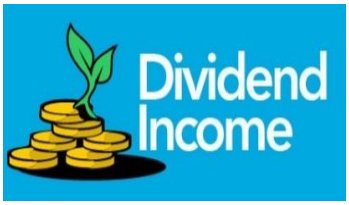
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Declaration and Payment of Dividend

1. Meaning of Dividend



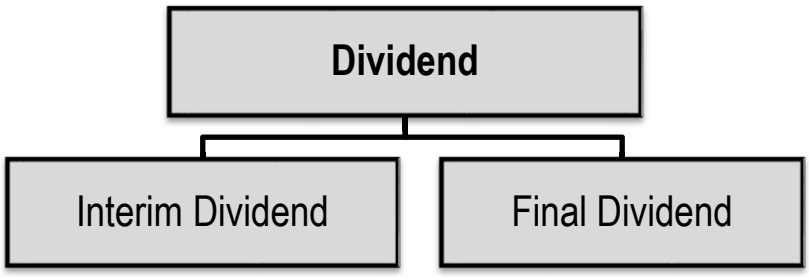
A dividend is a payment made by a company to its shareholders, usually as a distribution of profits i.e. a portion of profits earned and allocated as payable to the shareholders yearly or whenever declared.

A dividend is allocated as a fixed amount (generally in %) per share, with shareholders receiving a dividend in proportion to their shareholding.

Section 2(35) of the Companies Act, 2013, simply states that "dividend" includes any interim dividend.

2. Types of dividend

I. Dividend payable on the basis of Time (When declared)



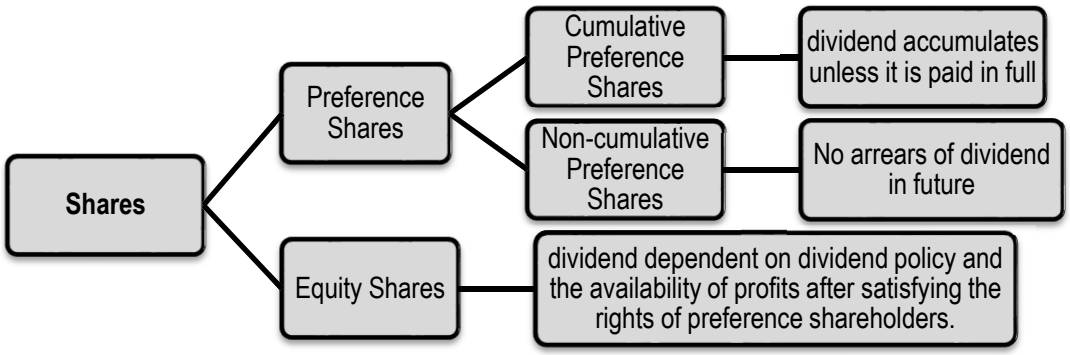
Interim Dividend: When the Board of Directors declare dividend between two annual general meetings of the company, such dividend is known as Interim dividend.

Final Dividend: When the dividend is declared at the annual general meeting of the company, it is known as Final dividend.

All the provisions applicable on dividend are also applicable on interim dividend.

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II. Dividend payable on the basis of Nature of shares



Shares can be classified into two categories- Preference shares and equity shares. The manner of payment of dividend is dependent upon the nature of shares.

(i) Preference Shares: According to section 43 of the Companies Act, 2013 persons holding preference shares, called preference shareholders, are assured of a preferential dividend at a fixed rate during the life of the company.

Dividend is generally cumulative in nature and need not be paid every year in case of deficiency of profits.

Types of Preference Shares on the basis of payment of dividend

Preference shares' classification on the basis of payment of dividend is as follows:

(a) Cumulative Preference Shares: A cumulative preference share is one that carries the right to a fixed amount of dividend or dividend at a fixed rate. Such a dividend is payable even out of future profit if current year's profits are insufficient for the purpose. This means that dividend on these shares accumulates unless it is paid in full and, therefore, the shares are called Cumulative Preference Shares.

(b) Non-cumulative Preference Shares: A non-cumulative preference share carries with it the right to a fixed amount of dividend. In case no dividend is declared in a year due to any reason, the right to receive such dividend for that year expires. It implies that holder of such a share is not entitled to arrears of dividend in future.

(ii) Equity Shares: Equity shares are those shares, which are not preference shares. It means that they do not enjoy any preferential rights in the matter of payment of dividend or repayment of capital. The rate of dividend on equity shares is recommended by the Board of Directors and may vary from year to year. Rate of dividend depends upon the dividend policy and the availability of profits after satisfying the rights of preference shareholders.

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3. Declaration of Dividend [Section 123]

According to this section:

(i) Dividend shall be declared or paid by a company for any financial year only—

(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of section 123(2), or

(b) out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or

[Note: Such depreciation shall be provided in accordance with the provisions of Schedule II.]

(c) out of both (a) and (b); or

(d) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government.

(ii) Transfer to reserves: A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company. Therefore, the company may transfer such percentage of profit to reserves before declaration of dividend as it may consider necessary. Such transfer is not mandatory and the percentage to be transferred to reserves is to be decided at the discretion of the company.

Example 1: Alma limited proposes to transfer more than 10% of the profits of the company to the reserves for the current year, before the declaration of dividend @ 12%. Is Alma Limited allowed to do so?

Answer: The amount to be transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. Therefore, the company is free to transfer any part of its profits to reserves as it deems fit.

Example 2: Brix Limited has earned a profit of Rs. 1,000 crores for the financial year 2016-17. It has proposed a dividend @ 8.75%. However, it does not intend to transfer any amount to the reserves of the company out of the profits earned. Can Brix Limited do so?

Answer: The amount to be transferred to reserves out of profits for a financial year has been left at the discretion of the company acting vide its Board of Directors. The company is free to transfer any part of its profits to reserves as it deems fit. There is no restriction to transfer any specific amount (i.e. even no amount can be transferred) to the reserves before declaration of dividend.

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(iii) Declaration of dividend out of accumulated profits: Where a company, owing to inadequacy or absence of profits in any financial year, proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall be made only in accordance with prescribed rules. [Second Proviso to section 123(1)]

Exemption: The above proviso shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments.

(iv) Declaration of dividend from free reserves: Dividend shall be declared or paid by a company only from its free reserves. No other reserve can be utilized for the purposes of declaration of such dividend.

(v) Declaration of dividend by set off of previous losses and depreciation against the profit of the company for the current year: No company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.

For declaration of dividend out of accumulated profits, the Ministry of Corporate Affairs has provided Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014. Thereby, when there is inadequacy or absence of profits in any year, a company may declare dividend out of free reserves. However, the following conditions shall be fulfilled before declaring dividend out of reserves:

(a) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the 3 years immediately preceding that year:

Rate of Dividend $\leq (RD_1 + RD_2 + RD_3)/3$ Where, RD_1, RD_2, RD_3 are rates at which dividend was declared by it in the 3 years immediately preceding that year.

However, **this rule will not apply** if a company has not declared any dividend in each of the 3 preceding financial years.

(b) The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.

Therefore,

Total amount that can be drawn from accumulated profits	$\leq$	1/10 of (Paid up share capital + Free reserves)

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(c) The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(d) The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

Example: A Public Company has been declaring dividend at the rate of 20% on equity shares during the last 3 years. The Company has not made adequate profits during the year ended 31st March, 2017, but it has got adequate reserves which can be utilized for maintaining the rate of dividend at 20%. Advise the Company as to how it should go about if it wants to declare dividend at the rate of 20% for the year 2016-17, as per the provisions of the Companies Act, 2013.

Answer: In the given case, the company has made adequate profits for the current year. However, it can declare dividend out of accumulated profits. Hence, the company can declare a dividend of 20% provided it has the required residual reserve (after such payment) of 15% of its paid up capital and free reserves as appearing it its latest audited financial statement. The company should have the dividend recommended by the Board and put up for the approval of the members at the Annual General Meeting as the authority to declare dividend lies with the members of the company.

(vi) Depositing of amount of dividend: In terms of section 123(4), the amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within 5 days from the date of declaration of such dividend.

This sub-section shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments or by one or more Government Company.

(vii) Interim Dividend:

According to section 123(3), the Board of Directors of a company may declare interim dividend during any financial year out of the surplus in the profit and loss account and out of profits of the financial year in which such interim dividend is sought to be declared.

However, in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years.

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If loss is there, Rate of Interim Dividend ≤ $(RD_1 + RD_2 + RD_3)/3$

Where, RD_1, RD_2, RD_3 are rates at which dividend was declared by it in the 3 years immediately financial years preceding that year.

The Board of directors may declare interim dividend and the amount of dividend including interim dividend shall be deposited in a scheduled bank in a separate bank account within 5 days from the date of declaration of such dividend.

Example: Wilson Limited is facing loss in business during the current financial year 2016-17. In the immediate preceding three financial years, the company had declared dividend at the rate of 8%, 10% and 12% respectively. To maintain the goodwill of the company, the Board of Directors has decided to declare 12% interim dividend for the current financial year. Is the act of Board of Directors valid?

Answer: Interim dividend shall not be declared at a rate higher than the average dividends declared by the company during the immediately preceding three financial years [i.e. (8+10+12)/3 =30/3=10%]. Therefore, decision of Board of Directors to declare 12% of the interim dividend for the current financial year is not tenable. They can declare a maximum 10% interim dividend.

(viii) Payment of dividend: According to section 123(5):

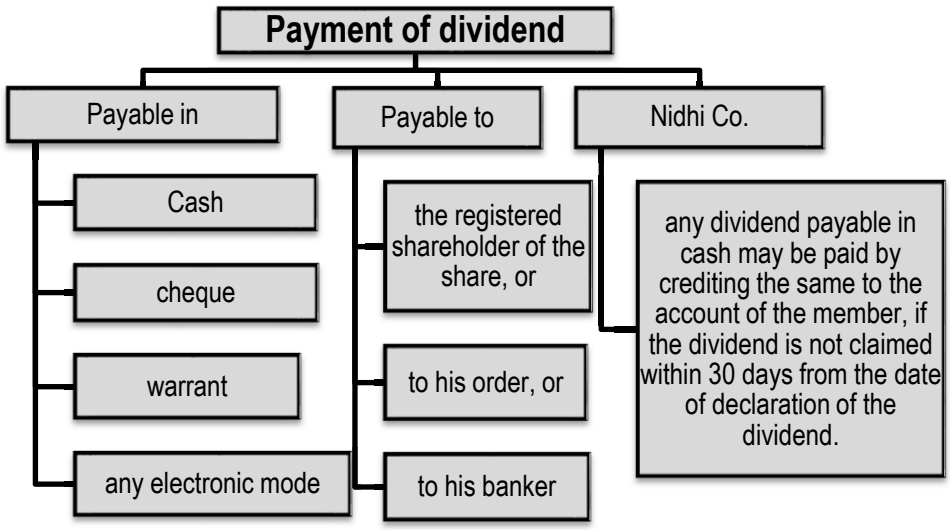
(a) Dividends are payable in cash. Dividends that are payable to the shareholder in cash may be paid by cheque or warrant or in any electronic mode.

(b) Dividend shall be payable only to the registered shareholder of the share or to his order or to his banker.

(c) This sub-section shall apply to the Nidhis company, subject to that any dividend payable in cash may be paid by crediting the same to the account of the member, if the dividend is not claimed within 30 days from the date of declaration of the dividend.

(d) Nothing in sub-section 5 of section 123, shall 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.

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Example: The Director of Som Limited proposed dividend at 12% on equity shares for the financial year 2015-16. The same was approved in the annual general meeting of the company held on 20th September, 2016. The Directors declared the approved dividends.

Mr. Ninja was the holder of 1,000 equity shares on 31st March, 2016, but he has transferred the shares to Mr. Raj, whose name has been registered on 20th May, 2016. Who will be entitled to the above dividend.

Answer: According to section 123(5), dividend shall be payable only to the registered shareholder of the share or to his order or to his banker. Facts in the given case state that Mr. Ninja, the holder of equity shares transferred the shares to Mr. Raj whose name has been registered on 20th May 2016. Since, he became the registered shareholder before the declaration of the dividend in the Annual general meeting of the company held on 20th September 2016, so, Mr. Raj will be entitled to the dividend.

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

(x) Prohibition on section 8 companies : According to section 8(1), the companies having licence under Section 8 (Formation of companies with Charitable Objects, etc.] of the Act are prohibited from paying any dividend to its members. Their profits are intended to be applied only in promoting the objects of the company.

No dividend

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4. Unpaid Dividend Account [Section 124]

The provisions related to Unpaid Dividend Account are given under section 124 of the Companies Act, 2013, which are as follows:

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

(2) Preparing of statement of particulars of the unpaid dividend: The company shall, within a period of 90 days of making any transfer of an amount under sub-section (1) of section 124 to the Unpaid Dividend Account, prepare a statement containing the names, their last known addresses and the unpaid dividend to be paid to each person and place it on the web-site of the company, if any, and also on any other web-site approved by the Central Government for this purpose, in such form, manner and other particulars as may be prescribed.

(3) Default in transferring of amount: If any default is made in transferring the total amount referred to in section 124(1) or any part thereof to the Unpaid Dividend Account of the company,- it shall pay, from the date of such default, interest on so much of the amount as has not been transferred to the said account, at the rate of twelve per cent per annum and the interest accruing on such amount shall ensure to the benefit of the members of the company in proportion to the amount remaining unpaid to them.

(4) Apply for payment of claimed amount: Any person claiming to be entitled to any money transferred under section 124(1) to the Unpaid Dividend Account of the company may apply to the company for payment of the money claimed.

(5) Transfer of unclaimed amount to Investor Education and Protection Fund(IEPF): Any money transferred to the Unpaid Dividend Account of a company in pursuance of this section which remains unpaid or unclaimed for a period of 7 years from the date of such transfer shall be transferred by the company along with interest accrued, if any, thereon to the Fund established under section 125(1) and the company shall send a statement in the prescribed form of the details of such transfer to the authority which administers the said Fund and that authority shall issue a receipt to the company as evidence of such transfer.

(6) Transfer of shares to IEPF: All shares in respect of which dividend has not been paid or claimed for 7 consecutive years or more shall be transferred by the company in the name of Investor Education and Protection Fund along with a statement containing such details as may be prescribed:

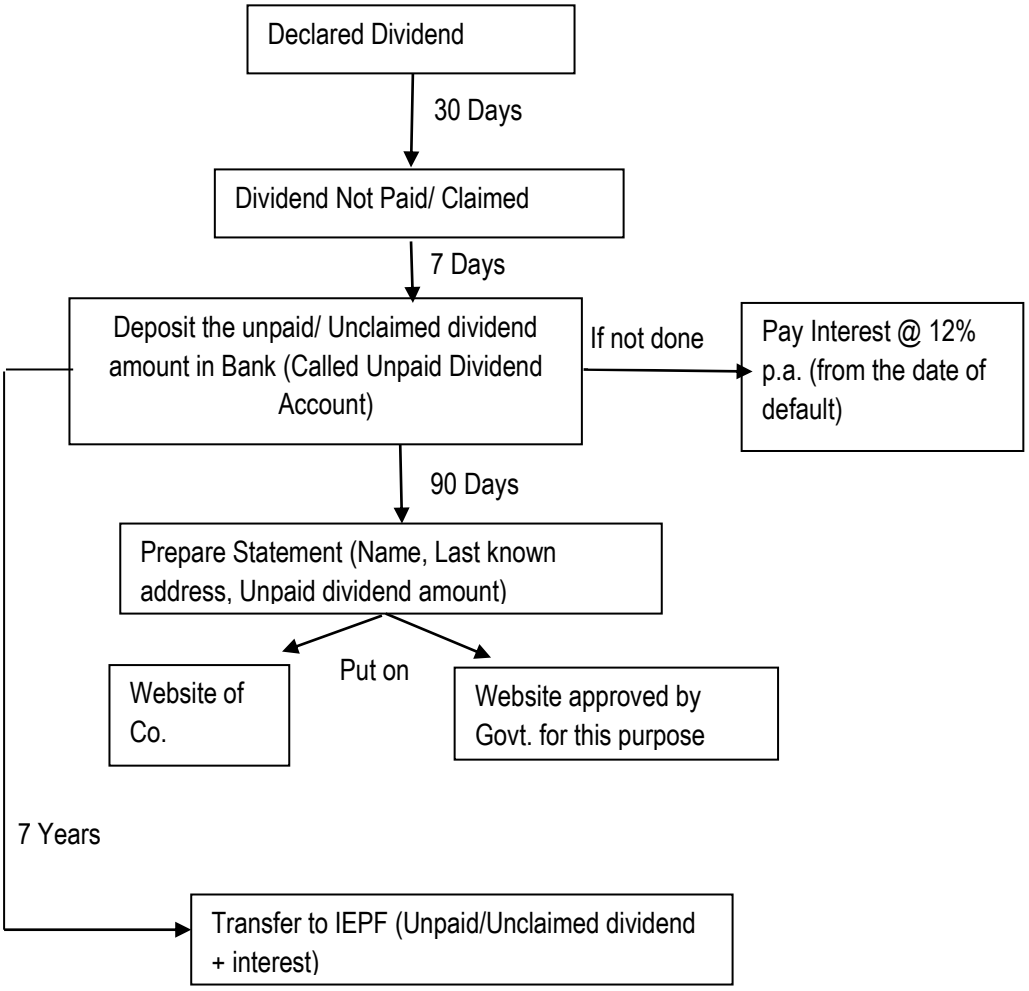
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Right of owner of shares transferred to IEPF to claim from IEPF:

Provided that any claimant of shares transferred above shall be entitled to claim the transfer of shares from Investor Education and Protection Fund in accordance with such procedure and on submission of such documents as may be prescribed.

Explanation—For the removal of doubts, it is hereby clarified that in case any dividend is paid or claimed for any year during the said period of 7consecutive years, the share shall not be transferred to Investor Education and Protection Fund.

(7) In case of contravention: If a company fails to comply with any of the requirements of this section, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to 5 lakh rupees.



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5. Investor Education and Protection Fund [Section 125]

Section 125 of the Act deals with the Investor Education and Protection Fund (IEPF).This fund shall be utilized for refund of unclaimed and unpaid amounts, promotion of investors' awareness and protection of the interests of investors etc. in accordance with provisions of section 125 of the Companies Act, 2013. Provisions given are as follows:

(1) Establishment of Fund: The Central Government shall establish a Fund to be called the Investor Education and Protection Fund (herein referred to as the Fund.

(2) Credit of amount to the Fund: There shall be credited to the Fund the following amounts—

(a) **Amount given by the Central Government-** the amount given by the Central Government by way of grants after due appropriation made by Parliament by law in this behalf for being utilised for the purposes of the Fund;

(b) **Donations by the Central Government-** donations given to the Fund by the Central Government, State Governments, companies or any other institution for the purposes of the Fund;

(c) **Amount of Unpaid Dividend Account-** the amount in the Unpaid Dividend Account (UDA) of companies transferred to the Fund under section 124(5);

(d) **Amount of the general revenue account of the Central Government-** the amount in the general revenue account of the Central Government which had been transferred to that account under section 205A(5) of the Companies Act, 1956 as it stood immediately before the commencement of the Companies (Amendment) Act, 1999 and remaining unpaid or unclaimed on the commencement of this Act;

(e) **Amount in IEPF-** the amount lying in the Investor Education and Protection Fund under section 205C of the Companies Act, 1956;

(f) **Income from investments-** the interest or other income received out of investments made from the Fund;

(g) **Amount received through disgorgement or disposal of securities-** The amount received under section 38(4) i.e. amount received through disgorgement or disposal of securities under section 38(3) shall be credited to the IEPF provided under section 38(4);

(h) **Application money-** the application money received by companies for allotment of any securities and due for refund;

(i) **Matured deposits-** matured deposits with companies other than banking companies;

(j) **Matured debentures-** matured debentures with companies;

(k) **Interest-** interest accrued on the amounts referred to in clauses (h) to (j);

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(l) **Amount received from sale proceeds-** sale proceeds of fractional shares arising out of issuance of bonus shares, merger and amalgamation for seven or more years;

(m) **Redemption amount-** redemption amount of preference shares remaining unpaid or unclaimed for seven or more years; and

(n) **Other amount-** such other amount as prescribed in Rule 3 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Exception- Provided that no such amount referred to in clauses (h) to (j) shall form part of the Fund unless such amount has remained unclaimed and unpaid for a period of 7 years from the date it became due for payment.

(3) Utilization of the Fund: The Fund shall be utilised for—

(a) the refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;

(b) promotion of investors' education, awareness and protection;

(c) distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement;

(d) reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the Tribunal; and

(e) any other purpose incidental thereto,

in accordance with such rules as prescribed under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

Provided that the person whose amounts referred to in clauses (a) to (d) of sub-section (2) of section 205C transferred to IEPF, after the expiry of the period of 7 years as per provisions of the Companies Act, 1956, shall be entitled to get refund out of the fund in respect of such claims in accordance with rules made under this section.

Explanation.—The disgorged amount refers to the amount received through disgorgement or disposal of securities.

(4) Application to the authority for payment: Any person claiming to be entitled to the amount referred in section 125 (2) may apply to the authority constituted under section 125 (5) for the payment of the money claimed.

(5) Constitution of authority for administration of Fund: The Central Government shall constitute, by notification, an authority for administration of the Fund consisting of a

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chairperson and such other members, not exceeding seven and a chief executive officer, as the Central Government may appoint.

(6) Handling of the Fund: The manner of administration of the Fund, appointment of chairperson, members and chief executive officer, holding of meetings of the authority shall be in accordance with such rules as may be prescribed under the Investor Education and Protection Fund Authority (Appointment of Chairperson and Members, holding of meetings and provision for offices and officers) Rules, 2016.

(7) Providing of resources from central government to administer the Fund: The Central Government may provide to the authority such offices, officers, employees and other resources in accordance with the *Investor Education and Protection Fund Authority (Appointment of Chairperson and Members, holding of meetings and provision for offices and officers) Rules, 2016*.

(8) Authority to work in consultation with CAG of India: The authority shall administer the Fund and maintain separate accounts and other relevant records in relation to the Fund in such form as may be prescribed after consultation with the Comptroller and Auditor-General of India.

(9) Right of the authority to spend the money: It shall be competent for the authority constituted under section 125 (5) to spend money out of the Fund for carrying out the objects specified in section 125 (3) i.e. utilization of fund.

(10) Audit of the Fund: The accounts of the Fund shall be audited by the Comptroller and Auditor- General of India at such intervals as may be specified by him and such audited accounts together with the audit report thereon shall be forwarded annually by the authority to the Central Government.

(11) Preparation of the annual report by authority: The authority shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament.

6. Right of dividend, Rights shares and Bonus shares to be held in abeyance pending registration of transfer of shares [Section 126]

Where any instrument of transfer of shares has been delivered to any company for registration and the transfer of such shares has not been registered by the company, the company shall —

(a) transfer the dividend in relation to such shares to the Unpaid Dividend Account referred to in section 124 unless the company is authorised by the registered holder of such share

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in writing to pay such dividend to the transferee specified in such instrument of transfer; and

(b) keep in abeyance in relation to such shares any offer of rights shares under clause (a) of sub-section (1) of section 62 and any issue of fully paid-up bonus shares in pursuance of first proviso to sub-section (5) of section 123.

7. Punishment for failure to distribute dividends [SectioN 127]

Section 127 of the Companies Act, 2013 deals punishment for failure to distribute dividend on time. According to this section:

(i) Where a dividend has been declared by a company but has not been paid or the warrant in respect thereof has not been posted within 30 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company shall, if he is knowingly a party to the default, be punishable with imprisonment which may extend to two years.

(ii) He shall also be liable for a fine which shall not be less than 1,000 rupees for every day during which such default continues.

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

(iv) However, the following are the exceptions under which no offence shall be deemed to have been committed:

(a) where the dividend could not be paid by reason of the operation of any law;

(b) where a shareholder has given directions to the company regarding the payment of the dividend and those directions cannot be complied with and the same has been communicated to him;

(c) where there is a dispute regarding the right to receive the dividend;

(d) where the dividend has been lawfully adjusted by the company against any sum due to it from the shareholder; or

(e) where, for any other reason, the failure to pay the dividend or to post the warrant within the period under this section was not due to any default on the part of the company.

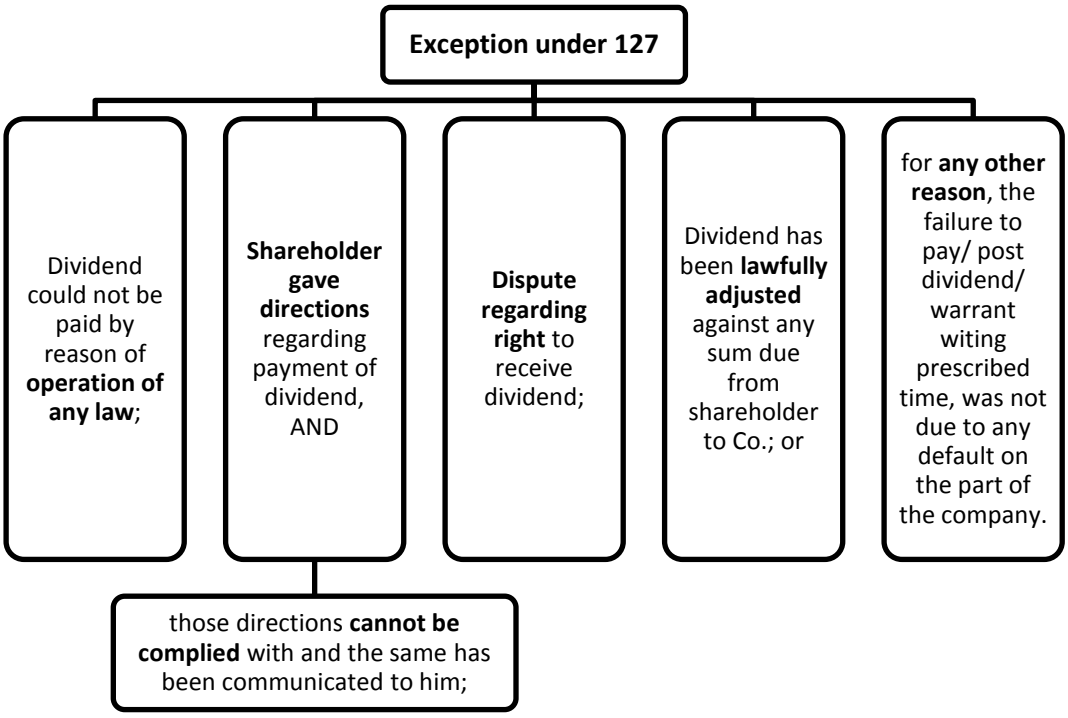
Exemption : This section shall apply to the Nidhis company, subject to that where the dividend payable to a member is 100 rupees or less, it shall be sufficient compliance of the provisions of the section, if the declaration of the dividend is announced in the local language in one local newspaper of wide circulation and announcement of the said declaration is also displayed on the notice board of the nidhis for at least 3 months.

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Example: Mr. Alok, holding equity shares of face value of ` 10 lakhs has not paid an amount of ` 1 lakh towards call money on shares. Can the same be adjusted against the dividend amount payable to him?

Answer: Yes, as per law, where the dividend is declared by a company and there remains calls in arrears and any other sum due from a member, in such case the dividend can be lawfully adjusted by the company against any sum due to it from the shareholder.

Thus, company can adjust sum of ` 1 lakh due towards call money on shares against the dividend amount payable to Mr. Alok.



RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 123	In section 123 of the principal Act,— (*a*) in sub- section (*1*),— (*i*) in clause (*a*),— (*A*) for the words "both; or", the word "both:" shall be substituted;	Notified till 30th April, 2018

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	(*B*) the following proviso shall be inserted, namely:— "Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or"; (*ii*) in the second proviso, for the words "transferred by the company to the reserves", the words "transferred by the company to the free reserves" shall be substituted; (*b*) for sub-section (*3*), the following sub-section shall be substituted, namely:— "(*3*) The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend: Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years."	

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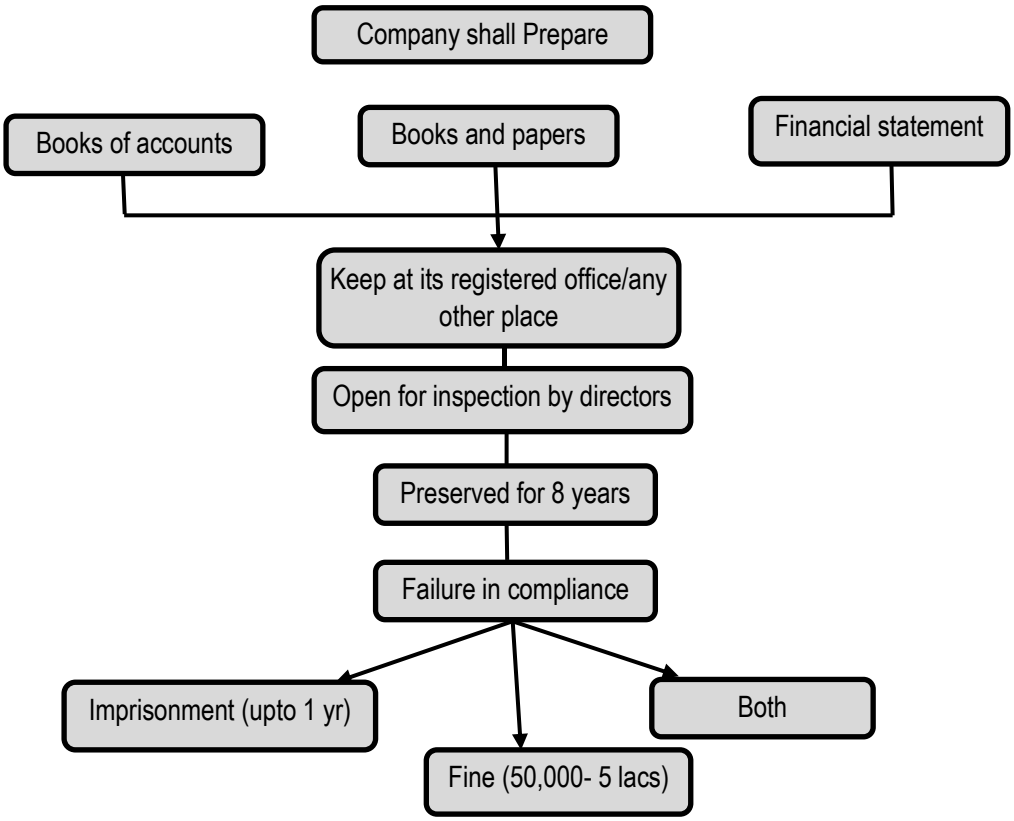
Accounts and Audit

UNIT 1: ACCOUNTS OFCOMPANIES

1. Introduction

There is a need for disclosing the Annual information to the shareholders by the directors about the working and financial position of the company, so that the shareholders are aware of the affairs of the company. So, the Companies Act, 2013, lays down the various provisions related to maintenance of proper books of account etc. of the companies through required compliances.

2. Books of Account, etc., to be kept by Company [Section128]



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General requirement

Every company shall prepare "books of account" and other relevant books and papers and financial statement for every financial year.

These books of accounts should give a true and fair view of the state of the affairs of the company, including that of its branch office(s).

These books of accounts must be kept on accrual basis and according to the double entry system of accounting.

Accrual basis and Double-entry system of accounting

Accrual basis of accounting is an accounting assumption or an accounting concept followed in preparation of the financial statements. Accrual concept is one of the four principles or accounting concepts, which involves recording income and expenses as they accrue, as distinct from when they are received or paid.

Double entry book-keeping is a method of recording any transactions of a business in a set of accounts, in which every transaction has a dual aspect of debt and credit and therefore, needs to be recorded in at least two accounts. Double aspect enables effective control of business because all the books of accounts must balance.

"books of account" as defined in Section 2(13) includes records maintained in respect of—

- all sums of money received and expended by a company and matters in relation to which the receipts and expenditure take place;
- all sales and purchases of goods and services by the company;
- the assets and liabilities of the company; and
- the items of cost as may be prescribed under section 148 in the case of a company which belongs to any class of companies specified under that section.

"book and paper" and "book or paper" as defined in Section 2(12) include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;

Place of Keeping Books of Account

Section 128(1) requires every company to prepare and keep the books of account and other relevant books and papers and financial statements at its registered office.

Provided all or any of the books of accounts may be kept at such other place in India as the Board of directors may decide. Where such a decision is taken by the Board the company shall within seven days thereof file with the registrar a notice in writing giving full address of that other place.

Maintenance of Books of account in electronic form

Company have the option of keeping such books of account or other relevant papers in electronic mode as per Rule 3 of the *Companies (Accounts) Rules, 2014*. Rule 3 lays down

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the manner of Books of accounts to be kept in electronic mode.

(1) Such books of accounts or other relevant books or papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent.

(2) The information contained in the records shall be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered

(3) The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.

(4) The information in the electronic record of the document shall be capable of being displayed in a legible form.

(5) The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any, shall be kept in servers physically located in India on a periodic basis.

(6) The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement following relevant information related to service provider—

(a) the name of the service provider;

(b) the internet protocol address of service provider;

(c) the location of the service provider (wherever applicable);

(d) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

Books of Account - Branch Office

Where a company has a branch office in India or outside India, it shall be deemed to have complied with the provisions of sub-section (1), if proper books of account relating to the transactions effected at the branch office are kept at that office and proper summarized returns periodically are sent by the branch office to the company at its registered office and are kept open for inspection at the registered office of the company or at such other place in India by any director during business hours.

Inspection by directors

As per Section 128 (3), any director can inspect the books of accounts and other books and papers of the company during business hours. The expression "Books and Papers" has been defined in section 2(12) which includes accounts, deeds, vouchers, writings and documents. Such inspection may be done by any type of director-nominee, independent, promoter or whole time.

The proviso to sub-section 3 provides that a person can inspect the books of accounts of the subsidiary, only on authorisation by way of the resolution of Board of Directors. The director can seek the information only individually and not by or through his attorney holder or agent or

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representative with respect to financial information maintained outside the country and to produce such financial information [Rule 4(4)of the *Companies (Accounts) Rules, 2014*].

Period for preservation of books [Section 128(5)]

The books of account of every company relating to a period of not less than eight financial years immediately preceding a financial year, or where the company had been in existence for a period less than eight years, in respect of all the preceding years together with the vouchers relevant to any entry in such books of account shall be kept in good order. The provisions of Income Tax Act shall also be complied with in this regard.

Where an investigation has been ordered in respect of a company, the Central Government may direct that the books of account may be kept for such period longer than 8 years, as it may deem fit and give directions to that effect.

