wants to issue Bonus Shares on or after 1st April, 2005 in the ratio of 1:1. Advise the Directors on the matter with reference to the guidelines issued by Securities and Exchange Board of India on Bonus Issue.*

*(b) Excel Ltd., a public limited company listed with The Stock Exchange, Mumbai, wants to make issue of equity shares on preferential basis pursuant to a scheme approved under Corporate Debt Restructuring framework specified by Reserve Bank of India to various persons as may be selected by the Board of Director of the Company. Following information relevant to the preferential issue is available:*

*(i) Total No. of equity shares to be issued: 50 Lac equity shares of Rs.10 each out of which 30 lac equity shares will be allotted on 30th June, 2005 as fully paid up and balance 20 lac equity shares shall be allotted on the same date but paid up to Rs.5 each and balance Rs.5 shall be called upon at a later date and shall be paid up on 30th November, 2005.*

*(ii) Out of the proposed allottees some persons are holding their shares in Excel Ltd. in physical form and not in dematerialed form and some persons had sold their entire shareholding in Excel Ltd. in January, 2005.*

*(iii) The meeting of general body of shareholders for approving the preferential issue was held on 15th March, 2005.*

*Based on the above information you are required to answer the following queries with reference to the SEBI (Disclosure and Investor Protection Guidelines, 2000:*

*(i) What would be the lock-in period for the shares allotted on preferential basis?*

*(ii) Who are the persons not entitled for allotment of shares on preferential basis?*

*( May 2005)*

Question 11

*(a) An investor has complained to SEBI that he has not received the payment due to him from the stock-broker registered with Calcutta Stock Exchange Association Ltd. The complainant has requested SEBI to take appropriate action against the stock-broker. You are required to state with reference to the provisions of Securities and Exchange Board of India Act, 1992 the answer to the following:*

*(i) What action SEBI can take against the stock-broker on the complaint as stated above?*

*(ii) What is the procedure to be adopted and what are the factors that will be taken into account while taking such action?*

*(b) Following information is available from the records of Star Chemicals & Engineering Ltd.:*

*(i) The Company is a closely held unlisted Company.*

*(ii) The paid up share capital of the Company since 1st April, 1999 is Rs.3.00 crores and its net worth as at 31st March, 2005 was Rs.5.00 crores as per audited Balance Sheet.*

*(iii) The Net Tangible Assets of the Company as per last 3 (three) audited Balance Sheet as at 31st March, 2003, 2004 and 2005 were Rs.4.00 crores, 4.50 crores and 5.00 crores respectively, out of which monetary assets were less than Rs.50 lacs in each of three years.*

*(iv) The Company was incorporated in 1996 and commenced its business on 1st April, 1996 and since then it has earned good profits and it has not incurred any loss in any year in past.*

*(v) The Company has not declared any dividend so far, but according to the profits*

*earned so far, the management could have declared the dividend in each of the last five years.*

*(vi) The name of the Company was changed from Star Engineering Ltd. to its present name with effect from 1st October, 2004.*

*The Company wants to make a public issue of shares to raise Rs.20.00 crores by issuing equity shares at premium. For the purpose of including the information in the prospectus, the company has prepared its accounts for 12 months ended 30th September, 2005 showing segment-wise revenue, which reveals that revenue from Chemical segment is more than the revenue from Engineering segment.*

*You are required to state the relevant guidelines issued by SEBI and your conclusion whether the company can make the desired issue of equity shares based on the facts stated above.* *( November 2005)*

### Question 12

*A designated Financial Institution under the Companies Act, 1956 proposes to go for issue of shares. Referring to the SEBI guidelines the institution seeks your advice on the following:*

*(i) What minimum reservation to promoters is to be made by the Financial Institution ?*

*(ii) To what conditions shall the Financial Institution be subject to, for reservation for employees out of the proposed issue? Advise.*

### Question 13

*XYZ Automobiles Ltd. intends to make a public issue of 2,00,00,000 equity shares of Rs. 10 each through the 100% book building process indicating a price band.*

*You are required to answer the following with reference to the SEBI (Disclosure and Investor Protection) Guidelines:*

*(i) What is the price band that can be indicated in the red herring prospectus, if the floor prince is proposed to be fixed at Rs. 300 per equity share ?*

*(ii) What are the restrictions, if the company wants to revise the price band during the bidding period?*

*(iii) How the shares are to be allocated to different categories of investors like Qualified institutional buyers, Retail individual investors, etc.?* *(November 2006)*

### Question 14

*Securities and Exchange Board of India (SEBI) has issued certain guidelines in respect of fixation of exit price through "Book Building" process for the shares to be bought back by the listed companies, who want to voluntarily delist their shares from the stock exchanges. You are required to state the salient features of the said "Book Building" process.*

*(May 2007)*

Question 15

*KYC a recognized Stock Exchange has not maintained proper books of account of the stock exchange, on the ground that such books of account are not essential. A compliant in this regard was made to SEBI who appointed Mr. E. An expert to make an enquiry. Explain whether SEBI is authorized to make inquiry and take action against the stock exchange.*

*(November 2007)*

Question 16

*M/s Earth Chemicals and Engineering Ltd. is a closely held unlisted company with a paid up share capital of Rs. 3.00 crores, since 1st April, 2001 and its net worth as on 31st March, 2007 was Rs. 5.00 crores. The net tangible assets of the company as per last three audited balance sheets as at 31st March, 2005, 2006 and 2007 were Rs. 4.00 crores, 4.50 crores and 5.00 crores respectively out of which momentary assets were less than Rs. 50 lakhs in each of the three years. The company was incorporated in 1998 and commenced its business on 1st April, 1998 and since then it was earned good profits and it has not incurred any loss in any year in the past. The company has not declared any dividend so far. But according to the profits earned so far, the management could have declared dividends in each of the last five years. The name of the company was changed from Earth Engineering ltd. to its present name effective from 1st October, 2006. The company wants to make a public issue of shares to raise Rs. 20.00 crors by issuing equity shares at premium. For the purpose of including the information in the prospectus. The company has prepared its accounts for 12 months ended 30th September, 2007 showing segment wise revenue, which reveals that revenue from chemical segment was more than the revenue from engineering segment. Keeping the relevant guidelines issued by SEBI into account, examine whether the company can make the desired issue of equity shares based on the facts stated above. (November 2007)*

Question 17

*An investor has complained to SEBI that he has not received the payment due to him from the stock broker registered with Calcutta Stock Exchange Association Ltd. The complainant has requested SEBI to take appropriate action against the stock broker. State with reference to the provisions of Securities and Exchange Board of India Act, 1992. The action that can be taken against the stock broker, the procedure to be adopted and the factors that will be taken into account of SEBI. (November 2007)*

