Company Laws – Ready Reckoner

-BY ***PRINCE WADHWA*** [BCOM (HONS),PERSUING CA FINAL]

Chapter No. 01

COMPANY AS A BUSINESS MEDIUM

Company as a Business Medium:

“A Company means a company formed and registered under the Companies Act, 1956 or under the previous laws relating to companies – Section 3(1)(iii)

An association formed not for profit acquires a corporate life within the meaning of a company by reason of a license" - Section 25(1)

Characteristics:-

1. Corporate Personality – Being a separate legal entity it bears its own name and acts under a corporate name.
2. Limited Liability
3. Perpetual Succession – Members may come and go but the company will go forever.
4. Separate Property – no member can claim himself to be owner of Company property during its existence or winding up.
5. Transferability of Shares – **Section 82**
6. Common Seal
7. Capacity to Sue and Be sued
8. Contractual Rights – A Company being a legal entity different from its members can enter into contracts in its own name.
9. Limitation of Action - company cannot go beyond what is stated in the Memorandum of Association.
10. Separate Management – The Company is administered and managed by its managerial personnel.
11. Voluntary Association for Profit
12. Termination of Existence – Company is created by Law, carries on its affairs according to law and ultimately is terminated by means of law.

Nature, Form and Types of Business Enterprises

1. **Sole Proprietor – One man Company**
2. **Joint Hindu Family – undivided family businnes**
3. **Partnership – Minimum TWO and maximum 20 members, 10 in case of Banking Company – section 11**
4. **Co- operative Society**
5. **Company**

Concept of Corporate Personality

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Lifting of Corporate Veil:-

Where a fraudulent and dishonest use is made of legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality – Section 45, 147, 212, 247 and 542.

Personal Liability Of Directors and Members:

1. Reduction of Membership below the statutory minimum - Section 45
2. Mis – description of name – Section 45
3. Subsidiary Company – A holding company is required to disclose to its members the accounts of its subsidiaries - Section 212 and 214
4. Fraudulent Conduct – Section 542
5. Failure to return Application Money if the minimum subscription has not been received – Section 69(5)
6. Misrepresentation in Prospectus – Section 62
7. Non payment of Tax
8. Ultra vires Acts

Chapter No. 02

TYPES OF COMPANIES

TYPES OF COMPANIES

1. Private Company :- Section 3(1)(iii)

Means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles,

(a) restricts the right to transfer its shares, if any;

(b) limits the number of its members to fifty not including

(i) persons who are in the employment of the company; and

(ii) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

(c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company;

(d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

2. Public Company: - Section 3 (1) (iv)

Means a company which__

(a) is not a private company;

(b) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed;

(c) is a private company which is a subsidiary of a company which is not a private company.

3. Company Limited by Shares :- Section 12(2)(a)

A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them.

4. Company Limited by Guarantee :- Section 12(2)(b)

A company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up.

5. Unlimited Company - Section 12(2)(c)

A company not having any limit on the liability of its member

6. Power to dispense with "Limited" in name of charitable or other company – Section 25(1)

Where it is proved to the satisfaction of the Central Governmentthat an association:

(a) is about to be formed as a limited company for promoting commerce, art, science, religion, charity or any other useful object, and

(b) intends to apply its profits, if any, or other income in promoting its objects, and to prohibit the payment of any dividend to its members,

The Central Government may, by license, direct that the association may be registered as a company with limited liability, without the addition to its name of the word "Limited" or the words "Private Limited".

An application to Regional Director electronically in the prescribed E- form No. 24A requesting for issue of a license under Section 25 for incorporating a company without the addition to its name of the word “limited” or the words “Private limited” as the case may be (Regulation 3 of Companies Regulations, 1956)

The application in the prescribed E-Form No. 24A should be accompanied with attachments as mentioned in Regulation 4 (i) to 4(ix) of Companies Regulations, 1956)

7. Government Companies- Section 617

Means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary of a Government company as thus defined.

Section 17, 18, 19 and 186 apply to Government Company also.

8. Foreign Companies – Section 591 to 602

Means companies falling under the following two classes, namely:-

(a) companies incorporated outside India which, after the commencement of this Act, establish a place of business within India; and

(b) 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.

Notwithstanding anything contained in sub-section (1) above, 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 bodies corporate incorporated in India whether singly or in the aggregate.

9. Holding and Subsidiary Company – Section 4

A company shall, subject to the provisions of sub-section (3), be deemed to be a subsidiary of another if, but only if,

(a) that other controls the composition of its Board of directors; or

(b) that other

(i) where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;

(ii) where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or

(c) the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

10. Producer Companies – Section 581A to 581 ZT –

"Producer institution" means a Producer Company or any other institution having only producer or producers or Producer Company or Producer Companies as its member whether incorporated or not having any of the objects referred to in section 581B and which agrees to make use of the services of the Producer Company or Producer Companies as provided in its articles – **Section 581A (m)**

11. Deemed Public Company - Section 43A

where not less than twenty-five per cent of the paid-up share capital of a private company having a share capital, is held by one or more bodies corporate the private company shall,

(a) on and from the date on which the aforesaid percentage is first held by such body or bodies corporate, or

(b) where the aforesaid percentage has been first so held before the commencement of the Companies (Amendment) Act, 1960 (65 of 1960) on and from the expiry of the period of three months from the date of such commencement unless within that period the aforesaid percentage is reduced below twenty-five per cent of the paid-up share capital of the private company, become by virtue of this section a public company

Chapter No. 03

PROCEDURE FOR INCORPORATION OF A PUBLIC LIMITED COMPANY UNDER THE COMPANIES ACT, 1956

PROCEDURE FOR INCORPORATION OF A PUBLIC LIMITED COMPANY UNDER THE COMPANIES ACT, 1956

Minimum paid up capital - Rs. 5 Lacs (Section 3(1)(iv))

Maximum no. of members - Unlimited

Minimum no. of Directors -3 (section 252)

Minimum no. of Subscribers - 7

Stage 1

APPLICATION FOR DIRECTOR'S IDENTIFICATION NUMBER AND DIGITAL SIGNATURES CERTIFICATE (Section 266A)

One must adhere to Companies (Director Identification Number) Rules, 2006 for applying to DIN

1. All the proposed directors need to have the DIN.

2. For applying DIN following personal information and documents are required.

- Full name
- Full name of the father. (in case of married woman's also this is compulsory)
- Date of Birth
- Place of Birth
- Full present residential address
- Full permanent residential address, if the present address is not permanent residential address
- Phone number available at both the address.
- Your personal e mail id, if any
- Photo copy of proof of identity: i.e. 1. Passport 2. Election (voter identity) card 3. Driving license 4. Income-tax PAN card
- Photo copy of proof of residence: i.e. 1. Passport 2. Election (voter identity) card 3. Driving license 4. Ration Card 5. Electricity bill 6. Telephone bill 7. Bank account statement
- Latest passport size photograph.

3. Based on the above information DIN will be processed and DIN number will be generated on payment receipt itself, if not duplicate in case of duplicate it processed through back office.

4. One of the proposed Directors (Applicant) needs to get the digital signature.

5. He will visit the www.mca.gov.in website and will do the registration and enrollment for getting the DSC.

6. The application for DSC will be printed and filled up.

7. Copies of proof of identification and proof of residence will be attached to DSC application. The copies need to be either attested by gazetted officer or by a Notary or by a professional.

8. After successful downloading of DSC promoters can proceed with making the application for name availability.

Stage 2

NAME APPROVAL (Section 20)

Following information is required for filling up form No 1A

- Full Name, Fathers name, Residential Address, Occupation, Nationality, Date of Birth, email id, DIN of all 3 the directors is required.
- Full Name, Fathers name, Residential Address, Occupation, Nationality, Date of Birth, email id, of all the 5 promoters is required
- Copy of either PAN/ voters card/ passport of each director/ promoter
- State in which company is to be formed
- Jurisdiction of ROC
- Maximum 6 proposed names of the Company in order of preference and significance for each proposed name.
- Details of proposed main activity of the Company

- Details of trade mark/ service mark associated with the proposed names and copies of the application/ registration etc., if any.
- In case of logo is associated with the name of the Company, and then soft copy of the logo in PDF format is required.
- In case of Company is the promoter, copy of their Board Resolution is required
- Avoid names which resemble too closely or are the same as the names of any other company already registered [Section 20], and also avoid names with the words" Stock Exchange" as part of the name. [Circular NO. 3/96 Dated 12.04.1996]
- Names starting with small alphabets can be used but before using such names it should be ensured that such names do not have phonetic or visual resemblance to the name of a company in existence [Circular No. 6/99 Dtaed 13.05.1999]
- If the proposed name is similar to other group company name, then copy of the Board resolution of another group company granting no objection to use the name by the new company is required.
- Details of other directorships with CIN number and designation for proposed directors
- Details of partnership firm, proprietary concern with full address

Stage 3

LIASONING WITH REGISTRAR OF COMPANIES FOR NAME APPROVAL

- Attending Registrar of Companies in regard to Approval of Name

Stage 4

REGISTRATION OF COMPANY (Section 33)

1. After filling up all the details in form no 1A the same is required to be digitally singed by the Applicant.

2. Form will then electronically submit to MCA and fees will be paid electronically

3. After receipt of intimation for name approval incorporation papers and MOA/ AOA needs to be prepared.

4. Requirements for form No 1/32.

- ROC reference number of names approval needs to be obtained from the MCA portal if form 1A is submitted through PFO. In case the form was submitted through the client or consultant's system, then SRN generated at the time of submission of the form is the reference number.
- The said number is to be filled up in form no 1 to enable data prefilling.
- Break up of authorized capital and face value of shares.
- CIN number of the existing company if it is promoter of the new company
- Name and designation of the person signing on behalf of the promoter company, if promoted by existing company
- Name of company with "Limited" as the last words of the name (Section 13)
- PDF copy of MOA/AOA (PDF to be made after stamping/ signing by all the promoters and also after making the corrections suggested by ROC)

- Scanned photos of each director in PDF format
- Consent of each director in PDF format (PDF to be made after signing the consent letter)

5. Requirements for form No 18

- Full address of the proposed registered office of the Company
- Full address of police station under whose jurisdiction the address of the company is located.

6. Form No 18 and 32 needs to be attested digitally by the PCS

7. The corrected forms and MOA/AOA needs to be uploaded and payment needs to be made electronically for normal filing fees as well as stamping fees.

8. System upon successful filing of e-forms generates a SRN and date.

ROC will issue the E-Certificate; e-certificate with digitally signed copy can also be downloaded from MCA site after logged in to the same

Stage 5

Certificate of Commencement of Business (Section 149)

A Public company cannot start its business unless it gets a certificate of commencement of business (COB) from the Registrar of companies.

Filing of Form No. 20

- Statement in lieu of prospectus - to be delivered to the ROC which does not issue a prospectus or which does not go to allotment on a prospectus issued and reports sent out therein
- MOA & AOA
- List of directors & shareholder
- Stamp paper
- Consent letter of auditor & Form no. 23B

Stage 6

Opening of Bank Account

Document required:-

- Duly filled and signed form of respective bank
- Copy of Board Resolution
- MOA and AOA of the company
- List of directors & shareholders

- Copy of Commencement of business

Note:- If to incorporatr to incorporate a Private Company which is going to be a subsdiary of a public company, it will be treated as a public company [Section 3(1)(iv)(c)]

Chapter No. 04

PROCEDURE FOR INCORPORATION OF A PRIVATE LIMITED COMPANY UNDER THE COMPANIES ACT, 1956

PROCEDURE FOR INCORPORATION OF A PRIVATE LIMITED COMPANY UNDER THE COMPANIES ACT, 1956

Minimum paid up capital Rs. 1 Lacs (Section 3(1)(iii))

Maximum limit of members = 50

Minimum no. of Directors - 2 (section 252)

Minimum no. of Subscribers - 2 (Section 12)

Stage 1

APPLICATION FOR DIRECTOR'S IDENTIFICATION NUMBER AND DIGITAL SIGNATURERS CERTIFICATE (Section 266A)

1. All the proposed directors need to have the DIN.

2. For applying DIN following personal information and documents are required.

- Full name
- Full name of the father. (in case of married woman's also this is compulsory)
- Date of Birth
- Place of Birth
- Full present residential address
- Full permanent residential address, if the present address is not permanent residential address
- Phone number available at both the address.
- Your personal e mail id, if any
- Photo copy of proof of identity: i.e. 1. Passport 2. Election (voter identity) card 3. Driving license 4. Income-tax PAN card
- Photo copy of proof of residence: i.e. 1. Passport 2. Election (voter identity) card 3. Driving license 4. Ration Card 5. Electricity bill 6. Telephone bill 7. Bank account statement
- Latest passport size photograph.

3. Based on the above information DIN will be processed and DIN number will be generated on payment

receipt itself, if not duplicate in case of duplicate it processed through back office.

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6. The application for DSC will be printed and filled up.

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NAME APPROVAL (Section 20)

Following information is required for filling up form No 1A

- Full Name, Fathers name, Residential Address, Occupation, Nationality, Date of Birth, email id, DIN both the 2 directors is required.
- Full Name, Fathers name, Residential Address, Occupation, Nationality, Date of Birth, email id, of all the 2 promoters is required
- Copy of either PAN/ voters card/ passport of each director/ promoter
- State in which company is to be formed
- Jurisdiction of ROC
- Maximum 6 proposed names of the Company in order of preference and significance for each proposed name.
- Details of proposed main activity of the Company
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- In case of logo is associated with the name of the Company, and then soft copy of the logo in PDF format is required.
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- Break up of authorized capital and face value of shares.
- CIN number of the existing company if it is promoter of the new company
- Name and designation of the person signing on behalf of the promoter company, if promoted by existing company
- PDF copy of MOA/AOA (PDF to be made after stamping/ signing by all the promoters and also after making the corrections suggested by ROC)
- Name of company with " Private Limited " as the last words of the name (Section 13)
- Scanned photo's of each director in PDF format
- Consent of each director in PDF format (PDF to be made after signing the consent letter

5. Requirements for form No 18

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8. System upon successful filing of e-forms generate a SRN and date.

ROC will issue the E-Certificate; e-certificate with digitally signed copy can also be downloaded from MCA site after logged in to the same

Stage 5

Opening of Bank Account (Section 73 of sub-section 3)

Document required:-

- Duly filled and signed form of respective bank
- Copy of Board Resolution
- MOA and AOA of the company
- List of directors & shareholders
- Copy of Certificate of Incorporation

Chapter No. 05

CORPORATE TRANSACTIONS AND CONVERSIONS

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Preliminary Contracts

1. Contracts made on behalf of the Company before its Incorporation – If the company takes some benefit from a contract made before its formation, the contract is not binding on the Company. The promoters only remain personally liable for it.
2. Contacts made after incorporation but before obtaining the certificate to commence business – provisional contracts are not binding on Company until the company is entitled to commence business on the grant of the Certificate.
3. Contracts made after obtaining the Certificate of Commencement – contracts which are intra vires or within the powers of the Company will be valid and binding

Conversion of Private Company into A Public Company:-

1. Conversion by Choice - Section 44
2. Conversion by default – Section 43
3. Conversion by Operation of law – Section 43A

Conversion of Public Company into A Private Company

1. Central Government approval required – Section 31(1)
2. Passing of Special resolution
3. Changing of Name – Section 21
4. Filing of printed copy of articles as altered with ROC.

Conversion of an Existing Business into a Company

1. By Outright Sale

2. By making partners, only shareholders in the newly incorporated company

3. Company becoming partner in the firm, which dissolve later.

4. By registration of existing joint stock company or existing joint family business under Sections 567 and 568 of Companies Act, 1956.

5. By amalgamation under Sections 391, 392, 393, and 394 of Companies Act, 1956.

Conversion of inter-State co-operative societies to become Producer Companies - Section 581J

Section 149(1) - A company having a Share Capital has issued a Prospectus inviting public to subscribe to shares it cannot commence any business or exercise any borrowing powers unless

- Fully paid shares have been allotted
- Every Director has paid on each share contracted to be taken by him
- No money liable to be repaid
- Filed with ROC the verified declaration in Form 19

Every Company must mention in its prospectus the Main Object to be pursued by the Company on its Incorporation and objects ancillary to attainment of Main object – **Section 13**

Section 149prohibits a Company from commencing any business stated under other objects without obtaining the prior approval of the shareholders in general meeting by a special resolution.

Chapter No. 06
INCORPORATION AND ITS CONSEQUENCES – M.O.A AND A.O.A

INCORPORATION AND ITS CONSEQUENCES – M.O.A AND A.O.A

The **Memorandum of Association (M.O.A.)** is a document that sets out the constitution of the company and as such is the foundation on which the structure of Company stands.

Requirements with respect to memorandum – Section 13

Section 13 (1) (a) – Name Clause

Section 13 (1) (b) – Registered Office Clause

Section 13 (1) (c) – Object Clause - company in existence immediately before the commencement of the

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Companies (Amendment) Act, 1965

Section 13 (1) (d) – Object Clause – formed after commencement of the Companies (Amendment) Act, 1965

Section 13(2) & (3) – Liability Clause

Section 13(4) – Capital Clause

Alteration of Memorandum of Association

1. By changing its name – **Section 21 22, 23, and 24**
2. By altering it in regard to the State in which the registered office is to be situated or its objects **(Section 17)**
3. By altering its Share Capital **(Section 94)**
4. By reorganizing its Share capital **(Section 391, 392, 393, 394, 395, and 396)**
5. By reducing Share capital **(Section 100)**
6. By making the liability Unlimited **(Section 322)**

Articles of Association (A.O.A.)

" articles" means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this Act, including, so far as they apply to the company, the regulations contained, as the case may be, in Table B in the Schedule annexed to Act No. 19 of 1857 or in Table A in the First Schedule annexed to the Indian Companies Act, 1882 (6 of 1882), or in Table A in the First Schedule annexed to the Indian Companies Act, 1913 (7 of 1913), or in Table A in Schedule I annexed to this Act – **Section 2(2)**

The A.O.A. are it's by- laws or rules and regulations that govern the management of its internal affairs and the conduct of its business.

Articles are subordinate to Memorandum.

Articles prescribing regulations – Section 26

There may in the case of a public company, limited by shares, and there shall in the case of an unlimited company or a company limited by guarantee or a private company limited by shares, be registered with the memorandum, articles of association signed by the subscribers of the memorandum, prescribing regulations for the company.

Alteration of Articles of Association

A company has a statutory right to alter its articles subject to provisions of Act and conditions contained in Memorandum.

Provided that no alteration made in the articles under this sub-section which has the effect of converting a public company into a private company, shall have effect unless such alteration has been approved by the Central Government

Where any alteration has been approved by the Central Government, a printed copy of the articles as altered shall be filed by the company with the Registrar within one month of the date of receipt of the order of approval – **Section 31**

Chapter No. 07

FINANCIAL STRUCTURE AND MEMBERSHIP - I - CONCEPT OF CAPITAL AND FINANCING OF COMPANIES.

FINANCIAL STRUCTURE AND MEMBERSHIP - I

CONCEPT OF CAPITAL AND FINANCING OF COMPANIES.