Persons responsible to maintain books

As per Section 128 (6) the person responsible to take all reasonable steps to secure compliance by the company with the requirement of maintenance of books of accounts etc. shall be:

(i) Managing Director,

(ii) Whole-Time Director, in charge of finance

(iii) Chief Financial Officer

(iv) Any other person of a company charged by the Board with duty of complying with provisions of section 128.

Penalty provisions

In case the aforementioned persons referred to in sub-section (6) fail to take reasonable steps to secure compliance, they shall in respect of each offence, be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or both.

Example: XYZ Ltd. wants to maintain its books of account on cash basis. Is this a valid act of XYZ?

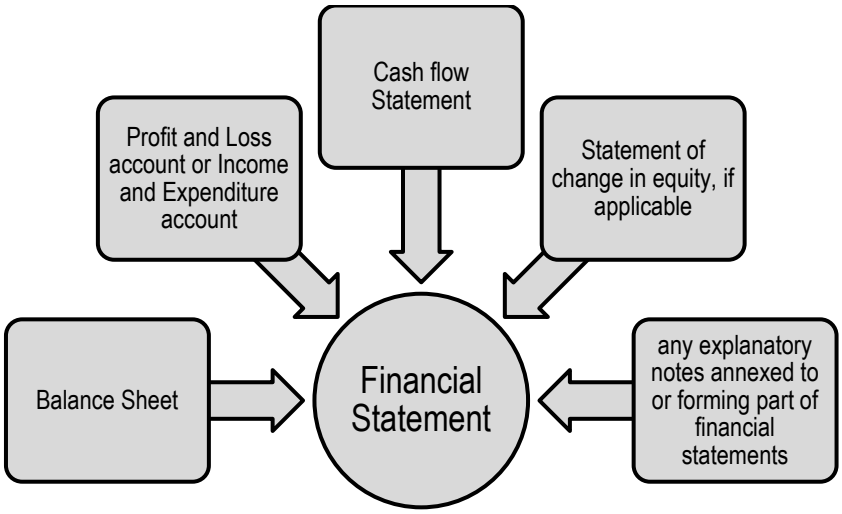
Answer: The Companies Act, 2013 vide section 128(1) now requires every company to prepare books of account and other relevant books and papers and financial statement for every financial year shall be kept on accrual basis and according to the double entry system of accounting. Further, section clearly states that the books of accounts must be maintained on accrual basis and according to the double entry system of accounting. No exception has been given by the Act to any class or classes of companies from the above requirement. Hence, it is clear that XYZ Ltd. cannot maintain its books of accounts on cash basis.

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3. Financial Statement [Section 129][1]

Financial Statements—Definition

Financial Statement is defined under Section 2 (40), to include–



However, the financial statement with respect to one Person Company, small company and dormant company, may not include the cash flow statement.

Financial statements should be prepared for financial year and shall be in form as per Schedule III.

"Financial year" [Section 2(41)], in relation to any company or body corporate, means the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a year, the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up:

Provided that on an application made by a company or body corporate, which is a holding company or a subsidiary of a company incorporated outside India and is required to follow a different financial year for consolidation of its accounts outside India, the Tribunal may, if it is satisfied, allow any period as its financial year, whether or not that period is a year:

Provided further that a company or body corporate, existing on the commencement of this Act, shall, within a period of two years from such commencement, align its financial year as per the provisions of this clause;

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1 Section 129 shall not apply to the Government Companies to the extent of application of Accounting Standard 17 (Segment Reporting) to the companies engaged in defence production. [Inserted vide Notification dated 5th June 2015]

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Schedule III has been amended vide *Notification No. G.S.R. 404(E)* dated 6th April, 2016 according to which Schedule III has been divided into two divisions.

Division I deals with Financial Statements for a company whose financial statements are required to comply with the *Companies (Accounting Standards) Rules, 2006.*

Division II deals with Financial Statements for a company whose financial statements are drawn up in compliance of the *Companies (Indian Accounting Standards) Rules, 2015.*

True and Fair view

As per section 129(1) the financial statements shall give a true and fair view of the state of affairs of the company or companies. It shall comply with the accounting standards notified under section 133 and shall be in the form or forms as may be provided for different class or classes of companies in Schedule III.

Non Applicability

Provided further that nothing contained in this sub-section shall apply to any insurance or banking company or any company engaged in the generation or supply of electricity, or to any other class of company for which a form of financial statement has been specified in or under the Act governing such class of company:

Provided also that the financial statements shall not be treated as not disclosing a true and fair view of the state of affairs of the company, merely by reason of the fact that they do not disclose—

Type of Company	Matters
Insurance Company	Matters which are not required to be disclosed by the Insurance Act, 1938, or the Insurance Regulatory and Development Authority Act, 1999
Banking company	Matters which are not required to be disclosed by the Banking Regulation Act, 1949
Company engaged in the generation or supply of electricity	Matters which are not required to be disclosed by the Electricity Act, 2003
Company governed by any other law	Matters which are not required to be disclosed by that law

Laying of financial Statements [Section 129(2)]

At every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year.

Consolidation of financial statements [Section 129(3)]

(1) Where a company has one or more subsidiaries, it shall, in addition to its financial statements, prepare a consolidated financial statement of the company and of all the subsidiaries in the same form and manner as that of its own which shall also be laid before the annual general meeting of the company along with the laying of its financial statement.

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The company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries in Form AOC-1 as per Rule 5 of the *Companies (Accounts) Rules, 2014.*

Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed under Rule 6 of the *Companies (Accounts) Rules, 2014.*

Manner of consolidation of Accounts: The consolidation of financial statements of the company shall be made in accordance with the provisions of Schedule III of the Act and the applicable accounting standards.

In case where company not require to prepare CFS: However, that in case of a company covered under sub-section (3) of section 129 which is not required to prepare consolidated financial statements under the Accounting Standards, it shall be sufficient if the company complies with provisions on consolidated financial statements provided in Schedule III of the Act.

Exemptions from preparation of CFS: "Provided further that nothing in this rule shall apply in respect of preparation of consolidated financial statements by a company if it meets the following conditions:

(i) it is a wholly-owned subsidiary, or is a partially-owned subsidiary of another company and all its other members, including those not otherwise entitled to vote, having been intimated in writing and for which the proof of delivery of such intimation is available with the company, do not object to the company not presenting consolidated financial statements;

(ii) it is a company whose securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India; and

(iii) its ultimate or any intermediate holding company files consolidated financial statements with the Registrar which are in compliance with the applicable Accounting Standards.

"Provided also that nothing in this rule shall apply in respect of consolidation of financial statement by a company having subsidiary or subsidiaries incorporated outside India only for the financial year commencing on or after 1" April, 2014."

Explanation—For the purposes of this sub-section, the word "subsidiary" shall include associate company and joint venture.

(2) The provisions applicable to the preparation, adoption and audit of the financial statements of a holding company shall, mutatis mutandis, also apply to the consolidated financial statements. **[Section 129(4)]**

(3) Without prejudice to sub-section (1), where the financial statements of a company do not comply with the accounting standards referred to in sub-section (1), the company shall disclose in its financial statements, the deviation from the accounting standards, the reasons for such deviation and the financial effects, if any, arising out of such deviation. **[Section 129(5)]**

(4) The Central Government may, on its own or on an application by a class or classes of

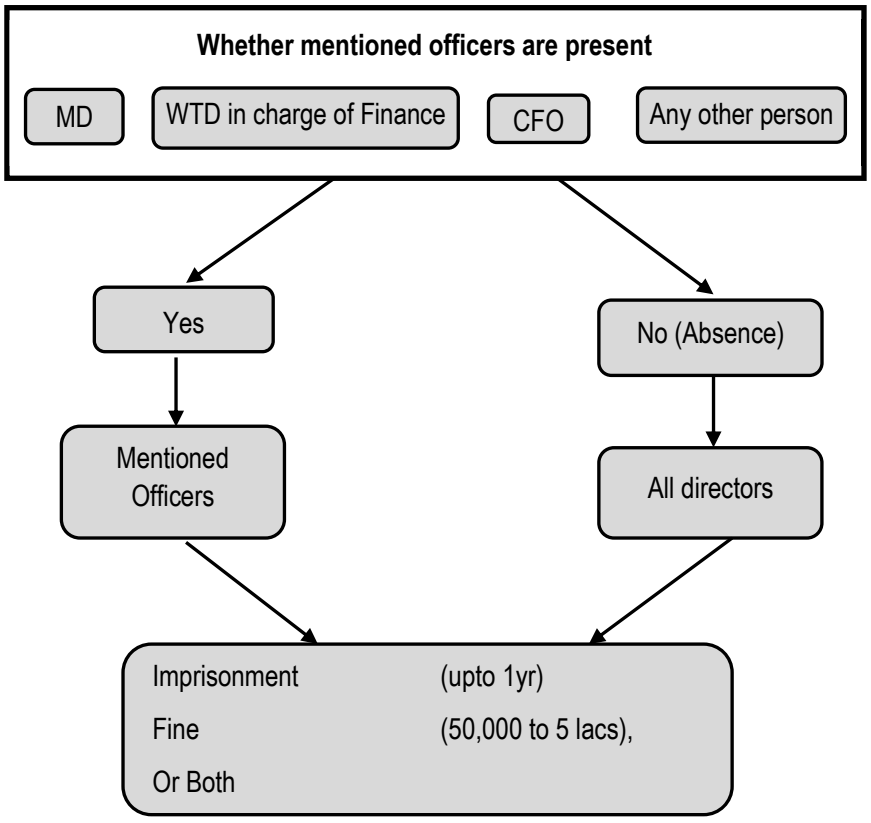
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companies, by notification,[2] exempt any class or classes of companies from complying with any of the requirements of this section or the rules made there under, if it is considered necessary to grant such exemption in the public interest and any such exemption may be granted either unconditionally or subject to such conditions as may be specified in the notification. **[Section 129(6)]**

Penal provisions [Section 129(7)]

If a company contravenes the provisions of this section, the managing director, the whole-time director in charge of finance, the Chief Financial Officer or any other person charged by the Board with the duty of complying with the requirements of this section and in the absence of any of the officers mentioned above, all the directors shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

Company Contravenes the provisions of section 129



[2] **2.** For exemptions granted to government companies engaged in production of Defence Equipments *Vide notification dated 4-9-2015.*

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Explanation: Here, any reference to the financial statement shall include any notes annexed to or forming part of such financial statement, giving information required to be given and allowed to be given in the form of such notes under this Act.

Example: Suppose if A Ltd. is wholly owned subsidiary of B Ltd. Here in this case B Ltd. will consolidate financials of A Ltd.

Now suppose, if A Ltd. has one subsidiary i.e. B Ltd.& one associate company i.e. C Ltd. B Ltd. is the entity incorporated outside India and C Ltd, is the entity incorporated in India. Here in the given case A Ltd. will consolidate financial statement of both B and C Ltd. A Ltd. shall also attach the financial statement of B Ltd. along with filing of consolidated financials of A Ltd. Also a statement containing the salient features of the financial statement of a companys' subsidiary, associate or joint venture shall be filed as an annexure to the board's report. The word 'Subsidiary' includes Associate Company and joint venture.

Example: The Board of Directors of ABC Ltd. wants to circulate unaudited accounts before the Annual General Meeting of the shareholders of the Company. Whether such an act of ABC Ltd. is tenable?

Answer: Section 129(2) of the Companies Act, 2013 provides that at every annual general meeting of a company, the Board of Directors of the company shall lay before such meeting financial statements for the financial year. Further section 134(7) provides that signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of:

(a) any notes annexed to or forming part of such financial statement;

(b) the auditor's report; and

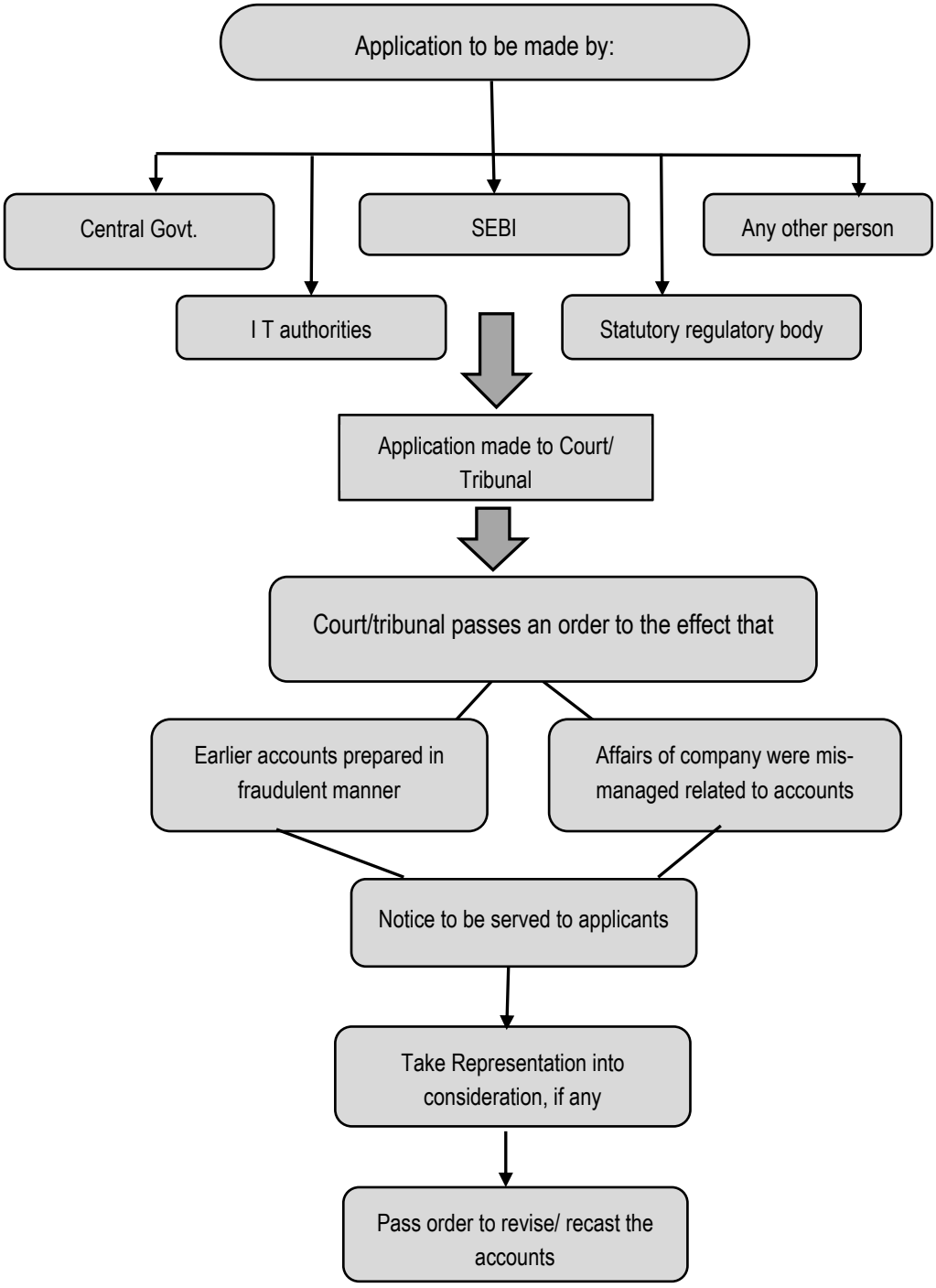
(c) the Board's report.

It, therefore, follows that unaudited accounts cannot be sent to members or unaudited accounts cannot be filed with the Registrar of Companies. So such an act of ABC Ltd, is not tenable.

4. Re-opening of Accounts on court's or Tribunal Orders [Section 130]

This section seeks to provide for the opening of books of accounts and recasting its financial statements.

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(1) Apply to court for re-opening of accounts—A company shall not re-open its books of account and not recast its financial statements, unless an application in this regard is made by-

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(b) the Income-tax authorities,

(c) the Securities and Exchange Board,

(d) any other statutory regulatory body or authority or any person concerned and an order is made by a court of competent jurisdiction or the Tribunal to the effect that—

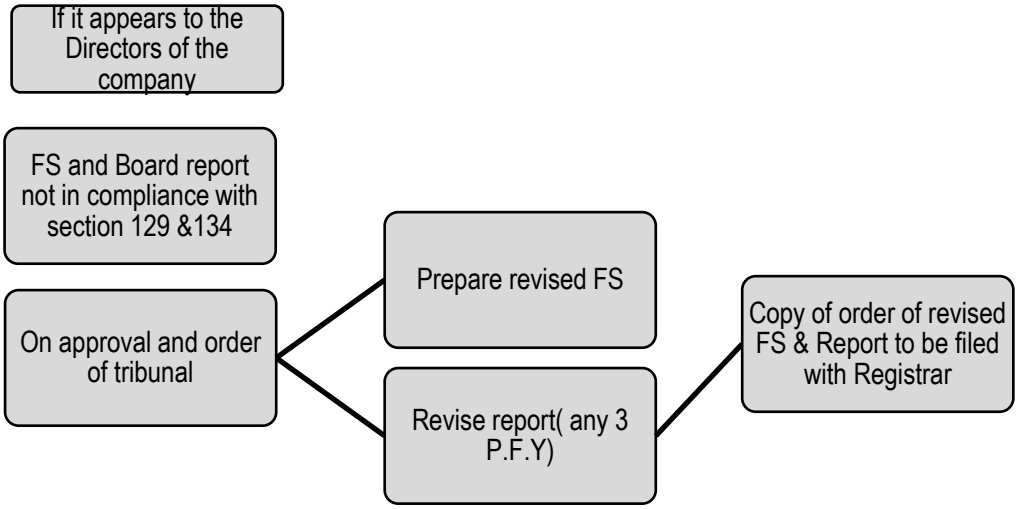
(i) the relevant earlier accounts were prepared in a fraudulent manner; or

(ii) the affairs of the company were mismanaged during the relevant period, casting a doubt on the reliability of financial statements:

Serving of notice: Provided that the court or the Tribunal, as the case may be, shall give notice to the Central Government, the Income-tax authorities, the Securities and Exchange Board or any other statutory regulatory body or authority concerned and shall take into consideration the representations, if any, made by that Government or the authorities, Securities and Exchange Board or the body or authority concerned before passing any order under this section.

(2) Revised accounts shall be final: The accounts so revised or re-cast, shall be final.

5. Voluntary Revision of Financial State-ments or Board's Report [Section 131]



(1) Preparation of revised financial statement or revised report on the approval of Tribunal: If it appears to the directors of a company that—

(a) the financial statement of the company; or

(b) the report of the Board,

do not comply with the provisions of section 129 or section 134, they may prepare revised financial statement or a revised report in respect of any of the three preceding financial years after obtaining approval of the Tribunal on an application made by the company in such form

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and manner as may be prescribed and a copy of the order passed by the Tribunal shall be filed with the Registrar:

Tribunal to serve the notice: Provided that the Tribunal shall give notice to the Central Government and the Income tax authorities and shall take into consideration the representations, if any, made by that Government or the authorities before passing any order under this section:

Number of times of revision and recast: Financial statement provided further that such revised financial statement or report shall not be prepared or filed more than once in a financial year:

Reason for revision to be disclosed: Provided also that the detailed reasons for revision of such financial statement or report shall also be disclosed in the Board's report in the relevant financial year in which such revision is being made.

(2) Limits of revisions: Where copies of the previous financial statement or report have been sent out to members or delivered to the Registrar or laid before the company in general meeting, the revisions must be confined to—

(a) the correction in respect of which the previous financial statement or report do not comply with the provisions of section 129 or section 134; and

(b) the making of any necessary consequential alternation.

(3) Framing of rules by the Central Government in relation to revised financial statement or director's report: The Central Government may make rules as to the application of the provisions of this Act in relation to revised financial statement or a revised director's report and such rules may, in particular—

(a) make different provisions according to which the previous financial statement or report are replaced or are supplemented by a document indicating the corrections to be made;

(b) make provisions with respect to the functions of the company's auditor in relation to the revised financial statement or report;

(c) require the directors to take such steps as may be prescribed

6. Constitution of National Financial Reporting Authority [Section 132] (Yet to be notified)[3]

Section 132 of the Companies Act, 2013 empowers the Central Government to form a Committee for recommendations on Accounting Standards which is National Advisory Committee on Accounting Standards (NACAS). This is now being renamed with enhanced independent oversight powers and authority as National Financial Reporting Authority (NFRA). It shall have the powers to recommend, enforce and monitor the compliance of accounting and auditing standards.

[3] This section is not notified till 30.4.2017

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(1) The Central Government may, by notification, constitute a NFRA to provide for matters relating to accounting and auditing standards under this Act.

(2) Notwithstanding anything contained in any other law for the time being in force, the NFRA shall—

(a) make recommendations to the Central Government on the formulation and laying down of accounting and auditing policies and standards for adoption by companies or class of companies or their auditors, as the case may be;

(b) monitor and enforce the compliance with accounting standards and auditing standards in such manner as may be prescribed;

(c) oversee the quality of service of the professions associated with ensuring compliance with such standards, and suggest measures required for improvement in quality of service and such other related matters as may be prescribed; and

(d) perform such other functions relating to clauses (a), (b) and (c) as may be prescribed.

(3) The NFRA shall consist of a chairperson, who shall be a person of eminence and having expertise in accountancy, auditing, finance or law to be appointed by the Central Government and such other members not exceeding fifteen consisting of part-time and full-time members as may be prescribed.

However, the terms and conditions and the manner of appointment of the chairperson and members shall be such as may be prescribed.

Provided further that the chairperson and members shall make a declaration to the Central Government in the prescribed form regarding no conflict of interest or lack of independence in respect of his or their appointment.

Provided also that the chairperson and members, who are in full-time employment with NFRA shall not be associated with any audit firm (including related consultancy firms) during the course of their appointment and two years after ceasing to hold such appointment.

(4) Notwithstanding anything contained in any other law for the time being in force, the NFRA shall—

(a) have the power to investigate, either suo moto or on a reference made to it by the Central Government, for such class of bodies corporate or persons, in such manner as may be prescribed into the matters of professional or other misconduct committed by any member or firm of chartered accountants, registered under the Chartered Accountants Act, 1949.

Provided that no other institute or body shall initiate or continue any proceedings in such matters of misconduct where the NFRA has initiated an investigation under this section;

(b) have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(i) discovery and production of books of account and other documents, at such place and at such time as may be specified by the NFRA;

(ii) summoning and enforcing the attendance of persons and examining them on oath;

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(iii) inspection of any books, registers and other documents of any person referred to in clause (b) at any place;

(iv) issuing commissions for examination of witnesses or documents;

(c) where professional or other misconduct is proved, have the power to make order for—

(A) imposing penalty of—

(I) not less than one lakh rupees, but which may extend to five times of the fees received, in case of individuals; and

(II) not less than ten lakh rupees, but which may extend to ten times of the fees received, in case of firms;

(B) debarring the member or the firm from engaging himself or itself from practice as member of the Institute of Chartered Accountant of India referred to in clause (e) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949 for a minimum period of six months or for such higher period not exceeding ten years as may be decided by the NFRA.

Explanation.—For the purposes of his sub-section, the expression "professional or other misconduct" shall have the same meaning assigned to it under section 22 of the Chartered Accountants Act, 1949.

(5) Any person aggrieved by any order of the NFRA issued under clause (c) of sub-section (4), may prefer an appeal before the Appellate Authority constituted under sub-section (6) in such manner as may be prescribed.

(6) The Central Government may, by notification, constitute, with effect from such date as may be specified therein, an Appellate Authority consisting of a chairperson and not more than two other members, to be appointed by the Central Government, for hearing appeals arising out of the orders of the NFRA.

(7) The qualifications for appointment of the chairperson and members of the Appellate Authority, the manner of selection, the terms and conditions of their service and the requirement of the supporting staff and procedure (including places of hearing the appeals, form and manner in which the appeals shall be filed) to be followed by the Appellate Authority shall be such as may be prescribed.

(8) The fee for filing the appeal shall be such as may be prescribed.

(9) The officer authorised by the Appellate Authority shall prepare in such form and at such time as may be prescribed its annual report giving a full account of its activities and forward a copy thereof to the Central Government and the Central Government shall cause the annual report to be laid before each House of Parliament.

(10) The NFRA shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings in such manner as may be prescribed.

(11) The Central Government may appoint a secretary and such other employees as it may consider necessary for the efficient performance of functions by the NFRA under this Act and

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the terms and conditions of service of the secretary and employees shall be such as may be prescribed.

(12) The head office of the NFRA shall be at New Delhi and the NFRA may, meet at such other places in India as it deems fit.

(13) The NFRA shall cause to be maintained such books of account and other books in relation to its accounts in such form and in such manner as the Central Government may, in consultation with the Comptroller and Auditor-General of India prescribe.

(14) The accounts of the NFRA shall be audited by the Comptroller and Auditor-General of India at such intervals as may be specified by him and such accounts as certified by the Comptroller and Auditor-General of India together with the audit report thereon shall be forwarded annually to the Central Government by the NFRA.

(15) The NFRA shall prepare in such form and at such time for each financial year as may be prescribed its annual report giving a full account of its activities during the financial year and forward a copy thereof to the Central Government and the Central Government shall cause the annual report and the audit report given by the Comptroller and Auditor-General of India to be laid before each House of Parliament.

7. Central Government to prescribe accounting standards [Section 133]

Section 133 of the Companies Act, 2013 deals with the power of the Central Government to prescribe the accounting standards.

Section 133 provides that Central Government shall prescribe the Standards of Accounting as recommended by ICAI in consultation with and after examination of the recommendations made by NFRA constituted under section 132 of the Act. Till date section 132 is not notified fully. So the following transitional Provisions with respect to Accounting Standards has been made.

(1) The standards of accounting as specified under the Companies Act, 1956 (1 of 1956) shall be deemed to be the accounting standards until accounting standards are specified by the Central Government under section 133.

(2) Till the National Financial Reporting Authority is constituted under section 132 of the Act, the Central Government may prescribe the standards of accounting or any addendum thereto, as recommended by the Institute of Chartered Accountants of India in consultation with and after examination of the recommendations made by the National Advisory Committee on Accounting Standards constituted under section 210A of the Companies Act, 1956.

Relevant Accounting Standards

The Companies (Accounting Standards) Rules, 2006

The Companies (Accounting Standards) Rules, 2006 amended vide Notification No. G.S.R 364(E) dated 30th March, 2016

The Companies (Indian Accounting Standards) Rules, 2015

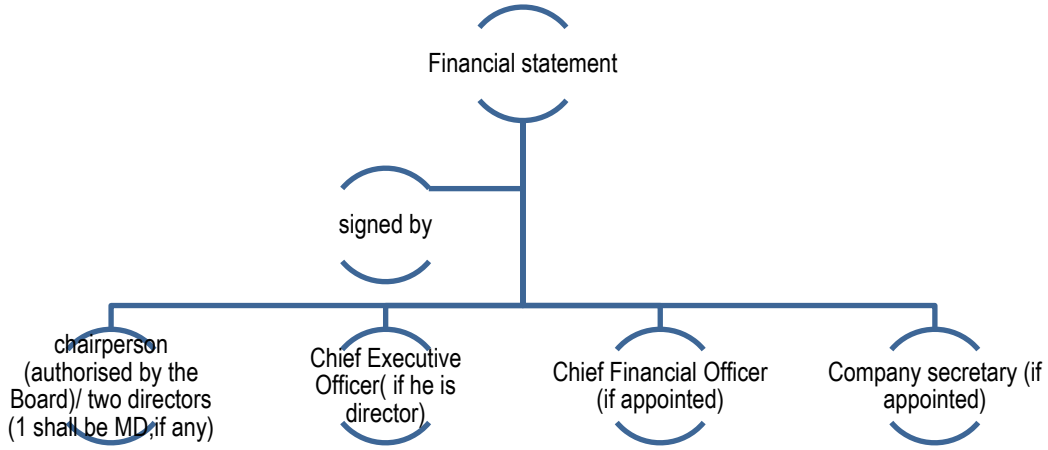
The Companies (Indian Accounting Standards) (Amendment) Rules, 2016

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8. Financial Statement, Board's Report, etc. [Section 134]

Section 134 deals with financial statements as well as board's report. The auditor's report is to be attached to every financial statement. A report by the Board of directors containing details on the matters specified, including director's responsibility statement, shall be attached to every financial statement laid before company. The Board's report and every annexure has to be duly signed. A signed copy of every financial statement shall be circulated, issued or published along with all notes or documents, the auditor's report and Board's report.

(i) Authentication of Financial statements [Section 134(1), (2) & (7)]:



(a) The financial statements, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board at least by the following:

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

  (2) By two directors out of which one shall be managing director and other the Chief Executive Officer, if he is a director in the company,

  (3) The Chief Financial Officer, wherever he is appointed; and

  (4) The company secretary of the company, wherever he is appointed.

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

(c) The auditors' report shall be attached to every financial statement.

(d) A signed copy of every financial statement, including consolidated financial statement, if any, shall be issued, circulated or published along with a copy each of—

  (1) Any notes annexed to or forming part of such financial statement;

  (2) The auditor's report; and

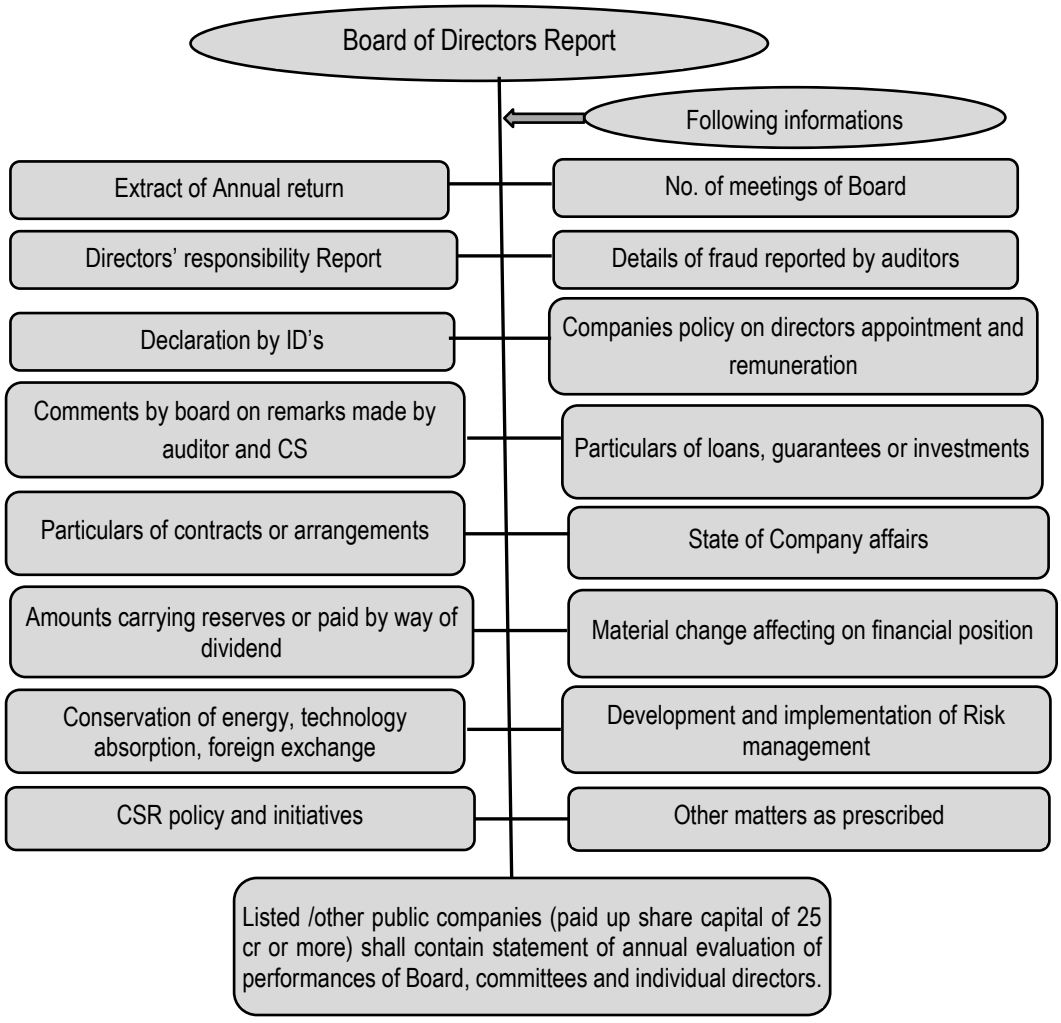
  (3) The Board's report.

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(ii) Board's report [Section 134(3) & (4)]:

(1) According to Rule 8 of the *Companies (Accounts) Rules*, *2014*, the Board's Report shall be prepared based on the stand alone financial statements of the company and shall report on the highlights of performance of subsidiaries, associates and joint venture companies and their contribution to the overall performance of the company during the period under report" .

(2)[4] There shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include—



[4] In case of specified IFSC public & IFSC private company, if any information listed in this sub-section is provided in the financial statement, the company may not include such information in the report of the Board of Directors.

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(a) The extract of the annual return as provided under sub-section (3) of section 92;

(b) Number of meetings of the Board;

(c) Directors' Responsibility Statement;

(ca) By the Companies (Amendment) Act, 2015, this is a new clause added under the Section 134(3), whereby details in respect of frauds reported by auditors under section 143(12) other than those which are reportable to the Central Government.

(d) a statement on declaration given by independent directors under sub-section (6) of section 149;

(e) [5]in case of a company covered under sub-section (1) of section 178, company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director and other matters provided under sub-section (3) of section 178;

(f) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made—

(i) by the auditor in his report; and

(ii) by the company secretary in practice in his secretarial audit report;

(g) particulars of loans, guarantees or investments under section 186;

(h) particulars of contracts or arrangements with related parties referred to in sub-section (1) of section 188 in Form AOC-2;

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

(j) the amounts, if any, which it proposes to carry to any reserves;

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

(l) 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 financial statements relate and the date of the report;

(m) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as prescribed under the Rule 8(3) of the *Companies (Accounts) Rules, 2014* which provides for:

(A) Conservation of energy—

(i) the steps taken or impact on conservation of energy;

(ii) the steps taken by the company for utilising alternate sources of energy;

(iii) the capital investment on energy conservation equipments;

[5] This clause is not applicable to the Government Company as per the Notification dated 5th of June 2015.