Question 18

*Excel Ltd., a Public Limited Company listed with the Stock Exchange, Mumbai, wants to make issue of equity shares on preferential basis pursuant to a scheme approved under Corporate Debt Restructuring framework specified by Reserve Bank of India to various persons as may be selected by the Board of Directors of the Company. Following information relevant to the preferential issue is available.*

*(i) Total No. of equity shares to be issued : 50 lac equity shares of Rs. 10 each out of which 30 lac equity shares will be allotted on 30th June, 2008 as fully paid up and balance 20 lac equity shares shall be allotted on the same date but paid up to Rs. 5 each and*

*balance Rs. 5 shall be called upon at a later date and shall be paid up on 30th November, 2008.*

*(ii) Out of the proposed allottees some persons are holding their shares in Excel Ltd. in physical form and not in dematerialed form and some persons had sold their entire shareholding in Excel Ltd. in January, 2008.*

*(iii) The meeting of general body of shareholders for approving the preferential issue was held on 15th March, 2008.*

*Based on the above information you are required to answer the following queries with reference to the SEBI (Disclosure and Investor Protection) Guidelines, 2000:*

*(i) What would be the lock-in period for the shares allotted on preferential basis?*

*(ii) Who are the persons not entitled for allotment of shares on preferential basis?*

*(May 2008)*

Question 19

*The promoters of ABC Ltd. an unlisted company decide to go for a public issue. They seek your advice in respect of the following matters:*

*Whether equity shares can be reserved in a firm allotment category for promoters at a price different from the price at which shares are offered to the public.*

*Circumstances in which the equity shares can be issued in denomination of Rs.2 per share.*

*Need for past track record of distributable profits.*

*Requirement of net tangible assets in the previous years.* *(November 2008)*

# CHAPTER 6

## APPLICATION OF SECRETARIAL PROCEDURES AND PRACTICES

### Question 1

*Explain the procedure for passing the resolution by Circulation under Section 289 of the Companies Act, 1956.* *(November, 2000)*

### Answer

The procedure for passing resolution by circulation as under section 269 of the Companies Act, 1956 are as follows:

(a) Circulate the draft of the resolution in duplicate with all necessary papers if any, to all the directors then in India not being less in number than the quorum for a board meeting and to all other directors at their usual addresses in India for approval by signing one copy of the resolution and send it back to the company.

(b) If all are majority of the above directors as are entitled to vote on the resolution approve the resolution, the resolution shall deemed to have been duly passed by the Board.

(c) Record the resolution having been passed by circulation in the minutes of the immediate next Board meeting.

(d) See that the resolution do not pertain to the matters which cannot be passed by the Board by circulation (i.e. Sections 262(1), 292, 297, 299, 307 etc.

(e) Enclose a copy of the circular resolution to the Agenda of the ensuing immediately next Board meeting.

### Question 2

*Under Section 603 of the Companies Act, 1956, what are the particulars required for incorporating in a prospectus to be issued by an exiting Foreign Company?* *(November 2000)*

### Answer

Under Section 603, Companies Act, 1956, the prospectus to be issued by an existing or intended Foreign Company in India must be dated and contain the following particulars:

(a) the instrument constituting or defining the constitution of the company;

(b) the enactment's or provisions under which the company was incorporated;

(c) the address of the place in India where the said instrument, enactments etc translation thereof in English if they are in some other Foreign language, can be inspected;

(d) the date on which and the country in which the company was incorporated; and

(e) whether there is a place of business in India and if so, the address of its principal office.

The provision contained in (a), (b) and (c) above, shall not be applicable if the prospectus is issued more than 2 years after the company had become entitled to commence business.

The prospectus of Foreign company must contain the matters laid down in specified in part-II of the schedule subject always to the provisions of Part-III of the schedule.

## Question 3

*Explain briefly the salient points to be taken into account while drafting the minutes of the Board of Directors. Draft a specimen Board resolution regarding the appointment of Mr. Sincere as the Managing Director of Full Cure Pharma Ltd. (May, 2001)*

## Answer

While drafting the minutes of the Board of directors, the following points have to be kept in mind.

(i) The minutes may be drafted in a tabular form or in the form of a series of paragraphs numbered consecutively and with relevant headings.

(ii) The place, date and time of the meeting should be stated.

(iii) The names of the persons present at the meeting should be stated.

(iv) Contents of the meeting giving serial number of the minute, brief subject heading, full terms of the resolutions adopted including the statistical details etc.

(v) Names of directors dissenting or not concurring with any resolution passed.

(vi) Reference about interested directors abstaining from voting is necessary.

(vii) Chairman's signature and date of verification of minutes as correct.

Specimen board resolution: *"Resolved that Shri Sincere who fulfills the conditions specified in Parts I and II of schedule XIII to the Companies Act, 1956 be and is hereby appointed as the Managing Director of the company for a period of 5 years effective from 1.4.2001 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.*

*Resolved further that the Secretary of the company be and is hereby directed to file the necessary returns with the Registrar of Companies and to do all acts and things as may be necessary in this connection."*

Question 4

*Some of the small shareholders of M/s Progressive Industries Ltd. approach you for advice regarding appointment of one of them as a director of the company. Explain the meaning of a small shareholder and the legal position regarding appointment of a director by such small shareholders.* *(November 2001)*

Answer

According to Section 252 of the Companies Act, 1956 as amended, every public company having a paid up capital of Rs.5 cores or more and 1000 or more small shareholders may have a director elected by such small shareholders in the manner as may be prescribed. For this purpose, a small shareholder means a shareholder holding shares of nominal value of Rs.20,000 or less in a public company. If the paid up capital of M/s Progressive Industries Ltd., is more than Rs.5 crores and the Company has 1000 or more small share holders, then the small share holders can proceed to elect their nominee as a director. The appointment is to be made in accordance with Companies (Appointment of small shareholders-Director) Rules, 2001.

Question 5

*The word "Misfeasance" is used in the Companies Act at several places but the same has not been defined. Explain as to how the meaning of the said word is ascertained in the absence of any definition. Examine whether misfeasance proceedings initiated against a director under the Companies Act can be continued even after his death.* *(May, 2002)*

Answer

The word "misfeasance" is not defined in the Companies Act, 1956. Where a particular word is not defined, it will be useful to refer to dictionary to find out the general sense in which the word is commonly used or understood. Further the judicial decisions laying down the meaning of the words in construing statues will have greater weight then the meaning furnished by the dictionaries. For technical terms reference is made to technical dictionaries. The dictionary meaning of the word "misfeasance" is improper performance of a lawful act. For creation of liability under section 543, it must be shown that there has been dishonesty or fraud or at least gross and culpable negligence. An honest mistake not amounting to culpable negligence or breach of duty, would not be misfeasance.