"A share in the share capital of a company, and includes stock except where a distinction between stock and shares is expressed or implied**" [Section 2(46)]**

Company Limited by shares issue two classes of shares **(Section 86)**

1. Preference Share Capital (Section 85[1])

    i) Participating and Non – participating

    ii) Cumulative and Non – cumulative

    iii) Redeemable and Non – Redeemable

2. Equity Share Capital **(Section 85 {2}**

3. Sweat Equity Shares – Issue of class of shares already issued **- (Section 79A)**

An eligible company shall be free to make public or rights issue of equity shares in any denomination determined by it in accordance with **Sub – section (4) of Section 13** and in accordance with following and other norms as may be specified by SEBI

Promoters Contribution –

Not less than 20% of post – issue capital

Lock in period of 3 years from the date of commencement of commercial production or date of allotment in the public issue whichever later.

Any contribution made by promoters over and above the minimum contribution shall be subject to a lock in period of 1 Year

Underwriting –

If the issue is underwritten, the lead merchant banker should accept a minimum underwriting obligation of 5 % of the total underwriting commitment or Rs. 25 Lakhs whichever is less.

Minimum Offer to Public –

Public issue of Unlisted Company – at least 10% or 25% of the post issue capital

Issue to be made fully Paid – up

Entire subscription money is called within 12 Months from the date of allotment unless the size is more than Rs. 500 Crore

Issue to be Open-

Within 3 months from the date of issuance of observation letter by SEBI

Post issue monitoring report-

Information to Lead merchant bankers a 3 day and 78 post issue monitoring report.

Book Building -

A process undertaken by which a demand for the securities proposed to be issued by a body corporate is build up and a 'FAIR PRICE' and 'QUANTUM 'of securities issued finally.

Minimum public offer of 20 lakhs securities through Book building process – allocation of 50% made to Qualified Institutional Buyers.

Making application to Stock Exchange for permission to listing – Section 73(1)

Printing and Distribution of Prospectus and application forms - Section 64(4)

Issuance of Share Certificate – Section 113

Issue of Shares at Discount – Section 79

Further issue of shares – "Right Issue of Shares" - Section 81 - Any time after expiry of two Years from the

Incorporation or one year from first allotment

Employees Stock Option Scheme – Section 2 (15A)

Option given to Whole Time Directors, Officers or Employees of a company, which gives right/benefit to purchase at future date at pre-determined price.

Alteration of Share Capital – Section 94

Increase, Consolidate, Divide, Convert, Cancel

Power of Alteration – Can be exercised by the members only if authorized by Articles.

Conversion of Shares into Stock - Section 96

The provision of the Act governing the shares shall cease to apply to the share capital as it is converted into stock

Reduction of Share Capital – Section 100 - Reduction of Liability Unpaid, Extinguishment of Liability, Paying Off, Purchase of Shares, Cancellation .

Diminution of Capital – Section 94(1) (3) - Company cancels shares which have not been taken or regard to be taken by any person.

Purchase of Shares of a member by the Company - Section 402

Buy – back of its own share – Section 77A

Chapter No. 08

FINANCIAL STRUCTURE AND MEMBERSHIP - II - PROSPECTUS

FINANCIAL STRUCTURE AND MEMBERSHIP - II

PROSPECTUS - Section 2(36)

"*Any document described or issued as a prospectus and includes as a prospectus and includes any notice circular, advertisement or other document inviting deposits from the public for the subscription or purchase of nay shares in, or debentures of a body corporate***"**

An offer or invitation to subscribe for shares or debentures made to fifty or more persons shall be treated as an offer or invitation made to public**. – Section 67(3)**

Prospectus not required to be issued- Section 56

Where a person is a bona fide invitee to enter into an underwriting agreement with regard to Shares and debentures, not offered to public, offered to existing holders.

Statement in lieu of Prospectus – Section 70(1)

All public companies either issue Prospectus or file a statement in lieu of Prospectus.

Prospectus must be dated- Section 55

Copy of underwriting agreement need to annex when prospectus filed with Registrar. Section 76 (1)(b)(v)

When Registrar must Refuse Registration – Section 60(3)

- It is not dated**,**
- non comply with Section 56,
- contains a report of experts engaged or interested in formation or promotion of the company- Section 57
- does not contain consent in writing of directors, auditors, legal advisor, banker, etc,

Shelf Prospectus – Section 60A

Prospectus issued by any financial institution or bank for issue of securities specified in prospectus. Validity of shelf prospectus is one Year

Information Memorandum – Section 60B

Process undertaken prior to filing of a prospectus by which a demand for the securities proposed to be issued is assessed by means of a notice, circular, advertisement or document.

Deemed Prospectus – Offer for sale of existing shares – Section 64

Untrue statement – Section 65

Statement misleading in the form and content.

Compensation of Untrue statement – Civil Liability - Section 62 and 56

An allottee is entitled to claim compensation for damages from directors, promoters and any person who authorized the issue of false prospectus.

Criminal Liability for Mis statement – Section 63

Imprisonment for Two years and / or fine up to Rs. 50,000.

Chapter No. 09

FINANCIAL STRUCTURE AND MEMBERSHIP – III - DEBT CAPITAL

FINANCIAL STRUCTURE AND MEMBERSHIP – III - DEBT CAPITAL

Section 293(1) (d) prohibits the Board of Directors of Public Company from borrowing a sum which exceeds the aggregate of paid – up share capital of the Company and its free reserves unless they have received the prior sanction of the company in general meeting.

Types of Borrowings

Long Term Borrowings – period ranging from five years or more

Short Term Borrowings – period upto one year

Medium Term Borrowing – Period two to five years.

Debentures- Section 2(12)

A document given by a company under its seal as an evidence of a debt to the holder usually arising out of loan and most commonly but not necessarily secured by charge.

- Redeemable Debentures
- Perpetual Debentures
- Registered and Bearer Debentures
- Secured and unsecured Debentures
- Convertible Debentures

Not carry any voting rights at any general meeting – **Section 117**

Public Financial Institutions – Section 4A(1)

ICICI, IFCI, IDBI, LIC, UTI, IDFC

Charge On uncalled Capital – Section 98 and 99

A company cannot mortgage or charge any part of its "reserve capital" i.e., such portion of its uncalled capital as is in capable of being called up except in the event of winding up of the company.

Debenture Stock

A Company instead of issuing debentures, each in respect of separate and distinct debt, may raise one aggregate loan fund or composite stock known as 'Debenture Stock'

Debenture Trust Deed – Section 117A

To secure Debenture Stock.

Appointment of Debenture Trustees and duties of Debentures Trustees – Section 117B

No company shall issue a prospectus or a letter of offer to the public for subscription of its debentures, unless the company has appointed one or more debenture trustees for such debentures and the company has on the face of prospectus stated the debenture trustees or trustees have given their consent to be so appointed.

Liability of Company to Create Security and Debenture Redemption Reserve – Section 117C

Company issues debentures after the commencement of Companies Amendment Act, 2000 create a debenture redemption reserve from out of its profits every year until such debentures are redeemed.

Register of Debenture holder – Section 152

Requires every Company to keep the register of debenture holders giving the details like Name, address, occupation of each Debentureholder and the date on which the debentures were held and how much.

Re- issue of Redeemed Debentures – Section 121

Remedies Open to Debenture holder- Section 117C (4) and (5)

Where a company fails to redeem the debentures on the date of maturity, the Debentureholder may make an application to Tribunal who in turn after hearing the parties concerned direct the company to redeem the debentures forthwith by the payment of principal and interest due thereon.

Chapter No. 10

FINANCIAL STRUCTURE AND MEMBERSHIP – IV - CREATION AND REGISTRATION OF CHARGE

FINANCIAL STRUCTURE AND MEMBERSHIP – IV - CREATION AND REGISTRATION OF CHARGE

Where property, both existing and future, is agreed to be available as a security for the repayment of Debt and Creditors have a present right to have it made available, there is a Charge

Kinds of Charge

1. Fixed or Specific Charge – Against security of certain specific property.
2. Floating Charge - property cover of fluctuating type like Stock –in –trade.

A floating Charge remains afloat until a winding up commences, unless it has been crystalized through the intervention of the debenture holders or creditors.

- Section 124

Invalidity of Floating Charge – Section 534

Where a company is being wound-up, a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up, shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid.

Registration of Charges – Section 125

Requires a company to file, within 30 days after the date of the creditors of a charge, with the Registrar complete particulars together with the instrument creating, evidencing or modifying the Charge.

Registration of charges on properties acquired subject to charge - Section 127

Where a company acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part, the company shall cause the prescribed particulars of the charge, together with a certified copy of the instrument, by which the charge was created or is evidenced, to be delivered to the Registrar for registration in the manner required by this Act within thirty days after the date on which the acquisition is completed:

Particulars to be filed with Registrar in case of series of Debentures – Section 128

File within 30 days with Registrar the total amount secured by whole series.

Company's Register of Charge – Section 143

Registrar's Register of Charge – Section 130

Company to report satisfaction and procedure thereafter - Section 138

The company shall give intimation to the Registrar of the payment or satisfaction, in full, of any charge relating to the company and requiring registration under this Part, within thirty days from the date of such payment or satisfaction.

The Registrar shall, on receipt of such intimation, cause a notice to be sent to the holder of the charge calling upon him to show cause within a time (not exceeding fourteen days) specified in such notice, why payment or satisfaction should not be recorded as intimated to the Registrar.

If no cause is shown, the Registrar shall order that a memorandum of satisfaction shall be entered in the register of charges. and if cause is shown, the Registrar shall record a note to that effect in the register, and shall inform the company that he has done so.

Satisfaction of Charge – Section 140

Where the Registrar enters a memorandum of satisfaction in whole or in part, in pursuance of **section 138 or 139**, he shall furnish the company with a copy of the memorandum.

Modification of Charge – Section 135

Intimate to Registrar any modification in terms and conditions or extent or operation within 30 days.

Chapter No. 11

FINANCIAL STRUCTURE AND MEMBERSHIP – V – ALLOTMENT AND CERTIFICATE OF SECURITIES

FINANCIAL STRUCTURE AND MEMBERSHIP – V – ALLOTMENT AND CERTIFICATE OF SECURITIES

Allotment of Shares means the act of appropriation by the Board of directors of the company out of the previously un- appropriated capital of a company of a certain number of shares to persons who have made applications for shares **– Section 75**

A person should agree in writing to become a member – **Section 41**

The Company intending to offer shares to the public for subscription by the issue of a prospectus shall, before such issue, make an application to one or more recognized stock exchange for permission for shares or Debentures to be dealt with in the regional stock Exchange – **Section 73(1)**

Date of opening of Subscription list – Section 72

Minimum Subscription – Section 69(1)

No shares which are offered to the public can be allotted until the minimum subscription stated in the prospectus has been subscribed and the amount payable on application has been received in cash by the Company.

Irregular Allotment –

Allotment without raising minimum subscription or without either collecting application money or collecting less than 5 percent as application money or failure to deliver a copy of statement in lieu of prospectus at least three days before allotment **– Section 70**

Return of Allotment – Section 75

After allotment of shares by any company, a return of allotment in the prescribed Form 2 even if it is of a single share, must be filled with the Registrar of Companies within thirty days of the allotment.

In case of default every officer of the company who is in default.

Each Share of the Share Capital of the Company shall be distinguished with a distinct number for its individual identification – **Section 83**

Issue of Duplicate Share Certificate – Section 84(4)

In case of lost or destroyed or has become mutilated

Sealing and Signing of Certificate - Rule 6 (Companies Issue of Share Certificate Rules, 1960)

Share Certificate shall be issued under the common seal of the company which shall be affixed in the presence of two directors and the Secretary appointed .

Whether Share Certificate an Official Publication

No – **Section 147(1) (c)**

Share Warrant – Section 114 and 115

A Share Warrant is a bearer document of title to the specified shares.

In respect of fully paid shares, issue under its common seal, and with the previous approval of the Central Government, a share warrant stating that the bearer is entitled to shares specified therein. Share Warrant holder is not the registered member of Company.

All money payable by any member to the company on the shares held by him under the MOA and AOA is a debt due for him to the Company – **Section 36(2)**

The power to make calls is exercised by the Board in its meeting by means of a resolution – Section 292(1)(a)

Payment in advance of Calls – Section 92

No return of allotment in respect of re-issue of Forfeited Shares – Section 75(5) – No return of allotment of the shares re-issued need to be filed with the Registrar

Chapter No. 12

FINANCIAL STRUCTURE AND MEMBERSHIP – VI – MEMBERSHIP IN A COMPANY

Company Laws – Ready Reckoner

-BY ***PRINCE WADHWA*** [BCOM (HONS),PERSUING CA FINAL]

FINANCIAL STRUCTURE AND MEMBERSHIP – V – MEMBERSHIP IN A COMPANY

In case of a Company limited by shares, the Shareholders are the members.

Definition of Member - Section 41

- The subscribers of the Memorandum of a company shall be deemed to have agreed to become members of the company, and on registration, shall be entered as members in its register of member.
- By agreeing in writing to become a member by making an application to the company for allotment of shares, or by executing an instrument of transfer, by acquiescence.
- By holding equity share capital of a company whose name is entered as beneficial owner in the records of a depository.

Minimum Number of Members – Section 12

Public Company – 7 or more

Private Company – 2 or more

Maintenance of Minimum Number – Section 45

The Liability of members become unlimited, if the number of its members falls below the statutory minimum and the company has carries on business beyond the period of six months after the number has so fallen and members are cognizant of the fact that it is carrying on the business with less than seven or two members, as case may be.

Restriction on Membership

By virtue of Section 3(1)(iii)(b), the maximum number of members of a private company is limited to fifty excluding the present and past employees of the Company who continues to be members of the Company.

No restriction with regard to the maximum number of members of a public company.

Cessation of Membership

- Transfer
- Forfeiture
- Sales
- Death of holder
- Adjudged insolvent
- Rescinds the contract on ground of misrepresentation
- Member is a company which is being wound – up in India
- Company is wound up

- Share warrants have been issued in exchange of fully paid shares.

Penalty for personation of Shareholders – Section 116

Imprisonment for a term which may extend to three years and shall also be liable to fine**.**

Register of Member – Section 150

Index of Members- Section 151

Every company having more than fifty members shall unless the register of members is in such a form as in itself to constitute an index, keep an index of members of the name of members within 14 days after the date on which any alteration is made in register, make necessary alteration of index.

Place of keeping and inspection of the Registrar – Section 163

At registered office of Company or such other place as approved by a special resolution.

Foreign Register – Section 157

Declaration by Persons not holding Beneficial Interest in any Share – Section 187C

Rights of Members

1. Right to Receive

- Abridged Balance Sheet and Profit and Loss Account – Section 219
- Report of the Cost Auditor
- Contract for appointment of MD/Manager – Section 302
- Notice of General Meeting – Section 171 172, 173

2. Right to Inspect

- Debenture Trust deed (Section 118)
- Register of Charge(Section 141)
- Register of Members, and Debenture holder and Index Register, Annual Returns (Section 163)
- Shareholders' Minute Book (Section 196)
- Register of Contracts (Section 301)

- Register of Directors' (Section 304)
- Register of Directors' Shareholders (Section 307)
- Copy of agreement of appointment of the MD/Manager (Section 302)

3. Right to attend meetings of the shareholders and exercise voting rights at these meetings either personally

or through proxy (Section 165, 166, 169, 176, 177).

Liability of Members –

A member is liable to pay the full nominal values of the shares he holds in a company as and when called up by the company.

The liability becomes unlimited if the number falls below the prescribed minimum limit - **Section 45**

Chapter No. 13

FINANCIAL STRUCTURE AND MEMBERSHIP – VII – TRANSFER AND TRANSMISSION OF SECURITIES

FINANCIAL STRUCTURE AND MEMBERSHIP – VII – TRANSFER AND TRANSMISSION OF SECURITIES

A Company shall not register transfer of shares in, or debentures of, the company, unless a proper instrument of transfer duly stamped and executed by or on behalf of the transferor and transferee has been delivered to the company along with the certificate relating to the company along with the certificate relating to the shares or debenture. – **Section 108(1)**

The instrument of transfer of shares must be in prescribed Form 7B.

Section 108(1A) - Provision of Section 108 not apply to Transfer of Shares Registered with the Depository

Extension of time Limit for presentation to prescribed Authority under Section 108(1D)

Application for transfer - Section 110

(1) An application for the registration of a transfer of the shares or other interest of a member in a company may be made either by the transferor or by the transferee.

(2) Where the application is made by the transferor and relates to partly paid shares, the transfer shall not be registered, unless the company gives notice of the application to the transferee and the transferee makes no objection to the transfer within two weeks from the receipt of the notice.

Transfer of Securities of a Public Company (Section 111A)

Provides that securities of a company other than a private company are freely transferable. The Board of Directors of a Company or the concerned depository has no discretion has no discretion to refuse or without transfer of any security.

Section 108A prohibits any individual, firm body corporate, group, or body corporate under common management to acquire more than 25 percent of the paid up equity share capital of a public without the prior approval of the Central Government.

Section 108D(1) empowers the Central Government to direct a company not to give effect to any transfer to share if it was satisfied that such transfer was likely to bring about a change in the controlling interest of the company which will be prejudicial to the interest of the company or to public interest.

Any transfer made during winding up of a company is void, unless it is made with the sanction of the Tribunal and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void – **Section 536**

Power to refuse registration and appeal against refusal - Section 111

If a company refuses to register the transfer of, or the transmission by operation of law of the right to, any shares or interest of a member in, or debentures of, the company, it shall, within two months from the date on which the instrument of transfer, or the intimation of such transmission, as the case may be, was delivered to the company, send notice of the refusal to the transferee and the transferor or to the person giving intimation of such transmission, as the case may be, giving reasons for such refusal.

The transferor or transferee, or the person who gave intimation of the transmission by operation of law, as the case may be, may appeal to the Tribunal against any refusal.

Certification of transfers - Section 112

The certification by a company of any instrument of transfer of shares in, or debentures of, the company, shall be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on the face of them show a prima facie title to the shares or debentures in the transferor named in the instrument of transfer, but not as a representation that the transferor has any title to the shares or debentures.

TRANSMISSSION OF SHARES –

A person acquires an interest in property by operation of any provision of law, such as by right of inheritance or succession. It is not to be treated as transfer.

Chapter No. 14

MANAGEMENT AND CONTROL OF COMPANIES - I - INSTITUTION OF DIRECTORS

MANAGEMENT AND CONTROL OF COMPANIES - I

INSTITUTION OF DIRECTORS (Section 2 (13))

Directors, as a body, frame the general policy of the company, direct its affairs, appoints the company officers, ensure that they carry out their duties and recommend to the shareholders regarding distribution of dividend.

Two types Directors:-

1. Executive or Whole- Directors (Section 269(1))
2. Non – executives or part- time directors.

Only an individual, and not a body corporate, association or firm, shall be appointed as directors – **Section 253**

Disqualification of Directors – Section 274

A person shall not be capable of being appointed director of a company having :-

1. Unsound Mind.
2. Un- discharged insolvent
3. Applied to be adjudicated as an insolvent and his application is pending.
4. Convicted by a Court
5. Has not paid any call in respect of the shares
6. Order disqualifying him for appointment as Directors has been passed by Court in pursuance of Section 203
7. Such person is already a director of a public company which has not filed the annual returns

Duty of Statutory Auditor to report on disqualification – Section 227(3) (f)

To report to members of Company whether any director is disqualified and to furnish a certificate each year as to whether on the basis of his examination of the books and records of the Company, any Director of the Company is disqualified for appointment as a director or not.