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(B) Technology absorption—

(i) the efforts made towards technology absorption;

(ii) the benefits derived like product improvement, cost reduction, product development or import substitution;

(iii) in case of imported technology (imported during the last three years reckoned from the beginning of the financial year)-

(a) the details of technology imported;

(b) the year of import;

(c) whether the technology been fully absorbed;

(d) if not fully absorbed, areas where absorption has not taken place, and the reasons thereof; and

(iv) the expenditure incurred on Research and Development.

(C) Foreign exchange earnings and Outgo-

The Foreign Exchange earned in terms of actual inflows during the year and the Foreign Exchange outgo during the year in terms of actual outflows.

By the *Companies (Accounts) Second Amendments Rules, 2015*, vide Notification dated 4th September 2015, a proviso has been inserted saying that the requirement of furnishing information and details under this sub-rule shall not apply to a Government Company engaged in producing defence equipment.

(n) A statement indicating development and implementation of a risk management policy for the company including identification therein of elements of risk, if any, which in the opinion of the Board may threaten the existence of the company;

(o) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;

(p) Every listed company and every other public company having a paid up share capital of 25 crore rupees or more calculated at the end of the preceding financial year shall include (as prescribed under the *Companies (Accounts) Rules, 2014*), in the report by its Board of directors, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.

This clause shall not apply to the Government Company in case the directors are evaluated by the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government, as per its own evaluation methodology [Inserted *vide Notification dated 5th June 2015]*

(q) Such other matters as contain as prescribed under *the Companies (Accounts) Rules, 2014*. According to which the report of the Board shall also contain–

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(i) the financial summary or highlights;

(ii) the change in the nature of business, if any;

(iii) the details of directors or key managerial personnel who were appointed or have resigned during the year;

(iv) the names of companies which have become or ceased to be its subsidiaries, joint ventures or associate companies during the year;

(v) the details relating to deposits like-

(a) accepted during the year;

(b) remained unpaid or unclaimed as at the end of the year;

(c) whether there has been any default in repayment of deposits or payment of interest thereon during the year and if so, number of such cases and the total amount involved-

(1) at the beginning of the year;

(2) maximum during the year;

(3) at the end of the year;

(vi) the details of deposits which are not in compliance with the requirements of Chapter V of the Act;

(vii) the details of significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future;

(viii) the details in respect of adequacy of internal financial controls with reference to the Financial Statements.

(3) Board's Report in case of OPC [Section 134(4)] : In case of a One Person Company, the report of the Board of Directors to be attached to the financial statement under this section shall, mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

(iii) Directors' Responsibility Statement [Section 134(5)] : The Directors' Responsibility Statement referred to in 134(3) (c) shall state that—

(1) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;

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

(3) 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;

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(4) the directors had prepared the annual accounts on a going concern basis; and

(5) the directors, in the case of a listed company, had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively.

Here, the term "internal financial controls" means the policies and procedures adopted by the company for ensuring the orderly and efficient conduct of its business, including adherence to company's policies, the safeguarding of its assets, the prevention and detection of frauds and errors, the accuracy and completeness of the accounting records, and the timely preparation of reliable financial information;

(6) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively.

(iv) Signing of Board's Report [Section 134(6)]:

The Board's report and any annexures thereto shall be signed by its chairperson of the company if he is authorised by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

(v) Contravention [Section 134(8)]:

Persons liable	Punishment for contravention of any provision of this section
Company	fine which shall not be less than `50,000 but which may extend to `25 Lacs
Every officer of the company who is in default	(1) Imprisonment for a term which may extend to 3 years; or (2) fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5 Lacs; or (3) Both with imprisonment and fine

Example : XYZ is the company who has not prepared and filed statements for the last 5 years, whether the current directors can sign all the financial statements for the past 5 years?

Answer : As per section 134 (1), the financial statements of the company shall be signed by the chairperson of the company where he is authorised by the Board; or two directors out of which one shall be managing director and other the Chief Executive Officer, if he is a director in the company, the Chief Financial Officer; and the company secretary of the company, wherever they are appointed. Therefore, if the financial statements are being prepared for the last 5 years in the current year, the current directors can sign the financial statements for the last 5 years. However, company can approach the Tribunal for compounding of offences for not holding the AGM's for the past 5 years and for non-filing of the financial statement for such periods.

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Example : ABC Company is a one person company and has only one director. Who shall authenticate the balance sheet and statement of profit & loss and the Board 's report?

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

9. Corporate Social Responsibility [Section 135][6]

The Companies Act, 2013 lays down the provisions requiring corporate to mandatorily spend a prescribed percentage of their profits on certain specified areas of social upliftment in discharge of their social responsibilities. Broadly, CSR implies a concept, whereby companies decide voluntarily to contribute to a better society and a cleaner environment – a concept, whereby the companies integrate social and other useful concerns in their business operations for the betterment of its stakeholders and society in general in a voluntary way.

Corporate Social Responsibility : *The Companies (CSR Policy) Rules, 2014* provides the exhaustive definition of CSR which provides that the CSR means and includes but is not limited to :

(i) Projects or programs relating to activities specified in Schedule VII to the Act; or

(ii) Projects or programs relating to activities undertaken by the board of directors of a company (Board) in pursuance of recommendations of the CSR Committee of the Board as per declared CSR Policy of the company subject to the condition that such policy will cover subjects enumerated in Schedule VII of the Act.

According to section 135 of the Companies Act, 2013 read with the *Companies (Corporate Social Responsibility) Rules, 2014:*

(i) Which Company is required to constitute CSR committee:

(a) Every company including its holding or subsidiary, and a foreign company defined under section 2(42) of the Companies Act, 2013 having its branch office or project office in India, having

(1) net worth* of rupees 500 crore or more, or

(2) turnover of rupees 1000 crore or more or

(3) a net profit of rupees 5 crore or more

during any financial year shall constitute a Corporate Social Responsibility Committee of the Board.

(b) The CSR Committee shall institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

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[6] In case of specified IFSC public & IFSC private company, section 135 shall not apply for period of 5 years from the commencement of business of a specified IFSC public company

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(c) However, the net worth, turnover or net profit of a foreign company shall be computed in accordance with balance sheet and profit and loss account of such company as prepared in accordance with the provisions of section 381(1)(a) and section 198 of the Act.

*"Net worth" [Section 2(57)] means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.

(ii) Exclusion of Companies

Every company which ceases to be a company covered under sub- section (1) of section 135 of the Act for three consecutive financial years

(1) shall not be required to constitute a CSR Committee, and

(2) is not required to comply with the provisions as per section 135

(iii) Composition of CSR Committee:

(a) The CSR Committee shall be consisting of three or more directors, out of which at least one director shall be an independent director.

(b) An unlisted public company or a private company which is not required to appoint an independent director shall have its CSR Committee without such director.

(c) A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(d) With respect to a foreign company covered as above, the CSR Committee shall comprise of at least two persons of which one person shall be as specified under section 380(1)(d) of the Act and another person shall be nominated by the foreign company.

(e) The Board's report under sub-section (3) of section 134 shall disclose the composition of the CSR Committee.

(iv) Duties of CSR Committee:

The CSR Committee shall,—

(a) formulate and recommend to the Board, a CSR Policy which shall indicate the activities to be undertaken by the company as specified in Schedule VII;

(b) recommend the amount of expenditure to be incurred on the activities referred to in clause (a); and

(c) monitor the CSR Policy of the company from time to time.

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(v) Contents of the CSR Policy:

(a) List of CSR projects or programs which a company plans to undertake falling within the purview of the Schedule VII of the Act, specifying modalities of execution of such project or programs and implementation schedules for the same; and

(b) monitoring process of such projects or programs:

(c) However, the CSR activities do not include the activities undertaken in pursuance of normal course of business of a company.

(d) The Board of Directors shall ensure that activities included by a company in its CSR Policy are related to the activities included in Schedule VII of the Act.

(e) The CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of the business profit of a company.

(vi) Duties of the Board in relation to CSR:

The Board of every company referred to in sub-section (1) shall,—

(1) after taking into account the recommendations made by the CSR Committee, approve the CSR Policy for the company and disclose contents of such Policy in its report and also place it on the company's website, if any, in such manner as may be prescribed; and

(2) ensure that the activities as are included in CSR Policy of the company are undertaken by the company.

(vii) Amount of contribution towards CSR :

(a) The Board of every company shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

(b) The company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for CSR activities.

(c) If the company fails to spend such amount, the Board shall, in its report, specify the reasons for not spending the amount

(d) Companies may build CSR capacities of their own personnel as well as those of their Implementing agencies through Institutions with established track records of at least three financial years. However, such expenditure including expenditure on administrative overheads, [inserted by the *Companies (Corporate Social Responsibility Policy) Amendment Rules, 2014*] shall not exceed five percent of total CSR expenditure of the company in one financial year.

(viii) CSR Activities :

Rule 4 of the *Companies (CSR Policy) Rules, 2014* states the various CSR activities that shall be undertaken by the companies. Following are the CSR activities-

(1) The CSR activities shall be taken by the company as per its CSR Policy, as projects or programmes or activities excluding activities undertaken in pursuance of its normal

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course of business.

(2) The Board of a company may decide to undertake its CSR activities approved by the CSR Committee, through

(a) a company established under section 8 of the Act or a registered trust or a registered society, established by the company, either singly or alongwith any other company, or

(b) a company established under section 8 of the Act or a registered trust or a registered society, established by the Central Government or State Government or any entity established under an Act of Parliament or a State legislature:

Provided that- if, the Board of a company decides to undertake its CSR activities through a company established under section 8 of the Act or a registered trust or a registered society, other than those specified in this sub-rule, such company or trust or society shall have an established track record of three years in undertaking similar programs or projects; and the company has specified the projects or programs to be undertaken, the modalities of utilisation of funds of such projects and programs and the monitoring and reporting mechanism".

(3) A company may also collaborate with other companies for undertaking projects or programs or CSR activities in such manner that the CSR Committees of respective companies are in a position to report separately on such projects or programs in accordance with these rules.

(4) Subject to provisions contained in section 135(5), the CSR projects or programs or activities undertaken in India only shall amount to CSR Expenditure.

(5) The CSR projects or programs or activities that benefit only the employees of the company and their families shall not be considered as CSR activities in accordance with section 135 of the Act.

(6) Companies may build CSR capacities of their own personnel as well as those of implementing agencies through Institutions with established track records of at least three financial years but such expenditure shall not exceed 5% of total CSR expenditure of the company in one financial year.

(7) Contribution of any amount directly or indirectly to any political party under section 182 of the Act, shall not be considered as CSR activity.

(ix) Exceptions to CSR Activities :

The *Companies (CSR Policy) Rules, 2014* provides for some activities which are not considered as CSR activities :

(1) The CSR projects or programs or activities undertaken outside India.

(2) The CSR projects or programs or activities that benefit only the employees of the company and their families.

(3) Contribution of any amount directly or indirectly to any political party under section 182 of the Act.

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(x) Calculation of Average Net profit :

(a) Here, "average net profit" shall be calculated in accordance with the provisions of section 198.

(b) "Net profit" shall not include the following:

(1) Any profit arising from any overseas branch or branches of the company, whether operated as a separate company or otherwise; and

(2) Any dividend received from other companies in India, which are covered under and complying with the provisions of section 135 of the Act.

(c) However, net profits in respect of a financial year for which the relevant financial statements were prepared in accordance with the provisions of the Companies Act, 1956, shall not be required to be re-calculated in accordance with the provisions of the Act:

(d) It is further provided that in case of a foreign company covered under these rules, net profit means the net profit of such company as per profit and loss account prepared in terms of clause (a) of sub-section (1) of section 381 read with section 198 of the Act.

(xi) CSR Reporting :

(a) The Board's Report of a company covered under these rules pertaining to a financial year commencing on or after the 1st day of April, 2014 shall include an annual report on CSR.

(b) In case of a foreign company, the balance sheet filed under section 381(1)(b) shall contain an Annexure regarding report on CSR.

(xii) Activities specified under Schedule VII :

Activities which may be included by companies in their CSR Policies Activities as specified under Schedule VII are as follows :

(1) eradicating hunger, poverty and malnutrition, promoting health care including preventive health care and sanitation including contribution to the Swach Bharat Kosh set-up by the Central Government for the promotion of sanitation and making available safe drinking water;

(2) promoting education, including special education and employment enhancing vocation skills especially among children, women, elderly, and the differently abled and livelihood enhancement projects;

(3) promoting gender equality, empowering women, setting up homes and hostels for women and orphans; setting up old age homes, day care centres and such other facilities for senior citizens and measures for reducing inequalities faced by socially and economically backward groups;

(4) ensuring environmental sustainability, ecological balance, protection of flora and fauna, animal welfare, agro forestry, conservation of natural resources and maintaining quality of soil, air and water including contribution to the Clean Ganga

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Fund set up by the Central Government for rejuvenation of river Ganga;

(5) protection of national heritage, art and culture including restoration of buildings and sites of historical importance and works of art; setting up public libraries; promotion and development of traditional arts and handicrafts;

(6) measures for the benefit of armed forces veterans, war widows and their dependents;

(7) training to promote rural sports, nationally recognised sports, paralympic sports and Olympic sports;

(8) contribution to the Prime Minister's National Relief Fund or any other -fund set up by the Central Government for socio-economic development and relief and welfare of the Scheduled Castes, the Scheduled Tribes, other backward classes, minorities and women;

(9) contributions or funds provided to technology incubators located within academic institutions which are approved by the Central Government;

(10) rural development projects;

(11) slum area development. [For the purposes of this item, the term 'slum area' shall mean any area declared as such by the Central Government or any State Government or any other competent authority under any law for the time being in force.]

The MCA vide *General Circular No. 21/2014 dated 18th June, 2014* has provided many clarifications with regard to provisions of Corporate Social Responsibility under section 135 of the Companies Act, 2013 which are as under :

(i) The statutory provision and provisions of CSR Rules, 2014, is to ensure that while activities undertaken in pursuance of the CSR policy must be relatable to Schedule VII of the Companies Act 2013, the entries in the said Schedule VII must be interpreted liberally so as to capture the essence of the subjects enumerated in the said Schedule.

(ii) It is further clarified that CSR activities should be undertaken by the companies in project/ programme mode. One-off events such as marathons/ awards/ charitable contribution/ advertisement/ sponsorships of TV programmes etc. would not be qualified as part of CSR expenditure.

(iii) Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.

(iv) Salaries paid by the companies to regular CSR staff as well as to volunteers of the companies (in proportion to company's time/hours spent specifically on CSR) can be factored into CSR project cost as part of the CSR expenditure.

(v) "Any financial year" referred under Sub-Section (1) of Section 135 of the Act read with Companies CSR Rule, 2014, implies 'any of the three preceding financial years'.

(vi) Expenditure incurred by Foreign Holding Company for CSR activities in India will qualify as CSR spend of the Indian subsidiary if, the CSR expenditures are routed

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through Indian subsidiaries and if the Indian subsidiary is required to do so as per section 135 of the Act.

(vii) 'Registered Trust' would include Trusts registered under Income Tax Act 1956, for those States where registration of Trust is not mandatory.

(viii) Contribution to Corpus of a Trust/ society/ section 8 companies etc. will qualify as CSR expenditure as long as (a) the Trust/ society/ section 8 companies etc. is created exclusively for undertaking CSR activities or (b) where the corpus is created exclusively for a purpose directly relatable to a subject covered in Schedule VII of the Act.

Penal Provisions

The Companies Act requires that—

(i) The Board's report shall disclose the composition of the Corporate Social Responsibility Committee as per subsection (3) of section 134;

(ii) If the company fails to spend such amount (i.e. at least two percent of the average net profit), the Board shall disclose and specify the reasons for not spending the amount in its report as per Clause (o) of sub-section (3) of section 134.

As per section 134 of Companies Act, 2013 if the Company fails to disclose such information, it shall be punishable with fine, which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees or with both.

Example : ABC, a company with a turnover of ` 1000 Crores or more and having incurred a loss in any of the preceding three financial years, will be required to comply with CSR ?

Answer : As per section 135(1) of the Act, if any one of the three criteria (whether net worth, or turnover, or net profit) gets satisfied than the company is mandatorily required to comply with the CSR provisions.

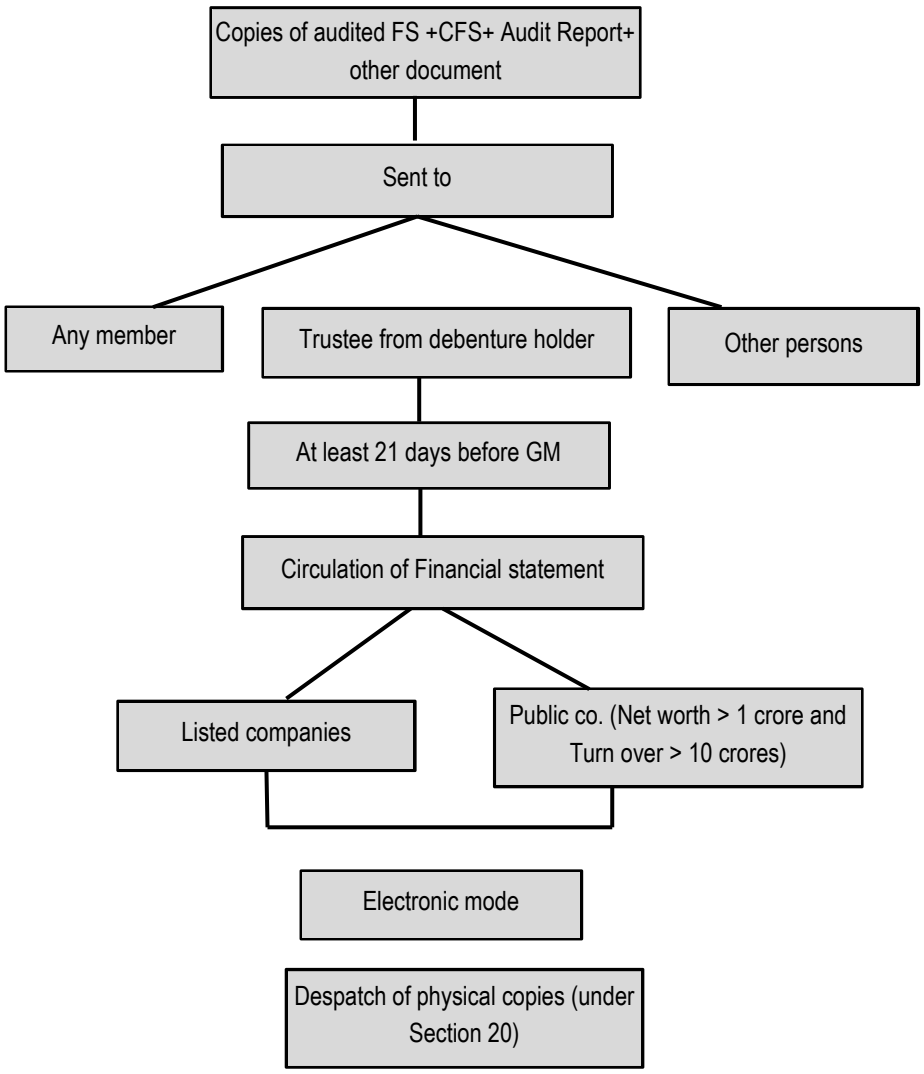
Example : XYZ Ltd is a listed company having turnover of ` 1200 crores during the financial year 2015-16. The CSR committee of the Board formulated and recommended a CSR project which was approved by the Board. Company finalised the project under its CSR initiatives which require funds @ 5 % of average net profit of the company for last three financial years. Will such excess expense be counted in subsequent financial years as a part of CSR expenditure? Advise.

Answer : In terms of Section 135(5) of the Companies Act, 2013, the Board of every company to which section 135 is applicable, shall ensure that the company spends, in every Financial year at least 2 per cent of average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR policy. There is no provision for carry forward of excess expenditure to the next year(s). The words used in the section are 'at least'. Therefore, any expenditure over 2% would be considered as voluntary higher spending.

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10. Right to members to copies of audited financial statement [Section 136]

This section seeks to provide that a copy of financial statements including consolidated financial statement and auditor's report to be sent to every member, every trustee for the debenture holder and all other persons who are so entitled, twenty one days before the date of general meeting.



(i) Who are entitled for audited financial statement?

(a) A copy of the financial statements, which are to be laid before a company in its general meeting, shall be sent to the following:

(1) every member of the company,

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(2) to every trustee for the debenture-holder of any debentures issued by the company, and

(3) to all persons other than such member or trustee, being the person so entitled.

(b) Consolidated financial statements, if any, auditor's report and every other document required by law to be annexed or attached to the financial statements shall be annexed with financial statements.

(c) These financial statements shall be sent in not less than 21 days before the date of the meeting.

(d) In the case of a listed company:

(1) The above provisions shall be deemed to be complied with, if the copies of the documents are made available for inspection at its registered office during working hours for a period of 21 days before the date of the meeting.

(2) Along with it a statement containing the salient features of such documents in the Form AOC-3 or copies of the documents, as the company may deem fit, is sent to every member of the company and to every trustee for the holders of any debentures issued by the company.

(3) The statement is to be sent not less than 21 days before the date of the meeting unless the shareholders ask for full financial statements.

(e) A company shall also allow every member or trustee of the debenture holder to inspect the audited Financial Statement at its registered office during business hours.

[Note : *Vide Notification dated 5th June 2015* for the companies under section 8 the word "twenty one days", the words "Fourteen days" shall be substituted]

(ii) Manner of circulation of financial statements in certain cases :

(a) In case of all listed companies and such public companies which have a net worth of more than one crore rupees and turnover of more than ten crore rupees, the financial statements may be sent-

(1) by electronic mode to such members whose shareholding is in dematerialized format and whose email Ids are registered with Depository for communication purposes;

(2) where Shareholding is held otherwise than by dematerialized format, to such members who have positively consented in writing for receiving by electronic mode; and

(3) by despatch of physical copies through any recognised mode of delivery as specified under section 20 of the Act, in all other cases.

(b) A listed company shall also place its financial statements including consolidated financial statements, if any, and all other documents required to be attached thereto, on its website, which is maintained by or on behalf of the company.

[Rule 11 of the Companies (Accounts) Rules, 2014]

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(iii) Subsidiary Companies :

Every company having a subsidiary or subsidiaries shall,—

(1) place separate audited accounts in respect of each of its subsidiary on its website, if any;

(2) provide a copy of separate audited financial statements in respect of each of its subsidiary, to any shareholder of the company who asks for it.

This sub-section (1) of the Section 136 shall apply to the Nidhis company in the case of members who do not individually or jointly hold shares of more than one thousand rupees in face value or more than 1% of the total paid up share capital whichever is less. It shall be sufficient compliance with the provisions of the section if an intimation is sent by public notice in newspaper circulated in the district in which the registered office of the Nidhi is situated stating the date, time and venue of the annual general meeting and the Financial statement with its enclosures can be inspected at the registered office of the company, and the financial statement with enclosures are affixed in the Notice Board of the company and a member is entitled to vote either in person or through proxy. [As per the *notification dated 5th June 2015*]

(iv) Every company shall be under an obligation to allow every member or trustee of the holder of any debentures issued by the company to inspect the financial statements and documents to be attached thereto stated under sub-section (1) at its registered office during business hours.

In case of listed companies, copies of documents shall be available for inspection at its registered office during working hours for a period of 21 days before the date of meeting and company may send the salient features of financial statements to members and debenture trustees in prescribed form.

(v) Contravention:

(a) If any default is made in complying with the provisions of this section, the company shall be liable to a penalty of ₹ 25,000.

(b) Every officer of the company who is in default shall be liable to a penalty of ₹ 5,000.

Vide General Circular No. 11/2015, dated 21st July 2015, clarification was issued by Ministry of Corporate Affairs with regards to circulation and filing of financial statement.

It has been clarified that a company holding general meeting after giving shorter notice as provided under section 101 of the Act may also circulate financial statements (to be laid/ considered in the same general meeting) at such shorter notice.

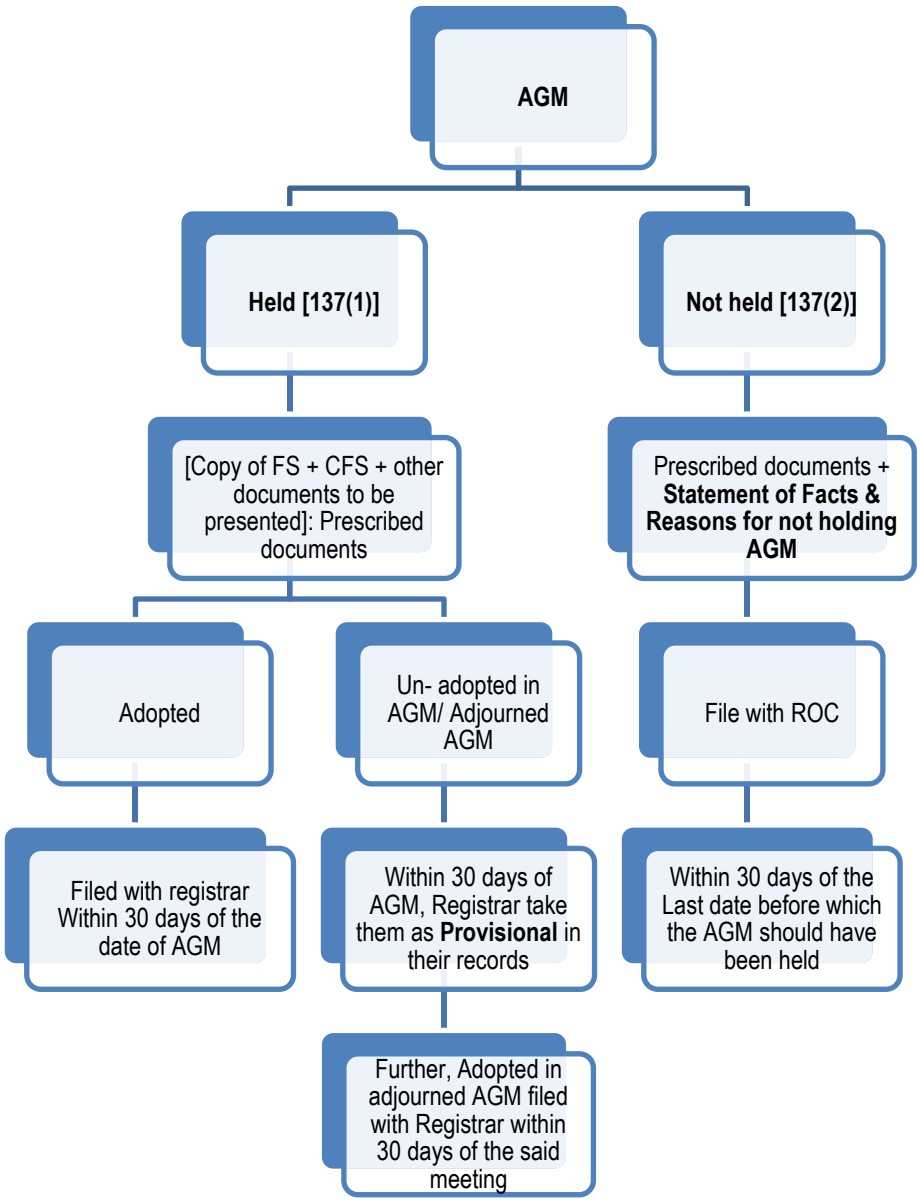
It has also been clarified that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian may place or file such unaudited accounts to comply with requirements of section 136(1) and 137(1) as applicable. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is

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not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

11. Copy of Financial statement to be filed with Registrar [Section 137]

This section provides that copies of financial statement including consolidated financial statement, if any, along with all the documents annexed to financial statement and adopted at AGM shall be filed with Registrar.



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(i) Filing of financial statements [Section 137(1)]:

A copy of the financial statements, including consolidated financial statement, if any, along with all the documents which are required to be or attached to such financial statements under this Act, duly adopted at the annual general meeting of the company, shall be filed with the Registrar within 30 days of the date of annual general meeting in such manner, with such fees or additional fees as may be prescribed within the time specified under section 403.

As per Rule 3 of the *Companies (Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015* vide Notification dated 9th September, 2015, following class of companies shall file their financial statement and other documents under this section with the registrar in e-form AOC-4 XBRL given in Annexure I for the financial years commencing on or after 1st April, 2014 using the XBRL taxonomy, namely—

(1) All companies listed with any stock exchange(s) in India and their Indian subsidiaries, or

(2) All companies having paid up capital of rupees five crore or above, or

(3) All companies having turnover of rupees hundred crore or above, or

(4) All companies which were hitherto covered under the *Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011*:

Provided that the companies in banking, insurance, power sector, non-banking financial companies and housing finance companies need not file financial statements under this rule.

(ii) If Financial Statements are not adopted [Section 137(1)] :

(a) Where the financial statements are not adopted at annual general meeting or adjourned annual general meeting, such unadopted financial statements along with the required documents shall be filed with the Registrar within 30 days of the date of annual general meeting.

(b) The Registrar shall take them in his records as provisional till the financial statements are filed with him after their adoption in the adjourned annual general meeting for that purpose.

(c) If the financial statements are adopted in the adjourned annual general meeting, then they shall be filed with the Registrar within 30 days of the date of such adjourned annual general meeting with such fees or such additional fees as may be prescribed within the time specified under section 403.

(iii) Filing by One Person Company [Section 137(1)] :

A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.

(iv) Company having subsidiaries [Section 137(1)] :

A company shall, along with its financial statements to be filed with the Registrar, attach

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the accounts of its subsidiary or subsidiaries which have been incorporated outside India and which have not established their place of business in India.

It has also been clarified vide *General Circular no. 11/2015 dated 21st July 2015* that in case of foreign company which is not required to get its accounts audited as per the legal requirements prevalent in the country of its incorporation and which does not get such accounts audited, the holding or parent Indian may place or file such unaudited accounts to comply with requirements of section 136(1) and 137(1) as applicable. Further, the format of accounts of foreign subsidiaries should be, as far as possible, in accordance with requirements under the Companies Act, 2013. In case this is not possible, a statement indicating the reasons for deviation may be placed/ filed along with such accounts.

(v) Annual General meeting not held [Section 137(2)] :

Where the annual general meeting of a company for any year has not been held, the financial statements along with the documents required to be attached, duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held and in such manner, with such fees or additional fees as may be prescribed within the time specified, under section 403.

(vi) Penalty [Section 137(3)] : If any of the provisions of this section are contravened,

(a) The company shall be punishable with fine of `1,000 for every day during which the failure continues but which shall not be more than `10 Lacs, and

(b) The managing director and the Chief Financial Officer of the company, if any, and, in the absence of the managing director and the Chief Financial Officer, any other director who is charged by the Board with the responsibility of complying with the provisions of this section, and, in the absence of any such director, all the directors of the company, shall be punishable with:

(1) Imprisonment for a term which may extend to 6 months or

(2) Fine which shall not be less than ₹ 1 lac but which may extend to ₹ 5 Lacs, or

(3) Both with imprisonment and fine.

Person Liable	Punishment for contravention of section 137
Company	with fine of ₹ 1,000 for every day during which the failure continues but which shall not be more than ₹ 10 Lacs,
Officers— managing director and the Chief Financial Officer of the company, if any	(1) Imprisonment for a term which may extend to 6 months or (2) Fine which shall not be less than ₹ 1 lac but which may extend to ₹ 5 Lacs, or (3) Both with imprisonment and fine.

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In their absence, any other director who is charged by the Board with the responsibility In its absence, all the directors of the company.	

Example : The Annual General Meeting of R Ltd., for laying the Annual Accounts thereat for the year ended 31st March, 2016 was not held. What remedies is available with the company regarding compliance of the provisions of section 137 of the Companies Act, 2013 for filing of copies of financial statements with the Registrar of Companies?

Answer : In the present case though Annual General Meeting was not held, it ought to be held by 30th September, 2016 under sections 96 of the Companies Act, 2013.

Therefore, under the provisions of section 137(2) the financial statements along with the documents required to be attached under this Act, duly signed along with the statement of facts and reasons for not holding the annual general meeting shall be filed with the Registrar within thirty days of the last date before which the annual general meeting should have been held i.e. by 30th October 2016 along with such fees or additional fees as may be prescribed.

Example : Will it make any difference in case the Annual Accounts were duly laid before the Annual General Meeting held on 27th September, 2016 but the same were not adopted by the shareholders?

Answer : Since the Annual General Meeting has been held in time on 27th September 2016, the unadopted financial statements along with the required documents under sub-section (1) of section 137 shall be filed with the Registrar within thirty days of the date of annual general meeting and the Registrar shall take them in his records as provisional till the financial statements are filed with him after its adoption in the adjourned annual general meeting for that purpose.

Example :

ABC Ltd is an unlisted public company engaged in pharma sector and has paid up capital of rupees 10 crores and achieved turnover of rupees 200 crores during financial year 2015-16. Is it necessary for ABC Ltd to file its financial statement in XBRL mode?

Answer : The following class of companies shall file their financial statement in XBRL (extensible Business Reporting Language) mode and by using the XBRL taxonomy:

(i) all companies listed with any stock exchange(s) in India and their Indian subsidiaries; or

(ii) all companies having paid up capital of rupees 5 crores or above;

(iii) all companies having turnover of rupees 100 crores or above; or

(iv) all companies which were covered under the *Companies (Filing of Documents and Forms in Extensible Business Reporting Language) Rules, 2011*.

However, Banking Companies, Insurance Companies, Power Companies and Non- Banking Financial Companies (NBFCs) and housing finance companies need not file financial statements under this rule. ABC Ltd is required to file its financial statement in XBRL mode.

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12. Internal Audit [Section 138][7]

Section 138 is to read with Rule 13 of the *Companies (Accounts) Rules, 2014* for the law related to internal audit in a company.

(i) Companies required to appoint Internal Auditor :

(a) The following class of companies shall be required to appoint an internal auditor which may be either an individual or a partnership firm or a body corporate, namely :

(1) every listed company;

(2) every unlisted public company having-

(A) paid up share capital of 50 crore rupees or more during the preceding financial year; or

(B) turnover of 200 crore rupees or more during the preceding financial year; or

(C) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year; or

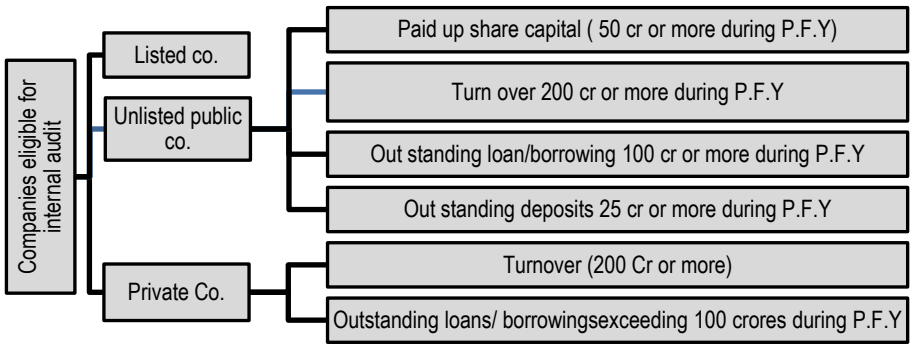
(D) outstanding deposits of 25 crore rupees or more at any point of time during the preceding financial year; and

(3) every private company having—

(A) turnover of 200 crore rupees or more during the preceding financial year; or

(B) outstanding loans or borrowings from banks or public financial institutions exceeding 100 crore rupees or more at any point of time during the preceding financial year.