If in the course of winding up of a company, it appears that any person who had taken part in the formation or promotion of the company, any past or present director has misapplied or retained any money or property of the company or has been guilty of any breach of trust in relation to the company, the court may on the application of the official liquidator proceed against such person who is guilty of committing the offence.

The misfeasance proceedings initiated under section 543 of the Companies Act against any director can be continued on his death against his heirs and legal representative for the purpose of determining and declaring the loss or damage caused to the company though no compulsive order may be made. On conclusion of the proceedings, a declaration of liability may be made and such a declaration partakes the character of a decree and the same can be enforced against the properties of the deceased director.

## Question 6

*M/s A to Z Technologies Ltd. has been wound up and the official liquidator has been asked to take charge of the company. Briefly explain the relevant provisions regarding filing of statement of affairs in relation to the company in liquidation. (May, 2002)*

## Answer

According to section 454 of the Companies Act, 1956 where the Court has made a winding up order or the Official Liquidator has been appointed a provisional liquidator, a statement as regards the affairs of the company in the prescribed Form No. 57 shall be filed with the Official Liquidator. The said statement should be verified by an affidavit and contain particulars of (i) the assets of the company stating separately the cash balance in hand and at bank (ii) its debts and liabilities (ii) the details of creditors including their names, residence, occupations and amounts due to them as secured and unsecured (iv) the details of debtors including the particulars of securities and their values, the names and particulars of debtors (with estimated amount to be realised) and (v) such further or other information as may be prescribed or required by the Official Liquidator. The said statement is required to be verified by one or more directors at the time of passing the winding up order by the court. Further the said statement is required to be submitted within 21 days of the winding up order or within such extended time not exceeding three months as may be fixed by the Official Liquidator or the court for special reasons.

## Question 7

*The Board Meeting of M/s ABC Company Ltd. was adjourned for want of Quorum. Advise the procedure now to be followed and also whether a resolution can be passed by circulation. If so, how? (November 2002)*

## Answer

Quorum and Resolution by circulation: For the conduct of business in the Board Meeting quorum is required. The Board Meeting of M/s. ABC Company Ltd. is adjourned for want of quorum. Section 288 of the Companies Act, 1956 provides the procedure when a Board Meeting is adjourned for want of quorum. Thus, under section 288 of the Act, following procedure is applicable :

1. If a Board Meeting could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned till the same day in the next week, at the same time and place, or if that day, is a public holiday, till the next succeeding day which is not a public holiday, at the same time and place.
2. The provisions of Section 285 shall not be deemed to have been contravened merely by reason of the fact that a meeting of the Board which had been called in compliance with the terms of that provision, could not be held for want of quorum.

When the question of passing resolution by circulation arises, the provisions of section 289 of the Companies Act, 1956 are applicable. For the passing of the circular resolution following conditions must be complied with:

1. The draft resolution, together with supporting papers has been circulated, to all the directors or members of the committee of the board thereof, then in India, not being less in number than the quorum fixed for a meeting of the Board or Committee, as the case may be.
2. to all the directors of the Board or member of the committee who are not in India, at their usual address in India, and
3. the same has been approved by such of the directors then in India, or by a majority of them, who are entitled to vote on the resolution.

## Question 8

*Explain the circumstances under which a Director retiring at an annual general meeting shall be deemed to have been re-appointed even though no such appointment has been made.*

*(May, 2003)*

## Answer

Section 256 of the Companies Act, 1956 deals with deemed re-appointment of a retiring director. The vacancies caused by the retirement of a director by rotation should be filled up at the same meeting or at an adjourned meeting. If it is not so done, the retiring director shall be deemed to have been re-appointed at such adjourned meeting except in the following cases:-

1. at any previous meeting, a resolution for his re-appointment was put to vote but was lost, or
2. the retiring director has, in writing expressed his unwillingness to continue or
3. he is not qualified or is disqualified for appointment, or
4. a special or ordinary resolution is necessary for his appointment by virtue of any provisions of the Companies Act; or
5. it is resolved to appoint two or more directors by a single resolution {Section 263(2) Proviso]; or
6. it is resolved not to fill the vacancy.

## Question 9

*Examine whether the following transactions are permissible under Foreign Exchange Management Act, 1999:*

*(i)* *Payment of remuneration to foreign technician.*

*(ii)* *Remittance of dividend to non-residents.*

*State also the procedure to be followed with regard to payment of dividend to non-residents.*

*(November 2003)*

## Answer

**Foreign Technician:** Salary payable to a foreign technician is a current account transaction. According to Section 5 of Foreign Exchange Management Act, 1999, any person can sell or draw foreign exchange to or from authorised person if such sale or drawal is a current account transaction and reasonable restrictions on current account transaction can be imposed by the Central Government in public interest, in consultation with RBI. Hence, basically all current account transactions are free, unless specifically restricted by the Central Government. Hiring of foreign nationals as technician is permissible without any restrictions. There is no ceiling on salary, which can be paid as per contract. Their salary can be remitted abroad, after tax deducted at source.

**Remittance of dividend**: Since remittances of dividend on investment are current account transactions, these are permitted without restrictions, if the shares were issued as per guidelines/regulations/permission. Dividend is restricted only when permission for issue of shares to non-residents was granted with condition for dividend balancing.

**Procedure for remittance of dividend to non-residents**: The procedure involved is briefly as follows:

1. **Application in Form A2** - Application should be submitted in Form A2 to authorised dealers. It should be accompanied by (a) List of non-resident shareholders (b) dividend to be remitted - the amount will be payable in Indian Rupees and payment will be made to payee in foreign exchange at current exchange rate.
2. **Supporting documents**: Application should be accompanied by copies of supporting documents to establish that the issue of shares was permissible as per regulations/specific approval was obtained as required. Copy of resolution in general meeting/Board meeting approving dividend/interim dividend should be submitted.
3. **Certificates:** Certificate from Chartered Accountant, practicing Company Secretary in respect of amount payable and details of calculation should be submitted. A certificate from Chartered Accountant that tax has been properly deducted at source should be submitted.

*Remittance of dividend*:- The dividend may be remitted through normal banking channels. If shareholder has issued instructions, the amount can be credited to NRE/FCNR account of NRI.

## Question 10

*An existing society seeks your advice as to its eligibility to be registered as a 'Producer Company' under the Companies Act, 1956 and the procedure to be followed for such registration. Advise explaining the relevant provisions of the Companies Act, 1956.*

*(November 2003)*

### Answer

**Producer Company:** Any existing inter-state co-operative society with objects not confined to one State may make an application to the Registrar of Companies for registration as 'Producer Company under the Companies Act, 1956. The conversion is purely optional (Section 581J(1)].