No person to be a director of more than twenty companies at a time– Section 275

Qualification shares – Section 270

- Each Director must obtain his qualification shares within two months after the appointment of Director
- The nominal value of the qualification shares shall not exceed five thousand rupees or the nominal value of one share where it exceeds five thousand rupees.

Penalty – Section 272

Director shall be punishable with fine which may extend to fifty rupees for every day if acts a Director after the expiry of the said period of two months without holding Qualification Shares**.**

Section 278 lays down the directorship in the following companies shall be excluded for the purpose of calculation of permissible maximum number of directorship for the purpose of **Section 275**, **276** and **277**

- private company which is neither a subsidiary nor a holding company of a public company
- an unlimited company
- an association not carrying on business for profit or which prohibits the payment of a dividend
- a company in which such person is only an alternate director

Appointment 0f Director

- By subscribers to Memorandum (First Directors) **Section 254**
- By members in General Meeting **Section 255**, **256**, **257**, **265**
- By Board of Directors **–**

  Additional Directors **- Section 260,**

  Filing up of Casual vacancies **– Section 262,**

  Alternate Director **– Section 313**

- By Central Government **Section 408**, **409**

To prevent the affairs of the Company being in the manner which is oppressive or in the manner which is prejudicial to the interest of the company or public interest.

- By third parties if Article provides – By financial institution or banks or other lenders to represent their interest on the Board.
- By small shareholders if the articles provide **Section 252**

Removal of Directors

- **Removal by Shareholders – Section 284(1)**

Passing an ordinary resolution at a general meeting before the expiry of period of his office.

- **Removal by Central Government – Section 338E**

- **Removal by Tribunal – Section 397**

On letter by any member of a company who complain that the affairs of the company

Penalty for wrongful holding of Company's Property – Section 630 - Punishable with fine which may extend to one thousand rupees

Vacation of Office of Directors – Section 283

- fails to obtain qualification share within two months of appointment

- found to be of unsound mind
- found to be of unsound mind
- adjudged an insolvent;
- convicted by a Court of any offence involving moral turpitude
- fails to pay any call on shares of the company held by him within six months from the last date fixed for the payment of the call
- absents himself from three consecutive meetings of the Board of directors or all meetings of the Board for a continuous period of three months, whichever is longer, without obtaining leave.
- disqualified by an order of Court under section 203
- Removal by Shareholders – **Section 284**

Remuneration to Directors

Directors are not entitled to payment in the absence of express provisions.

Managerial Remuneration – Section 198(4)

The total managerial remuneration payable by a public company or a private company which is a subsidiary of a public company, to its directors and manager in respect of any financial year shall not exceed eleven per cent of the net profits of that company.

Remuneration payable by companies having profits – Section 198 and 309

Such remuneration shall not exceed five per cent of the net profits for one such director, and if there is more than one such director, ten per cent for all of them together.

Office or place of profit – Section 314

No Director except with the previous consent of the company accorded by a special resolution,—

(a) no director of a company shall hold any office or place of profit, and

(b) no partner or relative of such a director, no firm in which such a director or relative is a partner, no private company of which such a director is a director or member, and no director, managing agent, secretaries, and treasures, or manager of such a private company shall hold any office or place of profit carrying a total monthly remuneration of five hundred rupees or more, except that of managing director, managing agent, secretaries and treasures, manager, legal or technical adviser such sum of five hundred rupees or more except that of managing director or manager, banker or trustee for the holders of debentures of the company,

(i) under the company; or

(ii) under any subsidiary of the company

Chapter No. 15

Company Laws – Ready Reckoner

-BY ***PRINCE WADHWA*** [BCOM (HONS),PERSUING CA FINAL]

MANAGEMENT AND CONTROL OF COMPANIES - II – POWER AND DUTIES OF DIRECTORS

MANAGEMENT AND CONTROL OF COMPANIES - II – POWER AND DUTIES OF DIRECTORS

The Board of directors of a company shall be entitled to exercise all such powers as the company is authorized to exercise and do. The Board shall not exercise any power or do any act or thing which is directed or required, whether by this or any other Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting – **Section 291**

Powers to be exercised only at Board Meetings – Section 292(1)

- Power to make calls on shareholders in respect of money unpaid on their shares
- Power to authorize the buy-back as per the provision to **section 77A (b)(2) Section 292 (1)(aa)**

- Power to issue debentures **Section 292(1)(b)**
- Power to borrow moneys otherwise than on debentures **Section 292(1) (c)**
- Power to invest the funds of the company; and **Section 292(1) (d)**
- Power to make loans - **Section 292(1)(e)**

Other Powers to be exercised at Board Meeting

- Power to form opinion about solvency of company in respect of Buy – back of shares – **Section 77A**
- Power to fill up casual vacancy –**Section 262**
- Power to constitute Audit Committee – **Section 292A**
- Power to make donation to political parties – **Section 293A(2)**
- Power to accord sanction for specified contracts in which one or more directors are interested – **Section 297(4)**
- Disclosure of interest by director – **Section 299(1)**
- Power to receive notice of disclosure of directors' shareholdings **– Section 308(2)**
- Power to purchase of shares or debenture of other companies – **Section 372A**
- Power to appoint a person as its manager if he is the manager or managing director of other company – **Section 386(2)**

Powers of the Board exercisable with the approval of the company in general meeting – Section 293(1)

- Sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company
- Remit, or give time for the repayment of, any debt due by a director
- Invest, otherwise than in trust securities
- Borrow moneys where the moneys to be borrowed, together with the moneys already borrowed by the company (apart from temporary loans), exceed the aggregate of the paid-up capital of the company and its free reserve
- Contribute to charitable and other funds not directly relating to the business of the company exceed **twenty**-five thousand rupees or five per cent, of its average net profits as determined in accordance with

the provisions of sections 349 and 350 during the three financial years immediately preceding, whichever is greater.

Loan to Director – Section 295(1)

No company shall, without obtaining the previous approval of the Central Government in that behalf 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, or to any other person by -

- any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;
- any firm in which any such director or relative is a partner;
- any private company of which any such director is a director or member;
- any body corporate at a general meeting of which not less than twenty-five per cent of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or
- any body corporate, the Board of directors, managing director or manager whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

Any contravention **Section 295(1)** shall be punishable either with fine which may extend to Five Thousand Rupees or with simple imprisonment for a term which may extend to six months

Boards Sanction for contracts in which Directors are interested – Section 297

(a) for the sale, purchase or supply of any goods, materials or services; or

(b) after the commencement of this Act, for underwriting the subscription of any shares in, or debentures of, the company:

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.

Position of Interested Director – Section 300

Interested director not to participate or vote in Board's proceedings.

Duties of Board if Directors –

Statutory Duty

- To attend Board Meeting – Section 283(1)(g)

- Not to contract without Boards consent – Section 297
- Not to disclose Interest – Section 299, 300
- To make disclosure of appointment or relinquishing the office – Section 305
- To make disclosure of Shareholding – Section 308
- To convene general meetings – Section 165, 166, 169
- To disclose transfer of property – Section 319
- File declaration of solvency – Section 77A
- Declaration of solvency in case of Members voluntary Winding up – Section 488
- File return of Allotment – Section 75

Liability for Statutory Defaults and Violations

Penalty – Section 59, Section 69(5), Section 71(3), Section 73(2), Section 207, Section 300.

Criminal Liability:

- Section 44(4)
- Section 58A(6)(B)
- Section 58A(10)
- Section 63
- Section 68
- Section 73(16)
- Section 105
- Section 202(1)
- Section 207
- Section 209A (8)
- Section 210(5)
- Section 211(8)
- Section 217(5)
- Section 221(4)
- Section 250(9)
- Section 293A(5)
- Section 295(4)
- Section 308(3)
- Section 372A
- Section 407(2)(C)

- Section 488(3)

Compounding of offences – Section 621A

Any offence punishable whether committed by a company or any officer thereof not being an offence punishable with imprisonment only, or with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by the Central Government on payment or credit, by the company or the officer to the Central Government of such sum as that the Government may prescribe:

The sum prescribed shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded

Chapter No. 16

MANAGEMENT AND CONTROL OF COMPANIES – III – MANAGING DIRECTOR, WHOLE-TIME DIRECTOR AND MANAGER

MANAGEMENT AND CONTROL OF COMPANIES – III – MANAGING DIRECTOR, WHOLE-TIME DIRECTOR AND MANAGER

1. MANAGING DIRECTOR

"Managing director" means a director who, by virtue of an agreement with the company or of a resolution passed by the company in general meeting or by its Board of directors or, by virtue of its memorandum or articles of association, is entrusted with any powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called **– Section 02(26)**

If a company wants to appoint a person as Managing Director, who is not a director of company, he has first to appointed as an additional director in accordance with **Section 260**

Section 317 restricts the period for which Managing Director be appointed at a time upto five years.

Obtain qualification shares prescribed by Articles within a period of two months from date of appointment **– Section 270**

Managing Director may be appointed:-

- By virtue of an agreement with the Company
- By virtue of resolution passed by company
- By virtue of resolution passed by Board of Directors
- By virtue of MOA and AOA.

No appointment without approval of Central Government – **Section 269(2)**

Relationship with the Board of Directors

He is a link between the directors and executives of company. Coordinator of activities of the various divisions and department of Company.

Liability

Liable for any breach, whether willful or unintentional, of any duties and powers entrusted to him under the terms and conditions of his appointment.

2. WHOLE- TIME DIRECTOR/ EXECUTIVE DIRECTOR –

Whole time Director is virtually Managing Director

The terms whole- time director and executive directors are not specifically defined in Companies Act except saying that he is in whole time employment.

Appointment is subject to **Section 274**

No restriction of Section 317

Remuneration – Section 387

Either by way of a monthly payment or by way of a specified percentage of the "net profits" of the company calculated in the manner laid down in **sections 350 and 351 [3]** or partly by the one way and partly by the other

Except with the approval of the Central Government such remuneration shall not exceed in the aggregate five per cent of the net profits.

Sitting Fees - Section 310 r.w.r 10B of Companies (Central Government's) General Rules and Forms, 1956—

For the purposes of the first proviso to section 310, the amount of remuneration by way of fee for each meeting of the Board of directors or a committee thereof, shall be as under:—

Companies with a paid-up share capital and free reserves of Rs. 10 crore and above or turnover of Rs. 50 crore and above the Sitting fees not to exceed the sum of twenty thousand rupees. Whereas for Other companies Sitting fees not to exceed the sum of ten thousand rupees

3. MANAGER

"Manager" means an individual (not being the managing agent) who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, and whether under a contract of service or not - **Section 02(24)**

Section 197A - No company shall appoint or employ at the same time a managing director and manager.

No company shall appoint or employ any firm, body corporate or association as its manager – **Section 384**. A manager must be individual.

Manager may be appointed or re- appointed not more than five years at a time **– Section 317**

Restriction on the number of companies of which a person may be appointed manager – Section 386

No company shall appoint or employ any person as manager, if he is either the manager or the managing director of any other company, except if he is the manager or managing director of one, and not more than one, other company.

Compensation for loss of office not permissible except to managing or whole-time directors or to directors who are managers - Section 318

4. CHAIRMAN

Unless the articles of the company otherwise provide, the members personally present at the meeting shall elect one of themselves to be the chairman thereof on a show of hands **– Section 175**

- The Chairman must ascertain that a quorum to constitute the meeting prescribed is present.
- Proceedings are conducted in a proper manner
- Observe strict impartially.
- To ensure that all the participating directors get equal opportunity to express their views.
- May allow any additional business to be transacted either with the consent of the meeting or at his own discretion

Chapter No. 17
MANAGEMENT AND CONTROL OF COMPANIES – IV – COMPANY SECRETARY

MANAGEMENT AND CONTROL OF COMPANIES – IV – COMPANY SECRETARY

"Secretary" means a Company Secretary within the meaning of clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980), and includes any other individual possessing the prescribed qualifications and appointed to perform the duties which may be performed by a secretary under this Act and any other ministerial or administrative duties – Section 02(54)

Section 383A (1)

Every company having such paid-up share capital as may be prescribe shall have a whole-time secretary, and where the Board of directors of any such company comprises only two directors, neither of them shall be the secretary of the company

Every company having a paid up Share Capital of not less than prescribed amount (Presently 5 Crores) must have a whole time Company Secretary who should be member of Institute of Company Secretary of India – (Companies Appointment and Qualification of Secretary Rules, 1988)

Every company not required employing a whole-time secretary under sub-section (1) of **Section 383A** and having a paid-up share capital of ten lakh rupees or more shall file with the Registrar a certificate from a secretary in whole-time practice

The provision of **Section 383A** of the Act is applicable to **Section 25** Companies also.

Position of Company Secretary

- Cannot participate in the management of the Company's affairs.
- Cannot negotiate contracts on behalf of company
- Cannot borrow money in the company's name
- Cannot transfer shares without the Board's authority
- Cannot call meetings of members
- No power to strike a name off the Register of Members, without the authority of Board of Directors.

Duties of Secretary

1. Statutory Duties

Section 54 - Authentication of documents and proceedings.

Section 70 – arrange to file statement in lieu of prospectus

Section 75 - Return as to allotments

Section 97 - Notice of increase of share capital or of members.

Section 113 – Deliver share or debenture certificates

Section 115 - Entries in register of members on issue of Share warrants

Section 118 – Make available for inspection of trust deed and forward a copy of it to members

Section 125- 126, 127 – Registration of Charge and Mortgage to ROC.

Section 146 – File Registered office of company

Section 147 - Publication of name by company.

Section 149 – Declaration for obtaining commencement of business.

Section 161 - Further provisions regarding annual return and certificate to be annexed thereto

Section 163 – Allow inspection of registers and returns.

Section 171 - Length of notice for calling meeting.

Section 192 - Registration of certain resolutions and agreements.

Section 193 – Prepare Minutes of proceedings of general meetings and of Board and other meetings.

Section 196 – Allow Inspection of minute books of general meetings.

Section 215 - Authentication of balance sheet and profit and loss account.

Section 286 – Issue Notice of meetings.

Section 304 – Make available Inspection of the register to Directors

Section 454 – Assist in preparing Statement of affairs to be made to Official Liquidator.

Section 224 – To inform Auditor of his appointment.

2. Maintain following Statuary Books

Section 49 – Register of Investments of company to be held in its own name.

Section 143 – Register of charges.

Section 150 – Register of members.

Section 152 – Register and index of debenture holders.

Section 301 – Register of contracts, companies and firms in which directors are interested

Section 303 –Register of directors, manager and secretary.

Section 307 –Register of directors' shareholdings, etc.

Section 372A–Register of loans and investments.

STATUTORY LIABILITY

Section 75 (4)

Section 77A 911)

Section 113 (2)

Section 127 (2)

Section 163 (5)

Section 165 (9)

Section 168

Section 188 (8)

Section 193(6)

Section 196(30)

Section 210 (5)

Section 286 (2)

Chapter No. 18
MANAGEMENT AND CONTROL OF COMPANIES –V – MEETINGS

MANAGEMENT AND CONTROL OF COMPANIES –V – MEETINGS

Kinds of Company Meeting

1. Shareholders Meeting

Statutory Meeting - Section 165

Company Laws – Ready Reckoner

-BY ***PRINCE WADHWA*** [BCOM (HONS),PERSUING CA FINAL]

Every company limited by shares, and every company limited by guarantee and having a share capital, shall, within a period of not less than one month not more than six months from the date at which the company is entitled to commence business, hold a general meeting of the members of the company, which shall be called "the statutory meeting.

A general meeting of a company may be called by giving not less than twenty-one days' notice in writing – **section 171**

Annual General Meeting - Section 166

Every company shall in each year hold in addition to any other meetings a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it; and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next.

A company may hold its first annual general meeting within a period of not more than eighteen months from the date of its incorporation

- **Business transacted at AGM – Section 173**

(a) All business to be transacted at the meeting shall be deemed special, with the exemption of business relating to

(i) the consideration of the accounts, balance sheet and the reports of the Board of directors and auditors,

(ii) the declaration of a dividend,

(iii) the appointment of directors in the place of those retiring, and

(iv) the appointment of, and the fixing of the remuneration of the auditors; and

(b) in the case of any other meeting, all business shall be deemed special

Extraordinary Meeting as per Section 169

The Board of directors of a company shall, on the requisition of such number of members i.e not less than one-tenth of such of the paid-up capital of the company as at that date carries the right of voting in regard to that matter forthwith proceed duly to call an extraordinary general meeting of the company.

- **Power of Tribunal to order Extraordinary meeting to be called – Section 186**

If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company in the manner prescribed by this Act or the articles, the Tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting

Class meetings - Section 106

Where the share capital of a company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or with the sanction of a special resolution passed at a separate meeting of the holders of the issued shares of that class.

2. Board Meetings of Board Of Directors – Refer to Chapter 13 for **Powers to be exercised only at Board Meetings and Other Powers to be exercised at Board Meeting**

- **Notice of Board Meeting – Section 286 -** Notice of every meeting of the Board of directors of a company 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. Every officer of the company whose duty it is to give notice as aforesaid and who fails to do so shall be punishable with fine which may extend to one thousand rupees.

- **·Time and Place of Board meeting – Section 166**
- **Minutes of Board Directors – Section 193 -** Every company shall cause minutes of all proceedings of every general meeting and of all proceedings of every meeting of its Board of directors or of every committee of the Board, to be kept by making within thirty days of the conclusion of every such meeting concerned, entries thereof in books kept for that purpose with their pages consecutively numbered
- Quorum of Directors – **Section 287(2)** - 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
- Disclosure of Interest – **Section 300** - Interested director not to participate or vote in Board's proceedings

3. Meeting of Board Committee –

Section 292 empowers the board to delegate the following powers among others to a committee of Directors:

- the power to make calls on shareholders in respect of money unpaid on their shares;
- the power to authorize the buy-back referred to in the first proviso to clause (b) of sub-section (2) of section 77A;]
- the power to issue debentures;
- the power to borrow moneys otherwise than on debentures;
- the power to invest the funds of the company; and
- the power to make loan

4.Meeting of Debenture holder - To vary the terms of security or to alter their rights in certain circumstances.

5.Meeting for Creditors for winding up

6.Meeting for Creditors other than winding up

7.Meeting of Contributories in Winding up

Voting and Demand for Poll – Section 176(1)(c)

Any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person (whether a member or not) as his proxy to attend and vote instead of himself; but a proxy so appointed shall not have any right to speak at the meeting.

RESOLUTIONS – Section 189

Decisions of a company are made by resolution passed by prescribed majority of members present in meeting

Two types of resolution are :-

- **Ordinary** - A resolution shall be an ordinary resolution when at a general meeting the votes cast (whether on a show of hands, or on a poll, as the case may be,) in favour of the resolution (including the casting vote, if any, of the chairman) by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy, exceed the votes, if any, cast against the resolution by members so entitled and voting.
- **Special** - A resolution shall be a special resolution when the votes cast in favour of the resolution (whether on a show of hands, or on a poll, as the case may be) by members who being entitled so to do, vote in person, or where proxies are allowed, by proxy, are **not less than three times** the number of the votes, if any, **cast against the resolution by members so entitled and voting**.

Intention to propose the resolution as a special resolution has been duly specified in the notice

Resolution requiring Special Notice – Section 190

Registration of Resolution and Agreement – Section 192

Passing of Resolution by Postal Ballot – Section 192A

A listed public company may, and in the case of resolutions relating to such business as the Central Government may, by notification, declare to be conducted only by postal ballot, shall, get any resolution passed by means of a postal ballot, instead of transacting the business in general meeting of the company.