(b) The Audit Committee of the company or the Board shall, in consultation with the Internal Auditor, formulate the scope, functioning, periodicity and methodology for conducting the internal audit.



[7] In case of a specified IFSC public company & IFSC private company, section 138 shall apply if the articles of the company provides for the same.

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(ii) Transitional period:

An existing company covered under any of the above criteria shall comply with the requirements of section 138 and this rule within 6 months of commencement of such section.

(iii) Who is Internal Auditor

(a) Internal Auditor shall either be a Chartered Accountant or a Cost Accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

The term "Chartered Accountant" or "Cost Accountant" shall mean a "Chartered Accountant" or a "Cost Accountant", as the case may be, whether engaged in practice or not'.

(b) The internal auditor may or may not be an employee of the company.



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UNIT 2: AUDIT AND AUDITORS

13. Introduction

Large business corporations are managed by the directors who represent the members who are the real owners of the company. In the absence of any check the directors may mismanage the finances of the organisation. Thus, members appoint auditor to look into the true and fair view of the financial affairs of the company. These auditors are independent from the management of the company and hence can express an un-biased opinion.

14. Appointment of Auditors [Section 139]

Section 139 of the Companies Act, 2013 provides for appointment of auditors. According to this section :

(i) Appointment of auditor [Section 139(1)] :

(a) Every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor of the company.

(b) The auditor shall hold office from the conclusion of 1st annual general meeting (AGM) till the conclusion of its 6th AGM and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the members ofthe company at AGM has been prescribed under the *Companies (Audit and Auditors) Rules, 2014*. According to the Rules:

(c) Manner and procedure of selection and appointment of auditors :

(1)

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177[8]	Audit Committee	(i) The competent authority shall take into consideration the qualifications and

[8] **Companies that require to constitute an audit committee**

For the purpose of constitution of Audit Committee section 177 of the Act read with Companies (Meetings of Board and its Powers) Rules, 2014 provides that:

The Board of directors of every listed companies and the following classes of companies shall constitute an Audit Committee of the Board-

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

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A Company which is not required to constitute an Audit Committee under section 177	Board	experience of the individual or the firm proposed to be considered for appointment as auditor and whether such qualifications and experience are commensurate with the size and requirements of the company.
		(ii) It shall have regard to any order or pending proceeding relating to professional matters of conduct against the proposed auditor before the Institute of Chartered Accountants of India or any competent authority or any Court. (iii) It may call for such other information from the proposed auditor as it may deem fit.

(2)

Categories of Companies	Competent authority	Responsibility of the competent authority
A company which is required to constitute an Audit Committee under section 177	Audit Committee	the committee shall recommend the name of an individual or a firm as auditor to the Board for consideration
A Company which is not required to constitute an	Board	the Board shall consider and recommend an

(ii) all public companies having turnover of one hundred crore rupees or more;

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

Explanation: The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited financial statements shall be taken into account for the purposes of this rule.

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Audit Committee under section 177		individual or a firm as auditor to the members in the annual general meeting for appointment

(3) If the Board agrees with the recommendation of the Audit Committee, it shall further recommend the appointment of an individual or a firm as auditor to the members in the AGM.

(4) If the Board disagrees with the recommendation of the Audit Committee, it shall refer back the recommendation to the committee for reconsideration citing reasons for such disagreement.

(5) If the Audit Committee, after considering the reasons given by the Board, decides not to reconsider its original recommendation, the Board shall record reasons for its disagreement with the committee and send its own recommendation for consideration of the members in the annual general meeting; and if the Board agrees with the recommendations of the Audit Committee, it shall place the matter for consideration by members in the AGM.

(d) The company shall place the matter relating to such appointment for ratification by members at every AGM. According to the Companies (*Audit and Auditors*) *Rules, 2014,* the appointment shall be subject to ratification in every annual general meeting till the 6th meeting by way of passing of an ordinary resolution.

If the appointment is not ratified by the members of the company, the Board of Directors shall appoint another individual or firm as its auditor or auditors after following the procedure laid down in this behalf under the Act.

(e) Before the appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor.

Certificate by Auditor: *The Companies (Audit and Auditors) Rules, 2014* provides the content of the Certificate. According to this, the auditor appointed shall submit a certificate that–

(A) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;

(B) the proposed appointment is as per the term provided under the Act;

(C) the proposed appointment is within the limits laid down by or under the authority of the Act;

(D) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

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(f) The certificate shall also indicate whether the auditor satisfies the criteria provided in section 141 [Section 141 provides provisions on eligibility, qualification and disqualification of Auditor which will be discussed later]

(g) **Communication to Auditor:** Further, the company shall inform the auditor concerned of his or its appointment, and also file a notice (in the *Form ADT-1*) of such appointment with the Registrar within 15 days of the meeting in which the auditor is appointed

Here, "appointment" includes reappointment.

(ii) Term of Auditor [Section 139(2)] :

(a) Section 139(2) provides that listed companies and other prescribed class or classes of companies (except one person companies and small companies) shall not appoint or re-appoint—

(1) an individual as auditor for more than one term of five consecutive years; and

(2) an audit firm as auditor for more than two terms of five consecutive years.

(b) Rule 5 of the *Companies* (*Audit and Auditors) Rules, 2014* has prescribed the following classes of companies for the purposes of section 139(2) :

(1) all unlisted public companies having paid up share capital of rupees 10 crore or more;

(2) all private limited companies having paid up share capital of rupees 20 crore or more;

(3) all companies having paid up share capital of below threshold limit mentioned in (2) and (3) above, but having public borrowings from financial institutions, banks or public deposits of rupees 50 crores or more.

(c) **Cooling off Period:**

(1) An individual auditor who has completed his term (i.e. one term of five consecutive years) shall not be eligible for re-appointment as auditor in the same company for five years from the completion of his term;

(2) An audit firm which has completed its term (i.e. two terms of five consecutive years) shall not be eligible for re- appointment as auditor in the same company for five years from the completion of such term.

Example : XYZ Ltd. which is a listed company appoints Mr. Raghav as an auditor in its AGM dated 29th September, 2016. Mr. Raghav will hold office of Auditor from the conclusion of this meeting upto conclusion of sixth AGM i.e. AGM to be held in the year 2021. Now as per sub-section (2), Mr. Raghav shall not be re-appointed as Auditor in XYZ Ltd. for further term of five years i.e. he cannot be appointed as Auditor upto year 2026.

Example : XYZ Ltd. which is a listed company appoints M/s Raghav & Associates as an audit firm in its AGM dated 29th September, 2016. M/s Raghav & Associates will hold office from the conclusion of this meeting upto conclusion of sixth AGM to be held in the year 2021. Now as per sub-section (2), M/s Raghav & Associates can be appointed or re-appointed as auditor for one more term of five years i.e. upto year

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2026. It shall not be re-appointed as Audit firm in XYZ Ltd. for further term of five years i.e. upto year 2031.

(d) Further, as on the date of appointment no audit firm having a common partner or partners to the other audit firm, whose tenure has expired in a company immediately preceding the financial year, shall be appointed as auditor of the same company for a period of five years.

Example : M/s Krishna & Associates is an audit firm having 2 partners namely Mr. Krishna and Mr. Shyam. Mr. Shyam is also a partner of another audit firm named M/s Kukreja & Associates. M/s Krishna & Associates was appointed as the auditors in the company Golden Smith Ltd. for two consecutive periods i.e. from year 2016 to year 2026. Now, if Golden Smith Ltd. wants to appoint M/s Kukreja & Associates as its audit firm, it can not do so because Mr. Shyam was the common partner between both the Audit firms. This prohibition is only for 5 years i.e. upto year 2031. After 5 years Golden Smith Ltd. may appoint M/s Kukreja & Associates as its auditors.

(e) **Transitional period :** Every company, existing on or before the commencement of this Act which is required to comply with the provisions of this sub-section, shall comply with requirements of this sub-section within a period which shall not be later than the date of the first annual general meeting of the company held, within the period specified under sub-section (1) of section 96, after three years from the date of commencement of this Act."

(f) It is also provided that nothing contained in this sub-section shall prejudice the right of the company to remove an auditor or the right of the auditor to resign from such office of the company.

(iii) Rotation of auditor [section 139(3) and (4)]:

(a) Members of a company may resolve to provide that—

(1) in the audit firm appointed by it, the auditing partner and his team shall be rotated at such intervals as may be resolved by members; or

(2) the audit shall be conducted by more than one auditor.

(b) The Central Government may, by rules, prescribe the manner in which the companies shall rotate their auditors.

(c) Manner of rotation of auditors by the companies on expiry of their term as provided under the *Companies (Audit and Auditors) Rules, 2014* :

(1) The Audit Committee shall recommend to the Board, the name of an individual auditor or of an audit firm who may replace the incumbent auditor on expiry of the term of such incumbent.

(2) Where a company is required to constitute an Audit Committee, the Board shall consider the recommendation of such committee, and in other cases, the Board shall itself consider the matter of rotation of auditors and make its recommendation for appointment of the next auditor by the members in annual general meeting.

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(3) For the purpose of the rotation of auditors—

(i) in case of an auditor (whether an individual or audit firm), the period for which the individual or the firm has held office as auditor prior to the commencement of the Act shall be taken into account for calculating the period of five consecutive years or ten consecutive years, as the case may be;

(ii) the incoming auditor or audit firm shall not be eligible if such auditor or audit firm is associated with the outgoing auditor or audit firm under the same network of audit firms.

The term "same network" includes the firms operating or functioning, hitherto or in future, under the same brand name, trade name or common control.

(iii) For the purpose of rotation of auditors,-

(A) a break in the term for a continuous period of five years shall be considered as fulfilling the requirement of rotation;

(B) if a partner, who is in charge of an audit firm and also certifies the financial statements of the company, retires from the said firm and joins another firm of chartered accountants, such other firm shall also be ineligible to be appointed for a period of five years.

Illustration explaining rotation in case of individual auditor:

Number of consecutive years for which an individual auditor has been functioning as auditor in the same company [in the first AGM held after the commencement of provisions of section 139(2)]	Maximum number of consecutive years for which he may be appointed in the same company (including transitional period)	Aggregate period which the auditor would complete in the same company in view of column I and II
I	II	III
5 years (or more than 5 years)	3 years	8 years or more
4 years	3 years	7 years
3 years	3 years	6 years
2 years	3 years	5 years
1 year	4 years	5 years

Here,

(a) Individual auditor shall include other individuals or firms whose name or trade mark or brand is used by such individual, if any.

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(b) Consecutive years shall mean all the preceding financial years for which the individual auditor has been the auditor until there has been a break by five years or more.

Illustration explaining rotation in case of audit firm

Number of consecutive years for which an audit firm has been functioning as auditor in the same company [in the first AGM held after the commencement of provisions of section 139(2)]	Maximum number of consecutive years for which the firm may be appointed in the same company (including transitional period)	Aggregate period which the firm would complete in the same company in view of column I and II
I	II	III
10 years (or more than 10 years)	3 years	13 years or more
9 years	3 years	12 years
8 years	3 years	11 years
7 years	3 years	10 years
6 years	4 years	10 years
5 years	5 years	10 years
4 years	6 years	10 years
3 years	7 years	10 years
2 years	8 years	10 years
1 year	9 years	10 years

Here,

(a) Audit Firm shall include other firms whose name or trade mark or brand is used by the firm or any of its partners.

(b) Consecutive years shall mean all the preceding financial years for which the firm has been the auditor until there has been a break by five years or more.

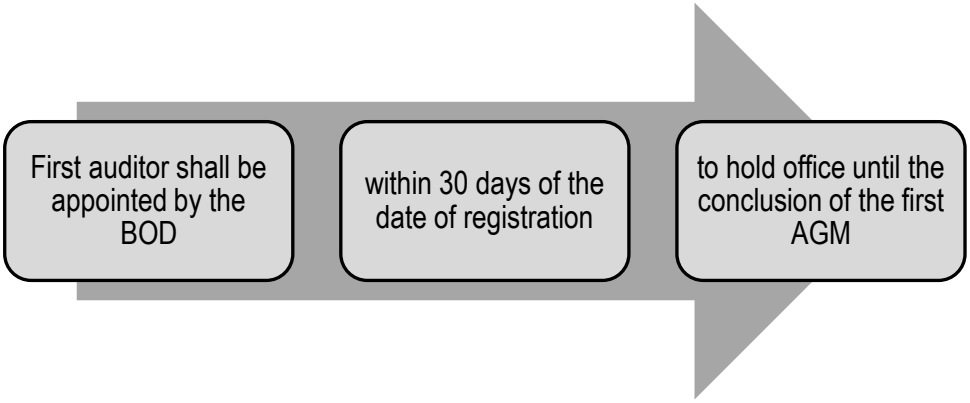
(4) Where a company has appointed two or more individuals or firms or a combination thereof as joint auditors, the company may follow the rotation of auditors in such a manner that both or all of the joint auditors, as the case may be, do not complete their term in the same year.

(d) Here, the word "firm" shall include a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008.

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(iv) First auditors [Section 139(6)] :

(a) Notwithstanding anything contained in sub-section (1), the first auditor of a company, other than a Government Company, shall be appointed by the Board of directors within 30 days of the date of registration of the company; and the auditor so appointed shall hold office until the conclusion of the first annual general meeting.



(b) If the Board fails to exercise its powers i.e. appointment of first auditor, it shall inform the members of the company and the company may appoint the first auditor within 90 days at an extra ordinary general meeting and such auditor shall hold office till the conclusion of the first annual general meeting.

Example : Managing Director of PQR Ltd. himself wants to appoint Shri Ganpati, a practicing Chartered Accountant, as first auditor of the company. Comment on the proposed action of the Managing Director.

Answer : Provisions and Explanation : Section 139(6) of the Companies Act, 2013 lays down that "the first auditor or auditors of a company shall be appointed by the Board of directors within 30 days from the date of registration of the company". In the instant case, the appointment of Shri Ganapati, a practicing Chartered Accountant as first auditors by the Managing Director of PQR Ltd by himself is in violation of Section 139(6) of the Companies Act, 2013, which authorizes the Board of Directors to appoint the first auditor of the company.

Conclusion : In view of the above, the Managing Director of PQR Ltd should be advised not to appoint the first auditor of the company.

(v) Filling up casual vacancy [Section 139(8)] :

(a) The Board may fill any casual vacancy in the office of an auditor within 30 days but where such vacancy is caused by the resignation of an auditor, such appointment shall also be approved by the company at a general meeting convened within three months of the recommendation of the Board.

(b) Any auditor appointed in a casual vacancy shall hold office until the conclusion of the next annual general meeting.

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Example : Prakash Carriers Limited appointed Mr. Raman as its auditor in the Annual General Meeting held on 30th September, 2016. Initially, he accepted the appointment. But he resigned from his office on 31st October, 2016 for personal reasons. The Board of directors seeks advice for filling up the vacancy by appointment of Mr. Albert as auditor.

In the present case, as the auditor has resigned, the casual vacancy so created can be filled up by the Board appointing Mr. Albert. However, the appointment of Mr. Albert must be approved by the company by passing of an ordinary resolution at a general meeting of the company which must be convened by the Board within 3 months of the recommendation of the Board. Mr. Albert will be entitled to hold office till the conclusion of the next Annual General Meeting.

(vi) Appointment of auditors in case of Government Company or any other company having controlled by State Government or Central Government [Section 139(5), 139(7) and 139(8)]

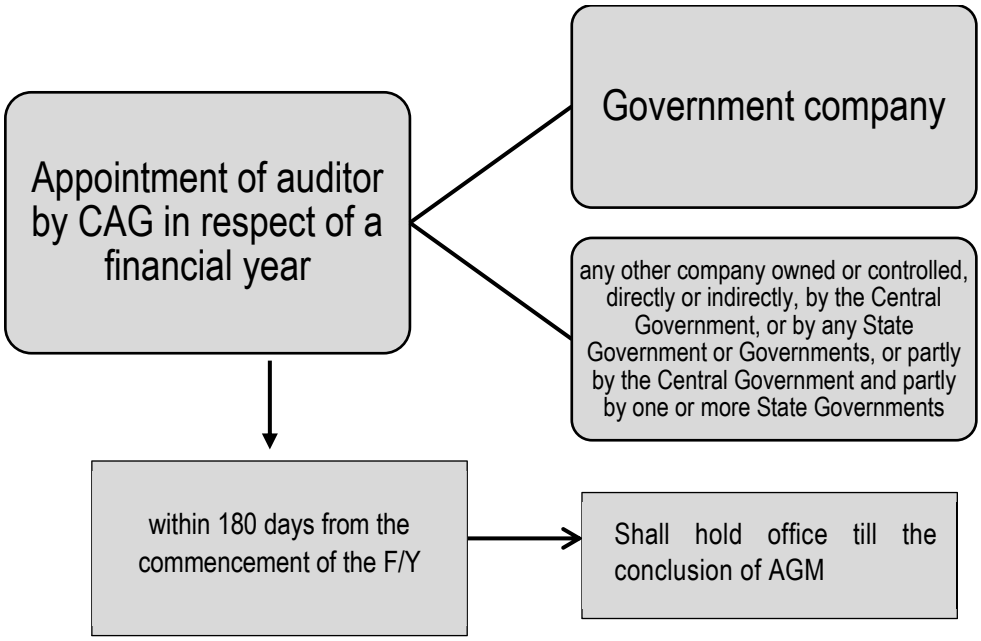
(a) As per section 139(5), the Comptroller and Auditor-General of India shall, in respect of a financial year, appoint an auditor duly qualified to be appointed as an auditor of companies under this Act in the case of:

(1) a Government company; or

(2) any other company owned or controlled, directly or indirectly, 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,

(b) The auditor shall be appointed within a period of 180 days from the commencement of the financial year. The auditor appointed shall hold office till the conclusion of the annual general meeting.

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(c) **First auditor [section 139(7)]** :

(1) in the case of a Government company or any other company owned or controlled, directly or indirectly, 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, the first auditor shall be appointed by the Comptroller and Auditor-General of India within 60 days from the date of registration of the company.

(2) In case the Comptroller and Auditor-General of India does not appoint first auditor within the said period, the Board of Directors of the company shall appoint such auditor within the next 30 days.

(3) Further, in the case of failure of the Board to appoint such auditor within the next 30 days, it shall inform the members of the company who shall appoint such auditor within the 60 days at an extraordinary general meeting, who shall hold office till the conclusion of the first annual general meeting.

(d) **Casual vacancy [section 139(8)]** :

(1) In the case of a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, casual vacancy of an auditor be filled by the Comptroller and Auditor-General of India within 30 days.

(2) In case the Comptroller and Auditor-General of India do not fill the vacancy within the said period, the Board of Directors shall fill the vacancy within next 30 days.

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(vii) Re-appointment of retiring auditor [section 139(9), (10) and (11)] :

(a) At any annual general meeting, a retiring auditor may be re-appointed at an AGM, if—

(1) he is not disqualified for re-appointment;

(2) he has not given the company a notice in writing of his unwillingness to be re-appointed; and

(3) a special resolution has not been passed at that meeting appointing some other auditor or providing expressly that he shall not be re-appointed.

(b) Where at any annual general meeting, no auditor is appointed or re-appointed, the existing auditor shall continue to be the auditor of the company.

(viii) Audit committee's recommendation [Section 139(11)] :

Where a company is required to constitute an Audit Committee under section 177, all appointments, including the filling of a casual vacancy of an auditor under this section shall be made after taking into account the recommendations of such committee.

15. Removal, resignation of auditor and giving of special notice [Section 140]

Section 140 of the Companies Act, 2013 provides for removal, resignation of auditor and giving of special notice. According to this section:

(i) Removal of auditor before the expiry of his term [Section 140(1)] :

(a) The auditor appointed under section 139 may be removed from his office before the expiry of his term only by a special resolution of the company and after obtaining the previous approval of the Central Government[9] by making an application in Form ADT-2 and shall be accompanied with the prescribed fees.

(b) The application shall be made to the Central Government within 30 days of the resolution passed by the Board.

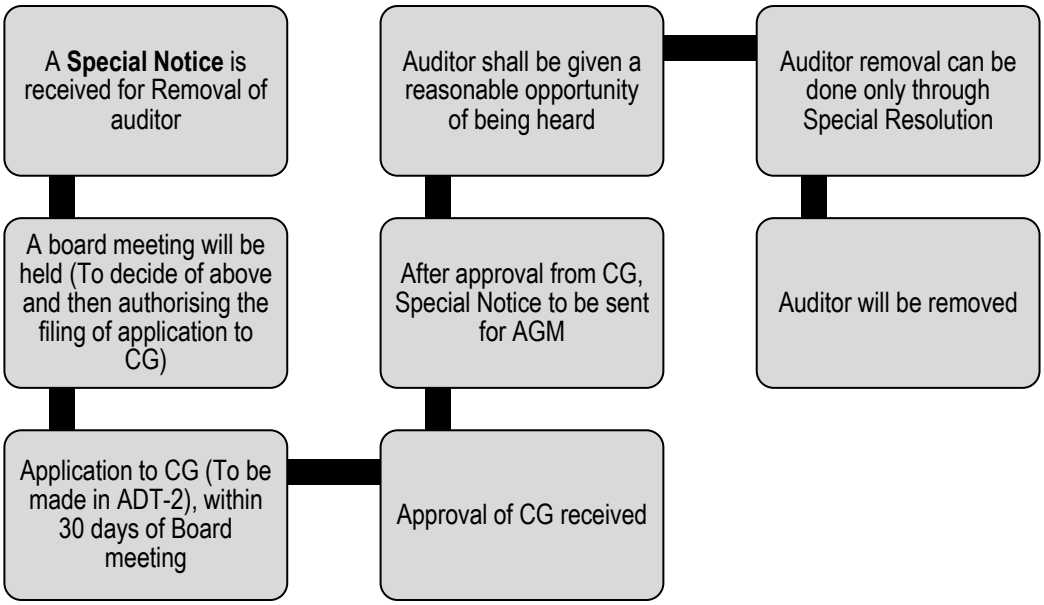
(c) The Company shall hold the general meeting within 60 days of receipt of approval of the Central Government for passing the special resolution.

(d) **Giving opportunity of being heard** (*Audi Alteram Partem*) : Before taking any action for removal of auditor before the expiry of his term, the auditor concerned shall be given a reasonable opportunity of being heard.

[9] Powers are delegated to Regional Director

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STEPS FOR REMOVAL OF AUDITOR



Example : Mr. Suresh, a Chartered Accountant, was appointed by the Board of Directors of AB Limited as the First Auditor. The company in General Meeting removed Mr. Suresh without seeking the approval of the Central Government and appointed Mr. Gupta as Auditor in his place. In this case, the first auditors appointed by Board of Directors can be removed in accordance with the provision of Section 140(1) of the Companies Act, 2013. Hence, the removal of the first auditor appointed by the Board without seeking approval of the Central Government is invalid. The company contravened the provision of the Act.

(ii) Resignation by Auditor [Section 140(2) & (3)]

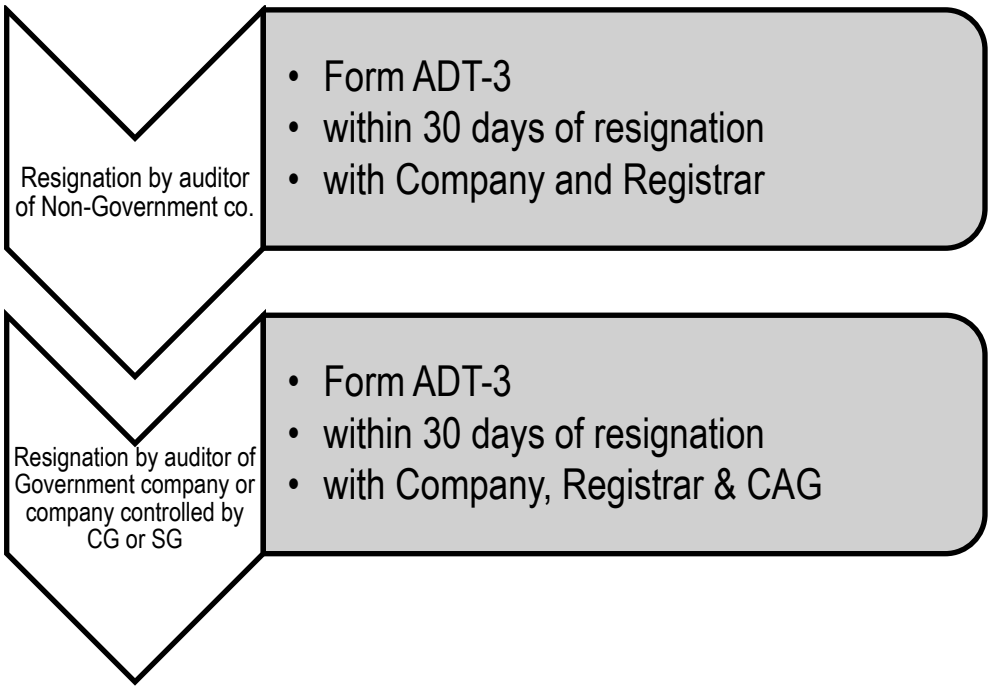
(a) If the Auditor has resigned from the company, he shall file within a period of 30 days from the date of resignation, a statement in the form ADT-3 with the company and the Registrar.

(b) The auditor shall indicate the reasons and other facts as may be relevant with regard to his resignation, in the statement.

(c) In case of government companies or company controlled by Central Government or State Government, the auditor shall also file such statement with the Comptroller and Auditor-General of India also along with company and the Registrar.

(d) If the auditor does not comply with aforesaid provision, he or it shall be punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5 Lacs.

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(iii) Appointing Auditor other than the Retiring Auditor [Section 140(4)]

(a) If the retiring auditor has not completed a consecutive tenure of 5 years or, as the case may be, 10 years, as provided under sub-section (2) of section 139, special notice shall be required for a resolution at an annual general meeting appointing as auditor a person other than a retiring auditor, or providing expressly that a retiring auditor shall not be re-appointed.

(b) On receipt of notice of such a resolution, the company shall forthwith send a copy thereof to the retiring auditor.

(c) Where notice is given of such a resolution and the retiring auditor makes with respect thereto representation in writing to the company (not exceeding a reasonable length) and requests its notification to members of the company, the company shall, unless the representation is received by it too late for it to do so,—

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

(2) send a copy of the representation to every member of the company to whom notice of the meeting is sent, whether before or after the receipt of the representation by the company,

(d) If a copy of the representation is not sent as aforesaid because it was received too late or because of the company's default, the auditor may (without prejudice to his right to be heard orally) require that the representation shall be read out at the meeting.

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(e) However, if a copy of representation is not sent as aforesaid, a copy thereof shall be filed with the Registrar.

(f) If the Tribunal is satisfied on an application either of the company or of any other aggrieved person that the rights conferred by this sub-section are being abused by the auditor, then, the copy of the representation may not be sent and the representation need not be read out at the meeting.

(iv) Auditor acts in a fraudulent manner or abetted or colluded in any fraud [Section 140(5)]

(a) **On satisfaction of Tribunal that the auditor of a company has acted in a fraudulent manner etc.:** Without prejudice to any action under the provisions of this Act or any other law for the time being in force, the Tribunal either—

suo motu; or
on an application made to it by the Central Government; or
by any person concerned,

if it is satisfied that the auditor of a company has, whether directly or indirectly, **acted in a fraudulent manner or abetted or colluded in any fraud by,** or in relation to, the company or its directors or officers,

it may, by order, **direct the company to change its auditors**.

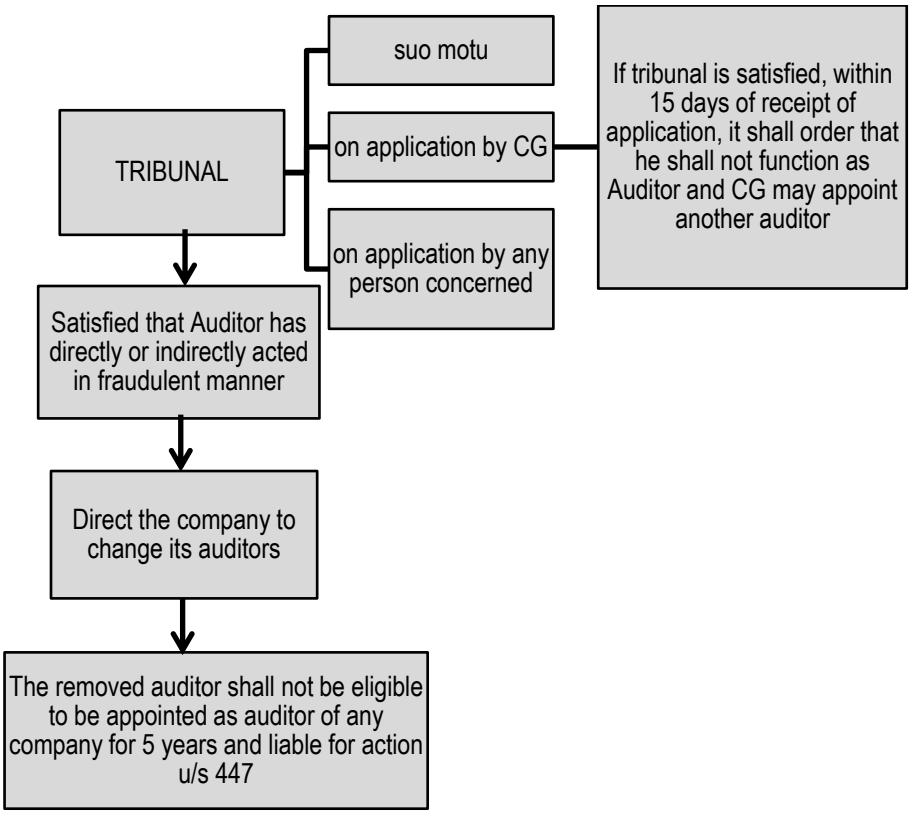
(b) **Requirement for change of auditor :** If the application is made by the Central Government and the Tribunal is satisfied that any change of the auditor is required, it shall within fifteen days of receipt of such application, make an order that he shall not function as an auditor and the Central Government may appoint another auditor in his place.

(c) **Ineligibility of auditor to be appointed :** An auditor, whether individual or firm, against whom final order has been passed by the Tribunal under this section shall not be eligible to be appointed as an auditor of any company for a period of five years from the date of passing of the order and the auditor shall also be liable for action under section 447.

(d) **Explanation I.—**It is hereby clarified that the case of a firm, the liability shall be of the firm and that of every partner or partners who acted in a fraudulent manner or abetted orcolluded in any fraud by, or in relation to, the company or its director or officers.

(e) **Explanation II.—**For the purposes of this Chapter the word "auditor" includes a firm of auditors.

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16. Eligibility, qualifications and disqualifications of auditors [Section 141]

Section 141 of the Companies Act, 2013 provides for eligibility, qualifications and disqualifications of auditors. This section deals with :

(i) Qualifications of an auditor [Section 141(1) & (2)] :

(a) A person shall be eligible to be appointed as auditor of a company only if he is a Chartered Accountant within the meaning of the Chartered Accountants Act, 1949.

(b) A firm whereof majority of partners practising in India are qualified for appointment as aforesaid may be appointed by its firm name to be auditor of a company.

(c) Where a firm including a Limited Liability Partnership is appointed as an auditor of a company, only the partners who are chartered accountants shall be authorised to act and sign on behalf of the firm.

(ii) Disqualifications of auditors [Section 141(3)] :

(a) The following persons shall not be qualified for appointment as auditor of a company—

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(1) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;

(2) an officer or employee of the company;

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

Example : Mr. A, a Chartered accountant has been appointed as an auditor of Laxman Ltd. in the Annual General Meeting of the company held in September, 2016, in which he accepted the assignment. Subsequently, in January, 2017 he joined B, another Chartered Accountant, who is the Manager Finance of Laxman Ltd., as partner.

Answer : Provisions and Explanation : Section 141(3) (c) of the Companies Act, 2013 prescribes that any person who is a partner or in employment of an officer or employee of the company will be disqualified to act as an auditor of a company. Sub-section (4) of Section 141 provides that an auditor who becomes subject, after his appointment, to any of the disqualifications specified in sub-sections (3) of Section 141, he shall be deemed to have vacated his office as an auditor.

Conclusion : In the present case, A, an auditor of M/s Laxman Ltd., joined as partner with B, who is Manager Finance of M/s Laxman Limited, has attracted clause (3) (c) of Section 141 and, therefore, he shall be deemed to have vacated office of the auditor of M/s Laxman Limited.

(4) a person who, or his relative or partner—

(A) is holding any security of or interest in the company or its subsidiary, or of its holding orassociate company or a subsidiary of such holding company:

Provided that the relative may hold security or interest in the company of face value not exceeding ₹ 1,00,000 as prescribed under the *Company (Audit and Auditors) Rules, 2014.*

The *Company (Audit and Auditors) Rules, 2014* provides that a relative of an auditor may hold securities in the company of face value not exceeding ₹ 1 Lac. Further, the above condition shall, wherever relevant, be also applicable in the case of a company not having share capital or other securities. If the relative acquires any security or interest above the prescribed threshold i.e. ₹ 1 Lac, the corrective action to maintain the limits as specified above shall be taken by the auditor within sixty days of such acquisition or interest.

Example 1 : "Mr. A", a practicing Chartered Accountant, is holding securities of "XYZ Ltd." having face value of ₹ 900/-. Whether Mr. A is qualified for appointment as an Auditor of "XYZ Ltd."?

Answer : As per section 141 (3)(d) (i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security

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of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company:

In the present case, Mr. A. is holding security of ₹ 900 in the XYZ Ltd, therefore he is not eligible for appointment as an Auditor of "XYZ Ltd".

Example 2 : "Mr. P" is a practicing Chartered Accountant and "Mr. Q", the relative of "Mr. P", is holding securities of "ABC Ltd." having face value of ₹ 90,000/-. Whether "Mr. P" is Qualified from being appointed as an Auditor of "ABC Ltd."?