'Inter-State Co-operative Society' means a 'Multi-State Co-operative Society' within the meaning of Multi-State Co-operative Societies Act, 2002 and includes any co-operative society registered under any other law for the time being in force which has, subsequent to its formation, excluded any of its objects to more than one State by enlisting the participation of persons or by extending any of its activities outside the State, whether directly or indirectly through an institution of which it is a constituent [Section 581A(e)]. Hence a co-operative society registered under Multi-state Co-operative Societies Act, 2002 or any other State Act with objects not confined to one State may opt for conversion into a 'producer company' under Companies Act, 1956.

The application to the Registrar of companies must be accompanied by the following:

(1) A copy of the special resolution of not less than two-third of total members of inter-state co-operative society, for its incorporation as a producer company under the Companies Act.

(2) A statement showing the names and addresses or the occupation of the directors and Chief Executive.

(3) A statement showing the list of members.

(4) A statement indicating that the Inter-State Co-operative Society is engaged in one or more of the objectives specified in Section 581B.

(5) A declaration by two or more directors of the Inter-State Co-operative Society (certifying that the particulars given in the above statements are correct. [Section 581J(2)].

When an Inter-State Co-operative Society is registered as a 'producer company', the words 'Producer Company Limited' shall form part of its name with any word or expression to show its identity preceding it [Section 581J(3)].

On completion of all formalities, the Registrar of Companies shall register and incorporate such society to be a 'Producer Company' under Part IXA of the Companies Act, 1956 (Section 581J (4)].

Upon registration as a Producer Company, the Registrar of Companies shall forthwith intimate the Registrar with whom the erstwhile Inter-State Co-operative Society was earlier registered for appropriate deletion from its register [Section 581J(7)].

### Question 11

*Draft a resolution proposed to be passed at a General Meeting of a Public Company giving consent to the Board of Directors for borrowing upto a specified amount in excess of the limits laid down under Section 293(1)(d) of the Companies Act, 1956 and also state the borrowings, which are to be excluded from the said limits.* *(May, 2004)*

## Answer

### Draft of ordinary resolution under Section 293(1)(d)

Resolved that the company hereby consents to the Board of Directors borrowing monies not exceeding Rs……(Rupees………………..) in excess of the aggregate of the paid-up capital of the company and its free reserves, that is to say reserves not set apart for any specific purpose, as provided in Section 293(1)(d) of the Companies Act, 1956, and in addition to any temporary loans obtained from the company's bankers in the ordinary course of business.

### Borrowings

Section 293(1)(d) does not apply to the borrowing by a company by way of temporary loans obtained from the company's bankers in the ordinary course of business. Therefore, in calculating the limits stipulated in this provision, temporary loans obtained from the company's bankers in the ordinary course of business shall be excluded.

The expression 'temporary loans' in i.e. (d) means loans repayable and demand or within six months from the date of the loan such as short term cash credit arrangements, the discounting of bills and the issue of other short terms loans of a seasonal character, but does not include loans raised for the purpose of financing expenditure of capital nature [Explanation II to Section 293(1)].

## Question 12

*ABC Engineering Limited proposes to invest Rs.20 lakhs in the Equity shares of PQR Trading Limited. The proposed investment together with the investments in securities of companies and loans to body corporates already made exceed 60 per cent of the paid-up share capital and also 100 per cent of free reserves of the company. The company has taken term loans from IDBI.*

*Explain the procedure to be followed by ABC Engineering Limited to give effect to the proposed investment.* *(May, 2004)*

## Answer

Investment in Shares: The proposed investment together with the investments, loans already made exceed 60% of the paid-up share capital of the company and also 100% of the free reserves. Hence, the proposed investment must be approved by a special resolution passed in a general meeting [Proviso to Section 372A (i)].

The Board of Directors must convene a general meeting for the purpose of passing a specific special resolution authorizing the proposed investment. The special resolution should specify:

(a) The limit upto which Board is to be authorized to make investment;

(b) Particulars of the body corporate in which the investment is proposed to be made;

(c) The purpose of the proposed investment;

(d) The source of funds to be invested; and

(e) Other relevant details (3rd proviso to Section 372A(1).

The special resolution passed at the general meeting will be filed with the Registrar of Companies.

As the total amount of inter-corporate investments, loans, etc. exceeds 60% of the paid-up share capital prior approval of public financial institution i.e. IDBI must be taken [Section 372A(2)].

Board meeting must be convened and the proposed investment must be sanctioned by a resolution passed with the consent of all the directors present at the Board meeting (Section 372A(2)].

The following particulars must be entered in the 'Register of Investments, Loans, Guarantees and Securities pursuant to Section 372A:

(a) Name of the body corporate on which the investment is made.

(b) Amount invested.

(c) Type and nature of securities in which investment is made.

(d) Main terms of the issue of the securities.

(e) The date on which the investment is made.

Particulars must be entered in the register in respect of each investment chronologically within 7 days of the making of the investment. [Section 372A(5)].

The register must be kept at the registered office of the company. Any member of the company can inspect the register. [Section 372A(6)].

## Question 13

*Answer any* one *of the following:*

*(i) Board of Directors of DBM Limited held a board meeting on 2nd May, 2008 at its registered office. You are required to state the salient points to be taken into account while drafting the minutes of the said board meeting.*

*(ii) Draft a board resolution for appointment of Mr. Paul as the managing director for 5 years with effect from 1st June, 2008 of DBM Limited passed in the above stated board meeting.* *(May 2008)*

## Answer

(i) While drafting the minutes of a board meeting following salient points should be kept in mind:

(a) the minutes may be drafted in a tabular form or they may be drafted in the form of a series of paragraphs, numbered consecutively and with relevant headings.

(b) the place, date and time of the meeting should be stated.

(c) the minutes should contain the constitution of the meeting, i.e., persons present and the capacity in which present, e.g. name of the person chairing the meeting, names of the directors and secretary, identifying them as director or secretary, names of persons in attendance like auditor, internal auditor etc. The minutes should also contain the subject of leave of absence granted, if any, to any of the board members.

(d) content of the meeting giving serial number of the minute, brief subject heading, full terms of the resolution adopted including the statistical details, if any.

(e) names of the directors dissenting or not concurring with any resolution passed at the board meeting.

(f) reference about interested directors abstaining from voting is also required to be stated in the minutes.

(g) Chairman's signature and date of verification of minutes as correct.

(ii) Resolution passed at the meeting of board of directors of DBM Limited held at its registered office situated at ……………………… on 2nd May, 2008 at ………… AM.