Dissolution – Section 174(3)

If within half an hour from the time appointed for holding a meeting of the company, a quorum is not present, the meeting, if called upon the requisition of members, shall stand dissolved.

Chapter No. 19
INVESTMENT AND LOANS

INVESTMENT AND LOANS

Inter – Corporate Loans and Investment – Section 372A

1. 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 anybody 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.

2. No investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorized by a special resolution passed in a general meeting.

3. Loan given to any body corporate shall carry the rate of interest not lowers than the prevailing bank rate.

4. **Section 372A(5)** Every company shall keep a register showing the particulars in respect of every investment or loan made, guarantee given or security provided by it in relation to any body corporate namely -

(i) the name of the body corporate;

(ii) the amount, terms and purpose of the investment or loan or security or guarantee;

(iii) the date on which the investment or loan has been made; and

(iv) the date on which the guarantee has been given or security has been provided in connection with a loan.

If default is made in complying with the provisions of sub-section (5) above, the company and every officer of the company who is in default shall be punishable with fine which may extend to five thousand rupees and also with a further fine which may extend to five hundred rupees for every day after the first during which the default continues

Penalty

If default is made in complying with the provisions of this section, other than sub-section (5), the company and every officer of the company who is in default shall be punishable with imprisonment which may extend to two years or with fine which may extend to fifty thousand rupees.

Exemptions

Nothing contained on **Section 372A** shall apply:-

- To any loan made or any guarantee given to a banking company, or any insurance Company, or a housing finance company in the ordinary course of its business, or of providing infrastructure facilities
- A company whose principal business is the acquisition of shares, stock, debentures or other securities.
- A private company, unless it is a subsidiary of a public company.

To investment made in shares allotted in pursuance of **Section 81(1)(a)** i.e. such further shares shall be offered to the persons who, at the date of the offer, are holders of the equity shares of the company, in proportion, as nearly as circumstances admit, to the capital paid-up on those shares at that date

To any loan made by a holding company to it's wholly – owned subsidiary

To any guarantee given or any security provided by a holding company in respect of loan made to its wholly-owned subsidiary

To acquisition by a holding company, by way of subscription, purchases or otherwise, the securities of its wholly-owned subsidiary.

Investments to be held in Company's own name – Section 49(1)

All investments made by a company on its own behalf shall be made and held by it in its own name and where any such investments are not so held at the commencement of this Act the company shall, within a period of one year from such commencement, either cause them to be transferred to, and hold them in, its own name, or dispose of them.

Chapter No. 20
DEPOSITS

DEPOSITS

Companies preferred to raise finance by accepting deposits form the public rather than taking loans from financial institution.

Section 58A - The Central Government may, in consultation with the Reserve Bank of India, prescribe the limits up to which, the manner in which and the conditions subject to which deposits may be invited or accepted by a company either from the public or from its members.

No company shall invite any deposit unless such deposit are in accordance with the rules made thereunder and an advertisement including therein a statement showing the financial position of the company, has been issued by the company in such form and in such manner as may be prescribed

The company should not in default in the repayment of any deposit or part thereof and any interest thereupon in accordance with the terms and conditions of such deposit.

Exemption

Nothing contained on **Section 58A** shall apply:-

1. Banking Company
2. Such other companies as the Central Government may, after consulting the Reserve Bank Of India, specify in this behalf
3. Such class of financial companies as the Central Government may, after consulting the Reserve Bank of India, specify in this behalf except the provisions relating to advertisement.

Nomination by Depositors - Section 58A(11)

A depositor may, at any time, make a nomination and the provisions of **Sections 109A and 109B** shall, as far as may be, apply to the nomination made.

Deposit on the name of Minor

If the Deposit is in the name of the minor, the name of guardian should be stated in the application and the guardian signs the form for and on behalf of the minor**.**

Deposit in Joint Name - All correspondence should be made in the name of the person whose name appears first in the order of the joint names.

Deposit Receipt is not transferred by assignment, endorsement, and transfer or otherwise.

Addition of one or more names(s), as joint holders, on a fixed Deposits Receipt during the period of fixed Deposit is not permissible.

Defaults in Repayment of Deposits to small Deposit holders – Section 58AA

Every company, which accepts deposits from small depositors, shall intimate within sixty days from the date of default to the Tribunal any default made by it in repayment of any such deposits or part thereof or any interest thereupon.

Section 58A(9) Where a company accepts or invites any deposit in excess of the limits prescribed or in contravention of the manner of condition

(a) the company shall be punishable,

(i) where such contravention relates to the acceptance of any deposit, with fine which shall not be less than an amount equal to the amount of the deposit so accepted;

(ii) where such contravention relates to the invitation of any deposit, with fine which may extend to ten lakh rupees]but shall not be less than fifty thousand rupees

(b) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to five years and shall also be liable to fine

Chapter No. 21

CORPORATE ACCOUNTABILITY – I – ACCOUNTS

CORPORATE ACCOUNTABILITY – I – ACCOUNTS

Books of account to be kept by company – Section 209

Every company shall keep at its registered office proper books of account with respect to

- all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place;
- all sales and purchases of goods by the company;
- the assets and liabilities of the company;
- in the case of a company pertaining to any class of companies engaged in production, processing, manufacturing or mining activities, such particulars relating to utilization of material or labour or to other items of cost as may be prescribed, if such class of companies is required by the Central Government to include such particulars in the books of account

All or any of the books of account aforesaid may be kept at such other place in India as the Board of directors may decide and when the Board of directors so decides, the company shall, within seven days of the decision, file with the Registrar a notice in writing giving the full address of that other place.

Liability where proper accounts not kept – Section 541(2)

If it is shown that proper books of account were not kept by the company throughout the period of two years immediately preceding the making of the application to Tribunal under **section 397 or 398**, or the period between the incorporation of the company and the making of the application, whichever is shorter, every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year.

Preservation of Books of Accounts – Section 209(4A)

The books of account of every company relating to a period of not less than eight years immediately preceding the current year together with the vouchers relevant to any entry in such books of account shall be preserved in good order.

Inspection of Books and Accounts

- **Director's Right of inspection – Section 209 (4) -** The books of account and other books and papers shall be open to inspection by any director during business hours
- **Member's Right of inspection –** No such right to inspect the books by members except as conferred by law or authorized by the company in general meeting.
- **Auditor's right of inspection of accounts – Section 227(1)** – Empowers an auditor with the right of access at all times to the company's account.

Section 209(1) r.w.s. **541(2)** provides for the maintenance of proper books of accounts and they obviously include the cost accounting records [**Section 209(1) (d)**] and stock records [**Section 541(2)**], apart from normal books of accounts.

Persons responsible for Keeping Books of Accounts – Section 209(6)

- where the company has a managing director or manager, such managing director or manager and all officers and other employees of the company
- where the company has neither a managing director nor manager, every director of the company

Statutory Books

1. Register of investments have been made, by a company are not held by it in its own name – Section 49(7)
2. Register of Fixed deposits
3. Register of Securities bought back [Section77A(9)]
4. Register Of Charges – Section 143(1)
5. Register Of Members – Section 150(1)
6. Index of Members where the number exceeds 50 – Section 151(1)
7. Register and index of debenture holders – Section152
8. Register and index of beneficial owners to be of debenture holder – Section 152A
9. Foreign register of members or debenture holders.- Section 157(1) and158
10. Books of minutes of proceedings of general meetings and of Board and other meetings – Section 193(1)
11. Dividend Register
12. Books of Accounts [Under Section 209(1)(a) to(c)]
13. Cost accounts records – Section 209(1)(d)
14. Register of contracts, companies and firms in which directors are interested – Section 301(5)

15. Register of directors etc. – Section 303(1)
16. Register of directors' shareholdings, etc. – Section 307(1)
17. Register of all investments made by it in shares of any other body or bodies corporate – Section 372(6)
18. Register of Loans, etc., to companies under the same management - Section 370 (1C)
19. Register of Inter-corporate loans and investments – Section 372A(5A)

Statistical Books

1. Share Application and Allotment Book
2. Share Call Book
3. Share Certificate Book
4. Debenture Interest Book
5. Director's Attendance Book
6. Agenda Book
7. Dividend Mandate Register
8. Share Warrant Register
9. Register of Certified Transfers
10. Register of lost share certificates
11. Register of Power of Attorney
12. Register of Probates
13. Register of documents sealed

Annual Accounts: Balance Sheet and Profit and Loss Account

Section 210 of the companies s act provide for laying of annual accounts before Annual General Meeting and **Section 211** relates to form and content of balance sheet and profit and loss account.

Default in laying of Accounts – Section 210(6)

If any person, not being a director of the company, having been charged by the Board of directors with the duty of seeing that the provisions of this section are complied with, makes default in doing so, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees, or with both.

Penalty for improper issue, circulation or publication of balance sheet or profit and loss account – Section 218

Authentication of balance sheet and profit and loss account by Secretary – Section 215

Right of member to copies of balance sheet and auditors' report – Section 219 - A copy of every balance sheet (including the profit and loss account, the auditors' report and every other document required by law to be annexed or attached, as the case may be, to the balance sheet) which is to be laid before a company in general meeting shall, not less than twenty-one days before the date of the meeting, be sent to every member of the company.

Section 349 - Determination of net profits for the purpose of calculating managerial remuneration.

Directors' Report – Section 271

There shall be attached to every balance sheet laid before a company in general meeting, a report by its Board of directors, with respect to-

(a) the state of the company's affairs;

(b) the amounts, if any, which it proposes to carry to any reserves in such balance sheet

(c) the amount, if any, which it recommends should be paid by way of dividend;

d) material changes and commitments, if any, affecting the financial position of the company which have occurred between the end of the financial year of the company to which the balance sheet relates and the date of the report;]

(e) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed.

Particulars in respect of certain employees – Section 217(2A)

Directors Responsibility Statement – Section 217(2AA)

The Board's report shall also include a Directors' Responsibility Statement, indicating therein,

(i) that in the preparation of the annual accounts, the applicable accounting standards had been followed ,

(ii) that the directors had selected such accounting policies 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 records 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.

Balance sheet of holding company to include certain particulars as to its subsidiaries – Section 212

Chapter No. 22
CORPORATE ACCOUNTABILITY – II - AUDIT

CORPORATE ACCOUNTABILITY – II -AUDIT

Audit is an examination of accounting records undertaken with a view to establishing the correctness of the transactions reflected therein. It involves the intelligent scrutiny of the books of accounts.

Appointment and remuneration of auditors – Section 224

Every company shall, at each annual general meeting, appoint an auditor or auditors to hold office from the conclusion of that meeting until the conclusion of the next annual general meeting and shall, within seven days of the appointment, give intimation thereof to every auditor so appointed.

The remuneration of the auditors of a company -

(a) in the case of an auditor appointed by the Board or the Central Government, may be fixed by the Board or the Central Government

(aa) in the case of an auditor appointed under section 619 by the Comptroller and Auditor-General of India, shall be fixed by the company in general meeting

(b) subject to clause (a), shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

For the purposes of this sub-section, any sums paid by the company in respect of the auditors' expenses shall be deemed to be included in the expression "remuneration".

Qualifications and disqualifications of auditors – Section 226

A person shall not be qualified for appointment as auditor of a company unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949.

Disqualification of Auditors – Section 226(3)

(a) a body corporate;

(b) an officer or employee of the company;

(c) a person who is a partner, or who is in the employment, of an officer or employee of the company;

(d) a person who is indebted to the company for an amount exceeding one thousand rupees, or who has given any guarantee or provided any security in connection with the indebtedness of any third person to the company for an amount exceeding one thousand rupees;

(e) a person holding any security of that company after a period of one year from the date of commencement of the Companies (Amendment) Act, 2000.

Reappointment of Auditors – Section 224A

At any annual general meeting, a retiring auditor, by whatsoever authority appointed, shall be re-appointed, unless___

(a) he is not qualified for re-appointment;

(b) he has given the company notice in writing of his unwillingness to be re-appointed;

(c) a resolution has been passed at that meeting appointing somebody instead of him or providing expressly that he shall not be re-appointed; or

(d) where notice has been given of an intended resolution to appoint some person or persons in the place of a retiring auditor, and by reason of the death, incapacity or disqualification of that person or of all those persons, as the case may be, the resolution cannot be proceeded with.

Rights of Retiring Auditors – Section 225(2) & (3)

Appointment of Auditors by Special resolution – Section 224A

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 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 shall be made by a special resolution.

Removal of Auditor – Section 224(5)

the company may, at a general meeting, remove any such auditor or all or any of such auditors and appoint in his or their places any other person or persons who have been nominated for appointment by any member of the company and of whose nomination notice has been given to the members of the company not less than fourteen days before the date of the meeting; and

Section 224(7) - Except as provided in the proviso to sub-section (5) above, any auditor appointed under this section may be removed from office before the expiry of his term only by the company in general meeting, after obtaining the previous approval of the Central Government in that behalf

Auditors of Government Company – Section 619

The auditor of a Government company shall be appointed or re-appointed by the Comptroller and Auditor-General of India.

The limits specified in sub-sections (1B) and (1C) of section 224 shall apply in relation to the appointment or re-appointment of an auditor under this sub-section.

Right and Powers of Auditors

1. Access at all times to the books and accounts and vouchers of the company – Section 227(1)
2. Right to obtain information and explanations
3. Right to sign the audit report – Section 229
4. Right to receive notice and attend general meeting – Section 231 Right to Audit of accounts of branch office of company – Sec 22
5. Right to receive remuneration – Section 224(8)

Duties of Auditor – Section 227(1A)

Special Audit – Section 233A

Where the Central Government is of the opinion—

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

(b) 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

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

Cost Audit – Section 209(1)(d)

In the case of a company pertaining to any class of companies engaged in production, processing, manufacturing or mining activities, such particulars relating to utilisation of material or labour or to other items of cost as may be prescribed, if such class of companies is required by the Central Government to include such particulars in the books of account.

Penalty for non-compliance by auditor with sections 227 and 229.

If any auditor's report is made, or any document of the company is signed or authenticated, otherwise than in conformity with the requirements of sections 227 and 229, the auditor concerned, and the person, if any, other than the auditor who signs the report or signs or authenticates the document, shall, if the default is willful, be punishable with fine which may extend to ten thousand rupees.

True and Fair View – Section 227(2)

The auditor shall make a report to the members of the company on the accounts examined by him, and on every balance sheet and profit and loss account and on every other document declared by this Act to be part of or annexed to the balance sheet or profit and loss account, which are laid before the company in general meeting during his tenure of office, and the report shall state whether, in his opinion and to the best of his information and according to the explanations given to him, the said accounts give the information required by this Act in the manner so required and give a true and fair view

(i) in the case of the balance sheet, of the state of the company's affairs as at the end of its financial year; and

(ii) in the case of the profit and loss account, of the profit or loss for its financial year.

Chapter No. 23

CORPORTAE ACCOUNTABILITY – III – DIVISIBLE PROFITS AND DIVIDENDS

CORPORTAE ACCOUNTABILITY – III – DIVISIBLE PROFITS AND DIVIDENDS

Dividend is the return on the share Capital subscribed for and paid to a company by its shareholders.

As per Section 217 (1) (c) there shall be attached to every balance sheet laid before a company in general meeting, a report by its Board of directors, with respect to the amount, if any, which it recommends should be paid by way of dividend.

It is declared by shareholders at Annual General Meeting by Shareholders.

Interim Dividend – Section 2(14A)

"Dividend" includes any interim dividend.

Both interim and final dividend when declared become debt and are payable within 30 days of declaration

Section 78

Where a company issues securities at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those securities shall be transferred to an account, to be called "the securities premium account"; and the provisions of this Act relating to the reduction of the securities capital of a company shall, except as provided in this section, apply as if the securities premium account were paid-up securities capital of the company.

Section 78 does not permit the amount standing to the credit of the Securities Premium Account to be distributed by way of dividend to the shareholders.

Dividend to be paid only out of profits

Section 205(1) - No dividend shall be declared or paid by a company for any financial year except out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2) or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with those provisions and remaining undistributed or out of both or out of moneys provided by the Central Government or a State Government for the payment of dividend in pursuance of a guarantee given by that Government:

Depreciation – Section 205(2)

Depreciation shall be provided either-

(a) to the extent specified in section 350; or

(b) in respect of each item of depreciable asset, for such an amount as is arrived at by dividing ninety-five per cent of the original cost thereof to the company by the specified period in respect of such asset; or

(c) on any other basis approved by the Central Government which has the effect of writing off by way of depreciation ninety-five per cent of the original cost on the expiry of the specified period

(d) as regards any other depreciable asset for which no rate of depreciation has been laid down, on such basis as may be approved by the Central Government by any general order published in the Official Gazette or by any special order in any particular case.

Transfer of Profits to Reserve - Section 205(2A)

No dividend shall be declared or paid by a company for any financial year out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), except after the transfer to the reserves of the company of such percentage of its profits for that year, not exceeding ten per cent, as may be prescribed:

Provided that nothing in this sub-section shall be deemed to prohibit the voluntary transfer by a company of a higher percentage of its profits to the reserves in accordance with such rules as may be made by the Central Government in this behalf.

Unpaid dividend to be transferred to special dividend account – Section 205A.(1)

Where, after the commencement of the Companies (Amendment) Act, 1974, a dividend has been declared by a company but has not been paid, or claimed, within thirty days from the date of the declaration, to any shareholder entitled to the payment of the dividend, the company shall, within seven days from the date of expiry of the said period of thirty days, transfer the total amount of dividend which remains unpaid or unclaimed within the said period of thirty days, to a special account to be opened by the company in that behalf in any scheduled bank, to be called "Unpaid Dividend Account of .... Company Limited/ Company (Private) Limited"

Where, owing to inadequacy or absence of profits in any year, any company proposes to declare dividend out of the accumulated profits earned by the company in previous years and transferred by it to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be made by the Central Government in this behalf, and, where any such declaration is not in accordance with such rules, such declaration shall not be made except with the previous approval of the Central Government **Section 205A(3)**

No dividend shall be payable except in cash provided that nothing in this sub-section shall be deemed to prohibit the capitalization of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount, for the time being unpaid, on any shares held by the members of the company – **Section 205(3)**

Dividend not to be paid except to registered shareholders or to their order or to their bankers – **Section 206**

Right to dividend, rights shares, and bonus shares to be held in abeyance pending registration of transfer of shares – **Section 206A**

Penalty for failure to distribute dividends within thirty days – Section 207

Every director of the company shall, if he is knowingly a party to the default, will be punishable with simple imprisonment for a term which may extend to three years and shall also be liable to a fine of one thousand rupees for every day during which such default continues and the company shall be liable to pay simple interest at the rate of eighteen per cent per annum during the period for which such default continues.

Establishment of Investor Education and Protection Fund – Section 205C

There shall be credited to the Fund the following amounts, namely:-

(a) amounts in the unpaid dividend accounts of companies

(b) the application moneys received by companies for allotment of any securities and due for refund

(c) matured deposits with companies

(d) matured debentures with companies

(e) the interest accrued on the amounts referred to in clauses (a) to (d)

(f) grants and donations by the Central Government, State Governments, companies or any other institutions for the purposes of the Fund

(g) the interest or other income received out of the investments made from the Fund.