Answer : As per section 141 (3)(d)(i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of ₹ 1,00,000.

In the present case, Mr. Q. (relative of Mr. P, an auditor), is having securities of ₹ 90,000 face Value in the ABC Pvt. Ltd., which is as per requirement of proviso to section 141 (3)(d)(i), Therefore, Mr. P will not be disqualified to be appointed as an auditor of ABCLtd.

Example 3 : "BC & Co." is an Audit Firm having partners "Mr. B" and "Mr. C", and "Mr. A" the relative of "Mr. C", is holding securities of "MWF Ltd." having face value of ₹ 1,01,000/-. Whether "BC & Co." is qualified from being appointed as an Auditor of "MWF Ltd."?

Answer : As per section 141 (3)(d) (i) an auditor is disqualified to be appointed as an auditor if he, or his relative or partner holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company: Further as per proviso to this Section, the relative of the auditor may hold the securities or interest in the company of face value not exceeding of ₹ 1,00,000.

In the instant case, BC & Co, will be disqualified for appointment as an auditor of MWF Ltd as the relative of Mr. C i.e. partner of BC & Co., is holding the securities in MWF Ltd which is exceeding the limit mentioned in proviso to section 141(3)(d)(i).

(B) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ` 5 Lacs; or

(C) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of ` 1 Lac.

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(5) a person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company. According to the *Companies (Audit and Auditors) Rules, 2014,* the term "business relationship" shall be construed as any transaction entered into for a commercial purpose, except–

(A) commercial transactions which are in the nature of professional services permitted to be rendered by an auditor or audit firm under the Act and the Chartered Accountants Act, 1949 and the rules or the regulations made under those Acts;

(B) commercial transactions which are in the ordinary course of business of the company at arm's length price-like sale of products or services to the auditor, as customer, in the ordinary course of business, by companies engaged in the business of telecommunications, airlines, hospitals, hotels and such other similar businesses.

(6) a person whose relative is a director or is in the employment of the company as a director or key managerial personnel;

(7) a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than 20 companies other than one person companies, small companies and private companies having paid-up share capital less than one hundred crore rupees.

Ceiling numbers of audits : Before appointment is given to any auditor, the company must obtain a certificate from him to the effect that the appointment, if made, will not result in an excess holding of company audit by the auditor concerned over the limit laid down in section141 (3)(g) of the Companies Act, 2013 which prescribes that a person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies;

Example : "ABC & Co." is an Audit Firm having partners "Mr. A", "Mr. B" and "Mr. C", Chartered Accountants. "Mr. A", "Mr. B" and "Mr. C" are holding appointment as an Auditor in 4, 6 and 10 Companies respectively.

(i) Provide the maximum number of Audits remaining in the name of "ABC & Co."

(ii) Provide the maximum number of Audits remaining in the name of individual partner i.e. Mr. A, Mr. B and Mr. C.

Fact of the Case: In the instant case, Mr. A is holding appointment in 4 companies, whereas Mr. B is having appointment in 6 Companies and Mr. C is

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having appointment in 10 Companies. In aggregate all three partners are having 20 audits.

Provisions and Explanations : As per section 141(3)(g) of the Companies Act, 2013, a person shall not be eligible for appointment as an auditor if he is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such person or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies;

As per section 141 (3)(g), this limit of 20 company audits is per person. In the case of an audit firm having 3 partners, the overall ceiling will be 3 × 20 = 60 company audits. Some-times, a chartered accountant is a partner in a number of auditing firms. In such a case, all the firms in which he is partner or proprietor will be together entitled to 20 company audits on his account.

Conclusion :

(i) Therefore, ABC & Co. can hold appointment as an auditor of 40 more companies:

Total Number of Audits available to the Firm = 20*3	= 60
Number of Audits already taken by all the partners	
In their individual capacity = 4+6+10	= 20
Remaining number of Audits available to the Firm	= 40

(ii) With reference to above provisions an auditor can hold more appointment as auditor = ceiling limit as per section 141(3)(g)- already holding appointments as an auditor. Hence

(1) Mr. A can hold: 20 – 4 = 16 more audits.

(2) Mr. B can hold 20 - 6 = 14 more audits and

(3) Mr. C can hold 20-10 = 10 more audits.

(8) a person who has been convicted by a court of an offence involving fraud and a period of 10 years has not elapsed from the date of such conviction;

(9) any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialised services as provided in section 144 (section 144 deals with certain services not to be tendered by auditor).

(iii) Vacation of office by an auditor [Section 141(4)] :

If a person appointed as an auditor of a company incurs any of the disqualifications specified in Section 141(3), he shall be deemed to have vacated his office. Such vacation shall be deemed to be a casual vacancy in the office of the auditor.

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17. Remuneration of auditors [Section 142]

Section 142 of the Companies Act, 2013 provides for remuneration of auditors. According to this section :

(i) The remuneration of the auditors of a company shall be fixed by the company in general meeting or in such manner as the company in general meeting may determine.

(ii) In the case of first auditor, remuneration may be fixed by the Board.

(iii) The remuneration mentioned aforesaid shall, in addition to the fee payable to an auditor, include the expenses, if any, incurred by the auditor in connection with the audit of the company and any facility extended to him. But the remuneration does not include any remuneration paid to him for any other service rendered by him at the request of the company.

18. Powers and duties of auditors and auditing standards [Section 143]

(i) Powers of Auditors [Section 143(1)] :

(a) **Access to books of accounts and vouchers:** Every auditor of a company shall have a right of access at all times to the books of accounts and vouchers of the company, whether kept at the registered office of the company or at any other place.

(b) **Entitled to have necessary information and explanation:** He shall be entitled to require from the officers of the company such information and explanations as the auditor may consider necessary for the performance of his duties as auditor.

(c) **Access to record of all its subsidiaries:** The auditor of a company which is a holding company shall also have the right of access to the records of all its subsidiaries in so far as it relates to the consolidation of its financial statements with that of its subsidiaries.

(ii) Duties of Auditors

(a) **Matters of inquiry :** The auditor shall inquire into the following matters, namely—

(1) Whether loans and advances made by the company on the basis of security have been properly secured and whether the terms on which they have been made are prejudicial to the interests of the company or its members;

(2) Whether transactions of the company which are represented merely by book entries are prejudicial to the interests of the company;

(3) Where the company not being an investment company or a banking company, whether so much of the assets of the company as consist of shares, debentures andother securities have been sold at a price less than that at which they were purchased by the company;

(4) Whether loans and advances made by the company have been shown as deposits;

(5) Whether personal expenses have been charged to revenue account;

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(6) Where it is stated in the books and documents of the company that any shares have been allotted for cash, whether cash has actually been received in respect of such allotment, and if no cash has actually been so received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading:

The Statement on reporting under section 227(1)(A)

- These are specific enquiries to be made during course of Audit
- It is not required to report unless has any special comments to make on any of the items if satisfied, no further duty to report.
- Only enquiries and not investigations

(b) The auditor shall make a report to the members of the company on the following :

(1) On the accounts examined by him; and

(2) On every financial statements which are required by or under this Act to be laid before the company in general meeting; and

(c) The auditor while making the report shall take into account the provisions of the Act, the accounting and auditing standards and matters which are required to beincluded in the audit report under the provisions of this Actor any rules made thereunder or under any order made under section 143(11).

(d) The auditor shall express his opinion of the accounts and financial statements examined by him. He shall express the opinion which according to him and to the best of his information and knowledge, the said accounts, financial statements give a true and fair view of the state of the company's affairs as at the end of its financial year and profit or loss and cash flow for the year and such other matters as may be prescribed.

(e) The auditors' report shall also state—

(1) whether he has sought and obtained all the information and explanations which to the best of his knowledge and belief were necessary for the purpose of his audit and if not, the details thereof and the effect of such information on the financial statements;

(2) whether, in his opinion, proper books of account as required by law have been kept by the company so far as appears from his examination of those books and proper returns adequate for the purposes of his audit have been received from branches not visited by him;

(3) whether the report on the accounts of any branch office of the company audited under sub-section (8) by a person other than the company's auditor has been sent to him under the proviso to that sub-section and the manner in which he has dealt with it in preparing his report;

(4) whether the company's balance sheet and profit and loss account dealt with in the report are in agreement with the books of account and returns;

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(5) whether, in his opinion, the financial statements comply with the accounting standards;

(6) the observations or comments of the auditors on financial transactions or matters which have any adverse effect on the functioning of the company;

(7) whether any director is disqualified from being appointed as a director under sub section (2) of section 164;

(8) any qualification, reservation or adverse remark relating to the maintenance of accounts and other matters connected therewith;

(9) whether the company has adequate internal financial controls system in place and the operating effectiveness of such controls;

As per the rule 10A inserted by the *Companies (Audit and Auditors) Amendments Rules, 2014 vide Notification dated 14th October, 2014* that for purposes of this clause under section 143(3), for the financial years commencing on or after 1st April, 2015, the report of the Auditor shall state about existence of adequate internal financial controls system and its operating effectiveness.

(10) such other matters as may be prescribed.

(f) Rule 11 of the *Companies (Audit and Auditors) Rules, 2014* provides that the auditor's report shall also include their views and comments on the following matters, namely :

(1) whether the company has disclosed the impact, if any, of pending litigations on its financial position in its financial statement;

(2) whether the company has made provision, as required under any law or accounting standards, for material foreseeable losses, if any, on long term contracts including derivative contracts;

(3) whether there has been any delay in transferring amounts, required to be transferred, to the Investor Education and Protection Fund by the company.

(4) whether the company had provided requisite disclosures in its financial statements as to holdings as well as dealings in Specified Bank Notes during the period from 8th November, 2016 to 30th December, 2016 and if so, whether these are in accordance with the books of accounts maintained by the company"

(g) Where any of the matters is answered in the negative or with a qualification, the auditor's report shall state the reason for the answer.

(h) **Compliance with auditing standards [Section 143(9) and 143(10)] :**

(1) Every auditor shall comply with the auditing standards

(2) The Central Government may prescribe the standards of auditing or any addendum thereto, as recommended by the Institute of Chartered Accountants of India, constituted under section 3 of the Chartered Accountants Act, 1949, in

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consultation with and after examination of the recommendations made by the National Financial Reporting Authority.

(3) It is further provided that until any auditing standards are notified, any standard or standards of auditing specified by the Institute of Chartered Accountants of India shall be deemed to be the auditing standards.

(i) **Additional matters to be reported in case of specified companies [Section 143(11)] :** In respect of such class or description of companies, as may be specified in the general or special order by the Central Government may, in consultation with the National Financial Reporting direct, the auditor's report shall also include a statement on such matters as may be specified therein.

Accordingly, CARO, 2016 [Companies Auditor Report Order] is issued in pursuance of Section 143 (11) of Companies Act 2013 for inclusion of the matters specified therein in auditors' report. CARO 2016 issued by MCA should be complied by the statutory auditor of every company on which it applies.

CARO 2016 applicable to every company including a foreign company as defined in clause (42) of Section 2 of the Companies Act 2013.

Until the National Financial Reporting Authority is constituted under section 132, the Central Government may hold consultation required under this sub- section with the Committee chaired by an officer of the rank of Joint Secretary or equivalent in the Ministry of corporate Affairs and the committee shall have the representatives from the Institute of Chartered Accountants of India and Industry Chambers and also special invitees from the National Advisory Committee on Accounting Standards and the office of the Comptroller and Auditor-General.

(iii) Reporting of frauds by auditors [Section 143(12)] :

(1) Notwithstanding anything contained in this section, if an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud involving amount of Rs. One crore or above (as prescribed under the Rule 13) is being or has been committed in the company by its officers or employees, the auditor shall report the matter to the Central Government within such time and in such manner prescribed in Rule 13 of the Companies (Audit and Auditors) Rules, 2014 which is as under :

The auditor shall report the matter to the Central Government as under :

(a) the auditor shall report the matter to the Board or the Audit Committee, as the case may be, immediately but not later than 2 days of his knowledge of the fraud, seeking their reply or observations within 45 days;

(b) on receipt of such reply or observations, the auditor shall forward his report and the reply or observations of the Board or the Audit Committee along with his comments (on such reply or observations of the Board or the Audit Committee) to the Central Government within 15 days from the date of receipt of such reply or observations;

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(c) in case the auditor fails to get any reply or observations from the Board or the Audit Committee within the stipulated period of 45 days, he shall forward his report to the Central Government along with a note containing the details of his report that was earlier forwarded to the Board or the Audit Committee for which he has not received any reply or observations;

(d) the report shall be sent to the Secretary, Ministry of Corporate Affairs in a sealed cover by Registered Post with Acknowledgement Due or by Speed Post followed by an e-mail in confirmation of the same;

(e) the report shall be on the letter-head of the auditor containing postal address, e-mail address and contact telephone number or mobile number and be signed by the auditor with his seal and shall indicate his Membership Number; and

(f) The report shall be in the form of a statement as specified in Form ADT-4

(2) In case of a fraud involving lesser than the specified amount, the auditor shall report the matter to the audit committee constituted under section 177 or to the Board in other cases within such time and in such manner prescribed in Rule 13 of the *Companies (Audit and Auditors) Rules, 2014*.

(a) In case of a fraud involving lesser than the amount specified in sub-rule (1), the auditor shall report the matter to Audit Committee constituted under section 177 or to the Board immediately but not later than two days of his knowledge of the fraud and he shall report the matter specifying the following:

(i) Nature of Fraud with description;

(ii) Approximate amount involved; and

(iii) Parties involved.

(b) The following details of each of the fraud reported to the Audit Committee or the Board under sub-rule (3) during the year shall be disclosed in the Board's Report:

(i) Nature of Fraud with description;

(ii) Approximate Amount involved;

(iii) Parties involved, if remedial action not taken; and

(iv) Remedial actions taken.

(3) The companies, whose auditors have reported frauds under this sub-section to the audit committee or the Board but not reported to the Central Government, shall disclose the details about such frauds in the Board's report in such manner prescribed in Rule 13 of *the Companies (Audit and Auditors) Rules, 2014*.

(4) The provision of this rule shall also apply, mutatis mutandis, to a Cost Auditor and a Secretarial Auditor during the performance of his duties under section 148 and section 204 respectively.

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(5) No duty to which an auditor of a company may be subject to shall be regarded as having been contravened by reason of his reporting the matter referred above if it is done in good faith.

(6) **Penalty for non compliance of section 143(12):** If any auditor, the cost accountant in practice conducting cost audit under section 148 or the company secretary in practice conducting secretarial audit under section 204 do not comply with the provisions of section 143(12) (reporting about the offence to the Central Government), he shall be punishable with fine which shall not be less than ₹ 1 Lacs but which may extend to ₹ 25 Lacs.

(iv) Audit of Government Companies [Section 143(5), (6) & (7)] :

(a) The auditor of a Government company is appointed by the Comptroller and Auditor-General of India under section 139(5) or section 139(7).

(b) In the case of a Government company or any other company owned or controlled, directly or indirectly, 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, the Comptroller and Auditor-General of India shall appoint the auditor under section 139(5) or 139(7) and direct such auditor the manner in which the accounts of the Government company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India.

(c) The audit report among other things, include the following:

(1) the directions, if any, issued by the Comptroller and Auditor-General of India,

(2) the action taken thereon and

(3) its impact on the accounts and financial statement of the company.

(d) The Comptroller and Auditor-General of India shall within 60 days from the date of receipt of the audit report have a right to,—

(1) conduct a supplementary audit of the financial statement of the company by such person or persons as he may authorise in this behalf; and for the purposes of such audit, require information or additional information to be furnished to any personor persons, so authorised, on such matters, by such person or persons, and in such form, as the Comptroller and Auditor-General of India may direct; and

(2) comment upon or supplement such audit report.

(e) Any comments given by the Comptroller and Auditor-General of India upon, or supplement to, the audit report shall be sent by the company to every person entitled to copies of audited financial statements under section 136(1) and also be placed before the annual general meeting of the company at the same time and in the same manner as the audit report.

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(f) **Test Audit :** For Government Company or Company controlled by State Government or Central Government, the Comptroller and Auditor- General of India may, if he considers necessary, by an order, cause test audit to be conducted of the accounts of such company, without prejudice to the provisions related to Audit and Auditors.The provisions of section 19A of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service)Act, 1971, shall apply to the report of such test audit.

(v) Audit of accounts of branch office of company [Section 143(8)] :

(a) **Branch office in India :**

Where a company has a branch office, the accounts of that office shall be audited either by:

(A) the company's auditor appointed under section 139, or

(B) by any other person qualified for appointment as an auditor of the company under section 139.

(b) **Branch office outside India :**

If the branch office is situated in a country outside India, the accounts of the branch office shall be audited either by:

(A) the company's auditor or

(B) by an accountant or

(C) by any other person duly qualified to act as an auditor of the accounts of the branch office in accordance with the laws of that country.

(c) The duties and powers of the company's auditor with reference to the audit of thebranch and the branch auditor, if any, shall be as contained in sub-sections (1) to (4) of section 143.

(d) The branch auditor shall prepare a report on the accounts of the branch examined by him and send it to the auditor of the company who shall deal with it in his report in such manner as he considers necessary.

(e) The provisions of regarding reporting of fraud by the auditor shall also extend to such branch auditor to the extent it relates to the concerned branch.

19. Auditor not to render certain services [Section 144]

Section 144 of the Companies Act, 2013 provides for Auditor not to render certain services. According to this section :

(i) An auditor appointed under this Act shall provide to the company only such other services as are approved by the Board of Directors or the audit committee, as the case may be. But such services shall not include any of the following services (whether such services are rendered directly or indirectly to the company or its holding company or subsidiary company), namely—

(a) accounting and book keeping services;

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(b) internal audit;

(c) design and implementation of any financial information system;

(d) actuarial services;

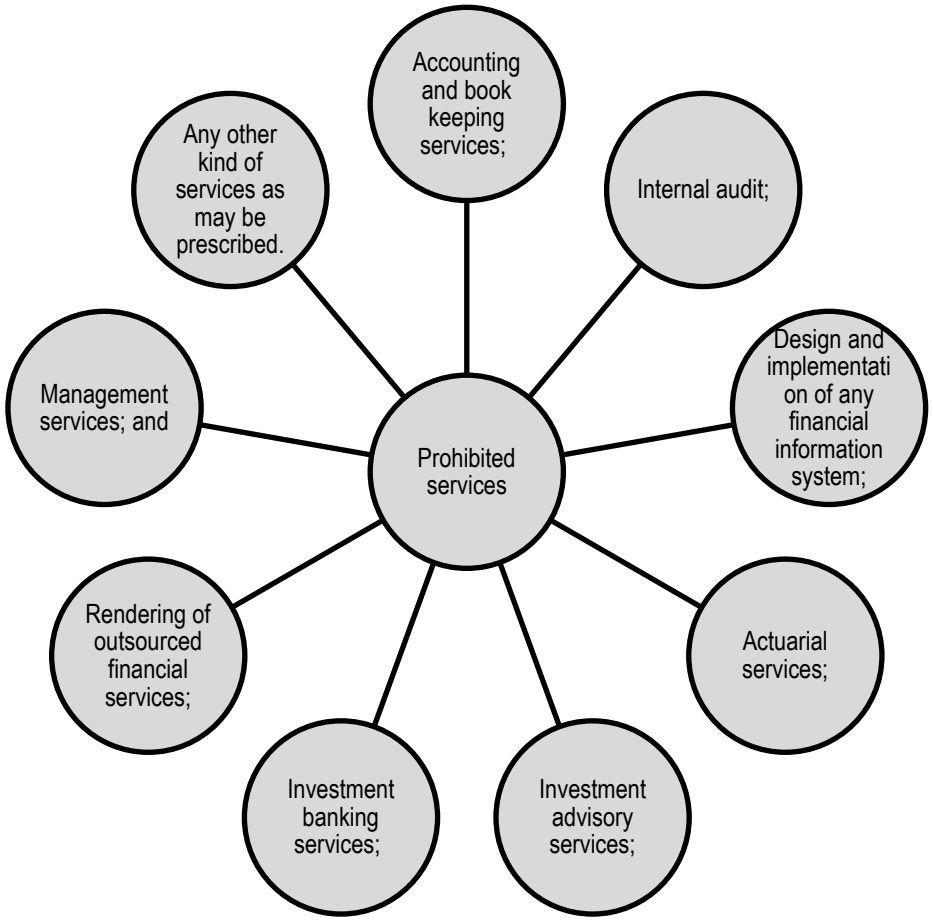
(e) investment advisory services;

(f) investment banking services;

(g) rendering of outsourced financial services;

(h) management services; and

(i) any other kind of services as may be prescribed. [However no other kind of services has been prescribed till date]



(ii) **Explanation :** The term "directly or indirectly" shall include rendering of services by the auditor,—

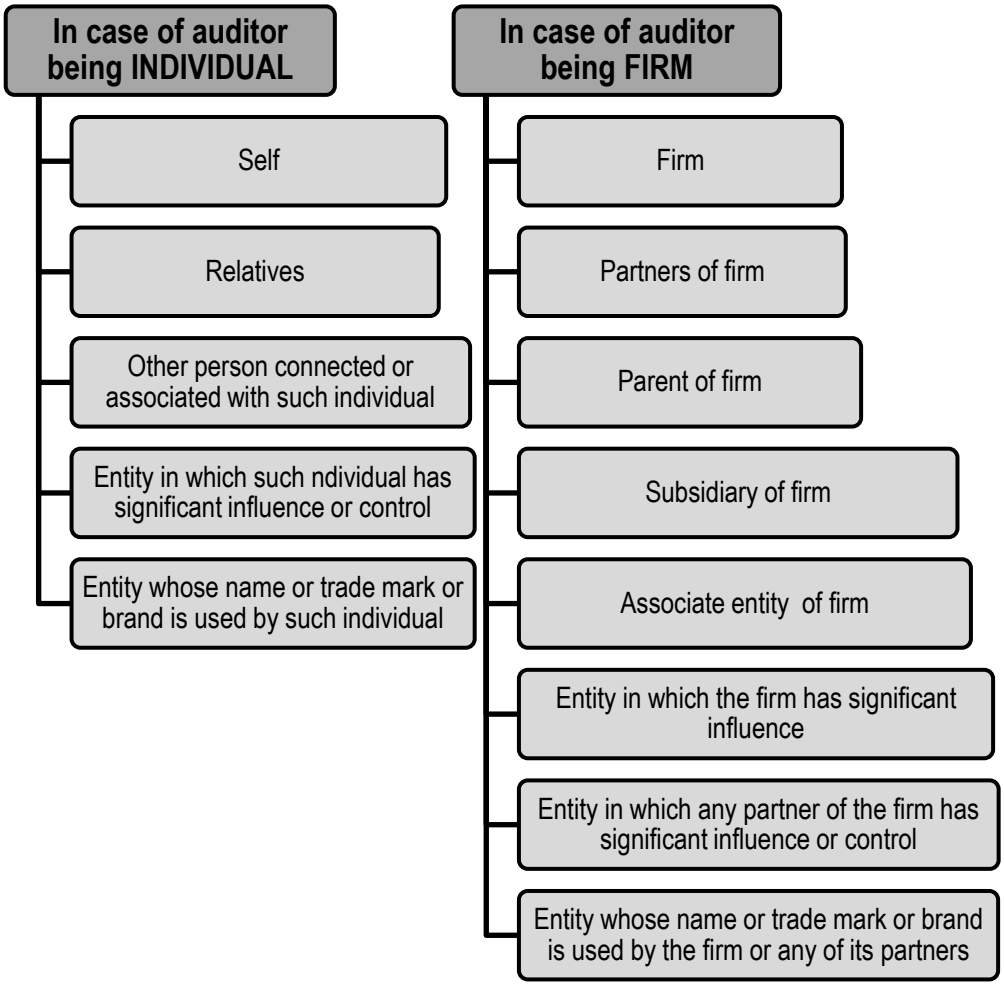
(1) in case of auditor being an individual, either himself or through his relative or any other person connected or associated with such individual or through any other entity,

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whatsoever, in which such individual has significant influence or control, or whose name or trade mark or brand is used by such individual;

(2) in case of auditor being a firm, either itself or through any of its partners or through its parent, subsidiary or associate entity or through any other entity, whatsoever, in which the firm or any partner of the firm has significant influence or control, or whose name or trade mark or brand is used by the firm or any of its partners.

RENDERING OF SERVICES 'DIRECTLY OR INDIRECTLY'



20. Auditors to sign audit reports, etc.[Section 145]

Section 145 of the Companies Act, 2013 provides for auditors to sign audit reports, etc. According to this section :

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(i) The person appointed as an auditor of the company shall sign the auditor's report or sign or certify any other document of the company in accordance with the provisions of sub-section (2) of section 141 (i.e. in case of firm including LLP, only Chartered Accountants are authorised to act and sign).

(ii) The qualifications, observations or comments on financial transactions or matters, which have any adverse effect on the functioning of the company mentioned in the auditor's report shall be read before the company in general meeting and shall be open to inspection by any member of the company.

21. Auditors to attend general meeting [Section 146]

Section 146 of the Companies Act, 2013 provides for auditors to attend general meeting. According to this section :

(i) All notices of, and other communications relating to, any general meeting shall be forwarded to the auditor of the company.

(ii) The auditor shall, unless otherwise exempted by the company, attend either by himself or through his authorised representative, who shall also be qualified to be an auditor, any general meeting.

(iii) The auditor shall have right to be heard at such meeting on any part of the business which concerns him as the auditor.

22. Punishment for contravention [Section 147]

Section 147 of the Companies Act, 2013 provides for punishment for contravention. According to this section :

(i) Penalty on company [Section 147(1)] :

If any of the provisions of sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall not be less than ` 25,000 but which may extend to ` 5 Lacs.

(ii) Penalty on officers [Section 147(1)] :

If any of the provisions of sections 139 to 146 (both inclusive) is contravened, every officer of the company who is in default shall be punishable with

(1) imprisonment for a term which may extend to 1 year or

(2) With fine which shall not be less than ` 10,000 but which may extend to ` 1 Lac; or

(3) Both with imprisonment and fine.

(iii) Penalty on auditor [Section 147(2) & (3)] :

(a) If an auditor of a company contravenes any of the provisions of section 139, section 143, section 144 or section 145, the auditor shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5 Lacs.

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(b) If an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with

(1) imprisonment for a term which may extend to 1 year and

(2) fine which shall not be less than ₹ 1 Lac but which may extend to ₹ 25 Lacs.

(c) Further, where an auditor has been convicted as above, he shall be liable to—

(1) refund the remuneration received by him to the company; and

(2) pay for damages to the company, statutory bodies or authorities or to any other persons for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(iv) The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons. Such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification. **[Section 147(4)]**

(v) Liability of Audit firm [Section 147(5)] :

Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in the Companies Act, 2013, or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally and shall also be liable under section 447.

23. Central Government to specify audit of items of cost in respect of certain companies [Section 148]

Section 148 of the Companies Act, 2013 provides the provisions for Central Government to specify audit of items of cost in respect of certain companies. According to this section :

(i) Notwithstanding anything contained in the provisions related to audit and auditor (Chapter X), the Central Government may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept under section 128 by that class of companies.

(ii) The Central Government shall, before issuing such order in respect of any class of companies regulated under a special Act, consult the regulatory body constituted or established under such special Act.

(iii) If the Central Government is of the opinion, that it is necessary to do so, it may, by order, direct that the audit of cost records of class of companies, which are covered aforesaid

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and which have a net worth of such amount as may be prescribed or a turnover of such amount as may be prescribed, shall be conducted in the manner specified in the order.

(iv) The cost audit shall be conducted by a Cost Accountant in practice who shall be appointed by the Board on such remuneration as may be determined by the members in such manner as may be prescribed.

(v) Rule 14 of *the Companies (Audit and Auditors) Rules, 2014 provides that—*

(1) in the case of companies which are required to constitute an audit committee -

(A) the Board shall appoint an individual, who is a cost accountant in practice, or a firm of cost accountants in practice, as cost auditor on the recommendations of the Audit committee, which shall also recommend remuneration for such cost auditor;

(B) the remuneration recommended by the Audit Committee under (A) shall be considered and approved by the Board of Directors and ratified subsequently by the shareholders;

(2) in the case of other companies which are not required to constitute an audit committee, the Board shall appoint an individual who is a cost accountant in practice or a firm of cost accountants in practice as cost auditor and the remuneration of such cost auditor shall be ratified by shareholders subsequently.

Companies required to constitute Audit Committee	**Companies not required to constitute Audit Committee**
(a) The Board shall appoint the cost auditor on the recommendation of the Audit Committee. (b) The Audit Committee shall recommend the remuneration for cost auditor.	(a) The Board shall appoint the cost auditor. (b) The remuneration of such cost auditor shall be ratified by shareholders subsequently.
(c) Such remuneration as recommended by the Audit Committee shall be considered and approved by the Board of Directors. (d) Then this remuneration subsequently to be ratified by the shareholders.	

(vi) No person appointed under section 139 as an auditor of the company (i.e. company auditor) shall be appointed for conducting the audit of cost records.

(vii) Cost auditor to comply with cost auditing standards: The auditor conducting the cost audit shall comply with the cost auditing standards.

Here, the expression "cost auditing standards" mean such standards as are issued by the Institute of Cost and Works Accountants of India, constituted under the Cost and Works Accountants Act, 1959, with the approval of the Central Government.

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(viii) An audit conducted under section 148 shall be in addition to the audit conducted under section 143.

(ix) The qualifications, disqualifications, rights, duties and obligations applicable to auditors (i.e. applicable to company auditor) shall, so far as may be applicable, apply to a cost auditor appointed under section 148 and it shall be the duty of the company to give all assistance and facilities to the cost auditor appointed under this section for auditing the cost records of the company.

(x) The report on the audit of cost records shall be submitted by the cost accountant in practice to the Board of Directors (BoD) of the company.

(xi) A company shall within 30 days from the date of receipt of a copy of the cost audit report furnish the Central Government with such report along with full information and explanation on every reservation or qualification contained therein.

Vide Notification dated 9th September, 2015 under the rule 4 of the *Companies(Filing of Documents and forms in Extensible Business Reporting Language) Rules, 2015*, a company is required to furnish cost audit report and other documents to the Central Government under this above sub- section 6 of the section 148 of the Act and rules made thereunder, shall file such report and other documents using the XBRL taxonomy given in Annexure III for the financial year commencing on or after 1st April, 2014 in e-form CRA-4 specified under the *Companies (Cost Records and Audit) Rules, 2014.*

(xii) If, after considering the cost audit report and the information and explanation furnished by the company, the Central Government is of the opinion that any further information or explanation is necessary, it may call for such further information and explanation and the company shall furnish the same within such time as may be specified by that Government.

(xiii) **Contravention :** If any default is made in complying with the provisions of section 148,—

(a) The company and every officer of the company who is in default shall be punishable in the manner as provided in section 147(1);

(b) the cost auditor of the company who is in default shall be punishable in the manner as provided in sub-sections (2) to (4) of section 147.

(xiv) The provisions of section 143 shall mutatis mutandis apply to the cost accountant in practice conducting cost audit under section 148.

RELEVANT AMENDMENTS

1. Exemptions to Private Companies Vide Notification G.S.R. 583(E) Dated 13th June, 2017

The Central Government amends the Notification G.S.R. 464(E), dated 5th June 2015. Following are the amendments:

(1) Section 143(3)(i) , shall not apply to a private company:-

(i) which is a one person company or a small company; or

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(ii) which has turnover less than rupees fifty crores as per latest audited financial **statement or** which has aggregate borrowings from banks or financial institutions or anybody corporate at any point of time during the financial year less than rupees twenty five crore."

2. Insertion of Paragraph 2A in the principal notification G.S.R. 464(E), dated 5th June 2015 Vide Notification G.S.R. 583(E) Dated 13TH June, 2017

In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:-

"2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.".

3. Corrigendum vide Notification S.O. 2218(E) dated 13th July 2017 with respect to the Notification G.S.R. 583(E) Dated 13TH June, 2017

Ministry of Corporate Affairs vide corrigendum stated that for the words "statement or" to read as "statement and" under section 143(3)(i).

4. Enforcement of *the Companies (Audit and Auditors) Second Amendment Rules, 2017* vide Notification G.S.R. 621(E) dated 22nd June 2017 in exercise of powers conferred by section 139.

The Central Government hereby amends the Companies (Audit and Auditors) Rules, 2014. Through this amendment rule, in Rule 5(b), for the word "twenty", the word "fifty" shall be substituted.

5. Clarification regarding applicability of exemption given to certain private companies under section 143(3)(i) vide circular no. 08/2017 dated 25th July 2017

Notification No. G.S.R. 583(E) dated 13th June, 2017 stated that requirements of reporting under section 143(3)(i) read Rule 10 A of the Companies (Audit and Auditors) Rules, 2014 of the Companies Act 2013 shall not apply to certain private companies. Through issue of this circular, it is hereby clarified that the exemption shall be applicable for those audit reports in respect of financial statements pertaining to financial year, commencing on or after 1st April, 2016, which are made on or after the date of the said notification.

6. Enforcement of sub-section (3) and (11) of Section 132 of the Companies Act, 2013 vide Notification No. S.o. 1316(E) dated 21st March, 2018

The Central Government appoints the 21st March, 2018 as the date on which the provisions of subsections (3) and (11) of section 132 of the said Act shall come into force.

7. Amendment in the notification number G.S.R. 463(E) dated the 5th June, 2015 vide Notification no. S.O. 802(E) dated 23rd February, 2018

In exercise of the powers conferred by clauses (a) and (b) of sub-section (1) and subsection (2) of section 462 of the Companies Act, 2013, the Central Government, in the

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interest of public amends the notification of the Government of India in the Ministry of Corporate Affairs number G.S.R. 463(E) dated the 5th June, 2015 namely:—

In the said notification, in the Table, for serial number 8 and entries relating thereto, the following serial number and entries shall be respectively substituted, namely:—

(1)	(2)	(3)
"8.	Chapter IX, Section 129	Shall not apply to the companies engaged in defence production to the extent of application of relevant Accounting Standard on segment reporting".

8. Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 129	In section 129 of the principal Act, for sub-section (*3*), the following sub-section shall be substituted, namely:— "(*3*) Where a company has one or more subsidiaries or associate companies, it shall, in addition to financial statements provided under sub-section (*2*), prepare a consolidated financial statement of the company and of all the subsidiaries and associate companies in the same form and manner as that of its own and in accordance with applicable accounting standards, which shall also be laid before the annual general meeting of the company along with the laying of its financial statement under sub-section (*2*): Provided that the company shall also attach along with its financial statement, a separate statement containing the salient features of the financial statement of its subsidiary or subsidiaries and associate company or companies in such form as may be prescribed: Provided further that the Central Government may provide for the consolidation of accounts of companies in such manner as may be prescribed."	Not notified till 30th April, 2018
Amendment of section 130.	In section 130 of the principal Act,— (*i*) in sub-section (*1*), in the proviso,— (*a*) after the words "regulatory body or authorities concerned", the words "or	Notified till 30th April, 2018

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	any other person concerned" shall be inserted; (*b*) after the words "the body or authority concerned", the words "or the other person concerned" shall be inserted; (*ii*) after sub-section (*2*), the following sub-section shall be inserted, namely:— "(*3*) No order shall be made under sub-section (*1*) in respect of re-opening of books of account relating to a period earlier than eight financial years immediately preceding the current financial year: Provided that where a direction has been issued by the Central Government under the proviso to sub-section (*5*) of section 128 for keeping of books of account for a period longer than eight years, the books of account may be ordered to be re-opened within such longer period."	
Amendment of section 132.	In section 132 of the principal Act,— (*i*) in sub-section (*4*), in clause (*c*), in sub-clause (*A*), in item (*II*), for the words "ten lakh rupees", the words "five lakh rupees" shall be substituted; (*ii*) in sub-section (*5*), for the words, brackets and figure "the Appellate Authority constituted under sub-section (*6*) in such manner as may be prescribed", the words "the Appellate Tribunal in such manner and on payment of such fee as may be prescribed" shall be substituted; (*iii*) sub-sections (*6*), (*7*), (*8*) and (*9*) shall be omitted.	Notified till 30th April, 2018
Amendment of section 134.	In section 134 of the principal Act,— (a) for sub-section (1), the following sub-section shall be substituted, namely:— "(1) The financial statement, including consolidated financial statement, if any, shall be approved by the Board of	Not notified till 30th April, 2018

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	Directors before they are signed on behalf of the Board by the chairperson of the company where he is authorised by the Board or by two directors out of which one shall be managing director, if any, and the Chief Executive Officer, the Chief Financial Officer and the company secretary of the company, wherever they are appointed, or in the case of One Person Company, only by one director, for submission to the auditor for his report thereon."; (b) in sub-section (3),— (i) for clause (a), the following clause shall be substituted, namely:— "(a) the web address, if any, where annual return referred to in sub-section (3) of section 92 has been placed;"; (ii) in clause (p), for the words "annual evaluation has been made by the Board of its own performance and that of its committees and individual directors", the words "annual evaluation of the performance of the Board, its Committees and of individual directors has been made" shall be substituted; (iii) after clause (q), the following provisos shall be inserted, namely:— "Provided that where disclosures referred to in this sub-section have been included in the financial statements, such disclosures shall be referred to instead of being repeated in the Board's report: Provided further that where the policy referred to in clause (e) or clause (o) is made available on company's website, if any, it shall be sufficient compliance of the requirements under such clauses if the salient features of the policy and any	

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	change therein are specified in brief in the Board's report and the web-address is indicated therein at which the complete policy is available."; (c) after sub-section (3), the following sub-section shall be inserted, namely:— "(3A) The Central Government may prescribe an abridged Board's report, for the purpose of compliance with this section by One Person Company or small company.".	
Amendment of section 135.	In section 135 of the principal Act,— (*i*) in sub-section (*1*),— (*a*) for the words "any financial year", the words "the immediately preceding financial year" shall be substituted; (*b*) the following proviso shall be inserted, namely:— "Provided that where a company is not required to appoint an independent director under sub-section (*4*) of section 149, it shall have in its Corporate Social Responsibility Committee two or more directors."; (*ii*) in sub-section (*3*), in clause (*a*), for the words and figures "as specified in Schedule VII", the words and figures "in areas or subject, specified in Schedule VII" shall be substituted; (*iii*) in sub-section (*5*), for the *Explanation*, the following *Explanation* shall be substituted, namely:— '*Explanation*.—For the purposes of this section "net profit" shall not include such sums as may be prescribed, and shall be calculated in accordance with the provisions of section 198.'	Not notified till 30th April, 2018
Amendment of section 136	In section 136 of the principal Act,— (*i*) in sub-section (*1*),—	Notified till 30th April, 2018

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	(*a*) the words and figures "Without prejudice to the provisions of section 101," shall be omitted; (*b*) in the first proviso, for the words "Provided that", the following shall be substituted, namely:— "Provided that if the copies of the documents are sent less than twenty-one days before the date of the meeting, they shall, notwithstanding that fact, be deemed to have been duly sent if it is so agreed by members— (*a*) holding, if the company has a share capital, majority in number entitled to vote and who represent not less than ninety-five per cent. of such part of the paid-up share capital of the company as gives a right to vote at the meeting; or (*b*) having, if the company has no share capital, not less than ninety-five per cent. of the total voting power exercisable at the meeting: Provided further that"; (*c*) in the second proviso, for the words "Provided further", the words, "Provided also" shall be substituted; (*d*) for the fourth proviso, the following provisos shall be substituted, namely:— 'Provided also that every listed company having a subsidiary or subsidiaries shall place separate audited accounts in respect of each of subsidiary on its website, if any: Provided also that a listed company which has a subsidiary	

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	incorporated outside India (herein referred to as "foreign subsidiary")— (*a*) where such foreign subsidiary is statutorily required to prepare consolidated financial statement under any law of the country of its incorporation, the requirement of this proviso shall be met if consolidated financial statement of such foreign subsidiary is placed on the website of the listed company; (*b*) where such foreign subsidiary is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the holding Indian listed company may place such unaudited financial statement on its website and where such financial statement is in a language other than English, a translated copy of the financial statement in English shall also be placed on the website.'; (*ii*) in sub-section (*2*), the following proviso shall be inserted, namely:— "Provided that every company having a subsidiary or subsidiaries shall provide a copy of separate audited or unaudited financial statements, as the case may be, as prepared in respect of each of its subsidiary to any member of the company who asks for it."	

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Amendment of section 137.	In section 137 of the principal Act,— (*i*) in sub-section (*1*),— (*a*) the words and figures "within the time specified under section 403" shall be omitted; (*b*) in the second proviso, the words and figures "within the time specified under section 403" shall be omitted; (*c*) after the fourth proviso, the following proviso shall be inserted, namely:— 'Provided also that in the case of a subsidiary which has been incorporated outside India (herein referred to as "foreign subsidiary"), which is not required to get its financial statement audited under any law of the country of its incorporation and which does not get such financial statement audited, the requirements of the fourth proviso shall be met if the holding Indian company files such unaudited financial statement along with a declaration to this effect and where such financial statement is in a language other than English, along with a translated copy of the financial statement in English.'. (*ii*) in sub-section (*2*), the words and figures "within the time specified, under section 403" shall be omitted; (*iii*) in sub-section (*3*), for the words and figures "in section 403", the word "therein" shall be substituted.	Not notified till 30th April, 2018
Amendment of section 139.	In section 139 of the principal Act, in sub-section (*1*), the first proviso shall be omitted.	Not notified till 30th April, 2018
Amendment of section 140.	In section 140 of the principal Act, in sub-section (*3*), for the words "fifty thousand rupees", the words "fifty thousand rupees or the remuneration of the auditor, whichever is less," shall be substituted.	Notified till 30th April, 2018

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Amendment of section 141.	In section 141 of the principal Act, in sub-section (*3*), for clause (*i*), the following clause shall be substituted, namely:— '(*i*) a person who, directly or indirectly, renders any service referred to in section 144 to the company or its holding company or its subsidiary company. *Explanation.*—For the purposes of this clause, the term "directly or indirectly" shall have the meaning assigned to it in the *Explanation* to section 144.'.	Notified till 30th April, 2018
Amendment of section 143.	In section 143 of the principal Act,— (*i*) in sub-section (*1*), in the proviso, for the words "its subsidiaries", at both the places, the words "its subsidiaries and associate companies" shall be substituted; (*ii*) in sub-section (*3*), in clause (*i*), for the words "internal financial controls system", the words "internal financial controls with reference to financial statements" shall be substituted; (*iii*) in sub-section (*14*), in clause (*a*), for the words "cost accountant in practice", the words "cost accountant" shall be substituted.	Notified till 30th April, 2018
Amendment of section 147.	In section 147 of the principal Act,— (*i*) in sub-section (*2*),— (*a*) after the words "five lakh rupees", the words "or four times the remuneration of the auditor, whichever is less" shall be inserted; (*b*) in the proviso, for the words "and with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees", the words "and with fine which shall not be less than fifty thousand rupees but which may extend to twenty-five lakh rupees or eight times the remuneration of the auditor, whichever is less" shall be substituted;	Notified till 30th April, 2018

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	(*ii*) in sub-section (*3*), in clause (*ii*), for the words "or to any other persons", the words "or to members or creditors of the company" shall be substituted; (*iii*) in sub-section (*5*), the following proviso shall be inserted, namely:— "Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.".	
Amendment of section 148	In section 148 of the principal Act,— (*i*) in sub-section (*3*),— (*a*) for the words "Cost Accountant in practice", the words "cost accountant" shall be substituted; (*b*) in the *Explanation*, for the words "Institute of Cost and Works Accountants of India", the words "Institute of Cost Accountants of India" shall be substituted; (*ii*) in sub-section (*5*), in the proviso, for the words "cost accountant in practice", the words "cost accountant" shall be substituted.	Notified till 30th April, 2018

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3

Appointment and Qualifications of Directors

1. Introduction

According to section 2(*10*) of the Companies Act, 2013, "**Board of Directors**" or "**Board**", in relation to a company, means the collective body of the directors of the company.

According to section 2(*34*) "director" means a director appointed to the Board of a company.

2. Company to have Board of Directors [Section 149]

This section provides for the provisions for companies to have a duly constituted Board of Directors. According to this section:



Number of Directors: According to section 149(1) of the Companies Act, 2013, every company shall have a Board of Directors consisting of individuals as directors and shall have-

(a) minimum number of directors:

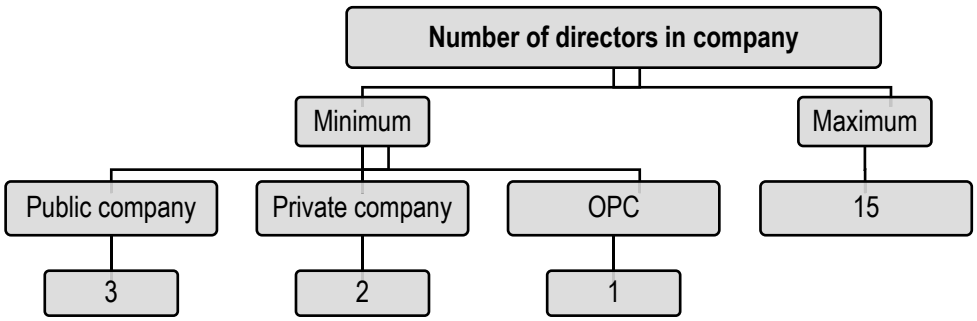
(A) in the case of Public company-3,

(B) in the case of Private Company-2, and

(C) in case of One person company (OPC)-1

(b) maximum number of directors: 15

If the company wants to appoint more than 15 directors, it can do so after passing a special resolution.



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Exemptions

As per the Notification G.S.R. 463(E) dated 5th June, 2015, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Government company.

Further, as per the Notification dated 13th June, 2017, the limit of maximum of 15 directors and their increase in limit by special resolution shall not apply to Section 8 companies

(c) Women director: At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. [Second proviso to section 149(1)][1]



Rule 3 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that the following class of companies shall appoint at least one woman director-

(1) every listed company;

(2) every other public company having -

(A) paid–up share capital of one hundred crore rupees or more; or

(B) turnover of three hundred crore rupees or more.

A company, which has been incorporated under the Act and is covered under provisions of second proviso to sub-section (1) of section 149 shall comply with such provisions within a period of six months from the date of its incorporation.

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

Example: In XYZ Ltd., an intermittent vacancy of the women director arises on 15th June, 2017. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than the date of the next Board meeting or three months from the date of such vacancy whichever is later.

⇒ If after the vacancy, the immediate Board meeting was held on 14th August, 2017, then the vacancy shall be filled-up by 14th August, 2017 or by 14th September 2017 (3 months from the date of such vacancy) whichever is later. In this case, it shall be filled up by 14th September 2017.

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[1] In case of Specified IFSC Public Company - Second proviso to Sub-section (1) of section 149 shall not apply- Notification Dated 4th January 2017.

"International Financial Services Centre (IFSC)" means an International Financial Service Centre which has been approved by the Central Government under sub-section (1) of Section 18 [Section 2(q) of the Special Economic Zones, 2005]

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⇒ If after the vacancy, the immediate Board meeting was held on 14th October, 2017 then the vacancy shall be filled-up by 14th October, 2017 or by 14th September 2017 whichever is later. In this case it shall be filled up by 14th October 2017.

Explanation.- For the purposes of this rule (woman director on board), it is clarified that the paid up share capital or turnover, as the case may be, as on the last date of latest audited financial statements shall be taken into account.

(d) Resident Director: Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in the previous calendar year. [Section 149(3)][2]

(e) Independent Director (ID): Every listed public company shall have at least one-third of the total number of directors as independent directors. [Section 149(4)][3]



The Central Government may prescribe the minimum number of independent directors in case of any class or classes of public companies.

Any fraction contained in such one-third numbers shall be rounded off as one

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

(1)	the Public Companies having paid up share capital of 10 crore rupees or more; or
(2)	the Public Companies having turnover of 100 crore rupees or more; or
(3)	the Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding 50 crore rupees.

However, in case a company covered as under the above rule is required to appoint a higher number of independent directors due to composition of its audit committee, such higher number of independent directors shall be applicable to it.

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[2] In case of Specified IFSC Public Company & IFSC Private Company - Sub-section (3) of section 149, the following proviso shall be inserted, namely:-

"Provided that this sub-section shall apply to a Specified IFSC public company in respect of financial years other than the first financial year from the date of its incorporation."-Notification Dated 4th January 2017.

[3] In case of Specified IFSC Public Company - Sub-sections (4) to (11), clause (i) of subsection (12) and sub-section (13) of section 149 shall not apply. -Notification Dated 4th January 2017.

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As per section 177(2) of the Companies Act, 2013, the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

Example: XYZ Ltd. is having 6 directors in its Audit Committee, then 4 directors out of 6 must be Independent Directors (4 is forming majority). Therefore, although in terms of the the *Companies (Appointment & Qualification) Rules 2014* the company is required to have at least 2 Independent directors, in this case the limit of 2 will increase to 4 as the company is required to appoint a higher number of independent directors due to composition of its audit committee.

Further, any intermittent vacancy of an independent director shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy, whichever is later.

Example: In XYZ Ltd., the vacancy of the independent director arises on 15th June, 2017. Thus, the vacancy shall be filled-up by the Board at the earliest but not later than immediate next Board meeting or three months from the date of such vacancy whichever is later.

⇒ If the immediate next Board meeting after the vacancy was held on 14th August, 2017, then the vacancy shall be filled-up by 14th August, 2017 or by 14th September 2017 whichever is later. In this case it shall be filled up by 14th September 2017.

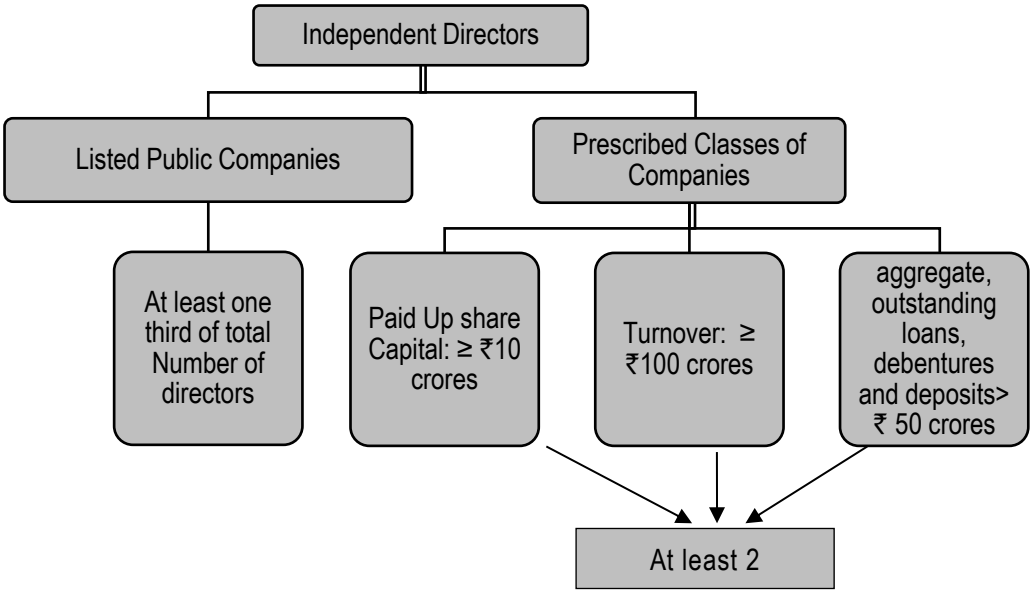
⇒ If the immediate next Board meeting after the vacancy was held on 14th October, 2017, then the vacancy shall be filled-up by 14th October, 2017 or by 14th September 2017 whichever is later. In this case it shall be filled up by 14th October 2017.

However, where a company ceases to fulfill any of three conditions laid down above for three consecutive years, it shall not be required to comply with these provisions until such time as it meets any of such conditions.

For the purpose of the above assessment, the paid up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, as existing on the last date of latest audited financial statements shall be taken into account.

A company belonging to any class of companies for which a higher number of independent directors has been specified in the law for the time being in force shall comply with the requirements specified in such law.

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If due to composition of audit committee, such higher number of ID shall be applicable

Non Applicabilty: If company ceases to fulfil any of the 3 conditions for 3 consecutive years

(f) Who can become the Independent Director [Section 149(6)]: In relation to a company, an independent director means a director other than a managing director or a whole-time director or a nominee director[4], and who fulfills the following criteria:

(1) who, in the opinion of the Board, is a person of integrity and possesses relevant expertise and experience;

Exemptions

As per G.S.R. 463 (E) dated 5th June, 2015, in case of a Government company, the word "Board' shall be substituted by the words "Ministry or Department of the Central Govermment which is adninistratively in charge of the company, or, as the case may be, the State Government".

(2) (A) who is or was not a promoter of the company or its holding, subsidiary or associate company;

[4] As per Explanation to section 149(7), "**Nominee director**" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

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(B) who is not related to promoters or directors in the company, its holding, subsidiary or associate company;

(3) who has or had no pecuniary relationship with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the two immediately preceding financial years or during the current financial year;

Exemptions

As per Notification 463 (E) dated 5th June, 2015, the above point no. (3) [section 149(6)(c)] shall not apply in case of a Government company.

(4) none of whose relatives has or had pecuniary relationship or transaction with the company, its holding, subsidiary or associate company, or their promoters, or directors, amounting to 2% or more of its gross turnover or total income or 50 lakh rupees or such higher amount as may be prescribed, whichever is lower, during the two immediately preceding financial years or during the current financial year;

(5) who, neither himself nor any of his relatives—

(A) holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed;

(B) is or has been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of—

(i) a firm of auditors or company secretaries in practice or cost auditors ofthe company or its holding, subsidiary or associate company; or

(ii) any legal or a consulting firm that has or had any transaction with the company, its holding, subsidiary or associate company amounting to ten per cent. or more of the gross turnover of such firm;

(C) holds together with his relatives 2% or more of the total voting power of the company; or

(D) is a Chief Executive or director, by whatever name called, of any non- profit organisation that receives twenty-five per cent or more of its receipts from the company, any of its promoters, directors or its holding, subsidiary or associate company or that holds 2% or more of the total voting power of the company; or

(6) who possesses such other qualifications as may be prescribed. According to the *Companies (Appointment and Qualification of Directors) Rules, 2014,* independent director shall possess appropriate skills, experience and knowledge in one or more fields of finance, law, management, sales, marketing, administration, research,

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corporate governance, technical operations or other disciplines related to the company's business.

(g) Declaration by Independent Director [Section 149(7)]: Every independent director shall

(1) at the first meeting of the Board in which he participates as a director; and

(2) thereafter at the first meeting of the Board in every financial year; or

(3) whenever there is any change in the circumstances which may affect his status as an independent director, give a declaration that he meets the criteria of independence as provided in sub-section (6).

(h) Code for independent directors [Section 149(8)]: The company and independent directors shall abide by the provisions specified in Schedule IV to the Companies Act, 2013.

(i) Remuneration of Independent Directors [Section 149(9)]: Notwithstanding anything contained in any other provision of this Act, but subject to the provisions of sections 197 and 198, an independent director shall not be entitled to any stock option and may receive remuneration by way of

(1) fee provided under section 197(5),

(2) reimbursement of expenses for participation in the Board and other meetings and

(3) profit related commission as may be approved by the members.

Entiled to:	Not Entitled to:
Fee provided under section 197(5)	Any stock option
Reimbursement of **expenses** for participation in: (i) Board Meetings (ii) Other Meetings	
Profit related commission as may be approved by the members	

(j) Tenure [Section 149(10) & (11)]:

(i) Subject to the provisions of section 152 (Appointment of directors), an independent director shall hold office for a term up to five consecutive years on the Board of a company. He shall be eligible for re-appointment on passing of a special resolution by the company and disclosure of such appointment in the Board's report.

(ii) No independent director shall hold office for more than two consecutive terms. However, such independent director shall be eligible for appointment after the expiration of three years of ceasing to be an independent director:

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Provided that during the said period of three years, such independent director shall not, be appointed in or be associated with the company in any other capacity, either directly or indirectly.

(iii) For the purposes of sub-sections (10) and (11), any tenure of an independent director on the date of commencement of this Act shall not be counted as a term under those sub-sections.

(k) Liability [Section 149(12)]: As per section 149(12) of the Companies Act, 2013, Notwithstanding anything contained in this Act,—

(i) an independent director;

(ii) a non-executive director not being promoter or key managerial personnel,

shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

Parties Liable	Liable Acts
(i) an independent director	• acts of omission or commission by a company which had occurred with his knowledge, • attributable through Board processes • with his consent or connivance, or where he had not acted diligently
(ii) a non-executive director not being promoter or key managerial personnel	

(l) Retirement by rotation [Section 149(13)]: The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 shall not be applicable to appointment of independent directors.

(Note: The provisions of retirement of directors by rotation covered under sub-sections (6) and (7) of section 152 will be discussed later on in this chapter)

Here, in section 149 "Nominee director" means a director nominated by any financial institution in pursuance of the provisions of any law for the time being in force, or of any agreement, or appointed by any Government, or any other person to represent its interests.

The MCA vide General Circular No. 14/2014 dated 9th June, 2014 has given some clarifications over manner relating to appointment and qualifications of directors and Independent Directors which are as under:

(i) Section 149(6)(c) : "pecuniary interest in certain transactions":

(a) This provision inter alia requires that an 'ID' should have no 'pecuniary relationship' with the company concerned or its holding/ subsidiary / associate

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company and certain other categories specified therein during the current and last two preceding financial years. Clarifications have been sought whether a transaction entered into by an 'ID' with the company concerned at par with any member of the general public and at the same price as is payable/paid by such member of public would attract the bar of 'pecuniary relationship' under section 149(6)(c). The matter has been examined and it is hereby clarified that in view of the provisions of section 188 which take away transactions in the ordinary course of business at arm's length price from the purview of related party transactions, an 'ID' will not be said to have 'pecuniary relationship' under section 149(6)(c) in such cases.

(b) Stakeholders have also sought clarification whether receipt of remuneration, (in accordance with the provisions of the Act) by an 'ID' from a company would be considered as having pecuniary interest while considering his appointment in the holding company, subsidiary company or associate company of such company. The matter has been examined in consultation with SEBI and it is clarified that 'pecuniary relationship' provided in section 149(6)(c) of the Act does not include receipt of remuneration, from one or more companies, by way of fee provided under sub-section (5) of section 197, reimbursement of expenses for participation in the Board and other meetings and profit related commission approved by the members, in accordance with the provisions of the Act.

(ii) Section 149(10) / (11)- Appointment of 'IDs' for less than 5 years:- Clarification has been sought as to whether it would be possible to appoint an individual as an ID for a period less than five years. It is clarified that section 149(10) of the Act provides for a term of "upto five consecutive years" for an 'ID'. As such while appointment of an 'ID' for a term of less than five years would be permissible, appointment for any term (whether for five years or less) is to be treated as a one term under section 149(10) of the Act. Further, under section 149(11) of the Act, no person can hold office of 'ID' for more than 'two consecutive terms'. Such a person shall have to demit office after two consecutive terms even if the total number of years of his appointment in such two consecutive terms is less than 10 years. In such a case the person completing 'consecutive terms of less than ten years' shall be eligible for appointment only after the expiry of the requisite cooling-off period of three years.

(iii) Appointment of 'IDs' through letter of appointment:- With reference to Para IV(4) of Schedule IV of the Act (Code for IDs) which requires appointment of 'IDs' to be formalized through a letter of appointment, clarification has been sought if such requirement would also be applicable for appointment of existing 'IDs'? The matter has been examined. In view of the specific provisions of Schedule IV, appointment

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of 'IDs' under the new Act would need to be formalized through a letter of appointment.

Exemptions

The MCA vide Notification No.466(E) dated 5th June, 2015, has exempted section 8 companies from following the provisions of sub-section (4), (5), (6), (7), (8), (9), (10), (11), clause (i) of sub- section (12) [related to independent director] and sub- section (13) of section 149 of the Companies Act, 2013.

3. Manner of selection of independent directors and maintenance of data bank of independent directors [Section 150]

This section provides for the manner of selection of independent directors and maintenance of databank of independent directors.

(i) According to section 150(1) of the Companies Act, 2013, an independent director may be selected from a data bank containing names, addresses and qualifications of persons who are eligible and willing to act as independent directors, subject to the provisions contained in section 149(5).

Such data bank shall be maintained by any body, institute or association, as may be notified by the Central Government as having the expertise in creation and maintenance of such data bank and put on their website for the use by companies appointing such directors.

Further, the responsibility of exercising due diligence before selecting a person as an independent director from the data bank referred to above, shall lie with the company making such appointment [Proviso to section 150(1)].

(ii) The appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152 and the explanatory statement annexed to the notice of the general meeting called to consider the said appointment shall indicate the justification for choosing the appointee for appointment as independent director [Section 150(2)].

(iii) The data bank referred to in sub-section (1), shall create and maintain data of persons willing to act as independent director in accordance with such rules as may be prescribed [Section 150(3)]

(iv) The Central Government may prescribe the manner and procedure of selection of independent directors who fulfill the qualifications and requirements specified under section 149 [Section 150(4)]

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Creation and maintenance of databank of persons offering to become independent directors:

(i) Any body, institute or association (referred as "the agency"), which has been authorised in this behalf by the Central Government shall createand maintain a data bank of persons willing and eligible to beappointed as independent director and such data bank shall be placedon the website of the Ministry of Corporate Affairs or on any other website as may be approved or notified by the Central Government.

(ii) The data bank shall contain the particulars in respect of each person included in the data bank to be eligible and willing to be appointed as independent director like DIN, the name and surname in full, details of LLPs in which he is or was a designated partner, the list of companies in which he is or was director, etc.

(iii) For further details regarding the procedure of creation and maintenance of databank of persons offering to become independent directors, please refer *Companies (Appointment and Qualification of Directors) Rules, 2014 and Companies (Appointment and Qualification of Directors) Amendment Rules, 2014.*

Exemptions

The MCA vide Notification No. 466(E) dated 5th June, 2015, has clarified that section 150 of the Companies Act, 2013, shall not apply to a section 8 company.

4. Appointment of Directors elected by Small shareholders [Section 151]

According to section 151 of the Companies Act, 2013:

A listed company may have one director elected by such small shareholders in such manner and on such terms and conditions as may be prescribed.

Here, "Small Shareholders" means a shareholder holding shares of nominal value of not more than ₹ 20,000 or such other sum as may be prescribed.

The *Companies (Appointment and Qualification of directors) Rules, 2014* provides for the procedure for appointment of Small shareholders' director according to which:

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

(a) one thousand small shareholders; or

(b) one- tenth of the total number of such shareholders,

whichever is lower, have a small shareholders' director elected by the small shareholders.

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However, a listed company may opt to have a director representing small shareholders *suomotu* and in such a case the provisions of sub-rule (ii), given below, shall not apply for appointment of such director.

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

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

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

(a) his Director Identification Number;

(b) that he is not disqualified to become a director under the Act; and

(c) his consent to act as a director of the company.

(iv) Such director shall be considered as an independent director subject to, his being eligible under sub-section (6) of section 149 and his giving a declaration of his independence in accordance with sub-section (7) of section 149 of the Act.

(v) The appointment of small shareholders' director shall be subject to the provisions of section 152 except that-

(a) such director shall not be liable to retire by rotation;

(b) such director's tenure as small shareholders' director shall not exceed a period of three consecutive years; and

(c) on the expiry of the tenure, such director shall not be eligible for re-appointment.

(vi) A person shall not be appointed as small shareholders' director of a company, if he is not eligible for appointment in terms of section 164 which specifies the disqualifications for appointment of a director.

(vii) A person appointed as small shareholders' director shall vacate the office if -

(a) the director incurs any of the disqualifications specified in section 164;

(b) the office of the director becomes vacant in pursuance of section 167;

(c) the director ceases to meet the criteria of independence as provided in sub-section (6) of section 149.

(viii) No person shall hold the position of small shareholders' director in more than two companies at the same time.

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However, the second company in which he has been so appointed shall not be in a business which is competing or is in conflict with the business of the first company.

(ix) A small shareholders' director shall not, for a period of three years from the date on which he ceases to hold office as a small shareholders' director in a company, be appointed in or be associated with such company in any other capacity, either directly or indirectly.

5. Appointment of Directors [Section 152]

According to section 152 of the Companies Act, 2013:

(i) Appointment of directors:



(a) Where no provision is made in the articles of a company for the appointment of the first director, the subscribers to the memorandum who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed. [Section 152(1)]

In case of a One Person Company, an individual being member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section. [Section 152(1)]

(b) Save as otherwise expressly provided in this Act, every director shall be appointed by the company in general meeting. [Section 152(2)]

(c) No person shall be appointed as a director of a company unless he has been allotted the Director Identification Number (DIN) under section 154. [Section 152(3)]

(d) Every person proposed to be appointed as a director by the company in general meeting or otherwise, shall furnish his Director Identification Number (DIN) and a declaration that he is not disqualified to become a director under this Act. [Section 152(4)]

(e) A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within 30 days[5] of his appointment in Form *DIR-12* along with the fee as prescribed [Section 152 (5)].

Rule 8 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides that every person who has been appointed to hold the office of a director

[5] In case of Specified IFSC Public Company- In Sub-section (5) of section 152, For the words "thirty days" read as "sixty days".- Notification Dated 4th January 2017.

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shall on or before the appointment furnish to the company consent in writing to act as director in Form *DIR-2*.

The proviso to Section 152 (5) states that in case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfills the conditions specified in this Act for such an appointment.

Exemptions

The Ministry of Corporate Affairs has clarified via Notification dated 5th June, 2015, that proviso to section 152(5) shall not apply in case of section 8 company.

The Ministry of Corporate Affairs has clarified via Notification dated 5th June, 2015, that in case of Government company, section 152(5) shall not apply where appointment of such director is done by the Central Government or State Government, as the case may be.

(ii) Retirement by rotation [Section 152(6)]

(a) Unless the articles provide for the retirement of all directors at every annual general meeting, not less than two-thirds of the total number of directors of a public company shall—

(A) be persons whose period of office is liable to determination by retirement of directors by rotation; and

(B) save as otherwise expressly provided in this Act, be appointed by the company in general meeting.

(b) The remaining directors in the case of any such company shall, in default of, and subject to any regulations in the articles of the company, also be appointed by the company in general meeting.

(c) At the first annual general meeting of a public company held next after the date of the general meeting at which the first directors are appointed and at every subsequent annual general meeting, one-third of such of the directors for the time being as are liable to retire by rotation, or if their number is neither three nor a multiple of three, then, the number nearest to one-third, shall retire from office.

Example 1: Company is having six directors.

Directors liable to retire by rotation: 6 * 2/3 i.e. 4

No. of directors to retire at AGM: 4* 1/3 i.e. 1.33 or nearest to 1/3rd is 1.

Example 2: Company is having 7 directors.

Directors liable to retire by rotation 7*2/3 i.e. 4.7

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No. of directors to retire at AGM: 4.7* 1/3 i.e. 1.56 or nearest to 1/3rd is 2.

(d) The directors to retire by rotation at every annual general meeting shall be those who have been longest in office since their last appointment, but as between persons who became directors on the same day, those who are to retire shall, in default of and subject to any agreement among themselves, be determined by lot.

(e) At the annual general meeting at which a director retires as aforesaid, the company may fill up the vacancy by appointing the retiring director or some other person thereto.

For the purposes of the above provisions "total number of directors" shall not include independent directors, whether appointed under this Act or any other law for the time being in force, on the Board of a company.

(iii) Vacancy in case of retiring director [Section 152(7)][6]

(a) If the vacancy of the retiring director is not so filled-up and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned till the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a holiday, at the same time and place.

(b) If at the adjourned meeting also, the vacancy of the retiring director is not filled up and that meeting also has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting, unless—

(A) at that meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;

(B) the retiring director has, by a notice in writing addressed to the company or its Board of directors, expressed his unwillingness to be so re-appointed;

(C) he is not qualified or is disqualified for appointment;

(D) a resolution, whether special or ordinary, is required for his appointment or re appointment by virtue of any provisions of this Act; or

(E) section 162 is applicable to the case.

For the purposes of section 152, the "retiring director" means a director retiring by rotation.

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[6] In case of Specified IFSC Public Company -Sub-sections (6) and (7) of section 152 shall not apply Notification Dated 4th January 2017.

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Exemptions

Non applicability of section 152(6) and 152(7): *The Ministry of Corporate Affairs has clarified via Notification 13th June, 2017, that section 152(6) and (7) of the Companies Act, 2013, shall not apply to:*

(a) Government company, which is not a listed company, in which not less than fifty-one per cent. of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) a subsidiary of a Government company, referred to in (a) above.". - Notification Dated 13th June, 2017.