"RESOLVED that subject to the approval by the shareholders in a general meeting and pursuant to provisions of Sections 198, 309, 310, Schedule XIII and other applicable provisions of the Companies Act, 1956, Mr. Paul be and is hereby appointed as the Managing Director of the Company with effect from 1st June, 2008 for a period of five years on a remuneration approved by the Remuneration Committee as enumerated below:

(1) Salary: Rs. ……………………… per month

(2) Perquisites, Benefits and Facilities …………………………….

"RESOLVED FURTHER that Mr. Paul, so long as the functions as the Managing Director of the Company shall not be entitled to any sitting fee for attending any meeting of the board of directors or any committee thereof and that he shall not be liable to retire by rotation."

"RESOLVED FURTHER that Mr. Paul till he holds the office of Managing Director of the Company shall not become interested or concerned in any selling agency directly or through his wife or minor children in future without prior approval of the Central Government."

"RESOLVED FURTHER that Mr. Paul, the Chairman, as well as the Company shall have right to terminate the appointment by giving 3 (three) months' notice in writing."

"RESOLVED FURTHER that the Secretary of the company be and is hereby directed and authorized to file necessary returns with the Registrar of Companies and to do all other necessary things required under the provisions of the Companies Act, 1956."

# CHAPTER 7

## RULES AND INTERPRETATION OF STATUTES, DEEDS AND DOCUMENTS

### Question 1

*Explain the rule of 'beneficial construction' while interpreting the statutes quoting an example*

*(May, 2000)*

### Answer

Where the language used in a statute is capable of more than one interpretation, the most firmly established rule for construction is the principle laid down in the Heydon's case. This rule enable, consideration of four matters in constituting an act:

(1) what was the law before making of the Act,

(2) what was the mischief or defect for which the law did not provide,

(3) what is the remedy that the Act has provided, and

(4) what is the reason for the remedy.

The rule then directs that the courts must adopt that construction which 'shall suppress the mischief and advance the remedy'. Therefore even in a case where the usual meaning of the language used falls short of the whole object of the legislature, a more extended meaning may be attributed to the words, provided they are fairly susceptible of it. If the object of any enactment is public safety, then its working must be interpreted widely to give effect to that object. Thus in the case of Workmen's Compensation Act, 1923 the main object being provision of compensation to workmen, it was held that the Act ought to be so construed, as far as possible, so as to give effect to its primary provisions.

However, it has been emphasized by the Supreme Court that the rule in Heydon's case is applicable only when the words used are ambiguous and are reasonably capable of more than one meaning *[CIT v. Sodra Devi (1957) 32 ITR 615 (SC)].*

### Question 2

*What is meant by 'disclaimer of onerous property' and how the same is exercised during winding up". Explain the circumstances under which such a disclaimer is not allowed.*

*(May, 2000)*

### Answer

The provisions relating to disclaimer of onerous property will arise during the winding up of the company. The liquidator, may, with the leave of the court disclaim any onerous property within 12 months of the commencement of the winding up. If the existence of any disclaimable property does not come to the knowledge of the liquidator, within one month after the commencement of the winding up, he can disclaim at any time within 12 months after he has become aware of it. The Court has, however, the power to extend the time.

An onerous property may consist of (a) land of any tenure burdened with onerous covenants (b) shares or stocks in companies (c) any other property which is unsaleable or not readily saleable (d) unprofitable contracts.

The liquidator's right to disclaim is lost if within 28 days or such extended period as may be allowed by the court, of receiving a demand from any interest person to make his decision, he does not give notice that he intends to apply to the court for leave to disclaim [Section 535(4)].

### Question 3

*How far are (i) title, (ii) preamble and (iii) marginal notes in an enactment helpful in interpreting any of the parts of an enactment?* *(May, 2001)*

### Answer

(i) Title: An enactment would have what is known as 'Short Title' and also a 'Long Title'. The short title merely identifies the enactment and is chosen merely for convenience. The 'Long title' describes the enactment and does not merely identify it.

The Long title is a part of the Act and, therefore, can be referred to for ascertaining the object and scope of the Act.

(ii) Preamble: It expresses the scope and object of the Act more comprehensively than the long title. The preamble may recite the ground and the cause for making a statute and or the evil which is sought to the remedied by it. The preamble like the Long title can legitimately be used for construing it. However, the preamble cannot over ride the provisions of the Act. Only if the wording of the Act gives rise to doubts as to its proper construction (e.g., where the words or a phrase has more than the one meaning and doubts arises as to which of the two meanings is intended in the Act) the preamble can and ought to be referred to the arrive at the proper construction.

(iii) Marginal notes: As held in *CIT Ahmed Bhai Umar Bhai Company HJR 1950, SC (134, 141)* marginal notes applied to the section cannot be used for construing the section.

However, marginal notes appended to the Articles of the Constitution have been held to be part of the constitution and therefore, have been made use of in construing the articles.

### Question 4

*Explain the principles of grammatical interpretation vis-à-vis logical interpretation especially in the context that the duty of the Court is to administer the law as it stands and not to find out whether the law is just or reasonable.* *(November, 2001)*

## Answer

Interpretation may be either grammatical or logical. Grammatical interpretation concerns itself exclusively with the verbal expression of law. It does not go beyond the letter of the law. Logical interpretation on the other hand, seeks more satisfactory evidence of the true intention of the legislature. In all ordinary cases, the grammatical interpretation is the sole form allowable. The court cannot take from or add to modify the letter of the law. However, where the letter of the law is logically defective on account of ambiguity, inconsistency or incompleteness, the court is under a duty to travel beyond the letter of law so as to determine from the other sources, the true intentions of the legislature. Further a statute is enforceable at law, however, unreasonable it may be. The duty of the court is to administer the law as it stands. It is not within its jurisdictions to see whether the law is just or unreasonable. However, if there are two possible constructions of a clause, one a mere mechanical construction based on the rules of grammar and the other which emerges from the setting in which the clause appears and the circumstances in which it came to be enacted and also the words used therein, the courts may prefer the second construction which though may not be literal may be a better one. *(Arora vs. State of U.P.)*

## Question 5

*Explain the significance of the definition clause in a Statute. The definition of a word may be either restrictive or extensive. Elaborate this with particular reference to the following definition of 'Book and Paper' as contained in the Companies Act, 1956:*

*"Book and Paper" include accounts, deeds, vouchers, writings, and documents. (May, 2002)*

## Answer

When a word is defined as having a particular meaning in the enactment, it is that meaning alone which must be given to it in interpreting the said section of Act unless there be anything repugnant in the context. When a word is defined to "mean" such and such, the definition is *prima facie* restrictive and exhaustive and it restricts the meaning of the word to that given in the definition section. But where the word is defined to "include" such and such the definition is *prima facie* extensive. Again when the word is defined as "means" and includes such and such, the definition would be exhaustive.