If the company has incurred any loss in any previous financial year or years, which falls or fall after the commencement of the Companies (Amendment) Act, 1960 then, the amount of the loss or an amount which is equal to the amount provided for depreciation for that year or those years whichever is less, shall be set off against the profits of the company for the year for which dividend is proposed to be declared or paid or against the profits of the company for any previous financial year or years, arrived at in both cases after providing for deprecation in accordance with the provisions of sub-section (2) or against both- **Section 205(b).**

Any dividend payable in cash may be paid by cheque or warrant sent through the post directed to the registered address of the shareholder entitled to the payment of the dividend, or in the case of joint shareholders, to the registered address of that one of the joint shareholders which is first named on the register of members, or to such person and to such address as the shareholder or the joint shareholders may in writing direct – **Section 205 (5) (b)**

Chapter No. 24

SOLE SELLING AND SOLE BUYING AGENTS

SOLE SELLING AND SOLE BUYING AGENTS

The expression "Sole Selling Agent" has not defined in the Companies Act.

Appointment of sole selling agents to require approval of company in general meeting – Section 294

No company shall, after the commencement of the Companies (Amendment) Act, 1960, appoint a sole selling agent for any area for a term exceeding five years at a time – **Section 294(1)**

If the company refuses or neglects to furnish any such information, the Central Government may appoint a suitable person to investigate and report on the terms and conditions of appointment of all the selling agents – **Section 294(6) (b)**

Penalty – Section 294(7)

If a company refuses or neglects___

(a) to furnish the information required by the Central Government under Section 294(5)(a) or 394(6)(a), or

(b) to produce to the person appointed under clause (b) of sub-section (5) or clause (b) of sub-section (6) any books and papers which are in its custody or power or otherwise to give to that person any assistance which it is reasonably able to give, the company and every officer of the company who is in default shall be punishable with fine which may extend to fifty thousand rupees and with a further fine of not less than five hundred rupees for every day after the first during which such refusal or neglect continues

Power of Central Government to prohibit the appointment of sole selling agents in certain cases. – Section 294AA

Where the Central Government is of opinion that the demand for goods of any category, to be specified by that Government, is substantially in excess of the production or supply of such goods and that the services of sole selling agents, will not be necessary to create a market for such goods, the Central Government may, by notification in the Official Gazette, declare that sole selling agents shall not be appointed by a company for the sale of such goods for such period as may be specified in the declaration.

(2) No company shall appoint sole selling agent of that company unless such appointment has been previously approved by the Central Government.

(3) 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.

(4) Where any appointment has been made of a sole selling agent by a company before the commencement of the Companies (Amendment) Act, 1974 and the appointment is such that it could not have been made except on the authority of a special resolution passed by the company and the approval of the Central Government, if sub-section (2), sub-section (3) and sub-section (8), were in force at the time of such appointment, the company shall obtain such authority and approval within six months from such commencement; and if such authority and approval are not so obtained, the appointment of the sole selling agent shall stand terminated on the expiry of six months from such commencement.

(5) 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.

Sole Buying or Purchasing Agents

The provisions of this section 294AA except those of sub-section (1), shall apply so far as may be to the appointment by a company of a sole agent for the buying or purchasing of goods on behalf of the company.

Prohibition of payment of compensation to sole selling agents for loss of office in certain cases – Section 294A

a) where the appointment of the sole selling agent ceases to be valid by virtue of sub-section (2A) of section 294;

(b) where the sole selling agent resigns his office in view of the reconstruction of the company or of its amalgamation with any other body corporate and is appointed as the sole selling agent of the reconstructed company or of the body corporate resulting from the amalgamation;

(c) where the sole selling agent resigns his office, otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(d) where the sole selling agent has been guilty of fraud or breach of trust in relation to, or of gross negligence.

(e) where the sole selling agent has instigated, or has taken part directly or indirectly in bringing about, the termination of the sole selling agency.

The compensation which may be paid by a company to its sole selling agent for loss of office shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term, or for three years whichever 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.

Chapter No. 25

PREVENTION OF OPPRESSION AND MANAGEMENT

PREVENTION OF OPPRESSION AND MANAGEMENT

Section 397 - Application to Tribunal for relief in cases of oppression.

Any member of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

If, on any application under sub-section (1) the Tribunal is of opinion

(a) that the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members; and

(b) that to wind up the company would unfairly prejudice such member or members, but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up;

the Tribunal may, with a view to bringing to an end the matters complained of, make such order as it thinks fit.

Section 398 - Application to Tribunal for relief in cases of mismanagement.

Any members of a company who complain that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or that a material change has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; may apply to the Tribunal for an order under this section, provided such members have a right so to apply in virtue of section 399.

(2) If, on any application under sub-section (1), the Tribunal is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the Tribunal may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Chapter No. 26

PRODUCER COMPANIES

PRODUCER COMPANIES

Section 581A - "Producer Company" means a body corporate having objects or activities specified in section 581B and registered as Producer Company under this Act

Section 581B - The objects of the Producer Company shall relate to all or any of the following matters, namely:

(a) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit:

(b) processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members;

(c) manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;

(d) providing education on the mutual assistance principles to its Members and others;

(e) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;

(f) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce;

(g) insurance of producers or their primary produce;

(h) promoting techniques of mutuality and mutual assistance;

(i) welfare measures or facilities for the benefit of Members as may be decided by the Board;

(j) any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) above;

(k) financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) which include extending of credit facilities or any other financial services to its Members.

Formation of Producer Company and its registration- Section 581C

Any ten or more individuals, each of them being a producer or any two or more producer institutions, or a combination of ten or more individuals and producer institutions, desirous of forming a Producer Company having its objects specified in section 581B and otherwise complying with the requirements of this Part and the provisions of this Act in respect of registration, may form an incorporated Company as a Producer Company under this Act.

On registration under sub-section (1), the Producer Company shall become a body corporate as if it is a private limited company.

Membership and voting rights of Members of Producer Company - Section 581D

In a case where the membership consists solely of individual members, the voting rights shall be based on a single vote for every Member, irrespective of his shareholding or patronage of the Producer Company.

Benefits to Members - Section 581E

Every Member shall initially receive only such value for the produce or products pooled and supplied as the Board of Producer Company may determine, and the withheld price may be disbursed later in cash or in kind or by allotment of equity shares, in proportion to the produce supplied to the Producer Company during the financial year to such extent and in such manner and subject to such conditions as may be decided by the Board.

Every Member shall, on the share capital contributed, receive only a limited return

The surplus if any, remaining after making provision for payment of limited return and reserves referred to in section 581ZI, may be disbursed as patronage bonus, amongst the Members, in proportion to their participation.

Memorandum of Producer Company - Section 581F

Articles of association of Producer Company - Section 581G

Amendment of memorandum of Producer Company - Section 581H

Amendment of articles of Producer Company - Section 581I

Option to inter-State co-operative societies to become Producer Companies - Section 581J

Number of directors - Section 581O - shall have at least five and not more than fifteen directors

The share capital of a Producer Company shall consist of equity shares only – **Section 581ZB(1)**

Penalty for contravention – Section 581ZM

Chapter No. 27
NATIONAL COMPANY LAW TRIBUNAL

NATIONAL COMPANY LAW TRIBUNAL

Dissolution of Company Law Board - 10FA.

(1) On and from the commencement of the Companies (Second Amendment) Act, 2002, the Board of Company Law Administration constituted under sub-section (1) of section 10E shall stand dissolved.

(2) On the dissolution of the Company Law Board, the persons appointed as Chairman, Vice-Chairman and members and officers and other employees of that Board and holding office as such immediately before such commencement shall vacate their respective offices and no such Chairman.

Vice-Chairman and member and officer and other employee shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service.

Provided that every officer or other employee, who has been, immediately before the dissolution of the Company Law Board, appointed on deputation basis to that Board shall, on such dissolution, stand reverted to his parent cadre, Ministry or Department, as the case may be:

Constitution of National Company Law Tribunal – Section 10FB

The Central Government shall, by notification in the Official Gazette, constitute a Tribunal to be known as the National Company Law Tribunal to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

Composition of Tribunal – Section 10FC

The Tribunal shall consist of a President and such number of judicial and Technical Members not exceeding sixty-two, as the Central Government deems fit, to be appointed by that Government, by notification in the

Official Gazette.

Qualifications for appointment of President and Members – Section 10FD

Term of office of President and Members - Section 10FE – Should hold office as such for a term of three years from the date on which he enters upon his office, but shall be eligible for re-appointment.

Appeal from order of Tribunal – Section 10FQ

(1) Any person aggrieved by an order or decision of the Tribunal may prefer an appeal to the Appellate Tribunal.

(2) No appeal shall lie to the Appellate Tribunal from an order or decision made by the Tribunal with the consent of parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order or decision made by the Tribunal is received by the appellant and it shall be in such form and accompanied by such fee as may be prescribed.

Constitution of Appellate Tribunal - 10FR.

(1) The Central Government shall, by notification in the Official Gazette, constitute with effect from such date as may be specified therein, an Appellate Tribunal to be called the "National Company Law Appellate Tribunal" consisting of a Chairperson and not more than two Members, to be appointed by that Government, for hearing appeals against the orders of the Tribunal under this Act.

(2) The Chairperson of the Appellate Tribunal shall be a person who has been a Judge of the Supreme Court or the Chief Justice of a High Court.

Appeal to Supreme Court – Section 10GF

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such decision or order:

Provided that 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 sixty days.

Chapter No. 28

CORPORATE RESTRUCTURING - MERGER AND AMALGAMATION

Corporate Restructuring

It is an expression that connotes a restructuring process undertaken by business enterprises for the purpose of bringing about a change for the better and to make the business competitive.

Need and scope of Corporate Restructuring:

Need:

- Orderly redirection of the firm's activities
- Deploying surplus cash from one business to finance profitable growth in another
- Exploiting inter- dependence among present or prospective businesses within the corporate portfolio.
- Risk reduction
- Development of core competence.

Scope:

Enhancing economy (cost reduction) and improving efficiency (profitably). When a company wants to grow or survive in a competitive environment, it needs to restructure itself and focus on its competitive advantage.

Merger - A Merger can be defined as the fusion or absorption of one company by another. It may be understood as an arrangement whereby the assets of two or more companies get transferred to, or come under the control of one company (which may or may not be one of the original two companies). The Shareholders of the company whose identity have been merged are then issued shares in the capital of the new merged company in accordance with Share Exchange Ratio.

Amalgamation - Amalgamation is an 'arrangement' or 'reconstruction'. Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another and as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or the amalgamated company.

Three Conditions for Merger to qualify as an amalgamation

- All the property of the amalgamating company (old) immediately before the amalgamation becomes the property of the amalgamated company (new) by virtue of amalgamation.
- All the liabilities of the amalgamating company immediately before the amalgamation become the property of the amalgamated company by virtue of amalgamation.
- Shareholders holding not less than three- fourth in value of the shares in the amalgamating company (other than shares already held therein immediately before the amalgamation by or by a nominee for the amalgamated company or its subsidiary) become shareholders of the amalgamated company by

virtue of the amalgamation.

Benefits achieved from Merger and Amalgamation

- Coming together to produce a new or enhanced effect.
- Reduction in the average cost of production and hence in the unit costs when output is increased, to enable to offer products at more competitive prices and thus to capture a larger market share.
- Reduction in production, administrative, selling, legal and professional expenses.
- Mutual benefit by reducing competition, saving costs by reducing overheads, capturing larger market, pooling technical or financial resources.
- Optimum Use of capacities and factors of production
- Tax advantage – Carry forward and setoff of losses of a loss – making amalgamating company against profits of a profit – making amalgamated company
- Financial constraints for expansion can be removed
- Diversification
- Advantage of Brand – Equity
- Survival
- Revival of Sick Company
- Substantial Growth.

Categories of Mergers

1.Cogeneric Merger – Within same industries and at the same level of economic activity

(a) Horizontal Merger – Merger between business competitors who are manufactures or distributors of the same type of products or who render similar or same type of services for profit. Horizontal Mergers result in the reduction in number of competing companies in an industry; increase the scope for economies of scale and elimination of duplicate facilities.

(b) Vertical Merger – It occurs which are complementary to each other. In this merger the two companies merge and control the production and marketing of the same product.

2. Conglomerate Merger – This type of merger involves coming together of two or more companies engaged in different industries and/or services. Their businesses lack commonalty either in their end product, or in the rendering of any specific type of services to the society.

Methods of Merger/Amalgamation

- Merger under a scheme of compromise or arrangement
- Merger by purchase of shares of one company by another

- Merger in public interest under the orders of Central Government.
- Merger through holding company
- Merger for revival and rehabilitation.

Legal aspect of Merger/Amalgamation

Companies Act, 1956 has provided for a set of provisions specially dealing with amalgamation of companies, to facilitate the transactions. The statutory provisions relating to Merger and Amalgamation are contained in Sections 390 to 396A.

Section 390 interprets the expressions “company”, "arrangement" and unsecured creditors.

Section 391 lays down in detail Power to compromise or make arrangements with creditors and members.

Section 392 explains Power of Tribunal to enforce compromise and arrangement.

Section 393 lays down Information as to compromises or arrangement that is to be sent with every notice calling a meeting of creditors and members.

Section 394 explains Provisions for facilitating reconstruction and amalgamation of companies.

Section 394A lays down Notice to be given to Central Government for applications under sections 391 and 394.

Section 395 depicts Power and duty to acquire shares of shareholders dissenting from scheme or contract approved by majority.

Section 396 lays down Power of Central Government to provide for amalgamation of companies in national interest.

Section 396A lays down Preservation of books and papers of amalgamated company.

Approvals in respect of amalgamation

1. Approval of Board of Directors
2. Approval of Shareholders – Section 391(1)
3. Approval of Stock Exchange
4. Approval of Financial Institutions
5. Approval from Land Holders – If the land on which the factory is situated is the lease hold land and the terms of lease deed so specifies, the approval from the lessor will be needed.

6. Approval of High Court
7. Approval of Reserve Bank of India – where the scheme of amalgamation envisages issue of shares to NRI.

Methods of accounting for amalgamation

1. The pooling of Interest Method - the assets, liabilities and reserves of the transferor company are recorded by the transferee companyat their existing carrying amounts. If, at the time of the amalgamation, the transferor and the transferee companies have conflicting accounting policies, a uniform set of accounting policies is adopted following the amalgamation. The effects on the financial statements of any changes in accounting policies are reported in accordance with Accounting Standard (AS) 5, Net Profit or Loss for the Period, Prior Period Items and Changes in Accounting Policies.

2. The Purchase Method - the transferee company accounts for the amalgamation either by incorporating the assets and liabilities at their existing carrying amounts or by allocating the consideration to individual identifiable assets and liabilities of the transferor company on the basis of their fair values at the date of amalgamation. The identifiable assets and liabilities may include assets and liabilities not recorded in the financial statements of the transferor company. Where assets and liabilities are restated on the basis of their fairvalues, the determination of fair values may be influenced by the intentions of the transferee company.

Treatment of Balance of Profit and Loss Account on Amalgamation

In the case of an ‘amalgamation in the nature of merger’, the balance of the Profit and Loss Account appearing in the financial statements of the transferor company is aggregated with the corresponding balance appearing in the financial statements of the transferee company. Alternatively, it is transferred to the General Reserve, if any.

In the case of an ‘amalgamation in the nature of purchase’, the balance

of the Profit and Loss Account appearing in the financial statements of the transferor company, whether debit or credit, loses its identity

Disclosure Requirements on Amalgamation

The following disclosures are considered appropriate in the first financial statements following the amalgamation:

(a) names and general nature of business of the amalgamating companies

(b) effective date of amalgamation for accounting purposes

(c) the method of accounting used to reflect the amalgamation

(d) particulars of the scheme sanctioned under a statute.

For amalgamations accounted for under the pooling of interests method the following additional disclosures:

(a) description and number of shares issued, together with the percentage of each company's equity shares exchanged to effect the amalgamation

(b) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof.

For amalgamations accounted for under the purchase method the following additional disclosures:

(a) consideration for the amalgamation and a description of the consideration paid or contingently payable

(b) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof including the period of amortisation of any goodwill arising on amalgamation.

Treatment of Goodwill Arising on Amalgamation

Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortized to income on a systematic basis over its useful life. Due to the nature of goodwill, it is frequently difficult to estimate its useful life with reasonable certainty. Such estimation is, therefore, made on a prudent basis. Accordingly, it is considered appropriate to amortize goodwill over a period not exceeding five years unless a somewhat longer period can be justified.

Chapter No. 29

CORPORATE RESTRUCTURING - FUNDING OF MERGER AND TAKEOVERS

Benefit of merger

If a company cannot grow internally due to lack of physical and managerial resources, it can grow externally by mergers and acquisition of companies engaged in same or similar industry in a convenient and inexpensive manner.

Benefit of merger = V = V (AB) – V (A) - V (B)

Where,

V= Present value

A& B are two firms willing to continue to form a new company called C

i.e. Benefit of merger = Total present value of merged firms Minus Sum of their value if they do not merge.

The combined value of the merged companies should be more than the value obtained by mere addition of the present values of each individual company.

Various types of Financial instruments used for funding

1.Funding through Equity Shares – Equity Share Capital can be considered as the permanent capital of a company. Equity needs no servicing as a company is not required to pay to its equity shareholders any fixed amount return in the form of interest which would be the case if the company were to borrow issue of bonds or other debt instruments. In issue of Equity shares, the commitment will be to declare dividends consistently if profit permits.

2.Funding through Preferential Allotment – Private placement in the form of a preferential allotment of shares is possible and such issues could be organized in a much easier way rather than an issue of shares to public.

3.**Funding through Merger –** The most common method of acquisition is a merger where the transferee company issues shares to the shareholders of Transferor Company. A merger needs no deployment of additional funds, either from internal accruals or from outside agencies like banks, financial institutions.

4.Funding through Preference Shares – Funding through preference share unlike Equity shares issued as purchase consideration to shareholders of merging company involves the payment of fixed preference dividend at a fixed rate. It is necessary to assure that the merged company or Target Company would be able to yield sufficient profits for covering discharging the additional liability in respect of payment of preference dividend.

5.**Funding through Options or Securities with Differential Rights -** Companies can restructure its capital through derivatives and options as a means of raising corporate funds and shares and quasi – equity instruments with different rights as to dividend and/or voting.

Company may also issue non-voting shares with differential voting rights which gives the companies an additional source of fund without interest cost and without an obligation to repay

6.Funding through Swaps or Stock to stock mergers – In Stock swaps the holders of the target company's stock receive shares of the acquiring company's stock. A merger arbitrage specialist will sell the acquiring company's stock short, and will purchase a long position in the target company, using the same ratio as that of the proposed transaction.

7.Funding through Employees Stock Option Scheme – This option may be used along with other options. ESOP Scheme is a voluntary scheme on the part of a company to encourage its employees to have a higher participation in the company. Stock option is the right but not an obligation granted to an employee. Only bonafide employees of the company are eligible for shares under scheme. The option granted to any employee is not transferable to any other person.

8.**Funding through External Commercial Borrowings –** ECB refers to commercial loans in the form of bank loans, buyers' credit, supplier' credit, securitized instrument such as Floating Rate Notes and Fixed RATYE Bonds etc. availed from non-resident lenders .

ECB under automatic route is permitted for investment in real sector, industrial sector including small and medium enterprises and specially infrastructure sector.