6. Application for allotment of Director Identification Number [Section 153]

"Director Identification Number" (DIN) means an identification number allotted by the Central Government to any individual, intending to be appointed as director or to any existing director of a company, for the purpose of his identification as a director of a company;

Provided that the Director Identification Number (DIN) obtained by the individuals prior to the notification of these rules shall be the DIN for the purpose of the Companies Act, 2013:

Provided further that "Director Identification Number" (DIN) includes the Designated Partnership Identification Number (DPIN) issued under section 7 of the Limited Liability Partnership Act, 2008 the rules made thereunder; [Rule 2(1)(e) of the *Companies (Specification of definitions details) Rules, 2014*]

Section 153 of the Companies Act, 2013 deals with the filing of application for allotment of DIN. According to it, every individual intending to be appointed as director of a company shall make an application for allotment of DIN to the Central Government in such form and manner and along with such fees as may be prescribed.

Rule 9 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides for the points for making application for allotment of DIN according to which:

(1) Every individual, who is to be appointed as director of a company shall make an application electronically in Form DIR-3, to the Central Government for the allotment of a DIN along with such fees as prescribed.

(2) The Central Government shall provide an electronic system to facilitate submission of application for the allotment of DIN through the portal on the website of the Ministry of Corporate Affairs.

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(3) (a) The applicant shall download Form DIR-3 from the portal, fill in the required particulars sought therein, verify and sign the form and after attaching copies of the following documents, scan and file the entire set of documents electronically-

(i) photograph;

(ii) proof of identity;

(iii) proof of residence; and

(iv) specimen signature duly verified.

(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by -

(i) a chartered accountant in practice or a company secretary in practice or a cost accountant in practice; or

(ii) a company secretary in full time employment of the company or by the managing director or director of the company in which the applicant is to be appointed as director.

The MCA vide Notification No. S.O. 1354(E) dated 21st May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 153 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.

(4) In case the name of a person does not have a last name, then his or her father's or grandfather's surname shall be mentioned in the last name along with the declaration in Form No. DIR-3A.

7. Allotment of Director Identification Number [Section 154]

According to section 154 of the Companies Act, 2013, the Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number (DIN) to the applicant in such manner as may be prescribed.

Rule 10 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* provides the procedure for allotment of DIN according to which:

(i) On the submission of the Form DIR-3 on the portal and payment of the requisite amount of fees through online mode, an application number shall be generated by the system automatically.

(ii) After generation of application number, the Central Government shall process the applications received for allotment of DIN and decide on the approval or rejection thereof and communicate the same to the applicant along with the DIN allotted in case of

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approval by way of a letter by post or electronically or in any other mode, within a period of one month from the receipt of such application.

(iii) If the Central Government, on examination, finds such application to be defective or incomplete in any respect, it shall give intimation of such defect or incompleteness, by placing it on the website and by email to the applicant who has filed such application, directing the applicant to rectify such defects or incompleteness by resubmitting the application within a period of 15 days of such placing on the website and email.

Provided that the Central Government shall –

(a) reject the application and direct the applicant to file fresh application with complete and correct information, where the defect has been rectified partially or the information given is still found to be defective;

(b) treat and label such application as invalid in the electronic record in case the defects are not removed within the given time; and

(c) inform the applicant either by way of letter by post or electronically or in any other mode.

(iv) In case of rejection or invalidation of application, the fee so paid with the application shall neither be refunded nor adjusted with any other application.

(v) All DIN allotted to individual(s) by the Central Government before the commencement of these rules shall be deemed to have been allotted to them under these rules.

(vi) The DIN so allotted under these rules is valid for the life-time of the applicant and shall not be allotted to any other person.

The MCA vide Notification No. S.O. 1354(E) dated 21st May, 2014 delegates the powers and functions of the Central Government in respect of allotment of Director Identification Number under section 154 of the Companies Act, 2013 to the Regional Director, Joint Director, Deputy Director or Assistant Director posted in the office of Regional Director at Noida.

8. Prohibition to obtain more than one DIN [Section 155]

According to this section, no individual, who has already been allotted a DIN under section 154, shall apply for, obtain or possess another DIN.

9. Director to intimate DIN [Section 156]

Section 156 of the Companies Act, 2013, provides for a Director to intimate the DIN allotted to him. According to this section, every existing director shall, within one month of the receipt of

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DIN from the Central Government, intimate his DIN to the company or all companies wherein he is a director.

10. Company to inform DIN to Registrar [Section 157]

According to section 157 of the Companies Act, 2013:

(i) Every company shall, within 15 days of the receipt of intimation under section 156, furnish the DIN of all its directors to the Registrar or any other officer or authority as may be specified by the Central Government with such fees as may be prescribed or with such additional fees as may be prescribed within the time specified under section 403. Every such intimation shall be furnished in such form and manner as may be prescribed. [Section 157(1)]

(ii) If a company fails to furnish the DIN under sub-section (1) above, before the expiry of the period specified under section 403 with additional fee, the company shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000 and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 1,00,000. [Section 157(2)]

According to Rule 10A of the *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014:*

(1) Every director, functioning as a director in one or more companies on or before the 30th June, 2007 and who has not yet intimated his DIN to such company or companies shall, within one month of the receipt of Director Identification Number from the Central Government, intimate his Director Identification Number to the company or all companies wherein he is a director as per Form DIR-3B.

(2) The intimation by the company of Director Identification Number of its directors under section 157 of the Act shall be furnished in Form DIR-3C within 15 days of receipt of intimation under section 156."

11. Obligation to indicate DIN [Section 158]

According to section 158 of the Companies Act, 2013, every person or company, while furnishing any return, information or particulars as are required to be furnished under this Act, shall mention the Director Identification Number in such return, information or particulars in case such return, information or particulars relate to the director or contain any reference of any director.

12. Punishment for contravention [Section 159]

Section 159 of the Companies Act, 2013 provides for Punishment for contravention of any of the provisions of section 152, 155 and 156 of the Act.

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According to the section, if any individual or director of a company, contravenes any of the provisions of section 152, 155 and 156, such individual or director of the company shall be punishable with imprisonment for a term which may extend to 6 months or with fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a further fine which may extend to ₹ 500 for every day after the first during which the contravention continues.

13. Cancellation or surrender or Deactivation of DIN

Rule 11 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* as amended by the *Companies (Appointment and Qualification of Directors) Amendment Rules*, 2014, lays down the procedure for cancellation or surrender or deactivation of DIN as under:

The Central Government or Regional Director (Northern Region), Noida or any officer authorised by the Regional Director may, upon being satisfied on verification of particulars or documentary proof attached with the application received alongwith fee as specified in *Companies (Registration Offices and Fees) Rules, 2014*, from any person, cancel or deactivate the DIN in case -

(a) the DIN is found to be duplicated in respect of the same person provided the data related to both the DINs shall be merged with the validly retained number;

(b) the DIN was obtained in a wrongful manner or by fraudulent means;

Provided that before cancellation or deactivation of DIN pursuant to the above clause (b), an opportunity of being heard shall be given to the concerned individual.

For this purpose

(i) the term "*wrongful manner*" means if the DIN is obtained on the strength of documents which are not legally valid or incomplete documents are furnished or on suppression of material information or on the basis of wrong certification or by making misleading or false information or by misrepresentation.

(ii) the term "*fraudulent means*" means if the DIN is obtained with an intent to deceive any other person or any authority including the Central Government.

(c) of the death of the concerned individual;

(d) the concerned individual has been declared as a person of unsound mind by a competent Court;

(e) if the concerned individual has been adjudicated an insolvent.

(f) on an application made in Form DIR-5 by the DIN holder to surrender his or her DIN along with declaration that he has never been appointed as director in any company and the said DIN has never been used for filing of any document with any authority, the Central Government may deactivate such DIN.

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Provided that before deactivation of any DIN in such case, the Central Government shall verify e-records.

14. Intimation of changes in particulars specified in DIN application

Rule 12 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* as amended by the *Companies (Appointment and Qualification of Directors) Amendment Rules, 2014*, provides for the procedure for Intimation of changes in particulars specified in the DIN application according to which:

(1) Every individual who has been allotted a DIN under these rules shall, in the event of anychange in his particulars as stated in Form DIR-3, intimate such change(s) to the Central Government within a period of thirty days of such change(s) in Form DIR-6 in the following manner, namely;-

   (i) The applicant shall download Form DIR-6 from the portal, fill in the relevant changes, verify theForm and attach duly scanned copy of the proof of the changed particulars and submit electronically.;

   (ii) the form shall be digitally signed by a chartered accountant in practice or a company secretary in practice or a cost accountant in practice;

   (iii) the applicant shall submit the Form DIR-6;

(2) The Central Government, upon being satisfied, after verification of such changed particulars from the enclosed proofs, shall incorporate the said changes and inform the applicant by way of a letter by post or electronically or in any other mode confirming the effect of such change in the electronic database maintained by the Ministry.

(3) The DIN cell of the Ministry shall also intimate the change(s) in the particulars of the director submitted to it in Form DIR-6 to the concerned Registrar(s) under whose jurisdiction the registered office of the company(s) in which such individual is a director is situated.

(4) The concerned individual shall also intimate the change(s) in his particulars to the company or companies in which he is a director within 15 days of such change.

15. Right of persons other than retiring directors to stand for directorship [Section 160] [7]

According to section 160 of the Companies Act, 2013:

[7] In case of Specified IFSC Public Company - Section 160 shall apply as per the articles framed by the company. - Notification Dated 4th January 2017.

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(i) a person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office.

(ii) Such notice must come along with the deposit of ₹ 1,00,000 or such higher amount as may be prescribed. Such deposit shall be refunded to such person or, as the case may be, to the member, if the person proposed get selected as a director or gets more than 25% of the total valid votes cast either on show of hands or on poll on such resolution.

As per Notification G.S.R. 465(E) dated 5th June, 2015, in case of a Nidhi Company, in section 160(1) of the Companies Act, 2013, the words "one lakh rupees" shall be substituted with "ten thousand rupees".

The MCA vide General Circular No. 38/2014, dated 14th October, 2014, has issued a clarification with respect to Refund of deposit under sectlon 160. In case of companies resgistered under section 8 of the Companies Act, 2013, the Board of directors of such company is to decide as to whether the deposit [₹ 1,00,000 received by them under section 160(1)] made by or on behalf of the person failing to secure more than 25% of the valid votes is to be forfeited or refunded.

(iii) The company shall inform its members of the candidature of a person for the office of director (as discussed above) in such manner as may be prescribed.

Exemptions

***Non applicability of section 160**: The MCA has clarified via Notifications No. 463(E), 464(E) and 466(E) dated 5th June, 2015, that section 160 of the Companies Act, 2013, shall not apply to:*

(1) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(2) A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Governmment company.

(3) A Private company

(4) Section 8 Companies whose articles provide for election of directors by ballot.

Notice of candidature of a person for directorship: Rule 13 of the *Companies (Appointment and Qualification of Directors) Rules, 2014* lays down the following points for giving notice of candidature of a person for directorship as under:

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(i) The company shall, at least 7 days before the general meeting, inform its members of the candidature of a person for the office of a director or the intention of a member to propose such person as a candidate for that office-

(1) by serving individual notices, on the members through electronic mode to such members who have provided their email addresses to the company for communication purposes, and in writing to all other members; and

(2) by placing notice of such candidature or intention on the website of the company, if any.

(ii) However, it shall not be necessary for the company to serve individual notices upon the members as aforesaid, if the company advertises such candidature or intention, not less than 7 days before the meeting at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district.

16. Appointment of additional director, alternate director and nominee director [Section 161]

(A) Additional Director [Section 161(1)]: Section 161(1) of the Companies Act, 2013 provides for appointment of additional director. According to this section:

(i) The articles of a company may confer on its Board of Directors the power to appoint any person as an additional director at any time.

(ii) A person, who fails to get appointed as a director in a general meeting, cannot be appointed as an additional director.

(iii) Additional director shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

(B) Alternate Director [Section 161(2)]: Section 161(2) of the Companies Act, 2013 provides for appointment of Alternate director. According to this section:

(i) The Board of Directors of a company may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person to act as an alternate director in place of another director (original director) during his absence for a period of not less than 3 months from India.

(ii) A person who is holding any alternate directorship for any other director in the company cannot be considered for appointment as above.

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(iii) No person shall be appointed as an alternate director for an independent director unless he is qualified to be appointed as an independent director under the provisions of this Act.

(iv) An alternate director shall not hold office for a period longer than that permissible to the original director in whose place he has been appointed and shall vacate the office if and when the original director returns to India.

(v) If the term of office of the original director is determined before he so returns to India, any provision for the automatic re-appointment of retiring directors in default of another appointment shall apply to the original, and not to the alternate director.

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

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

From the above provision it is clear that the authority to appoint alternate director has been vested in the board of directors only and that too subject to empowerment by the Articles.

Therefore, Q is not authorized to appoint an alternate director and the appointment of Mr. Y is not valid.

(C) Nominee Director [Section 161(3)][8]: Section 161(3) of the Companies Act, 2013 provides for appointment of Nominee director. According to this section:

Subject to the articles of a company, the Board may appoint any person as a director nominated by any institution in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company.

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[8] In case of Specified **IFSC Public Company & IFSC Private Company** - In sub-section (3) of Section 161, the following proviso shall be inserted, namely:-

"Provided that in case of a Specified IFSC public company & IFSC Private Company, the Board may appoint, any person nominated by any institution or company or body corporate as a director in pursuance of the provisions of any law for the time being in force or of any agreement or by the Central Government or the State Government by virtue of its shareholding in a Government company."- Notification Dated 4th January 2017.

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(D) Casual Vacancy [Section 161(4)]: Section 161(4) of the Companies Act, 2013 provides for appointment of director in casual vacancy. According to this section:

(i) In the case of a public company, if the office of any director appointed by the company in general meeting is vacated before his term of office expires in the normal course, the resulting casual vacancy may, in default of and subject to any regulations in the articles of the company, be filled by the Board of Directors at a meeting of the Board.

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

17. Appointment of directors to be voted individually [Section 162]

According to section 162 of the Companies Act, 2013:

(i) Two or more directors of a company cannot be elected as directors by a single resolution.

(ii) Thus, each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and no vote has been cast against such agreement.

(iii) A resolution moved in contravention of this provision shall be void, whether or not objection thereto was raised at the time it was so moved.

(iv) A motion for approving a person for appointment, or for nominating a person for appointment as a director, shall be treated as a motion for his appointment.

Exemptions

Non applicability of section 162: *The MCA has clarified via Notifications No. 463(E) and 464(E) dated 5th June, 2015, that section 162 of the Companies Act, 2013, shall not apply to:*

(1) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(2) A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Governmment company.

(3) A Private company

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18. Option to adopt principle of proportional representation for appointment of directors [Section 163]

According to section 163 of the Companies Act, 2013:

(i) Notwithstanding anything contained in the Companies Act, 2013, the articles of a company may provide for the appointment of not less than two-thirds of the total number of the directors of a company in accordance with the principle of proportional representation.

(ii) Such appointments may be made once in every 3 years whether by the single transferable vote or by a system of cumulative voting or otherwise.

Single transferable vote means, a candidate gets elected if he gets the required number of votes fixed as quota. These systems of voting ensure that the Board will have fair representation of the minority interest.

(iii) Casual vacancies of such directors shall be filled as provided in sub-section (4) of section 161.

Exemptions

Non applicability of section 162: *The MCA has clarified via Notifications No. 463(E) dated 5th June, 2015, that section 163 of the Companies Act, 2013, shall not apply to:*

(1) A Government company in which the entire paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(2) A subsidiary of a Government company, referred to in (a) above, in which the entire paid up share capital is held by the Governmment company.

19. Disqualifications for appointment of director [Section 164]

According to section 164 of the Companies Act, 2013:

(i) A person shall not be eligible for appointment as a director of a company in any of the following cases:

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than 6 months and a period of 5 years has not elapsed from the date of expiry of the sentence.

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However, if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of 7 years or more, he shall not be eligible to be appointed as a director in any company

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and 6 months have elapsed from the last day fixed for the payment of the call;

(g) he has been convicted of the offence of dealing with related party transactions under section 188 at any time during the last preceding 5 years; or

(h) he has not complied with sub-section (3) of section 152 which requires a director to have a Director Identification Number under section 154.

(ii) No person who is or has been a director of a company which—

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

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

shall be eligible to be re-appointed as a director of that company or appointed in other company for period of 5 years from the date on which the said company fails to do so. [Section 164(2)]

Exemptions

The MCA has clarified via Notifications dated 5th June, 2015, that Section 164(2) is not applicable to Government company.

(iii) A private company may by its articles provide for any disqualifications for appointment as a director in addition to those specified in sub-sections (1) and (2) of section 164 as stated above [i.e. point (i) and (ii) above].

However, the disqualifications referred to in clauses (d), (e) and (g) of sub-section (1) [given in point (i) above] shall not take effect—

(a) for 30 days from the date of conviction or order of disqualification;

(b) where an appeal or petition is preferred within 30 days as aforesaid against the conviction resulting in sentence or order, until expiry of 7 days from the date on which such appeal or petition is disposed off; or

(c) where any further appeal or petition is preferred against order or sentence within 7 days, until such further appeal or petition is disposed off.

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20. Number of directorship [Section 165]

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

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

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

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

Exemptions

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

(ii) The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as directors. [Section 165(2)]

(iii) Transition period for complying with sub-section (1) is one year and within this period, if any director is holding office as director in companies more than the specified limits, he shall -

(a) choose not more than the specified limit of companies, in which he wishes to continue to hold the office of director;

(b) resign his office as director in the other remaining companies; and

(c) intimate the choice made by him under clause (a), to each of the companies in which he was holding the office of director before such commencement and to the Registrar having jurisdiction in respect of each such company. [Section 163(3)]

(iv) Any resignation made in pursuance of clause (b) of sub-section (3) shall become effective immediately on the dispatch thereof to the company concerned. [Section 163(4)]

(v) After dispatching the resignation of his office as director or non-executive director or after the completion of the transition period of one year, whichever is earlier, no such person shall act as director in more than specified number of companies.

(vi) If a person accepts an appointment as a director in contravention of sub-section (1) i.e. holding directorship in more than 20 companies or more than 10 public companies, he shall be punishable with fine which shall not be less than ₹ 5,000 but which may extend to ₹ 25,000 for every day after the first during which the contravention continues.

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21. Duties of Directors [Section 166]

Duties of directors has been defined in the company Law for the first time under section 166 of the Companies Act, 2013.The following duties have been prescribed for a director under the said section:

(i) He shall act in accordance with the articles of the company, subject to the provisions of this Act.

(ii) He shall act in good faith in order to promote the objects of the company for the benefit of its members as a whole, and in the best interests of the company, its employees, the shareholders, the community and for the protection of environment.

(iii) He shall exercise his duties with due and reasonable care, skill and diligence and shall exercise independent judgment.

(iv) He shall not involve in a situation in which he may have a direct or indirect interest that conflicts, or possibly may conflict, with the interest of the company.

(v) He shall not achieve or attempt to achieve any undue gain or advantage either to himself or to his relatives, partners, or associates and if such director is found guilty of making any undue gain, he shall be liable to pay an amount equal to that gain to the company.

(vi) He shall not assign his office and if any assignment so made, it shall be void.

(vii) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000.

22. Vacation of office of director [Section 167]

According to section 167 of the Companies Act, 2013:

(i) The office of a director shall become vacant in case [Section 167(1)]-

  (a) he incurs any of the disqualifications specified in section 164;

  (b) he absents himself from all the meetings of the Board of Directors held during a period of 12 months with or without seeking leave of absence of the Board;

  (c) he acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

  (d) he fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;

  (e) he becomes disqualified by an order of a court or the Tribunal;

  (f) he is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months.

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It is further provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

(g) he is removed in pursuance of the provisions of this Act;

(h) he, having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

(ii) If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified in sub-section (1), he shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 5,00,000, or with both. [Section 167(2)]

(iii) Where all the directors of a company vacate their offices under any of the disqualifications specified in sub-section (1), the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting. [Section 167(3)]

(iv) A private company may, by its articles, provide any other ground for the vacation of the office of a director in addition to those specified in sub-section (1). [Section 167(4)]

23. Resignation of Director [Section 168]

Provisons regarding resignation of directors has been provided for the first time under the Companies Act, 2013. According to this section:

(i) a director may resign from his office by giving a notice in writing to the company.

(ii) The Board shall on receipt of such notice take note of the same.

(iii) The company shall within 30 days from the date of receipt of notice of resignation from a director, intimate the Registrar in *Form DIR-12* and post the information on its website, if any.

(iv) The company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.

(v) Such director shall also forward a copy of his resignation along with detailed reasons for the resignation to the Registrar within 30 days from the date of resignation in Form *DIR-11* along with the prescribed fee.

Provided that in case a company has already filed Form DIR-12 with the Registrar (as provided above), a foreign director of such company resigning from his office may authorise in writing a practising chartered accountant or cost accountant in practice or company secretary in practice or any other resident director of the company to sign Form DIR-11 and file the same on his behalf intimating the reasons for the resignation. [*Companies (Appointment and Qualification of Directors) Amendment Rules, 2015*].

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The MCA vide General Circular No. 3/15 dated 3rd March, 2015 has clarified that in the event of deactivation of Digital signature certificate (DSC) following en masse resignation of all the directors of a company before appointment of new directors in their places. The difficulty arises because of automatic deactivation of DSC on filing of DIR-11 (Notice of resignation of a director to the Registrar) by the resigned/resigning Director(s), and none of the new Director's details having been filed. As a result, form DIR-12 (Particulars of appointment of directors and the key managerial personnel and the changes among then) cannot be filed by a company due to lack of an authorized signatory Director.

In order to enable the filing of such e-forms and till an alternative mechanism is put in place in MCA 2I system, it is clarified that the Registrar of Companies within their respective jurisdictions are authorized, on request from the stakeholders, and after due examinalion, to allow any one ofthe resigned director who was an authorized signatory Director for the purpose offiling DIR-12 only along with additional fees, as applicable and subject to compliance of other provisions of Companies Act, 2013.

(vi) The resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.

(vii) It is further provided that the director who has resigned shall be liable even after his resignation for the offences which occurred during his tenure.

(viii) Where all the directors of a company resign from their offices, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.

24. Removal of Directors [Section 169]

Section 169 of the Companies Act, 2013 provides the provisions for removal of directors. According to this section:

(i) A company may, by ordinary resolution, remove a director other than a director appointed by the Tribunal under section 242 of the Act, before the expiry of the period of his office after giving him a reasonable opportunity of being heard. [Section 169(1)]

(ii) It is further provided that the directors appointed on the principle of proportional representation under section 163 cannot be removed by an ordinary resolution as aforesaid. [Proviso to section 169(1)]

(iii) A special notice shall be required of any resolution, to remove a director under section 169 or to appoint somebody in place of a director so removed, at the meeting at which he is removed. [Section 169 (2)]

(iv) On receipt of the notice of a resolution to remove a director under section 169, the company shall forthwith send a copy thereof to the director concerned, and the director,

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whether or not he is a member of the company, shall be entitled to be heard on the resolution at the meeting. [Section 169(3)]

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

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

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

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

(vi) The vacancy resulting from the aforesaid removal if he had been appointed by the company in general meeting or by the Board, may be filled in by the appointment of another director at the same meeting at which the director is removed, provided special notice of the proposed appointment has been given under section 169(2). [Section 169(5)]

(vii) A director so appointed shall hold office for the remaining period for which the director who has been removed would have held office if he had not been removed. [Section 169(6)]

(viii) If the vacancy is not filled in the same meeting as above, then it may be filled as a casual vacancy in accordance with the provisions of this Act provided that the director who was so removed from office shall not be reappointed as a director. [Section 169(7)]

(ix) Nothing in this section shall be taken to deprive a person removed under this section of his rights to compensation or damages payable to him in respect of the premature termination of the directorship, or terms of his appointment as director or of any appointment terminating with that as a director. [Section 169(8)(a)]

(x) Nothing in this section shall be derogating from any power to remove a director under any other provisions of this Act. [Section 169(8)(b)]

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25. Register of Directors and Key Managerial Personnel and their shareholding [Section 170]

Section 170 of the Companies Act, 2013 provides as under:

(i) Every company shall keep at its registered office a register containing such particulars of its directors and key managerial personnel as may be prescribed and which shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies. [Section 170(1)]

(ii) Section 170(2) provides that a return containing such particulars and documents as may be prescribed, of the directors and the key managerial personnel shall be filed with the Registrar

(a) within 30 days[9] from the appointment of every director and key managerial personnel, as the case may be, and

(b) within 30 days of any change taking place.

Exemptions

Section 170 of the Companies Act, 2013 shall not apply to a Government company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government by MCA vide Notification No. 463(E) dated 5th June, 2015.

26. Members right to inspect [Section 171]

According to section 171 of the Companies Act, 2013:

(i) The register of directors and Key Managerial personnel kept under section 170(1) shall be open for inspection during business hours and the members shall have the right to take extracts therefrom and copies thereof, on request and will be provided within 30 days free of cost. [Section 171(1)(a)]

(ii) Such register shall also be kept open for inspection at every annual general meeting of the company and shall be made accessible to any person attending the meeting. [Section 171(1)(b)]

(iii) If any inspection during business hours is refused, or if any copy required as above is not sent within thirty days from the date of receipt of such request, the Registrar shall on an

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[9] In case of **Specified IFSC Public Company**- In Sub-section (2) of section 170 for the words "thirty days" at both places read as "sixty days". - Notification Dated 4th January 2017.

In case of **Specified IFSC Priavte Company**- In Sub-section (2) of section 170 For the words "thirty days" at both places read as "sixty days". - Notification Dated 4th January 2017.

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application made to him order immediate inspection and supply of copies required there under. [Section 171(2)]

Exemptions

Section 171 shall not apply to a Government company in which the entire share capital is held by the Central Government, or by any State Government or Governments or by the Central Government or by one or more State Government by MCA vide Notification No. 463(E) dated 5th June, 2015.

27. Punishment [Section 172]

Section 172 of the Companies Act, 2013 provides as under:

If a company contravenes any of the provisions of the sections i.e. from 149 to 171 (both inclusive) and for which no specific punishment is provided therein, the company and every officer of the company who is in default shall be punishable with fine which shall not be less than ₹ 50,000 but which may extend to ₹ 5,00,000.

Relevant Amendments

1. Exemptions to Government Companies Vide Notification G.S.R. 582(E) Dated 13th June, 2017

The Central Government amends the Notification G.S.R. 463(E), dated 5th June 2015. Following are the amendments:

(i) According to the amendment, section 152(6) & (7) , shall not apply to –

(a) a Government company, which is not a listed company, in which not less than fifty-one per cent. of paid up share capital is held by the Central Government, or by any State Government or Governments or by the Central Government and one or more State Governments;

(b) a subsidiary of a Government company, referred to in (a) above."

2. Insertion of Paragraph 2A in the principal notification G.S.R. 463(E), dated 5th June 2015 Vide Notification G.S.R. 582(E) Dated 13th June, 2017

In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:-

"2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a Government company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar."

3. Exemptions to Companies covered section 8 of the Companies Act, 2013 Vide Notification G.S.R. 584(E) Dated 13TH June, 2017

The Central Government amends the Notification G.S.R. 466(E), dated 5th June 2015. Following are the amendments:

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Section 149(1)(b) & first proviso shall not apply on section 8 companies.

Insertion of Paragraph 2A in the principal notification G.S.R. 466 (E), dated 5th June 2015 Vide Notification G.S.R. 584(E) Dated 13TH June, 2017

In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:- "2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a company covered under section 8 of the said Act which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar."

4. Enforcement of the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017 Vide Notification G.S.R. 839(E) dated 5th July 2017

The Central Government hereby makes the following rules further to amend the Companies (Appointment and Qualification of Directors) Rules, 2014.

In the *Companies (Appointment and Qualification of Directors) Rules, 2014*, rule 4 shall be numbered as sub-rule (1) and after sub-rule (1) as so renumbered, the following sub-rule shall be inserted namely :-

"(2) The following classes of unlisted public company shall not be covered under sub-rule (1), namely:-

(a) a joint venture;

(b) a wholly owned subsidiary; and

(c) a dormant company as defined under section 455 of the Act."

5. Exemptions given to certain unlisted public companies under the Companies (Appointment and Qualification of Directors) Rules, 2014 from appointment of Independent Directors Vide notification of circular 09/2017 dated 5th September 2017

Vide Notification number G.S.R. 839(E) dated 5th July, 2017 an amendment was issued through the Companies (Appointment and Qualification of Directors) Amendment Rules, 2017 inter-alia amending rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014.

The said amended Rule 4 provides that an unlisted public company which is a joint venture, a wholly owned subsidiary or a dormant company will not be required to appoint Independent Directors.

Through the issue of this circular, it is hereby clarified that a "joint venture, would mean a joint arrangement, entered into in writing, whereby the parties that have joint control of the arrangement, have rights to the net assets of the arrangement. The usage of the term is similar to that under the Accounting Standards.

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6. Enforcement of the Companies (Appointment and Qualification of Directors) Amendment Rules, 2018 Vide Notification G.S.R.51(E) dated 22nd January, 2018

The Central Government hereby makes the following rules further to amend the *Companies (Appointment and Qualification of Directors) Rules, 2014*

In the Companies (Appointment and Qualification of Directors) Rules, 2014, in rule 9,

(A) for the marginal heading, the following marginal heading shall be substituted, namely:-

"Application for allotment of Director Identification Number before appointment in an existing company";

(B) for sub-rule (1), the following shall be substituted, namely:-

"(1) Every applicant, who intends to be appointed as director of an existing company shall make an application electronically in Form DIR-3, to the Central Government for allotment of a Director Identification Number (DIN) along with such fees as provided under the Companies (Registration Offices and Fees) Rules, 2014.

Provided that in case of proposed directors not having approved DIN, the particulars of maximum three directors shall be mentioned in Form No.INC-32 (SPICe) and DIN may be allotted to maximum three proposed directors through Form INC-32 (SPICe)";

(C) in sub-rule (3),

(I) In sub-clause (a), after sub-clause (iii), the following sub-clause shall be inserted, namely:-

"(iiia) board resolution proposing his appointment as director in an existing company";

(II) for clause (b), the following clause shall be substituted, namely:-

"(b) Form DIR-3 shall be signed and submitted electronically by the applicant using his or her own Digital Signature Certificate and shall be verified digitally by a company secretary in full time employment of the company or by the managing director or director or CEO or CFO of the company in which the applicant is intended to be appointed as director in an existing company,"

7. Companies (Removal of Difficulties) Order, 2018 S.O. 768(E) dated 21st February, 2018

In the Companies Act, 2013, in section 169, in sub-section (1), −

(i) before the proviso, the following proviso shall be inserted, namely :-

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

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(ii) in the existing proviso, for the words "Provided that", the words "Provided further that" shall be substituted.

8. Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 149	In section 149 of the principal Act,— (i) for sub-section (*3*), the following sub-section shall be substituted, namely:— "(*3*)Every company shall have at least one director who stays in India for a total period of not less than one hundred and eighty-two days during the financial year: Provided that in case of a newly incorporated company the requirement under this sub-section shall apply proportionately at the end of the financial year in which it is incorporated."; (ii) in sub-section (6),— (a) in clause (*c*), for the words "pecuniary relationship", the words "pecuniary relationship, other than remuneration as such director or having transaction not exceeding ten per cent. of his total income or such amount as may be prescribed," shall be substituted; (b) for clause (d), the following clause shall be substituted, namely:— "(d) none of whose relatives— (i) is holding any security of or interest in the company, its holding, subsidiary or associate company during the two immediately preceding financial years or during the current financial year: Provided that the relative may hold security or interest in the company of face value not exceeding fifty lakh rupees or two per cent. of the paid-up capital of the company, its holding, subsidiary or associate company or such higher sum as may be prescribed; (ii) is indebted to the company, its holding, subsidiary or associate company or their promoters, or directors, in excess	Not notified till 30th April, 2018

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	of such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, its holding, subsidiary or associate company or their promoters, or directors of such holding company, for such amount as may be prescribed during the two immediately preceding financial years or during the current financial year; or (iv) has any other pecuniary transaction or relationship with the company, or its subsidiary, or its holding or associate company amounting to two per cent. or more of its gross turnover or total income singly or in combination with the transactions referred to in sub-clause (*i*), (*ii*) or (*iii*);"; (*c*) in clause (*e*), in sub-clause (*i*), the following proviso shall be inserted, namely:— "Provided that in case of a relative who is an employee, the restriction under this clause shall not apply for his employment during preceding three financial years.".	
Amendment of section 152	In section 152 of the principal Act,— (a) in sub-section (3), after the word and figures "section 154", the words and figures "or any other number as may be prescribed under section 153" shall be inserted; (b) in sub-section (4), after the word "Number", the words and figures "or such other number as may be prescribed under section 153" shall be inserted.	Notified till 30th April, 2018.
Amendment of section 153	In section 153 of the principal Act, the following proviso shall be inserted, namely:— "Provided that the Central Government may prescribe any identification number which shall be treated as Director Identification Number for the purposes of this Act and in case any individual holds or acquires such identification number, the requirement of this section shall	Notified till 30th April, 2018.

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	not apply or apply in such manner as may be prescribed."	
Amendment of Section 157	In section 157 of the principal Act,— (*i*) in sub-section (*1*), the words and figures, "within the time specified under section 403" shall be omitted; (*ii*) in sub-section (*2*), the words and figures, "before the expiry of the period specified under section 403 with additional fee", shall be omitted.	Not notified till 30th April, 2018
Amendment of section 160.	In section 160 of the principal Act, in sub-section (*1*), the following proviso shall be inserted, namely:— "Provided that requirements of deposit of amount shall not apply in case of appointment of an independent director or a director recommended by the Nomination and Remuneration Committee, if any, constituted under sub-section (*1*) of section 178 or a director recommended by the Board of Directors of the Company, in the case of a company not required to constitute Nomination and Remuneration Committee."	Notified till 30th April, 2018
Amendment of section 161.	In section 161 of the principal Act,— (i) in sub-section (2), after the words "alternate directorship for any other director in the company", the words "or holding directorship in the same company" shall be inserted; (ii) in sub-section (4),— (a) the words "In the case of a public company," shall be omitted; (b) after the words "meeting of the Board", the words "which shall be subsequently approved by members in the immediate next general meeting" shall be inserted.	Notified till 30th April, 2018
Amendment of section 164	In section 164 of the principal Act,— (i) in sub-section (*2*), the following proviso shall be inserted, namely:— "Provided that where a person is appointed as a director of a company which is in default of clause (*a*) or clause (*b*), he shall not incur the disqualification for a period of six months from the date of his appointment."; (ii) in sub-section (*3*), for the proviso, the following proviso shall be substituted, namely:— "Provided that the disqualifications referred to in	Not notified till 30th April, 2018

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	clauses (*d*), (*e*) and (*g*) of sub-section (*1*) shall continue to apply even if the appeal or petition has been filed against the order of conviction or disqualification."	
Amendment of section 165.	In section 165 of the principal Act, in sub-section (*1*), the *Explanation* shall be renumbered as *Explanation* I and after *Explanation* I as so numbered, the following *Explanation* shall be inserted, namely:— "*Explanation* II.—For reckoning the limit of directorships of twenty companies, the directorship in a dormant company shall not be included."	Notified till 30th April, 2018.
Amendment of section 167.	In section 167 of the principal Act, in sub-section (1),— (i) in clause (a), the following proviso shall be inserted, namely:— "Provided that where he incurs disqualification under sub-section (2) of section 164, the office of the director shall become vacant in all the companies, other than the company which is in default under that sub-section."; (ii) in clause (f), for the proviso the following proviso shall be substituted, namely,— "Provided that the office shall not be vacated by the director in case of orders referred to in clauses (e) and (f)— (i) for thirty days from the date of conviction or order of disqualification; (ii) where an appeal or petition is preferred within thirty days as aforesaid against the conviction resulting in sentence or order, until expiry of seven days from the date on which such appeal or petition is disposed of; or (iii) where any further appeal or petition is preferred against order or sentence within seven days, until such further appeal or petition is disposed of."	Not notified till 30th April, 2018
Amendment of Section 168	In section 168 of the principal Act, in sub-section (*1*), in the proviso, for the words, "director shall also forward", the words "director may also forward" shall be substituted.	Not notified till 30th April, 2018.