### 'Book and paper'

It is an inclusive definition and as such the definition is prima facie extensive i.e. the word defined is not restricted to the meaning assigned to it but has extensive meaning which also includes the meaning assigned to it in the definition section. It includes all registers, book and other papers maintained by the company and as such the directors who are entitled to inspect the books of accounts and other books and papers can have access to all the registers and other documents maintained by the company.

## Question 6

*Explain the meaning of the word "Statute" and discuss the need for interpretation of any statute citing an example in the case of holding the annual general meeting of a company* *where more than one prescribed time is given in the Companies Act, 1956.* *(May, 2002)*

Answer

The word 'Statute' generally means the laws and regulations of every sort without considering from which source they emanate. It has been defined as the written will of the legislature solemnly expressed according to the forms necessary to constitute it the law of the State. Normally, the term denotes an Act enacted by the legislative authority (e.g. Parliament of India).

Even though the Laws are drafted by legal experts, yet they are expressed in language and no language is so perfect as to leave no ambiguities. Since a statute is an edict of the legislature, many a time the intent of the legislature has to be gathered not only from the language but the surrounding circumstances that prevailed when the law was enacted. Further if any provision is open to two interpretations, the Court has to choose that interpretation which represents the time intention of the legislature.

In the case of holding an annual general meeting of a company three different periods have been given as stated.

(a) The meeting should be held in every calendar year (section 166(i))

(b) The gap between the two meetings should not be more than 15 months (Section 166(i))

(c) The meeting should be held with 6 month from the close of the financial year of the company (section 210(3))

The above said three requirements are cumulative and separate. Failure to comply with any of them constitutes an offence. Therefore to give effect to all the provisions, they are to be interpreted harmoniously.

Question 7

*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.* *(May, 2003)*

Answer

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.

### Question 8

*Explain the usefulness of 'Heading and Title of a chapter in an Act and marginal notes of a Section' as internal aids in interpreting the provisions of a Statute. (November, 2003)*

### Answer

Heading and Marginal Notes: A number of sections in an Act applicable to any particular object are grouped together, sometimes in the form of chapters, pre-fixed by Heading and/or Titles. Marginal notes means titles to the section.

In *Uttam Das Chela Sunder Das v. SGPC AIR 1996 SC 2133*, it was observed that 'Marginal notes or captions undoubtedly, part and parcel of legislative exercise and the language employed therein provides the key to the legislative intent. The words employed are not mere surplusage'. Marginal note is legislative and not editorial exercise *C Bhagirath v. Delhi Admn. AIR, 1985 SC 1050*. It gives an indication as to what was exactly the mischief that was intended to be remembered and throws light on the intention of legislature. It is relevant factor to be taken into consideration in construing the ambit of the section. *Shree Sajjan Mills Ltd. (v) CIT (1985) 156 ITR 585(SC).* Heading, title and marginal notes can be referred to if the words are ambiguous. If there is any doubt in the interpretation of words in a section, the headings help to resolve the doubt. But they cannot control the plain words of a statute.

To sum up, heading, title and marginal notes can be used to understand the legislative intent, but cannot limit or restrict the clear word used in a section.

### Question 9

*Explain the effects of a proviso to a section in a statute. (May, 2004)*

### Answer

Proviso: Some times a section in a statute contains a proviso. The normal function of a proviso is to except something out of the enactment to qualify something stated in the enactment which would be within its purview of the proviso were not there. The effect of the proviso is to qualify the preceeding enactment which is expressed in terms which are too general. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment. Ordinarily a proviso is not interpreted as stating a general rule.

It is a cardinal rule of interpretation that a proviso to a particular provision of a statute embraces only the field which is covered by the main provision. It carries out an exception to the main provision to which it has been enacted as a proviso and to no other *(Ram Narain Sons Ltd v. Asst. Commissioner of Sales Tax AIR 1955 Sc. 765).*

## Question 10

*Explain briefly the distinction between "Mandatory" and "Directory" provisions in a statute. How the Court deals with them differently? (November, 2004)*

## Answer

The distinction between a provision which is mandatory and one which is 'directory' is that when it 'mandatory', it must be strictly complied with, when it is 'directory', it would be sufficient that it substantially complied with. Non-observance of mandatory provisions involves the consequences invalidating. But non-observance of directory provision does not entail the consequence of invalidating, whatever other consequences may occur.

No general rule can be laid down for deciding whether any particular provision on a statue is mandatory or directory. In each case the court has to consider not only the actual word used, but has to decide the legislatures intent. For ascertaining the real intention of the legislature, the court may consider, amongst other things, the following

1. The nature and design of the statute.
2. The consequence, which would flow from construing one-way or the other.
3. The impact of other provisions by resorting to which the necessity of complying with the provision in question can be avoided.
4. Whether or not the statute provides any penalty if the provision in question is not complied with
5. If the provision in question is not complied with, whether the consequences would be trivial or serious.
6. Most important of all, whether the object of the legislation will be defeated or furthered.

Where a specific penalty is provided in a statute itself for non-compliance with the particular provision of the Act no discretion is left to the court to determine whether such provision is directory or mandatory - it has to be taken as mandatory.

## Question 11

*(i) Explain the rule of 'ejusdem generis' with regard to interpretation of statutes. (4 Marks)*

*(ii) Sunrise Industries Ltd. has paid Rs.1,00,000 to a political party as its contribution to fight elections. Can it do so under the provisions of the Companies Act, 1956? (4 Marks)*

*Will it make any difference if the company has advertised its products in the monthly magazine published by the political party? (May 2005)*

Answer

(i) the term 'ejusdem generis' means 'of the same kind or species'. This rule can be explained as follows:

(a) Where any Act enumerates different subjects, general words following specific words are to be construed with reference to the words that precede them. Those genera words are to be taken as applying to things of the same kind as the specific words previously mentioned, unless there is something to show that a wider sense was intended. Thus, this rule means that where specific words are used and after them some general words are used the general words would take their colour from the specific words used earlier.

Where there was prohibition on importation of arms, ammunition or gun -powder or any other goods', the words' any other goods' will be construed as referring to goods similar to 'arms, ammunition or gun powder – A.G. Brown (1920)/KB. 773.

(b) If the particular words used exhaust the whole genus (category), then the general words are to be construed as covering a larger genus.

(c) This rule applies only where the specific words are of the same nature. When they are of different categories than the meaning of the general words following these specific words remains unaffected. The general words then would not take colour from the earlier specific words.