8.Funding through Indian Deposit Receipts – Deposit receipts represent equity shares. An Indian company may be promoted by foreign nationals. Such companies cannot issue shares in Indian Market but could only issue deposit receipts which will be known as Indian Deposit Receipts. A Depository receipt is a negotiable certificate that usually represents a company's publicly traded equity or debt.

9.Funding through Global Depository Receipts (GDRs) – It is a dollar denominated instrument tradable on a stock exchange in Europe or U.SA.

10.Funding through American Depository Receipts (ADRs) – It represents a non - US company's publicly traded shares or debt. ADR's trade freely like any other US security as they are priced and quoted in US dollars. This instrument permits the foreign investor to access non- US market for investment.

11.Funding through Financial Institutions and banks – Funding through banks has advantage as the period of such fund is definite which is fixed at the time of taking such loans which assures the Board of the company about continued availability of such funds for the pre- determined period.

12.Funding through Rehabilitation Finance – Sick Industries get attached through BIFR with healthy units with financial package to the acquirer from the financial institutions and the banks having financial stakes in the acquire company to ensure rehabilitation and recovery of dues from the acquirer.

13.Funding through Leveraged and Management Buyouts – Options available for the revival of a 'sick company'. One is buyout of such a company by its employees. It has distinct option over Government intervention and other conventional remedies.

Leveraged Buyout is defined as the acquisition by a small group of investors, financed largely by borrowing. The buying group forms a shell company to act as the legal entity making the acquisition. it is different from ordinary acquisition as a large fraction of purchase price is debt financed and the shares of Leveraged Buyout are not traded on open market.

Chapter No. 30

CORPORATE RESTRUCTURING - DE-MERGER

DEMERGER

Demerger is a form of corporate restructuring in which the entity's business operations are segregated into one or more components. It is the converse of a merger or acquisition.

A demerger can take place through a spin out by distributed or transferring the shares in a subsidiary holding the business to company shareholders carrying out the demerger. The demerger can also occur by transferring the relevant business to a new company or business to which then that company's shareholders are issued shares of new company.

Demergers can be undertaken for various business and non-business reasons, such as government intervention, by way of anti-trust law, or through decartelization.

A **spin-out**, also known as a **spin-off** or a **starburst**, refers to a type of corporate action where a company "splits off" sections of itself as a separate business

The common definition of spin-out is when a division of a company or organization becomes an independent business. The "spin-out" company takes assets, intellectual property, technology and/or existing products from the parent organization. Shareholders of the parent company receive equivalent shares in the new company in order to compensate for the loss of equity in the original stocks; thus, at the moment of spin-off, the ownership of the original and spun-off companies are identical. However, shareholders may then buy and sell stocks from either company independently; this potentially makes investment in the companies more attractive, as potential share purchasers can invest in only the portion of the business they think will have the most growth.

The companies Act, 1956 does not contain the concept of ‘De – merger’ as such , but it does indirectly recognize it in:

(a) Section 391/394 (as a scheme of compromise, scheme or arrangements

(b) Section 293(1)(a) (sell, lease or otherwise dispose of the whole, or substantially the whole, of the undertaking of the company, or where the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking)

Modes of Demerger

1. Demerger by agreement – It may be effected by agreement where under the demerged company spins off its specific undertaking to a resulting company, formed with another names in such a manner that all the property and all the liabilities of the undertaking, being transferred by the demerged company immediately before the demerger, becomes the property and liabilities of the resulting company by virtue of demerger. The resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis.

2. Demerger under scheme of arrangement – It requires the approval by Tribunal **u/s 391** of the Companies Act.

3. Demerger and Voluntary Winding up – A Company, which has split into several companies after division, can be wound up voluntarily pursuant to Section 484 to 498 of the Companies Act. Where a the transferor company is proposed to be, or is in course of being wound-up altogether voluntarily the liquidator of the transferor company may, with the sanction of a special resolution of that company conferring on the liquidator either a general authority or an authority in respect of any particular arrangement receive, by way of compensation or part compensation for the transfer or sale, shares, policies, or other like interest in the transferee company, for distribution among the members of the transferor company or enter into any other arrangement whereby the members of the transferor company may, in lieu of receiving cash, shares, policies, or other like interests or in addition thereto, participate in the profits of, or receive any other benefit from, the transferee company.

Demerger – Importance of Appointed Date

Appointed Date means the date for identification of assets and liabilities of the existing company for transfer to new company. The 'Appointed Date' has been taken for identification and qualification of the assets and liabilities of the existing company and new company consequent upon proposed spin off. This identification is done on the basis of the audited balance sheet of the existing company for the financial year.

Appointed date is different from 'Effective Date' which was the date on which all consents and approvals required under the scheme were to be obtained and transfer effected.

Steps to be taken for Demerger

1. Preparation of Scheme of Demerger
2. Application to Tribunal for direction to hold meetings of members/ creditors.(Section 391[1] of Companies Act)
3. Obtaining Tribunal's order for holding meetings of members/ creditors.
4. Notice of the meetings of members/ creditors
5. Holding meeting of members and creditors
6. Reporting the result of the meeting by the Chairman to Tribunal.
7. Petition to the Tribunal for sanctioning the scheme of demerger.
8. Obtaining Order of the Tribunal sanctioning the scheme
9. Tribunal's order on petition sanctioning the scheme of demerger – Section 394 of Companies Act

Tax reliefs to Demerged Company

1. Capital gains tax not attracted – According to **Section 47(vib) of the Income Tax, 1961** where there is any transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company shall not be regarded as a transfer for the purposes of capital gains.

2. Tax relief to a foreign demerged company - According to Section 47(vic) of the Income Tax, 1961 where there is any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerged foreign company to the resulting foreign company, if—

(a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and

(b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated :

Provided that the provisions of sections 391 to 394 of the Companies Act, 1956 shall not apply in case of demergers referred to in this clause, shall not be regarded as a transfer for the purposes of capital gains.

3. Tax relief to the Shareholders of the demerged company - According to Section 47(vid) of the Income Tax, 1961 when there is any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking shall not be regarded as a transfer for the purposes of capital gains.

$$\text{Cost of acquisition of Shares in resulting Company} = \frac{\text{Cost of acquisition of shares in demerged company} \times \text{Net Book Value of Assets transfered in demerger}}{\text{Net worth of demerged company before demerger.}}$$

Tax relief to resulting company

The resulting company is eligible for tax relief if

- The demerged satisfies all the conditions laid down in Section 2(19AA) of the Income Tax ACT, 1961
- The resulting company is an Indian company.

1.Depreciation on assets transferred to resulting company – **Section 32(1) of the Income Tax, 1961** provides that in respect of depreciation of—

(i) buildings, machinery, plant or furniture, being tangible assets;

(ii) know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed;

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed

The **fifth proviso to clause (ii) of Section 32(1) of the Income Tax, 1961** the aggregate deduction, in respect of depreciation allowable to the amalgamating company and the amalgamated company in the case of amalgamation, or to the demerged company and the resulting company in the case of demerger, as the case may be, shall not exceed in any previous year the deduction calculated at the prescribed rates as if the succession or the amalgamation or the demerger, as the case may be, had not taken place, and such deduction shall be apportioned between the predecessor and the successor, or the amalgamating company and the amalgamated company, or the demerged company and the resulting company, as the case may be, in the ratio of the number of days for which the assets were used by them.

2. Expenditure on acquisition of patent rights and copyrights **– Section 35A (1) of the Income Tax, 1961** provides in respect of any expenditure of a capital nature incurred after the 28th day of February, 1966 but before the 1st day of April, 1998**,** on the acquisition of patent rights or used for the purposes of the business, there shall, subject to and in accordance with the provisions of this section, be allowed for each of the relevant previous years, a deduction equal to the appropriate fraction of the amount of such expenditure.

Section 35A (7) Where in a scheme of demerger, the demerged company sells or otherwise transfers the rights to the resulting company (being an Indian company),-

(i) the provisions of sub-sections (3) and (4) **Section 35A** shall not apply in the case of the demerged company; and

(ii) the provisions of this section shall, as far as may be, apply to the resulting company as they would have applied to the demerged company, if the latter had not sold or otherwise transferred the rights.

However, if such expenditure is incurred by the demerged company 31.03.98, deduction under Section 35A is not allowed, as such expenditure will be eligible for depreciation.

3. Expenditure on Know –how – **Section 35AB(3) of the Income Tax, 1961** provides where there is a transfer of an undertaking under a scheme of amalgamation or demerger and the amalgamating or the demerged company is entitled to a deduction under this section, then, the amalgamated company or the resulting company, as the case may be, shall be entitled to claim deduction under this section in respect of such undertaking to the same extent and in respect of the residual period as it would have been allowable to the amalgamating company or the demerged company, as the case may be, had such amalgamation or demerger not taken place.

4. Expenditure for obtaining licence to operate telecommunication services - **Section 35ABB(7) of the Income Tax, 1961** provides where, in a scheme of demerger, the demerged company sells or otherwise transfers the licence to the resulting company (being an Indian company),-

(i) the provisions of sub-sections (2), (3) and (4) of **Section 35ABB** shall not apply in the case of the demerged company; and

(ii) the provisions of this section shall, as far as may be, apply to the resulting company as they would have applied to the demerged company if the latter had not transferred the licence

5. Amortization of certain preliminary expenses - **Section 35D(5A) of the Income Tax, 1961** provides that where the undertaking of an India Indian company which is entitled to the deduction under sub-section (1) **Section 35D** of is transferred, before the expiry of the period specified in sub-section (1), to another company in a scheme of demerger

(i) no deduction shall be admissible under sub-section (1) in the case of the demerged company for the previous year in which the demerger takes place; and

(ii) the provisions of this section shall, as far as may be, apply to the resulting company, as they would have applied to the demerged company, if the

demerger had not taken place

6. Amortization of expenditure in case of amalgamation or demerger - **Section 35DD(1) of the Income Tax, 1961** provides that where an assessee, being an Indian company, incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.

7. Computation of actual cost to resulting company of capital assets transferred **– Explanation 7A to Sub- section (1) of Section 43 of the Income Tax, 1961** Where, in a demerger, any capital asset is transferred by the demerged company to the resulting company and the resulting company is an Indian company, the actual cost of the transferred capital asset to the resulting company shall be taken to be the same as it would have been if the demerged company had continued to hold the capital asset for the purpose of its own business.

However, such actual cost shall not exceed the written down value of such capital asset in the hands of demerged company.

8. Written down value of assets transferred to resulting company - **Explanation 2A & 2B to Clause (ii) of Sub- section (6) of Section 43 of the Income Tax, 1961**

Explanation 2A.—Where in any previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then, notwithstanding anything contained in clause (*1*), the written down value of the block of assets of the demerged company for the immediately preceding previous year shall be reduced by the written down value of the assets transferred to the resulting company pursuant to the demerger.

Explanation 2B—Where in a previous year, any asset forming part of a block of assets is transferred by a demerged company to the resulting company, then, notwithstanding anything contained in clause (1), the written down value of the block of assets in the case of the resulting company shall be the written down value of the transferred assets of the demerged company immediately before the demerger.

9. Carry forward and set off of accumulated loss and unabsorbed depreciation allowance - **Section 72A(4) of the Income Tax, 1961**

Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(*a*) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(*b*) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

10. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc - **Section 80-IA of the Income Tax, 1961** - Where the gross total income of an assessee includes any profits and gains derived by eligible business, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction of an amount equal to hundred per cent of the profits and gains derived from such business for ten consecutive assessment years.

Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger—

(*a*) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

(*b*) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

11. Tax on income from bonds or Global Depository Receipts purchased in foreign currency or capital gains arising from their transfer - **Section 115AC(5) of the Income Tax, 1961** provides that where the assessee acquired Global Depository Receipts or bonds in an amalgamated or resulting company by virtue of his holding Global Depository Receipts or bonds in the amalgamating or demerged company, as the case may be, in accordance with the provisions of sub-section (1) **Section 115AC of the Income Tax, 1961** of , the provisions of that sub-section shall apply to such Global Depository Receipts or bonds.

Chapter No. 31

CORPORATE RESTRUCTURING - RECONSTRUCTION & REVERSE MERGER

RECONSTRUCTION

Provisions for facilitating reconstruction and amalgamation of companies – Section 394 (1) of Companies Act.

Where an application is made to the Tribunal under Section 391 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the amalgamation of any two or more companies the Tribunal may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation shall be fully and effectively carried out.

“Reconstruction” involves the winding up of an existing company and the transfer of its assets and liabilities to a new company formed for the purpose of taking over the business and undertaking of the existing company. Shareholders in the existing company become shareholders in the new company. The business undertaking and shareholders of the new company are substantially the same as those of the old company.

The company should ensure that its Memorandum of Associated contains a clause authorizing reconstruction.

REVERSE MERGER

In a reverse merger, a healthy company merges with a financially weak company. The main reason for this type of reverse merger is the tax savings under the Income- Tax, 1961. **Section 72A of the Income Tax Act** ensures the tax relief, which becomes attractive for such reverse mergers, since the healthy and profitable company can take advantage of the carry forward losses/of other company. The healthy units lose its name and surviving sick company retains its name.

Salient features of Reverse mergers under Section 72A of the Income Tax Act

1. Amalgamation should be between the companies and none of them should be a firm of partners or sole- proprietor.
2. The tax relief under Section 72A would not be made available to companies engaged in trading activities or services.
3. The company should make an application to the "specified authority" for requisite recommendation of the case to the Central Government for granting or allowing the relief.
4. Specified Authority has to be satisfied of the eligibility of the company for the relief under Section 72 of the Income Tax Act.
5. Carry forward of unabsorbed depreciation the conditions of Section 32 should not have been violated.
6. Accumulated loss should arise from "Profits and Gains from business or Profession" and not be loss under the head" Capital Gains" or " Speculation'
7. After amalgamation the "sick" company shall survive and the other income generating company shall extinct.
8. One of the merger partner should be financially unviable and have accumulated losses to qualify for the merger and the other merger partner should be profit earning so that tax relief to the maximum extent could be had.
9. Amalgamation should be in the public interest and should not defeat basic tenets of law and must safeguard the interest of employees, consumers, creditors, and shareholders apart from promoters of the company through revival of company.

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Chapter No. 32

CORPORATE RESTRUCTURING – VALUATION OF SHARES, BUSINESS AND BRANDS

Valuation is an exercise to assess the worth of an enterprise or a property. In a merger or amalgamation or demerger or acquisition, valuation is certainly needed. It is essential to fix the value of the shares to be exchanged in a merger or the consideration payable for an acquisition.

Valuation Methods

1. Valuation based on assets - This valuation method is based on the simple assumption that adding the value of all the assets of the company and subtracting the liabilities, leaving a net asset valuation, can best determine the value of a business.

If this method is employed, the fixed assets of all the amalgamating companies should preferably be valued on a going concern basis.

An asset based valuation can be further separated into four approaches:

(a) Book Value – The tangible book value of a company is obtained from the balance sheet by taking the adjusted historical cost of the company's assets and subtracting the liabilities, intangible assets (goodwill) are excluded in the calculation.

Using book value does not provide a true indication of a company's value, nor does it take into account the cash flow that can be generated by the company's assets.

(b) Replacement Cost - Replacement Cost reflects the expenditures required to replicate the operations of the company. Estimating replacement cost is essentially a make or buy decision.

(c) Appraised Value – The difference between the appraised value of assets, and the appraised value of liabilities is the net appraised value of the firm. This approach is commonly used in a liquidation analysis because it reflects the divestiture of the underlying assets rather than the ongoing operations of the firm.

(d) Excess Earnings – In order to obtain the value of business using this method, a premium is added to the appraised value of net assets. This premium is calculated by comparing the earnings of a business before a sale and the earnings after the sale, with the difference referred to as excess earrings.

2. Open market Valuation – Open market value refers to a price of the assets of the company which could be fetched or realized by a negotiating sale provided there is a willing seller, property is freely exposed to market, sale could materialize within a reasonable period, orders will remain static throughout this period and without interruption from any purchaser giving an extraordinary higher bid. Each asset of the company is normally valued on the basis of liquidation as resale item rather than on a going concern basis.

3. Valuation based on earnings – Valuation based on earnings based on the rate of return on capital employed is a more modern method. From the last earnings declared by a company, items such as tax, preference dividend, if any, are deducted and net earnings are taken.

An alternate to this method is the use of Price earning (P/E) ratio instead of the rate of return. The P/E ratio of a listed company can be calculated as:

$$P/E = \frac{P}{EPS}$$

Where P is the current price of the shares

The Share price can thus be determined as:

$$P = EPS \times P/E \text{ ratio}$$

4. Merger negotiations: Significance of P/E ratio and EPS analysis – In practice, investors attach a lot of importance to the earnings per share (EPS) and the price – earnings (P/E) ratio. The product of EPS and P/E ratio is the market price per share.

Exchange Ratio – The current market value of the acquiring and the acquired firms may be taken as the basis for exchange of shares.

$$SER = \frac{Pb}{Pa}$$

SER = Share Exchange Ratio

Pb = Share price of the acquired firm (seller)

Pa = Share price of the acquiring firm (purchaser)

5. Discounted Cash Flow – It consists of projecting future cash flows, deriving a discount rate and applying this discount rate to the future cash flows and terminal value. Discounted Cash Flow analysis is to project future operating cash flows over projected holding periods. These projections are generally done before debt (but after taxes) to obtain an accurate indication of future free cash flow, without making any assumptions about the company leverage.

6. Valuation based on Super Profit - This approach is based on concept of the company as a going concern. The super profits are calculated as the difference between maintainable future profits and the return on net assets.

Value can be calculated using the following formula:

$$V = T + P - rT$$

Where:

T= Value of net tangible assets

P= Maintainable future profits

r = Normal return expected on assets

7. Discounted cash flow valuation method – This method is based upon expected future cash flows and discount rates.

The DCF model is applied in the following steps

1. Estimate the future cash flows of the target based on the assumption for its post-acquisition management by the bidder over the forecast horizon.

2. Estimate the terminal value of target at forecast horizon.

3. Estimate the cost of capital appropriated for the target.

4. Discount the estimated cash flows to give a value of the target.

5. Add other cash inflows from sources such as asset disposals or business divestment

6. Subtract debt and other expenses, such as tax on gains from disposals and divestment, and acquisition costs, to give a value for the equity of the target.

7. Compare the estimated equity value for the target with its pre – acquisition stand – alone value to determine the added value from the acquisition. Decide how much of this added value should be given away to target shareholders as control premium.

Target cash flows are generally forecast for the next five to ten years. Whatever the forecast horizon, the terminal value of the target at the end of that period based on free cash flows thereafter also needs to be forecast. The level perpetual cash flows are then capitalized at the cost of capital to yield the terminal value.

The Cost of Capital is the weighted average cost of capital (WACC), estimated from the target's pre – acquisition costs of equity and debt.

$$WACC = K^e\ E/V + (1-T^{C)}\ K^d\ D/V + K^p\ P/V$$

Where:

K^e = Cost of Equity

K^d = Cost of Debt

$K^{p\ =}$ Cost of Preference Shares

E = Market value of Equity

D= Market value of dept.

P = Market value of Preference Shares

T^C = Corporate Tax rate

V = E+D+P, the value of firm.

8. Valuation by team of experts – Valuation is an important aspect in merger and acquisition and it should be done by a team of experts keeping into consideration the basic objective of acquisition. Team should comprise of financial experts, accounting specialists technical and legal experts who should look into aspects, of valuation from different angles.