Courts have discretion whether to apply this rule in a particular case or not. For example, the 'just and equitable' clause under Section 433 of the Companies Act is held to be not restricted by the first five situations in which the court may wind up a company.

(ii) Under section 293A of the Companies Act, 1956, a company may contribute any amount not exceeding 5% of its average net profits during 3 immediately preceding financial years, to any political party or for any political purpose. For the purpose, Board may pass a resolution in this behalf and the amount contributed and the name of the party be disclosed in the Profit and Loss Account of the company. However, a Government company is prohibited to make any such political contribution.

Sunrise Industries Ltd. may contribute the amount of Rs.1 lakh subject to the above restrictions provided it has been in existence for more than three years.

As per section 293A(3)(b) of the Act, the amount of expenditure incurred on advertisement in any publication (being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like) by a political party shall also be deemed to be a contribution to a political party. Publication of advertisement of the products of the company in the monthly magazine of the political party will be covered by the general words 'or the like and will also be deemed to be a contribution to the political party for the purposes of section 293A of the Act.

Question 12

(i) *Explain the rules relating to interpretation of Statutes, when the terms "notwithstanding"* and "Subject to" are used in any provision of an Act.

(ii) *State the effect of the words "notwithstanding anything contained in this Act" used in Section 408 of the Companies Act, 1956, which vests certain powers in the Central Government to prevent oppression or mismanagement* *(November 2005)*

Answer

(i) The term "notwithstanding" used along with the words "anything contained" in an Act characterises the non obstante clause. It is used in a provision of an Act when the intention of the legislature is to give an over-riding effect to that provision over other provisions of that Act and/or over provisions of other Acts as may be specified later in such provision. If there is any inconsistency or departure between the non obstante clause and other provisions, then the provisions as contained in the non obstante clause shall prevail. *[K. Parasuramaiah Vs. Pakari Lakshman AIR (1965) AP 220].*

As against the above non obstante clause, the term "subject to" is used in a provision of an Act to convey the intention of the legislature that the particular provision is yielding place to another provision or provisions to which is made "subject to". Thus, it can be concluded that the effect of non obstante clause (i.e., not withstanding") is the opposite to a provision or provisions which includes the term "subject to".

(ii) Section 408 of the Companies Act, 1956 starts with the words "notwithstanding anything contained in this Act". This is a non obstante clause which vests over-riding powers in the Central Government to nominate directors to prevent mismanagement or oppression. *[Oriental Industrial Investment Corporation Ltd. Vs. Union of India (1981) 52 Comp. Cas. 487, 493].* This expression indicates that the appointment of the directors under this section is not to be controlled by other provisions of the Companies Act, 1956 such as maximum number or other proportion, if any fixed by the said Act. Further, the directors so appointed are also not liable to be removed by the company at general meeting under the provisions of section 284 of the Companies Act, 1956.

Question 13

*What are the Internal and External aids to interpretation of statutes ? Give five examples each of Internal and External aids.* *(May 2006)*

Answer

Internal aids to interpretation / construction are those which are found within the text of the statutes. On the other hand external aids of interpretation are those factors which are external to the text of the statute but are of great help.

Examples of internal aids to interpretation:

1. Definitional sections and clauses
2. Illustrations
3. Provisos
4. Long title and short title
5. Preambles
6. Heading and title of chapter
7. Marginal notes
8. Explanations
9. Schedules
10. Reading the statute as a whole

Examples of external aids to interpretation:

1. Historical setting (Background)
2. Consolidating statute & Previous law
3. Usage
4. Earlier & later analogous acts
5. Earlier acts explained by the later act
6. Reference to repealed acts
7. Dictionary definition
8. Use of foreign decisions

### Question 14

*There is an apparent difference between section 292 of the Companies Act, 1956, which permits the board to delegate its power to make loans and section 372A of the Companies Act, which requires approval of loan by a resolution passed at a board meeting with the consent of all the directors present at the meeting. How would you interpret these two provisions applying the rule of harmonious construction ? (November 2006)*

### Answer

### Rule of Harmonious Construction

Where there are in an enactment two or more provisions which cannot be reconciled with each other, they should be so interpreted, wherever possible, as to give effect to all of them. This is what is known as the Rule of Harmonious Construction. Importance should not be attached to a single clause in one section overlooking the provisions of another section. If it is impossible to avoid inconsistency, the provision which was evaluated or amended later in point of time must prevail. The rule of Harmonious Construction is applicable only where there is real and not merely apparent conflict between the provisions of an Act, and one of them has not been made subject to the other.

Every loan falling within the purview of Section 372 A of the Companies Act, 1956 must be sanctioned by a resolution of the Board of Directors passed at its meeting (Section 372 A(2). Every such resolution must be passed with the consent of all the directors present at the Board meeting, that is no one dissenting or unanimously.

Every loan covered by Section 372 A falls within the purview of Section 292 (i)(e). That section permits delegation by the Board of its power of making loans vide proviso to Section 292 (i), subject to the conditions stipulated in Section 292(3). The condition that the resolution delegating the power must specify the total amount upto which loans may be made by the delegate, the purposes for which the loans may be made and the maximum amount of loans which may be made for each purpose in individual cases.

However, by harmonious interpretation of both the provisions of Section 292 and 372A and in absence of specific prohibition in Section 372A against delegations, the Boards power under Section 372A may be delegated in accordance with the provisions of Section 292 by passing unanimous resolution of the Board. Any other interpretation will make provisions of Section 292 redundant.

## Question 15

(i) What is the effect of proviso ? Does it qualify the main provisions of an Enactment?

(ii) Does an explanation added to a section widen the ambit of a section ? Support your answer with an example from the Companies Act, 1956.

*(iii) What do you understand by the term 'Preamble" and how does it help in interpretation of a statute ? (May 2007)*

## Answer

(i) Normally a Proviso is added to a section of an Act to except something or qualify something stated in that particular section to which it is added. A proviso should not be, ordinarily, interpreted as a general rule. A proviso to a particular section carves out an exception to the main provision to which it has been enacted as a Proviso and to no other provision. *[Ram Narian Sons Ltd. Vs. Commissioner of Sales Tax AIR (1955) S.C. 765]*

(ii) Sometimes an explanation is added to a section of an Act for the purpose of explaining the main provisions contained in that section. If there is some ambiguity in the provisions of the main section, the explanation is inserted to harmonise and clear up and ambiguity in the main section. Something may added to or something may be excluded from the main provision by insertion of an explanation. But the explanation should not be construed to widen the ambit of the section.

For example, Section 294AA of the Companies Act, 1956 gives power to the Central Government to prohibit the appointment of Sole Selling Agents of a company in certain cases. An explanation has been added to that section which states that an "appointment" includes "re-appointment". By inclusion of this explanation, the legislature has only clarified the main provisions of that section and has not widened the ambit of the powers of the Central Government.

(iii) 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.

## Question 16

*"When two or more provisions of the same statue are repugnant to each other, the court will try to construe the provisions in such a manner, if possible, as to give effect to all". Examine the statement with reference to the provisions of sections 166 and 210 of the Companies Act, 1956 which appear to be seemingly contradictory to each other for compliance.*

*(November 2007)*

## Answer

The statement in question is relates to an important rule of interpretation that is 'Rule of Harmonious Construction of a statute. According to this rule when there is doubt about the meaning of the words of a statute, these should be understood in the sense in which they harmonise with the subject of the enactment and the object which the legislature had in view their meaning is found not so much in strictly grammatical or etymological propriety of language, nor even its popular use, as in the subject or in the occasion on which they are used and the object to be attained.

Where there are in an enactment two or more provisions which cannot be reconciled with each other, they should be so interpreted whichever possible as to give effect to all of them. This is what is known as the Rule of Harmonious Construction. Let us take an example: according to Section 166(i) of the Companies Act, 1956 there must be not more than fifteen months between tow consecutive annual general meetings of a Company. Section 210 requires the Board of Directors to lay at every annual general meeting of a company a profit and loss account, which must cover the period since the preceding account and must be made up to date not earlier than the date of the meeting by more than six months.

The account is required to be accompanied by a balance sheet as at the date to which the profit and loss account is made up. For some special reasons, however, the Registrar may give an extension for not more than 3 months to hold the meeting.

In such a case, the accounts must relate to a period not earlier than the date of the meeting by more than six months plus the extension period. From this, we can easily make out that except the first annual general meeting which is subject to different rules on annual general meeting is to be held subject to the following rules:

(i) The meeting must be held in each year

(ii) It must be held not later than 15 months (18 months if extension is granted) from the date of the previous general meeting.

(iii) Further, it must be held later than six months (or six months + extension) of the date of balance sheet.

These three requirements are cumulative and separate; failure to comply with any of them constitutes an offence. We would note that even where a company may hold its annual general meeting within the time limit of 15 moths (or 18 months, if extension is granted) it may still be guilty of contravention of Section 210. Therefore, to give effect to both the sections, they are to be interpreted harmoniously and in fixing the date of the annual general meeting Section 166 as well as 210 are to be taken into account. The following illustration will make things clear – the financial year of a company ends on 31st March each year, presumption that the annual general meeting to adopt the accounts etc. relating to the year ended on 31st March, 2006 was hold on 30th September, 2006 under Section 166 (i) the next general meeting need not be held till 31st December, 2007. But the relevant accounts would be those of the year ended on 31st March, 2007 which would be more than six months before the date of meeting. Therefore, the last date for holding that meeting would be 31st September, 2007.

## Question 17

*(i) Explain the rules relating to interpretation of statues when the terms "notwithstanding" and "Subject to" are used in any provision of an Act.*

*(ii) State the effect of the words "notwithstanding anything contained in this Act" used in Section 408 of the Companies Act, 1956 which vests certain powers in the Central Government to prevent oppression or mismanagement. (May 2008)*

## Answer

(i) The term 'notwithstanding' used along with the words 'anything contained' in an Act characterises the non obstante clause. It is used in a provision of an Act when the intention of the legislature is to give an over-riding effect to that provision over other provisions of that Act and/or over provisions of other Acts as may be specified later in such provision. If there is any inconsistency or departure between the non-obstante clause and other provisions, then the provisions as contained in the non-obstante clause shall prevail. *[K Parsuramaiah Vs. pakari Lakshman AIR (1965) AP 220].*

As against the above non obstante clause, the term 'subject to' is used in a provision of an Act to convey the intention of the legislature that the particular provision is yielding place to another provision or provisions to which is made 'subject to'. Thus, it can be concluded that the effect of non obstante clause (i.e., not withstanding) is the opposite to a provision or provisions which includes the term "subject to".

(ii) Section 408 of the Companies Act, 1956 starts with the words "notwithstanding anything contained in this Act". This is a non obstante clause which vests over-riding powers in the Central Government to nominate directors to prevent mismanagement or oppression. *[Oriental industrial Investment Corporation Ltd. Vs. Union of India (1981) 52 Comp. Cas. 487, 493]*. This expression indicates that the appointment of the directors under this section is not to be controlled by other provisions of the Companies Act, 1956 such as maximum number or other proportion, if any, fixed by the said Act. Further, the directors so appointed are also not liable to be removed by the company at general meeting under the provisions of Section 284 of the Companies Act, 1956.

### Question 18

*The analysis of the language of Section 292 and Section 372A of the Companies Act, 1956 apparently discloses a conflict because the former provision permits the Board of Directors to delegate its powers to make loans whereas the latter provision requires approval of loan by resolution passed at a board meeting with the consent of all the directors present at the said meeting. To what extent the rule of "Harmonious construction" can be applied for the purpose of interpreting these two provisions of the companies Act, 1956.* *(November 2008)*

### Answer

HARMONIOUS CONSTRUCTION: Where there are in an enactment two or more provisions which can not be reconciled with each other, they should be so interpreted, wherever possible so as to give effect to all of them. This is what is known as the rule of Harmonious Construction. Importance should not be attached to a single clause in one section overlooking the provision of another section. If it is impossible to avoid inconsistency the provision which was enacted or amended later in point of time must prevail .The Rule of Harmonious Construction is applicable only when there is a real and not merely apparent conflict between the provisions of an Act and one of them has not been subject to the other.

Every loan falling within the preview of Section 372A of the Companies Act, 1956, must be sanctioned by a resolution of the Board of Directors passed at its meeting. Every such resolution must be passed with the consent of all the directors present at the Board meets unanimously so that there is no one dissenting.

Every loan covered by Section 372A falls within the preview of Section 292(1)(e). The Section permits delegation by the Board of Directors of its powers of making loans vide proviso to Section 292(I), subject to the conditions stipulated in Section 292(3). The condition is that the resolution delegating the power must specify the total amount up to which loans may made by the delegate, the purpose for which the loans may be made and the maximum amount of loans which may be made for each purpose in individual cases.

However by harmonious interpretation of both the provisions of Section 292 and Section 372A and in the absence of specific prohibition in Section 372A against delegation, the Board's power under Section 372A may be delegated in accordance with the provisions of Section 292 by passing unanimous resolution of the Board. Any other interpretation will make provisions of Section 292 redundant.

NOTE