Nevertheless, the experts must take following into consideration for determining exchange ratio:

A. Market Price Of Shares – If the offeree and offeror are both listed companies, the stock exchange prices of the shares of both the companies should be taken into consideration which existed before commencement of negotiations or announcement of the takeover bid to avoid distortions in the market price which are likely to be created by interested parties in pushing up the price of the shares of the offeror to get better deal and vice versa.

B. Dividend Payout Ratio (DPR) – The dividend paid in immediately past by the two companies is important as the shareholders want continuity of dividend income.

$$DPR = \frac{\text{Dividend}}{\text{Earnings}}$$

C. Price Earnings Ratio (PER) – Price earing ratios of both the offeror and offeree companies be compared to judge relative growth prospects.

$$PER = \frac{\text{PRICE}}{\text{Earnings}}$$

D. Debt Equity Ratio (DER) – Company with low gearing offers positive factor to investors for security and stability rather growth potential with a geared company having capacity to expand equity base.

$$DER = \frac{\text{Debt}}{\text{Equity}}$$

E. Net Assets Value (NAV) – It is compared of the two companies as the company with lower NAV has greater chances of being pushed into liquidation.

$$\text{NAV} = \frac{\text{Net assets (Total assets – Liability \& Preferred claims}}{\text{No. of Shares}}$$

9. Fair Value of Shares – The fair value of shares is arrived at after consideration of different modes of valuation and diverse factors. There is no mathematically accurate formula of valuation. An element of guesswork is involved in valuation. The factors kept in mind in the valuation of shares.

(a) Capital Cover

(b) Yield

(c) Earning capacity

(d) Marketability

For arriving at the fair value of shares, three well – known methods are applied:

(1) The manageable profit basis method(the earning per share method)

(2) The net worth method or breakup value method

(3) The market value method.

Fair Value of Shares = Value of net assets method + Value of yield method

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10. Free Cash Flow (FCF) – It is a financial tool. It will be close to the profits after tax without taking into account depreciation. FCF of a company is determined by the after tax operating cash flows minus interest paid/ payable duly taking into account the savings arising out of tax paid/ payable on interest and after providing for certain fixed commitments such as preference shares dividends, redemption commitments and investments in plant and machinery required to maintain cash flows.

Valuation of Brands –

Brands is defined as a word, mark, symbol, design, term or a combination of these, both visual and oral, used for the purpose of identification of same product or services.

It is a hallmark of a shrewd businessman to commence his business with a roadmap of his plans.

The Importance of Brand Valuation

Brands/ marks are a class of assets like human resource, knowledge, etc. They create a value premium for the goods and services. Therefore, without the brand/mark, the goods/ services may be address less. There is no prescribed manner to value a brand. But all knows that brands connect markets with products and products and thereby they create value.

Brands do not command any value unless they are able to bring cash flows to the Company that has adopted the same. With the incremental cash flows increasing, the value of brand increases proportionally.

In order to sustain the valuation of the brand, there must be a constant attempt from the company to protect the value of the Brand. Brand has to be associated with good quality goods and services, they require proper show casing and servicing and they should remain active in appropriate markets.

Chapter No. 33

FINANCIAL RESTRUCTURING - REDUCTION OF SHARE CAPITAL

Financial structure of a company comprises of:

1. Paid up equity and preference share capital
2. Reserves
3. Borrowings in the form of

- Long term loans from financial institutions
- Working capital from banks including loans through commercial papers
- Debentures
- Bonds
- Credits from suppliers
- Trade deposits
- Public Deposits
- Deposits and loans from directors, their relatives and business associates
- Deposits from shareholders
- GDRs, ADRs, FCCCBs
- Funds raised through any other local instrument.

Need for financial restructuring

1. Necessity for injecting more working capital to meet the market demand for the company's products or services.
2. When the company is unable to meet its current commitments
3. When the company is unable to obtain further credit from suppliers of raw materials, consumable stores, brought – out components etc. and from other parties like those doing job work for the company.
4. When the company is unable to utilize its full production capacity for lack of liquid funds.

Restructuring of under – capitalized company

An undercapitalized company may restructure its capital by taking one or more of the following corrective steps**:**

1. Injecting more capital whenever required either by resorting to rights issue/ preferential issue or additional public issue.
2. Resorting to additional borrowings from financial institutions, banks, other companies.
3. Issuing debentures
4. Inviting and accepting fixed deposits from directors, their relatives, business associates and public.

Restructuring of over – capitalized company

An over capitalized company may restructure its capital by:

1. Buy back of own shares.
2. Paying back surplus share capital to shareholders
3. Repaying loans to financial institutions, banks, etc.
4. Repaying fixed deposits to public
5. Redeeming its debentures, bonds, etc.

Reorganization of capital

In accordance with Section 390(b) of the Companies Act, the expression "arrangement" includes a reorganization of the share capital of the company by the consolidation of shares of different classes, or by the division of shares into shares of different classes or, by both those methods.

Reduction of Share Capital

It means reduction of issued, subscribed and paid – up capital of the company.

Section 100 of Companies Act, provides for a company limited by shares or a company limited by guarantee and having a share capital subject to confirmation by the Tribunal, may, if so authorized by its articles, by special resolution, reduce its share capital in any way, and in particular and without prejudice to the generality of the foregoing power, may

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid-up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay off any paid-up share capital which is in excess of the wants of the company; and may, if and so far as is necessary alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Reduction of Share Capital without sanction of the Tribunal:

1. Surrender of Shares – It means the surrender of shares already issued to the company by the registered holder of shares. Where shares are surrendered to the company, whether by way of settlement of a dispute or for any other reason, it will have the same effect as a transfer in favour of the company and the amount to a reduction of capital.

The Companies Act contains no provision for Surrender of Shares. Thus surrender of shares is valid only when Articles of Association provide for the same and:

A. Where forfeiture of such shares is justified

B. When shares are surrendered in exchange for new shares of same nominal value.

2. Forfeiture of Shares – A company may if authorized by its articles, forfeit shares for non-payment of calls and the same will not require confirmation of the court. Where power is given in the Articles, it must be exercised strictly in accordance with the regulations regarding notice, procedure and manner stated therein; otherwise the forfeiture will be void. Forfeiture will be affected by means of Board resolution.

3. Diminution of Capital – Where the company cancels shares which have not been taken or agreed to be taken by any person.[Section 94(1)(3)]

4. Redemption of redeemable preference shares

5. Purchase of shares of a member by the company under Section 402

6. Buy back of its own shares under **Section 77A of companies Act.**

Reduction of Capital when the Company is defunct

The Registrar of Companies has been empowered under Section 560 of Companies Act to strike off the name of defunct company from its register where he has reasonable cause to believe that a company is not carrying on business or in operation.

Reduction of Capital of Unlimited Company

An unlimited company to which Section 100 of Companies Act does not apply can reduce its capital in any manner that its MOA and AOA allow. It is not governed by Section 94 and 100 of Companies Act.

Creditors' Right to obtain to Reduction

The creditors having a debt or claim admissible in winding up are entitled to object. To enable them to do so, the Court will settle a list of creditors entitled to object. If any creditor objects, then either his consent to the proposed reduction should be obtained or he should be paid off or his payment be secured. The Tribunal, in deciding whether or not to confirm the reduction will take into consideration the minority shareholders and creditors.(Section 101 of Companies Act)

Confirmation and Registration of Reduction

As per Section 102 of the Companies Act the Tribunal, if satisfied with respect to every creditor of the company who under Section 101 is entitled to object to the reduction, that either his consent to the reduction has been obtained or his debt or claim has been discharged, or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

Where the Tribunal makes any such order, it may if for any special reason it thinks proper so to do, make an order directing that the company shall, during such period commencing on, or at any time after, the date of the order, as is specified in the order, add to its name as the last words thereof the words "and reduced"

When a Diminution of Share capital is not a reduction of Share capital?

1. Where the company cancels shares which have not been taken or agreed to be taken by any person **[Section 94(1)(e)]**
2. Where the redeemable preference shares are redeem – **Section 80**
3. Where any shares are forfeited for non-payments of calls and such forfeiture amounts to reduction of capital
4. Where the company buys – back its own shares under **Section 77A**

Liability of Members in respect of Reduction Share capital

On the reduction of Share Capital, the extent of the liability of any past or present member or any call or contribution shall not exceed the difference between the amount already paid on the share, or the reduced amount, if any, which is deemed to have been paid thereon by the member, and the amount of shares fixed by the scheme of the reduction.

Chapter No. 34
CORPORATE RESTRUCTURING – TAKEOVERS

TAKEOVERS

When an "acquirer" takes over the control of the "target company", it is termed as takeover. Takeovers usually take place when shares are acquired or purchased from the shareholders of accompany at a specified price to be extent of at least controlling interest in order to gain control of that company. Takeover implies acquisition of control of accompany, which is already registered, through the purchase or exchange of shares. Those companies whose shares are under quoted on the stock market are under quoted on the stock market are under a constant threat of takeover.

Kinds of Takeover

1.Friendly takeovers

Before a bidder makes an offer for another company, it usually first informs the company's board of directors. In an ideal world, if the board feels that accepting the offer serves shareholders better than rejecting it, it recommends the offer be accepted by the shareholders.

In a private company, because the shareholders and the board are usually the same people or closely connected with one another, private acquisitions are usually friendly. If the shareholders agree to sell the company, then the board is usually of the same mind or sufficiently under the orders of the equity shareholders to cooperate with the bidder.

2.Hostile takeovers

A hostile takeover allows a suitor to take over a target company whose management is unwilling to agree to a merger or takeover. A takeover is considered "hostile" if the target company's board rejects the offer, but the bidder continues to pursue it, or the bidder makes the offer directly after having announced its firm intention to make an offer.

3. Reverse takeovers (Bail out Takeover)

Takeover of a financially weak company not being a sick industrial company by a profit earning company to bail out the former is known as Bail out Takeover.

A reverse takeover is a type of takeover where a private company acquires a public company. This is usually done at the instigation of the larger, private company, the purpose being for the private company to effectively float itself while avoiding some of the expense and time involved in a conventional IPO.

Objects of Takeover

1. To effect savings in overheads and other working expenses on the strength of combined resources.

2. To achieve product development

3. To diversify through acquiring companies with new product lines.

4. To improve productivity and profitability by joint efforts of technical and other personnel of both the companies.

5. To create shareholder value and wealth by optimum utilization of both companies resources

6. To eliminate competition.

7. To keep hostile takeover at bay.

8. To achieve economy of numbers by mass production at economical costs.

9. To secure advantage of vertical combination

10. To secure substantial facilities

11. To increase market share.

12. To achieve market development by acquiring one or more companies in new geographical territories or segments.

Takeover Bids

A type of corporate action in which an acquiring company makes an offer to the target company's shareholders to buy the target company's shares in order to gain control of the business. Takeover bids can either be friendly or hostile.

Consideration for Takeover –

1. Consideration in the form of cash – Cash could be paid in exchange for the shares acquired. Shares could be acquired through a bid made directly to the equity holders or through the stock market.

2. Consideration in the form of shares – In this method, consideration is paid by issuing to the shareholders of the target company the shares of the acquirer company. In exchange for such shares the acquirer company will purchase the shares of the target company. It includes Share for share takeover bid in which the offeror company in exchange for shares of offeree provides fully paid up shares on a stated basis or Reverse Bid and Combination of various modes.

3. Acquisition through a new company – A new company may be formed by acquiring shares in target companies and the shares of the new company may be issued to the shareholders of both the target companies, in consideration for acquisition for acquisition of shares capital or undertakings in whole or in part.

4. Acquisition of minority held shares of a company – The offeror, if already holds 50% or more of issue capital in the offeree company can plan to acquire the balance equity of the offeree subject to applicable legal compliances.

Legal Aspects of Takeover –

The provisions of **Section 395** of the Companies Act lay down legal requirements for purpose of takeover of an unlisted company through transfer of undertaking to another company. The takeover of a listed company is regulated by Clause 40A and 40B of the Listing Agreement.

Where a scheme or contract involving the transfer of shares of the transferor company to the transferee company within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, at any time within two months after the expiry of the said four months, give notice in the prescribed manner to any dissenting shareholder, that it desires to acquire his shares; and when such a notice is given, the transferee company shall, unless, on an application made by the dissenting shareholder within one month from the date on which the notice was given, the Tribunal thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

Checkpoint for Takeover

Transferor Company:

1. The offer of a Transferee Company to acquire shares of a Transferor company should be received from the transferee company.
2. It should have been duly approved by the Board of Directors at a duly convened and held meeting.
3. Offer received from the transferee company along with other documents, particulars, etc. should have been circulated to members of the company.
4. The consent letter must be filed with the registrar of companies before issuing to the members of the company.
5. The scheme of contract for transfer of shares of the company to the transferee company has been approved by the shareholders of not less than 9/10th in value of shares within the stipulated period of four months. If proviso to Sub – section (1) of Section 395 is attracted, the number of such approving shareholders should comprise

of not less than three-fourths in number of the holders of those shares sought to be transferred.

6. Comply with any order of the Tribunal if any dissenting shareholders had approached the Tribunal against the transfer and if the Tribunal passed any order contrary to the proposed transfer.
7. The transferee company should have been registered as holder of the transferred shares and the consideration received for the shares has been deposited in a separate bank account to be held in trust for the dissenting shareholders.

Transferee Company:

1. Offer made to the transferor company.
2. Copy of notice for the general meeting along with a copy of E- form circulated by the transferor company to its members.
3. Intimation received from the transferor company in respect of approval of the offer by the requisite majority of the shareholders of the company.
4. Notice as prescribed in Section 395 of the Companies Act, 1956 given by the company to dissenting shareholders of the transferor company for the purpose of acquiring their shares.
5. If there is any Tribunal order in favour of the dissenting shareholders of the transferor company, terms of the same has been compiled with.
6. If sub section (2) of Section 395 is attracted, the company must ensure that the prescribed notice has been sent to those shareholders of the transferor company who have not assented to the transfer of the shares and that such shareholders have agreed to transfer their shares to the company.

To ensure that a copy of the notice has been sent to the dissenting shareholders of the Transferor Company and duly executed instrument(s) of the transfer together with the value of the shares have been sent to the transferor company.

Financial and Accounting Aspects of Takeover -

1. Holding company's books of account – If the consideration for the acquired shares has been paid in cash only, the Cash Account will be credited and the Investments Account will be debited.

If only paid shares have been allotted by the acquiring company to the shareholders of the target company, whose shares have been acquired, in exchange for their shares, then the Share Capital Account will be credited and the Investments Account will be debited.

After the consideration has been paid partly in cash and partly in the form of fully paid shares, then for the cash portion, Cash Account will be credited and the Investment Account will be debited and for the fully paid shares portion. Share Capital Account will be credited and the Investment Account will be debited.

Besides, the books of account, the acquiring or the holding company shall also maintain a Register of Investment in accordance with the provisions of Section 372A(5) of the Companies Act.

2. **Subsidiary company's books of account -** There will be no accounting entry in the books of account of the subsidiary company or Target Company.

However, in the register of members of the subsidiary company, the transfer of shares of the shareholders, whose shares have been acquired by the holding company, shall be registered as soon as the relevant instruments of transfer along with the relevant share certificates have been received and the registration of their transfer. The share certificates shall be sent to the holding company after making due endorsement of the transfer under the authentication of the authorized signatory of the subsidiary company.

Anti – Takeover Amendments or "Shark Repellants"

An increasing used defense mechanism is anti – takeover amendments to the company's constitution or articles of association, popularly called "Shark Repellants" The practice consist of the companies changing the articles, regulation, bye- laws, etc. to be less attractive to the corporate bidder.

Anti-takeover amendments generally impose new conditions on the transfer of managerial control of the firm through a merger, tender offer, or by replacement of the Board of Directors.

Types of Anti – Takeover Amendments

1. **Supermajority Amendments** require shareholders' approval by at least two votes and sometimes as such as 90% of the voting power of outstanding capital stock for all transactions involving change of control**.**

2. **Fair – Price Amendments** are supermajority provisions with a board out clause and an additional clause waiving the supermajority requirement if a fair – price is paid for the

purchase of all the shares. The fair price is normally defined as the highest priced paid by the bidder during a specified period. Thus, fair price amendments defend against two –tier tender offers that are not approved by the target's board.

3. Classified Boards – Another major type of anti – takeover amendments provides for a staggered, or classified, Board of Directors to delay effective transfer and control in a takeover**.**

4. Authorization of Preferred Stock – The Board of Directors is authorized to create a new class of securities with special voting rights. This security, typically preferred stock, may be issued to a friendly party in a control contest. Thus, this device is a defense against hostile takeover bids, although historically it was used to provide the Board of Directors with flexibility in financing under changing economic conditions.

Refusal to Register Transfer of Shares

Refusal by Board of Directors to register a transfer is an important strategy to avert a takeover.

Poison Pill Defenses – It is a popular defense mechanism against hostile takeover bids is the creation of securities called "poison pills". These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event such as a tender offer for the control or the accumulation of a specified percentage of target shares.

Chapter No. 35

CORPORATE RESTRUCTURING – BUY BACK OF SHARES

Buy Back of Shares – Section 77A

Company limited by shares may not purchase its own shares as this would amount to an unauthorized reduction of Capital.

A company may purchase its own shares or other specified securities through "buy-back" out of -

(i) its free reserves; or

(ii) the securities premium account; or

(iii) the proceeds of any shares or other specified securities

No company shall purchase its own shares or other specified securities unless such buy-back is authorized by its articles and a special resolution has been passed in general meeting of the company authorizing the buy-back.

Objective of Buy – Back

The reasons for buy- back may be one or more of the following:

1. To improve earnings per share
2. To improve return on capital, return on net worth and to enhance the long term shareholder value
3. To provide an additional exit route to shareholders when shares are under valued or are thinly traded
4. To enhance consolidation of stake in the company
5. To prevent unwelcome takeover bids
6. To return surplus cash to shareholders
7. To achieve optimum capital structure
8. To support share price during periods of sluggish market conditions
9. To service the equity more efficiently.

Authority and Quantum of Buy back of Securities

1. Authority in the Articles – Buyback of securities should be authorized by the Articles of Association – Section 77A (2)(A)

2. Board resolution and quantum of buy back – By passing a resolution, the Board can authorize the buy – back of securities not exceeding 10% of the total paid – up equity capital and free reserves of the company. Section 77A (2)

3. Shareholders' resolution and quantum of buy – back – By passing a special resolution, the buyback of securities is or less than twenty-five per cent of the total paid-up capital and free reserves of the company. Section 77A (2)(b)& (c)

4. Maximum Quantum of buy back – A company cannot buy back more than 25% of its total paid – up capital and free reserves. Section 77A (2)(c)

5. Further offer of buyback - No offer of buy-back shall be made within a period of three hundred and sixty-five days reckoned from the date of the preceding offer of buy-back, if any. Second proviso to Section 77A(2)

Conditions to be fulfilled and obligations for Buy back of Securities

1. Only fully paid up securities qualify for buy back – Section 77A (2)(e). Fully paid up securities, even if quoted below par on the stock exchange qualify for buy back.
2. After buy back, the company should have a debt- equity ratio not exceeding 2:1 - Section 77A (2)(d)
3. Where buy back is made out of free reserves, the company should transfer to the capital redemption reserve account [Section 80(1)(d)], a sum equal to nominal amount of the shares bought back and the details of such transfer and should be disclosed in the balance sheet - Section 77AA
4. Where a company completes a buy-back of its shares or other specified securities under this section, it shall not make further issue of the same kind of shares including allotment of further shares under section 81(1)(a) or other specified securities within a period of six months except by way of bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares. Section 77A (8)
5. No buy back of securities should be undertaken while a petition for amalgamation is pending
6. No issue of any securities including bonus shares should be made till the closure of offer of buy back
7. Promoters or persons acting in concert should not deal in the securities of the company while the buyback offer is open.

Restriction on Buy back

1. A company should not buy back its securities if default subsist in repayment of deposits or interest payable thereon, or in redemption of debentures or preference shares or repayment of any term loan or interest payable to any financial institutions – Section 77B(1)(C)
2. Buy back should not be made if a company has defaulted in relation to preparation and filling of its annual return – Section 77B(2)
3. Buy back should not be made in event of any default in relation to payment of dividend to any equity or preference shareholders - Section 77B(2)
4. Buy back should not be made in the event of default in preparation of annual accounts - Section 77B(2)
5. Buy back should not be made through any subsidiary company including its own

subsidiary companies or through any investment company or group of investment companies - Section 77B(1)(a)&(b)

Declaration of Solvency – Section 77A (6)

Where a company has passed a special resolution or the Board has passed a resolution under the first proviso to clause (b) of Section 77A to buy-back its own shares it shall, before making such buy-back, file with the Registrar and the Securities and Exchange Board of India a declaration of solvency in the form as may be prescribed, and verified by an affidavit to the effect that the Board has made a full inquiry into the affairs of the company as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year of the date of declaration adopted by the Board, and signed by at least two directors of the company, one of whom shall be the managing director.

Income Tax Aspects

Section 46A of Income tax Act provides that where a shareholder or a holder of other specified securities the meaning assigned to it in section 77A of the Companies Act, 1956, receives any consideration from any company for purchase of its own shares or other specified securities held by such shareholder or holder of other specified securities, then, subject to the provisions of section 48, the difference between the cost of acquisition and the value of consideration received by the shareholder or the holder of other specified securities, as the case may be, shall be deemed to be the capital gains arising to such shareholder or the holder of other specified securities, as the case may be, in the year in which such shares or other specified securities were purchased by the company.

Methods of Buy back

The buy-back under sub-section (1) may be

(a) from the existing security holders on a proportionate basis; or

(b) from the open market; or

(c) from odd lots, that is to say, where the lot of securities of a public company whose shares are listed on a recognized stock exchange, is smaller than such marketable lot, as may be specified by the stock exchange; or

(d) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.

Chapter No. 36

CORPORATE RESTRUCTURING - WINDING UP

Winding up of accompany is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

In winding up administrator called liquidator is appointed and he takes control of the company, collects its debts and finally distributes any surplus among the members in accordance with their rights.

Company cannot be Adjudged Insolvent

The Winding up of a Company is not the same thing as the insolvency of a company, for the general rule in regard to winding up is that if the members of a company desire that the company should be dissolved or if it becomes insolvent or is otherwise unable to pay its debts, of if for any reason it seems desirable that it should cease to exist, it is wound up. Thus it is obvious that a company may be wound up even when it is perfectly solvent.

A company can never be declared bankrupt although it is unable to pay its debts. It can only be wound up.

Winding up and Dissolution

The entire procedure for bringing about a lawful end to the life of a company is divided into two stages – 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are released, liabilities are paid off and the surplus, if any distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law.

Winding up in all cases does not culminate in dissolution. Even after paying all the creditors there may still be a surplus, company may earn profits during the course of beneficial winding up, there may be a scheme of compromise with creditors while company is in winding up and in all such events the company will in all probability come out of winding up and hand over back to shareholders/ old management. Dissolution is an act which puts an end to the life of the company.

As such winding up is only a process while the dissolution puts an end to the existence of the company.

Who may make Petition for Winding Up?

An application to the Tribunal for the winding up of a company shall be by petition presented **(Section 439 of Companies Act)**

(a) by the company, or

(b) by any creditor or creditors, including any contingent or prospective creditor or creditors, or

(c) by any contributory or contributories, or Section

(d) by all or any of the parties specified in clauses (a), (b) and (c), whether together or separately, or

(e) by the Registrar, or

(f) in a case falling under section 243, by any person authorized by the Central Government in that behalf, or

(g) in a case falling under clause (h) of section 433, by the Central Government or a State Government.

Modes of Winding up

1. By the Tribunal i.e. compulsory winding up – Winding up by the Tribunal or compulsory winding up is initiated by an application by way of petition Tribunal for a Winding up order. A winding up petition has to be resorted to only when other means of healing an ailing company are of absolutely no avail. The extreme and irretrievable concerning the management and running of company. The extreme and irretrievable step of winding up must be resorted to only in very compelling circumstances.

Circumstances in which company may be wound up by Tribunal

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal

(b) if default is made in delivering the statutory report to the Registrar or in holding the statutory meeting

(c) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year

(d) if the number of members is reduced, in the case of a public company, below seven, and in the case of a private company, below two

(e) if the company is unable to pay its debts – **Section 434** of Companies Act lays down the specific circumstances when the company shall be unable to pay its debts.

(f) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up

- Where the whole object of the company was fraudulent
- Where subject matter of the company is gone or the object for which it was formed has substantially failed, the existing assets of the company are insufficient to meet the existing liabilities of the company.
- Where the main object of the company for which it was incorporated has been completely achieved.
- Where there is complete deadlock in the management.
- When there is a "bubble" and has no business to carry on
- Where the company is insolvent and its business is being carried on for the benefit of the debenture holders.
- Where there has been Mis - management and misapplication of funds
- Where the petitioner was excluded from all participation in the business of a private company.

(g) if the company has made a default in filing with the Registrar its balance sheet and profit and loss account or annual return for any five consecutive financial years

(h) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality

(i) if the Tribunal is of the opinion that the company should be wound up under the circumstances specified in section 424G i.e. **Winding up of sick industrial company**

2. Voluntary Winding up – In voluntary winding up the company and its creditors are left to settle their affairs without going to Tribunal, although they may apply for directions or orders, as and when necessary. One or more liquidators are to be appointed by the company in general meeting for the purpose of winding up the affairs and distributing the assets of the company.

A company may be wound-up voluntarily **– Section 484**

(a) when the period, if any, fixed for the duration of the company by the articles has expired, or the event, if any, has occurred, on the occurrence of which the articles provide that the company is to be dissolved, and the company in general meeting passes a resolution requiring the company to be wound-up voluntarily,

(b) if the company passes a special resolution that the company be wound-up voluntarily.

Kinds of Voluntary Winding

Section 488(5) of the Company divides voluntary winding up into two kinds:

1.Members' Voluntary Winding up – When company is solvent and is able to pay its liabilities in full, it need not consult the creditors or call their meeting. Its directors, or where they are more than two, the majority of its directors may, at a meeting of the board, make a declaration of solvency verified by an affidavit stating that they have made full enquiry into the affairs of the company and that having done so they have formed an opinion that the Company has no debts or it will be able to pay its debts in full within such period not exceeding three years. Before making any winding up procedure the declaration of solvency of a company need to be declared to Registrar else considered null and void.

A declaration made as aforesaid shall have no effect for the purposes of this Act, unless it is made within the five weeks immediately preceding the date of the passing of the resolution for winding up the company and is delivered to the Registrar for registration before that date.

Section 484, 490, 491, 493, 494, 496, 497, 507,508 and 509 of Companies Act applies to Members' Voluntary Winding up.

2. Creditors' Voluntary Winding up - A winding up in the case of which a declaration has been made and delivered in accordance with this Section 488 of Companies Act referred to as "a members' voluntary winding up", and a winding up in the case of which a declaration has not been so made and delivered is referred to as "a creditors' voluntary winding up".

Section 500, 501, 502, 503, 504, 505, 506, 507,508 and 509 of Companies Act applies to Creditors' Voluntary finding up.

Provisions applicable to every type of Voluntary Winding up

The provisions applicable to every type of voluntary winding up are comprehensively stated in Section 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521 of Companies Act and these apply to every type of volunatry winding up whether it be a members' or a cerditors winding up.

Consequences of Winding up Order-

- Order for winding up to be communicated to Official Liquidator and Registrar
- Where the Tribunal makes an order for the winding up of the company, the Tribunal, shall within a period not exceeding two weeks from the date of passing of the order, cause intimation thereof to be sent to the Official Liquidator and the Registrar.
- On the making of a winding up order, it shall be the duty of the petitioner in the winding up proceedings and of the company to file with the Registrar a certified copy of the order, within thirty days from the date of the making of the order.
- When a winding up order has been made or the Official Liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, against the company, except by leave of the Tribunal and subject to such terms as the Tribunal may impose.
- Where any company is being wound up by the Tribunal any attachment, distress or execution put in force, without leave of the Tribunal against the estate or effects of the company, after the commencement of the winding up or any sale held, without leave of the Tribunal of any of the properties or effects of the company after such commencement, shall be void.
- On a winding up order being made in respect of a company, the Official Liquidator shall, by virtue of his office, become the liquidator of the company
- Any transfer of property, movable or immovable, delivery of goods, payment, execution or other act relating to property made, taken or done by or against a company within six months before the commencement of its winding up which, had it been made, taken or done by or against an individual within three months before the presentation of an insolvency petition on which he is adjudged insolvent, would be

deemed in his insolvency a fraudulent preference, shall in the event of the company being wound-up, be deemed a fraudulent preference of its creditors and be invalid accordingly.

- Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.
- Where a company is being wound-up, a floating charge on the undertaking or property of the company created within the twelve months immediately preceding the commencement of the winding up, shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except to the amount of any cash paid to the company at the time of, or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate of five per cent per annum or such other rate as may for the time being be notified by the Central Government in this behalf in the Official Gazette.

Consequences as to Shareholders described as Contributories

The term "contributory" means, every person liable to contribute to the assets of a company in the event of its being wound up, and includes the holder of any shares which are fully paid up and for the purposes of all proceedings for determining, and all proceedings prior to the final determination of, the persons who are to be deemed contributories, includes any person alleged to be a contributory.

Contributories in case of winding up of a body corporate which is a member

As per **Section 432** **of the Companies Act** if a body corporate which is a contributory is ordered to be wound up, either before or after it has been placed on the list of contributories -

(a) the liquidator of the body corporate shall represent it for all the purposes of the winding up of the company and shall be a contributory accordingly, and may be called on to admit to proof against the assets of the body corporate, or otherwise to allow to be paid out of its assets in due course of law, any money due from the body corporate in respect of its liability to contribute to the assets of the company; and

(b) there may be proved against the assets of the body corporate the estimated value of its liability to future calls as well as calls already made.

Liability as contributories of present and past members

In the event of a company being wound up, every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of section 427 and subject also to the following qualifications

a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

(c) no past member shall be liable to contribute unless it appears to the Tribunal that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(d) in the case of a company limited by shares, no contribution shall be required from any past or present member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;

(e) in the case of a company limited by guarantee, no contribution shall, subject to the provisions of sub-section (2), be required from any past or present member exceeding the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up;

(f) nothing in this Act shall invalidate any provision contained in any policy of insurance or other contract whereby the liability of individual members on the policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of the policy or contract;

(g) a sum due to any past or present member of the company in his character as such, by way of dividends, profits or otherwise, shall not be deemed to be a debt of the company payable to that member, in a case of competition between himself and any creditor claiming otherwise than in the character of a past or present member of the company but any such sum shall be taken into account for the purpose of the final adjustment of the rights of the contributors among themselves.

(2) In the winding up of a company limited by guarantee which has a share capital, every member of the company shall be liable, in addition to the amount undertaken to be contributed by him to the assets of the company in the event of its being wound up, to contribute to the extent of any sums unpaid on any shares held by him as if the company were a company limited by shares.

Provisions of Overriding preferential payments

Notwithstanding anything contained in any other provision 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 to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues, shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause (b) above shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Section 530 of the Companies Act provides for list of debts to be paid in priority to all other debts that in winding up subject to provisions of Overriding preferential payments as discussed above.

Provisions of Liability for fraudulent conduct of business in the course of the winding up of a company – Section 542

If in the course of the winding up of a company, it appears that any business of the company has been carried on, with intent to defraud creditors of the company or any other persons, or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator or any creditor or contributory may, if it thinks fit, declare that any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct.

On the hearing of an application, the Official Liquidator or the liquidator, as the case may be, may himself give evidence or call witnesses.

Where any business of a company is carried on with such intent or for such purpose as is mentioned above, every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to fifty thousand rupees, or with both

Disposal of books and papers of company – Section 550

When the affairs of a company have been completely wound-up and it is about to be dissolved, its books and papers and those of the liquidator may be disposed of as follows, that is to say:

(a) in the case of winding up by the Tribunal, in such manner as the Tribunal directs;

(b) in the case of a members' voluntary winding up, in such manner as the company by special resolution directs; and

(c) in the case of a creditors' voluntary winding up, in such manner as the committee of inspection or, if there is no such committee, as the creditors of the company may direct.

Information as to pending liquidations – Section 551

If the winding up of a company is not concluded within one year after its commencement, the liquidator shall, unless he is exempted from so doing either wholly or in part by the Central Government within two months of the expiry of such year and thereafter until the winding up is concluded, at intervals of not more than one year or at such shorter intervals, file a statement in the prescribed form and containing the prescribed particulars duly audited, by a person qualified to act as auditor of the company, with respect to the proceedings in, and position of, the liquidation -

(a) in the case of a winding up by the Tribunal, in Tribunal; and]

(b) in the case of a voluntary winding up, with the Registrar:

Provided that no such audit as is referred to in this sub-section shall be necessary where the provisions of section 462 apply.

When the statement is filed in Tribunal, a copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.

Meetings to ascertain wishes of creditors or contributories

In all matters relating to the winding up of a company, the Tribunal] may-

(a) have regard to the wishes of creditors or contributories of the company, as proved to it by any sufficient evidence

(b) if it thinks fit for the purpose of ascertaining those wishes, direct meetings of the creditors or contributories to be called, held and conducted in such manner as the 2[Tribunal] directs and

(c) appoint a person to act as chairman of any such meeting and to report the result thereof to the Tribunal.

(2) When ascertaining the wishes of creditors, regard shall be had to the value of each creditor's debt.

(3) When ascertaining the wishes of contributories, regard shall be had to the number of votes which may be cast by each contributory.

Chapter No. 37

CORPORATE RESTRUCTURING - REVIVAL & RESTRUCTURING OF SICK COMPANIES

REVIVAL

It is necessary to make all attempts to revive the company rather than close it.

Major causes of sickness of industrial companies

1. Inability of management to keep a constant vigil over competitive forces
2. Inability of management to focus on continued viability of the industrial unit
3. Inability of management to introduce dynamic changes to suit the development taking place in the industry
4. Lack of serious efforts to combat sickness at the initial stage and to take efforts to revive it
5. Lack of adequate and quality manpower
6. Lack of funds required for meeting replenishment and much needed modernization and up gradation programmes
7. Technological obsolescence
8. Sweeping changes across the industry

9. Political and economic factors
10. Change in consumer behaviour
11. Lack of timely government support
12. Mismanagement by directors
13. Diversion and misapplication of funds
14. Reckless investments in other businesses
15. Disproportionate investments

Reasons for Industrial Sickness

A) Internal Causes

1) Project related - under estimation of project cost, non availability of critical information having a vital bearing on the project, delayed project implementation and resultant cost escalation

2) Human resource related – poor quality management, excessive commitment to non appropriate policies, poor financial/marketing/management control, management succession problems, poor inter-personal and inter-departmental coordination

3) Performance related – faulty choice of product/technology, under utilisation of available resources, inadequacy of working capital, diversion of funds, inadequate market forecast

B) External Causes

1) Non cooperative government policies

2) Recession/adverse economic conditions

3) Powerful competitors in market

4) Non availability and shortage of inputs

5) Regional and industry-wise phenomena

6) Technological advancement

7) Delayed financial assistance

Why Revival Should Be Undertaken

Revival should be undertaken as winding up of a company would result in:

A) Closing down of unit which provided some goods or services

B) It would throw out of employment numerous persons resulting in grave hardship

C) Loss of revenue to the state

D) Scarcity of goods and diminishing employment opportunities

Sick Industrial Company

It means an industrial company (being a company registered for not less than 5 years, which has at the end of any financial year accumulated losses equal to or exceeding its entire "net worth".

Net Worth

Means sum of the paid up capital and free reserves.

Preparation and Sanction of Scheme for Revival

Where an industrial company, has become a sick industrial company, the Board of directors of such company shall make a reference to the Tribunal and prepare a scheme of its revival and rehabilitation and submit the same to the Tribunal along with an application containing such particulars as may be prescribed for determination of the measures which may be adopted with respect to such company:

If the Tribunal appoints an operating agency in order to conduct an enquiry that a company has become a sick industrial company, then the industrial agency is required to prepare and submit a schedule in respect of referred company by providing the following measures:

A) Financial reconstruction

B) Proper management of sick industrial company by change in, or takeover of

C) The amalgamation of the sick industrial company or vice-versa

The Tribunal may finalize the scheme on the suggestion of the operating agency and thereafter formally sanction the scheme referred to as "sanctioned scheme".

Winding Up of Sick Industrial Company

Where the Tribunal, after making inquiry under section 424B and after consideration of all the relevant facts and circumstances and after giving an opportunity of being heard to all concerned parties, is of the opinion that the sick industrial company is not likely to make its net worth exceed the accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof is not likely to become viable in future and that it is just and equitable that the company should be wound up, it may record its findings and order winding up of the company.

For the purpose of winding up of the sick industrial company, the Tribunal may appoint any officer of the operating agency, if the operating agency gives its consent, as the liquidator of such industrial company and the officer so appointed shall for the purpose of the winding-up of such sick industrial company be deemed to be, and have all the powers of, the official liquidator under this Act.

Notwithstanding anything contained in Para 2 above, the Tribunal may cause to be sold the assets of the sick industrial company in such manner as it may deem fit and pass orders for distribution in accordance with the provisions of section 529A, and other provisions of this Act.

Without prejudice to the other provisions contained in this Act, the winding up of a company shall, as far as may be, conclude within one year from the date of the order made by Tribunal

Penalty for certain offences

Whoever violates the provisions of any scheme, or any order, of the Tribunal or the Appellate Tribunal or makes a false statement or gives false evidence to the Tribunal or the Appellate Tribunal, and attempts to tamper the records of reference or appeal filed under this Act, he shall be punishable with simple imprisonment for a term which may extend to three years or shall be liable to fine not exceeding ten lakh rupees.

No court shall take cognizance of any offence under except on a complaint in writing of an officer of the Tribunal or the Appellate Tribunal or any officer of the Central Government authorized by it or any officer of an operating agency as may be authorized in this behalf by the Tribunal or the Appellate Tribunal, as the case may be.

Direction not to dispose of assets

The Tribunal may, if it is of the opinion, that any direction is necessary in the interest of the sick industrial company or creditors or shareholders or in the public interest, by order, direct such company not to dispose of, except with the prior approval of the Tribunal, any of its assets during the period of inquiry under section 424B or during the period of preparation or consideration of the scheme under section 424C.

Company Laws – Ready Reckoner

-BY ***PRINCE WADHWA*** [BCOM (HONS),PERSUING CA FINAL]

contact me at princewadhwa1234@gmail.com or sms me at 9999000671…