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4

Appointment and Remuneration of Managerial Personnel

1. INTRODUCTION

"Chief Executive Officer" [Section 2(18)] means an officer of a company, who has been designated as such by it.

"Chief Financial Officer" [Section 2(19)] means a person appointed as the Chief Financial Officer of a company.

"Company Secretary" or "secretary" [Section 2(24)] means a company secretary as defined in clause (*c*) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) who is appointed by a company to perform the functions of a company secretary under this Act;

"Company secretary in practice" [Section 2(25)] means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980 (56 of 1980).

"Key managerial personnel" [Section 2(51)], in relation to a company, means—

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer; and

(v) such other officer as may be prescribed.

"Manager" [Section 2(53)] means an individual 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, whether under a contract of service or not.

Managing Director [Section 2(54)]: Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

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(i) virtue of the articles of a company or

(ii) an agreement with the company or

(iii) a resolution passed in its general meeting, or by its Board of Directors,

and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:

(i)	the power to affix the common seal of the company to any document or
(ii)	to draw and endorse any cheque on the account of the company in any bank or
(iii)	to draw and endorse any negotiable instrument or
(iv)	to sign any certificate of share or
(v)	to direct registration of transfer of any share.

Whole Time Director [Section 2(94)]: "Whole-time director" includes a director in the whole-time employment of the company.

2. APPOINTMENT OF MANAGING DIRECTOR, WHOLE TIME DIRECTOR OR MANAGER [SECTION 196]

Section 196 of the Companies Act, 2013 provides for the provisions for appointment of Managing Director, Whole Time Director or Manager. According to this section:

(i) A company shall not appoint or employ a managing director and a manager at the same time. [Section 196(1)]

(ii) **Tenure [section 196(2)]:**

(a) No company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time.

(b) It is further provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Example: 'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2016. Examine in this connection, Can 'X' be appointed for life as Managing Director?

Answer: Section 196(2) of the Companies Act, 2013 lays down that no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No concession or exception is allowed

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by the Act to private companies. Hence, 'X' cannot be appointed as Managing Director for life in a private company.

(iii) **Disqualification:** For appointing a person as a Managing Director, whole-time director or manager, firstly he shall not be disqualified for appointment as a director under section 164.

As per section 196(3), no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who-

(a) is below the age of 21 years or has attained the age of 70 years.

Provided that a person who has attained the age of seventy years may be appointed to such office by the passing of a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

(b) is an undischarged insolvent or has at any time been adjudged as an insolvent; or

(c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

(d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

(e) Schedule V to the Companies Act, 2013, has prescribed additional conditions for managing or whole-time director or a manager to be eligible for appointment without approval of Central Government:

(1) he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under 16 Acts as specified under Schedule V.

(2) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

Provided that where the Central Government has given its approval to the appointment of a person convicted or detained under para (1) or para (2), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

(3) where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II

(4) he is resident of India.

Explanation I: Here, resident in India includes a person who has been staying in

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India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India,-

(a) for taking up employment in India; or

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

Explanation II: This condition shall not apply to the companies in Special Economic Zones as notified by Department of Commerce from time to time:

Provided that a person, being a non-resident in India shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such person shall be required to furnish, along with the visa application form, profile of the company, the principal employer and terms and conditions of such person's appointment.

(iv) **Procedure of appointment [section 196(4)]*:***

(1) Subject to the provisions of section 197 and Schedule V, a managing director, whole-time director or manager shall be appointed, and the terms and conditions of such appointment and remuneration payable be

(i) approved by the Board of Directors at a meeting.

(ii) approved by shareholders by a resolution at the next general meeting of the company.

(2) In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.

(3) The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.

(4) A return in the prescribed form along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

(v) **Validity of acts [Section 196(5)]**: Subject to the provisions of this Act, where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall deemed to be valid.

Example: A Managing Director is appointed in board meeting on 1st June, 2017. General

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meeting was to be held on 7th June, 2017 for approval of the same. The Managing Director executed an agreement on 3rd June, 2017. The General meeting was held accordingly on 7th June, 2017 but did not approve the appointment of Managing Director. Whether the executed agreement by Managing Director is valid?

Answer: Yes, the agreement is valid. Acts done by the managing director from 1st June, 2017 to 7th June, 2017 i.e. upto the non approval of the general meeting, shall be valid subject to the provisions of this Act.

Exemptions

*(i) In case of **Government Companies**, section 196(2), (4) and (5) shall not apply (Notification No. G.S.R. 463(E) dated 5th June, 2015).*

*(ii) In case of **Private companies** section 196(4) and (5) shall not apply (Notification No. G.S.R. 464(E) dated 5th June, 2015).*

*(iii) In case of **Specified IFSC Public Company** - Sub-section (4) of section 196 shall not apply (Notification Dated 4th January, 2017)*

3. APPOINTMENT OF KEY MANAGERIAL PERSONNEL [SECTION 203]

Section 203 of the Companies Act, 2013 lays down the provisions for appointment of Key Managerial Personnel of companies.

(i) Who is KMP [section 203(1)]: Every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel:-

(a) Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-time Director;

(b) Company Secretary; and

(c) Chief Financial Officer.

According to Rule 8 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014* every listed company and every other public company having a paid-up share capital of ₹ 10 crore or more shall have whole-time key managerial personnel.

Further, as per *the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014*, a company other than a company covered under Rule 8 above, which has a paid up share capital of ₹ 5 crore or more shall have a whole-time company secretary.

With the insertion of Rule 8 A to the above rules, it is now mandatory of every other company to have a whole time company secretary if it's paid up share capital is ₹ 5

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Crores or more.

(ii) Prohibition on individual to be appointed as chairperson as well as Managing Director or Chief Executive Officer at the same time [Proviso to section 203(1)]:

An individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time unless,—

(a) the articles of such a company provide otherwise; or

(b) the company does not carry multiple businesses. [First proviso to section 203(1)]

Provided that the above mentioned prohibition shall not apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government. [Second proviso to section 203(1)]

The MCA vide Notification No. S.O. 1913(E) dated 25th July, 2014 notifies that public companies having paid-up share capital of ₹ 100 crore or more and annual turnover of ₹ 1,000 or more which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business shall be the class of companies for the purpose of the second proviso to sub-section (1) of section 203 of the said Act.

Explanation- For the purpose of this notification, the paid-up share capital and the annual turnover shall be decided on the basis of the latest audited balance sheet.

(iii) Conditions for appointment:

(a) Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration. [Section 203 (2)]

(b) A whole-time key managerial personnel shall not hold office in more than one company at the same time except in its subsidiary company. [Section 203 (3)]

Provided that nothing in the above sub section shall disentitle a key managerial personnel from being a director in any company with the permission of the Board.

(iv) Managing Director or manager in more than one company [Third proviso to section 203(3)]:

(a) A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company.

(b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting.

(c) It is further provided that specific notice of such meeting, and of the resolution to be

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moved thereat has been given to all the directors then in India.

(v) Casual Vacancy [section 203(4)]: If the office of any whole-time KMP is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.

(vi) Penalty for contravention [Section 203(5)]:

(a) **On company:** If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than ₹ 1 lac but which may extend to ₹ 5 Lacs.

(b) **On director and KMP**: Every director and KMP of the company who is in default shall be punishable with fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a further fine which may extend to ₹ 1,000 for every day after the first during which the contravention continues.

Exemptions

In case of Government companies, after sub-section (4), the following sub-section shall be inserted vide Notification No. G.S.R. 463(E) dated 5th June, 2015, namely:

"(4A) The provisions of sub-section (1), (2), (3) and (4) of this section shall not apply to a managing director or Chief Executive Officer or manager and in their absence, a whole-time director of the Government company."

4. FUNCTIONS OF COMPANY SECRETARY [SECTION 205]

Once the Company Secretary is appointed in terms of requirements of section 203, the Company Secretary shall perform the functions covered under Section 205.

(i) Functions of the Company Secretary: According to Section 205(1) read with the Rule 10 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, the functions of the company secretary shall include,—

(a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;

(b) to ensure that the company complies with the applicable secretarial standards;

(c) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

(d) to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

(e) to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;

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(f) to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;

(g) to assist the Board in the conduct of the affairs of the company;

(h) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and

(i) to discharge such other duties as have been specified under the Act or rules; and

(j) such other duties as may be assigned by the Board from time to time.

Here, the expression "secretarial standards" means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

(ii) According to Section 205 (2), the provisions contained in section 204 and section 205 shall not affect the duties and functions of the Board of Directors, chairperson of the company, managing director or whole-time director under this Act, or any other law for the time being in force.

5. CENTRAL GOVERNMENT OR COMPANY TO FIX LIMIT WITH REGARD TO REMUNERATION [SECTION 200]

According to section 200 of the Companies Act, 2013, notwithstanding anything contained in this Chapter, the Central Government or a company may, while according its approval under section 196, to any appointment or to any remuneration under section 197 in respect of cases where the company has inadequate or no profits, fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit and while fixing such remuneration the Central Government shall have regard to:

(a)	the financial position of the company;
(b)	the remuneration or commission drawn by the individual concerned in any other capacity;
(c)	the remuneration or commission drawn by him from any other company;
(d)	professional qualifications and experience of the individual concerned;
(e)	any other matters as may be prescribed.

According to Rule 6 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, for the purposes of clause (e) above the Central Government or the company shall have regard to the following matters, namely:-

(1) the Financial and operating performance of the company during the three preceding financial years.

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(2) the relationship between remuneration and performance.

(3) the principle of proportionality of remuneration within the company, ideally by a rating methodology which compares the remuneration of directors to that of other directors on the board and employees or executives of the company.

(4) whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.

(5) the securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

6. OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN CASE OF ABSENCE OR INADEQUACY OF PROFITS [SECTION 197]

Section 197 of the Companies Act, 2013 lays down the provisions for overall maximum managerial remuneration by every public company and managerial remuneration in case of absence or inadequacy of profits. The section read with Schedule V defines maximum remuneration payable to KMPs. This section does not apply to the private company. According to this section:



(i) Overall Maximum Managerial Remuneration [Section 197(1)]

(a) The overall managerial remuneration to the Directors including managing director, whole time director and manager in respect of any financial year is summarized as under:

S. No.	Conditions	Maximum remuneration in any financial year	Conditions when remuneration can exceed as referred in column (b)
	(a)	(b)	(c)
(i)	Overall limit	11% of the net profits of the company for that financial year	Company in general meeting with approval of Central Government subject to provisions of Schedule V
(ii)	If there is one Managing director/ Whole time director/ manager	5% of the net profits of the company for that year	With the approval of the company in general meeting this limit may be exceeded.
(iii)	If there is more than one Managing director/ Whole time director/ manager	10% of the net profits	With the approval of the company in general meeting this limit may be exceeded.

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(iv)	If there is directors who are neither Managing director nor whole time directors	1% of the net profits of the company if there is a managing director or a whole time director	Approval of the company in general meeting is required.
(v)	If there are directors who are neither Managing director nor whole time directors	3% of the net profits of the company if there is no managing director or whole time director	Approval of the company in general meeting is required.

Section 197(2) provides that above percentages shall be exclusive of any fees payable to directors under section 197(5).

(b) Section 197(8) further provides that the net profits shall be computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

(ii) No profits or profits are inadequate [Section 197(3) & (11)]

(a) If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay by way of remuneration any sum exclusive of sitting fees to its directors, including any managing or whole- time director or manager except in accordance with the provisions of Schedule V.

(b) If the company is not able to comply with such provisions of Schedule V in the above case, then previous approval of the Central Government shall be taken.

(c) In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company's memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule and if such conditions are not being complied, the approval of the Central Government had been obtained.

Section II of part II of Schedule V- Remuneration payable by companies having no profit or inadequate profit without Central Government approval

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding, the limits under (A) and (B) given below:-

(A):

(1)	(2)

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Where the effective capital is	Limit of yearly remuneration payable shall not exceed (Rupees)
(i) Negative or less than 5 crores	60 Lakhs
(ii) 5 crores and above but less than 100 crores	84 Lakhs
(iii) 100 crores and above but less than 250 crores	120 Lakhs
(iv) 250 crores and above	120 lakhs plus 0.01% of the effective capital in excess of ₹ 250 crores:

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Explanation- It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

(B):

In case of a managerial person who is functioning in a professional capacity, no approval of Central Government is required, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company;

Provided further that the limits specified under items (A) and (B) of this section shall apply, if-

(i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of suction 178 also by the Nomination and Remuneration Committee;

(ii) the company has not committed any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in the preceding financial year before the date of appointment of such managerial person and in case of a default, the company obtains prior approval from secured creditors for the proposed remuneration and the fact of such prior approval

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having been obtained is mentioned in the explanatory statement to the notice convening the general meeting;

(iii) an ordinary resolution or a special resolution, as the case may be, has been passed for payment of remuneration as per the limits laid down in item (A) or a special resolution has been passed for payment of remuneration as per item (13), at the general meeting of the company for a period not exceeding three years.

(iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:-

I. General information:

(1) Nature of industry

(2) Date or expected date of commencement of commercial production

(3) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus

(4) Financial performance based on given indicators

(5) Foreign investments or collaborations, if any.

II. Information about the appointee:

(1) Background details

(2) Past remuneration

(3) Recognition or awards

(4) Job profile and his suitability

(5) Remuneration proposed

(6) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)

(7) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

III. Other information:

(1) Reasons of loss or inadequate profits

(2) Steps taken or proposed to be taken for improvement

(3) Expected increase in productivity and profits in measurable terms

IV. Disclosures: The following disclosures shall be mentioned in the Board of Director's report under the heading "Corporate Governance", if any, attached to the Financial statement:

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(i) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;

(ii) details of fixed component. and performance linked incentives along with the performance criteria;

(iii) service contracts, notice period, severance fees; and

(iv) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Explanation: For the purposes of Section II of this part, "Statutory Structure" means any entity which is entitled to hold shares in any company formed wider any statute.

(iii) Determination of remuneration [Section 197(4)]

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

(i) by the articles of the company, or

(ii) by a resolution or,

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

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

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

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

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

Example: Star Health Specialties Ltd. owns a Multi-Specialty Hospital in Chennai. Dr. Hamilton, a practicing Heart Surgeon, has been appointed by the company as its director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013.

Answer: In the given case, Dr. Hamilton has been appointed as a director. He has to be paid a fee for surgeries performed by him; it shall be fully possible under section 197(4) which states that the remuneration payable to the directors including managing or whole-

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time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

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

(b) in the opinion of the Nomination and Remuneration Committee (if applicable) or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

The company can therefore, pay a remuneration to Dr. Hamilton a fee for surgeries performed by him as a professional fee which shall not be construed as a Managerial Remuneration under the Act.

(iv) Sitting Fees to directors [Section 197(5)]:

(a) A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board.

(b) The sitting fees shall not exceed one lakh rupees per meeting of the Board or committee thereof. [As per the *Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014*]

However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

(c) The percentages under sub-section (1) shall be exclusive of any sitting fees payable to directors for attending meetings of the Board or committee thereof or for any other purpose whatsoever as may be decided by the Board.

(d) Different fees for different classes of companies and fees in respect to independent directors may be such as may be prescribed.

Example: The Article of Association of a listed company have fixed payment of sitting fee for each Meeting of Directors subject to maximum of ₹ 30,000. In view of increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to ₹ 45,000 per meeting. Advise the company about the requirement under the Companies Act, 2013 to give effect to the proposal.

Answer: Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of rupees 1 lakh per meeting of the Board or committee thereof. Further, the Board may decide different sitting fee payable to independent and non-independent

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directors other than whole-time directors.

From the above, it is clear that fee to independent directors can be increased from ₹ 30,000 to ₹ 45,000 per meeting by passing a resolution in the Board Meeting and alternating the Articles of Association by passing Special Resolution.

(v) Mode of payment of remuneration [Section 197(6)]: A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

(vi) Restriction on remuneration of Independent Director [Section 197(7)]: Notwithstanding anything contained in any other provision of this Act but subject to the provisions of this section, an independent director shall not be entitled to any stock option and may receive remuneration by way of

(1) sitting fees in terms of section 197(5),

(2) reimbursement of expenses for participation in the Board and other meetings; and

(3) profit related commission as may be approved by the members.

(vii) Refund of excess remuneration paid to a director [Section 197(9)]: If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.

The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless permitted by the Central Government. [Section 197(10)]

(viii) Disclosure by listed company [Section 197(12)]:

(a) It shall disclose in the Board's report, the ratio of the remuneration of each director to the median employee's remuneration and such other details as may be prescribed. The details are prescribed under the Rule 5 of the *Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.*

(b) The board's report shall include a statement showing the names of the top ten employees in terms of remuneration drawn and the name of every employee, who-

(i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than one crore and two lakh rupees;

(ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than eight lakh and fifty thousand rupees per month;

(iii) if employed throughout the financial year or part thereof, was in receipt of

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remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

(c) The statement referred to in above para (b) shall also indicate some particulars of the above employees like designation, remuneration received, nature of employment, qualification and experience, date of commencement of employment, age, last employment held by such employee before joining the company, the percentage of equity shares held by the employee in the company within the meaning of clause (iii) of para (b) above, and whether any such employee is a relative of any director or manager of the company and if so, name of such director or manager.

(ix) Insurance for indemnification [Section 197(13)]:

(a) Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

(b) Provided that, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

(x) Receiving Commission [Section 197(14)]: Subject to the provisions of this section, any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board's report.

(xi) Contravention [Section 197(15)]: If any person contravenes the provisions of section 197, he shall be punishable with fine which shall not be less than ₹ 1 Lakh but which may extend to ₹ 5 Lakhs.

Exemptions

*(i) In case of **Government Companies**, section 197 shall not apply (Notification No. G.S.R. 463(E) dated 5th June, 2015).*

*(ii) In case of **Nidhis**, second proviso to sub-section (1) of section 197 shall apply with the modification that the remuneration of a director who is neither managing director nor whole-time director or manager for performing special services to the Nidhis specified in the articles of association may be paid by way of monthly payment subject to the approval of the company in general meeting and also to the provisions of section 197:*

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Provided that no approval of the company in general meeting shall be required where,-

(a) a Nidhi does not have a managing director or a whole-time director or a manager;

(b) the remuneration payable during a financial year to all the directors of the Nidhi does not exceed ten per cent. of the net profits of such Nidhi or fifteen lakh rupees, whichever is less; and

(c) a remuneration payable under clause (b) is approved by a special resolution passed in this behalf by the Nidhi (Notification No. G.S.R. 465(E) dated 5th June, 2015)

*(iii) In case of **Specified IFSC Public Company** - Section 197 shall not apply (Notification Dated 4th January, 2017)*

7. RECOVERY OF MANAGERIAL REMUNERATION IN CERTAIN CASES [SECTION 199]

Section 199 of the Companies Act, 2013 provides for recovery of remuneration in certain cases. According to this section:

Without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made thereunder, the company shall recover from any past or present managing director or whole-time director or manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

8. CALCULATION OF PROFITS [SECTION 198]



According to section 198 of the Companies Act, 2013:

Net profits for the purpose of managerial remuneration payable under section 197 shall be calculated as follows:

(i) Credit shall be given for the sums specified in section 198(2)

Add: Bounties and subsidies received from any Government, or any public authority constituted or authorised in this behalf, by any Government, unless and except in so far as the Central Government otherwise directs.

(ii) Credit shall not be given for those specified in section 198(3)

Less: (if credited to the P & L A/c for arriving at Profit before tax

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(a) profits, by way of premium on shares or debentures of the company, which are issued or sold by the company;

(b) profits on sales by the company of forfeited shares;

(c) profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof;

(d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets:

Provided that where the amount for which any fixed asset is sold exceeds the written-down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written- down value;

(e) any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.

(iii) Sums specified in section 198(4) shall be deducted

(a) all the usual working charges;

(b) directors' remuneration;

(c) bonus or commission paid or payable to any member of the company's staff, or to any engineer, technician or person employed or engaged by the company, whether on a whole-time or on a part-time basis;

(d) any tax notified by the Central Government as being in the nature of a tax on excess or abnormal profits;

(e) any tax on business profits imposed for special reasons or in special circumstances and notified by the Central Government in this behalf;

(f) interest on debentures issued by the company;

(g) interest on mortgages executed by the company and on loans and advances secured by a charge on its fixed or floating assets;

(h) interest on unsecured loans and advances;

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

(j) outgoings inclusive of contributions made under section 181;

(k) depreciation to the extent specified in section 123;

(l) the excess of expenditure over income, which had arisen in computing the net profits in accordance with this section in any year which begins at or after the commencement of this Act, in so far as such excess has not been deducted in any

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subsequent year preceding the year in respect of which the net profits have to be ascertained;

(m) any compensation or damages to be paid in virtue of any legal liability including a liability arising from a breach of contract;

(n) any sum paid by way of insurance against the risk of meeting any liability such as is referred to in clause (m) above;

(o) debts considered bad and written off or adjusted during the year of account.

(iv) Sums specified in section 198(5) shall not be deducted:

(a) income-tax and super-tax payable by the company under the Income-tax Act, 1961, or any other tax on the income of the company not falling under clauses (*d*) and (*e*) of sub-section (*4*) of Section 198;

(b) any compensation, damages or payments made voluntarily, that is to say, otherwise than in the nature of a liability such as is referred to in clause (*m*) of sub-section (*4*) of section 198;

(c) loss of a capital nature including loss on sale of the undertaking or any of the undertakings of the company or of any part thereof not including any excess of the written-down value of any asset which is sold, discarded, demolished or destroyed over its sale proceeds or its scrap value;

(d) any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.

9. FORMS OF, AND PROCEDURE IN RELATION TO, CERTAIN APPLICATIONS [SECTION 201]

When the company is not complying with condition given in Schedule V, then the company would apply to Central Government for approval and the process for approval is given in section 201.

According to section 201 of the Companies Act, 2013:

(i) Every application made to the Central Government under this Chapter shall be in prescribed form and shall be accompanied by fee as may be specified for the purpose.

(ii) Before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made.

(iii) Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district.

(iv) The copies of the notices, together with a certificate by the company as to the due

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publication thereof, shall be attached to the application.

(v) Rule 7 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, prescribes that the companies other than listed companies and subsidiary of a listed company may without Central Government approval pay remuneration to its managerial personnel, in the event of no profit or inadequate profit beyond ceiling specified in Section II, Part II of Schedule V, subject to complying with the following conditions namely:-

(a) Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee, if any. While doing so, the clear reason and justification for payment of remuneration beyond the said limit has to be recorded in writing.

(b) The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon, preference shares and dividend on preference shares for a continuous period of thirty days in the preceding financial year before the date of payment to such managerial personnel.

(c) The approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding three years.

(d) a statement along-with a notice calling the general meeting referred to above point (c), shall contain the information as per sub clause (iv) of second proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

(e) The company has filed Balance Sheet and Annual Return which are due to be filed with the Registrar of Companies.

(f) Every such application seeking approval shall be made to the Central Government within a period of ninety days from the date of such appointment.

10. COMPENSATION FOR LOSS OF OFFICE OF MANAGING OR WHOLE-TIME DIRECTOR OR MANAGER [SECTION 202]

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

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

(ii) No payment of compensation shall be made in the following cases:

(a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate,

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and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;

(b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(c) where the office of the director is vacated under sub-section (1) of section 167;

(d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director;

(e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof; and

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

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

(iv) No such payment however can be made at all if winding up of the company is commenced whether before or within 12 months after, the date on which he ceased to hold office, if the assets on winding up (after deducting expenses on winding up) are not sufficient to repay the shareholders the capital, including premiums if any, contributed by them.

(v) Nothing in this section shall be deemed to prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity.

11. SECRETARIAL AUDIT FOR BIGGER COMPANIES [SECTION 204]

Section 204 of the Companies Act, 2013 provides the provisions for secretarial audit for bigger companies which are as under:

(i) Companies that are required to conduct secretarial audit: Under Section 204(1), every listed company and a company belonging to other class of companies as may be prescribed, shall annex with its Board's report made in terms of section 134 (3), a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed.

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Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that for the purposes of section 204 (1), the other class of companies shall be as under:

(a)	Every public company having a paid up share capital of ₹ 50 crore or more; **or**
(b)	Every public company having a turnover of ₹ 250 crore or more.

The format of the Secretarial Audit Report shall be in Form No. *MR. 3.*

(ii) Duty of the company:

(a) It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company [Section 204(2)].

(b) The Board of Directors, in their Report prepared under section [134(3)] shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report [Section 204 (3)].

(iii) Contravention [Section 204(4)]: If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, then

(a)	the company; or
(b)	every officer of the company; or
(c)	the company secretary in practice,

who is in default, shall be punishable with fine which shall not be less than ₹ 1 Lac but which may extend to ₹ 5 Lacs.

12. MANAGERIAL REMUNERATION AS PER PART II, PART III AND PART IV OF SCHEDULE V

Part II

(i) Section I- Remuneration payable by companies having profits: Subject to the provisions of section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in such section.

(ii) Section II- Remuneration payable by companies having no profit or inadequate profit without Central Government approval [Discussed in Para 6 of the Study material u/s Section 197(3)]

(iii) Section III— Remuneration payable by companies having no profit or inadequate profit without Central Government approval in certain special circumstances: In the following circumstances a company may, without the Central Government approval, pay remuneration to a managerial person in excess of the amounts provided in Section II above:—

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(a) where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in general meeting to make such payment, and treats this amount as managerial remuneration for the purpose of section 197 and the total managerial remuneration payable by such other company to its managerial persons including such amount or amounts is within permissible limits under section 197.

(b) where the company—

(i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or

(ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or

(iii) is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay remuneration up to two times the amount permissible under section II.

(c) where remuneration of a managerial person exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal:

Provided that the limits under this Section shall be applicable subject to meeting all the conditions specified under Section II and the following additional conditions:-

(i) except as provided in para (a) of this Section, the managerial person is not receiving remuneration from any other company;

(ii) the auditor or Company Secretary of the company or where the company has not appointed a Secretary, a Secretary in whole-time practice, certifies that all secured creditors and term lenders have stated in writing that they have no objection for the appointment of the managerial person as well as the quantum of remuneration and such certificate is filed along with the return as prescribed under sub-section (4) of section 196.

(iii) the auditor or Company Secretary or where the company has not appointed a secretary, a secretary in whole-time practice certifies that there is no default on payments to any creditors, and all dues to deposit holders are being settled on time.

(d) a company in a Special Economic Zone as notified by Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of

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thirty days in any financial year, may pay remuneration up to ₹ 2,40,00,000 per annum.

(iv) Section IV— Perquisites not included in managerial remuneration:

1. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:-

(a) Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961 (43 of 1961);

(b) gratuity payable at a rate not exceeding half a month's salary for each completed year of service; and

(c) Encashment of leave at the end of the tenure.

2. In addition to the perquisites specified in paragraph 1 of this section, an expatriate managerial person (including a non-resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III—

(a) *Children's education allowance*: In case of children studying in or outside India, an allowance limited to a maximum of ₹ 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.

(b) *Holiday passage for children studying outside India or family staying abroad*: Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.

(c) *Leave travel concession*: Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave be spent in home country instead of anywhere in India.

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

Explanation II.—

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(a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment;

(b) In any other case the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

Explanation III.— For the purposes of this Schedule, ''family'' means the spouse, dependent children and dependent parents of the managerial person.

Explanation IV.— The Nomination and Remuneration Committee while approving the remuneration under Section II or Section III, shall—

(a) take into account, financial position of the company, trend in the industry, appointee's qualification, experience, past performance, past remuneration, etc.;

(b) be in a position to bring about objectivity in determining the remuneration package while striking a balance between the interest of the company and the shareholders.

Explanation V.— For the purposes of this Schedule, "negative effective capital" means the effective capital which is calculated in accordance with the provisions contained in Explanation I of this Part is less than zero.

Explanation VI.— For the purposes of this Schedule:—

(A) "*current relevant profit"* means the profit as calculated under section 198 but without deducting the excess of expenditure over income referred to in sub-section 4

(I) thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies.

(B) "Remuneration" means remuneration as defined in clause (78) of section 2 and includes reimbursement of any direct taxes to the managerial person.

(v) Section V—Remuneration payable to a managerial person in two companies:

Subject to the provisions of sections I to IV, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

PART III- Provisions applicable to Parts I and II of this Schedule

1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting.

2. The auditor or the Secretary of the company or where the company is not required to appointed a Secretary, a Secretary in whole-time practice shall certify that the requirement of

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this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of section 196.

PART IV: Exemption by the Central Government

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.

The MCA vide General Circular No. 07/2015 dated 10th April, 2015 has clarified that a managerial person who has been appointed in accordance with provisions of Schedule XIII of the Companies Act, 1956, may continue to receive remuneration for his remaining term in accordance with terms and conditions approved by company as per relevant provisions of Schedule XIII of 1956 Act even if the part of his/her tenure falls after 1st April, 2014.

RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

Relevant Sections	Amendment	Status
Amendment in Section 2(51)	in clause (*51*), — (a) in sub-clause (iv), the word "and" shall be omitted; (b) for sub-clause (v), the following sub-clauses shall be substituted, namely:— "(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and (vi) such other officer as may be prescribed;"	Notified till 30th April, 2018
Amendment of section 196	In section 196 of the principal Act,— (a) in sub-section (3), in clause (a), after the proviso, the following proviso shall be inserted, namely:— "Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made."; (b) in sub-section (4), for the words "specified in that Schedule", the words "specified in Part I of that Schedule"	Not notified till 30th April, 2018

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	shall be substituted.	
Amendment of Section 197	In section 197 of the principal Act,— (a) in sub-section (1),— (i) in the first proviso, the words "with the approval of the Central Government," shall be omitted; (ii) in the second proviso, after the words "general meeting,", the words "by a special resolution," shall be inserted; (iii) after the second proviso, the following proviso shall be inserted, namely:— "Provided also that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting."; (b) in sub-section (3), the words "and if it is not able to comply with such provisions, with the previous approval of the Central Government" shall be omitted; (c) for sub-section (9), the following sub-section shall be substituted, namely:— "(9) If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company."; (d) in sub-section (10),— (i) for the words "permitted by the Central Government", the words "approved by the company by special resolution within two years from the date the sum becomes refundable" shall be substituted; (ii) the following proviso shall be inserted, namely:—	Not notified till 30th April, 2018

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	"Provided that where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining approval of such waiver."; (e) in sub-section (11), the words "and if such conditions are not being complied, the approval of the Central Government had been obtained" shall be omitted; (f) after sub-section (15), the following sub-sections shall be inserted, namely:— "(16) The auditor of the company shall, in his report under section 143, make a statement as to whether the remuneration paid by the company to its directors is in accordance with the provisions of this section, whether remuneration paid to any director is in excess of the limit laid down under this section and give such other details as may be prescribed. (17) On and from the commencement of the Companies (Amendment) Act, 2017, any application made to the Central Government under the provisions of this section [as it stood before such commencement], which is pending with that Government shall abate, and the company shall, within one year of such commencement, obtain the approval in accordance with the provisions of this section, as so amended."	
Amendment of Section 198	In section 198 of the principal Act,— (i) in sub-section (3),— (a) in clause (a), after the words “sold by the company”, the words, letter, brackets and figures “unless the company is an investment company as referred to in clause (a) of the Explanation to section 186” shall be inserted; (b) after clause (e), the following clause shall be inserted, namely:—	Not notified till 30th April, 2018

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	"(f) any amount representing unrealised gains, notional gains or revaluation of assets."; (ii) in sub-section (4), in clause (l), the words "which begins at or after the commencement of this Act" shall be omitted.	
Amendment of section 200.	In section 200 of the principal Act, the words "the Central Government or" appearing at both the places shall be omitted.	Not notified till 30th April, 2018
Amendment of section 201.	In section 201 of the principal Act,— (a) in sub-section (*1*), for the words "this Chapter", the word and figures "section 196" shall be substituted; (b) in sub-section (*2*), in clause (*a*), for the words "any of the sections aforesaid", the word and figures "section 196" shall be substituted.	Not notified till 30th April, 2018

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5

Meetings of Board and its Powers

1. Introduction

Two main organs, the shareholders in general meetings and the directors acting as a Board conduct the affairs of a company. Therefore, directors frequently meet up to discuss various matters relating to the management and administration of the affairs of the company in the interest of the public and the shareholders. The modern practice is to confer upon the directors the right to exercise all company's powers except for those matters, which are by law required to be exercised by the company in general meeting. The Board of directors oversees management of the company to ensure that the interests of shareholders are protected.

The provisions related to meetings of Board and its powers are dealt under sections 173 to 195 of the Companies Act, 2013 and Rules. This chapter specifies the laws related to convening of Board meeting, requisite quorum for the conduct of the meeting, various committees of the Board, Powers of Board and the imposed restrictions, Disclosure of interest by directors, Loan and investment, related party transactions and etc.

2. Meetings of Board [Section 173]

Section 173 of the Companies Act, 2013 provides for Meetings of Board. According to this section:

(i) Frequency of Board Meetings [Section 173 (1)][1]:

(a) **First Board meeting:** Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation.

(b) **Subsequent Board meetings**: Every company shall hold minimum of 4 meetings every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government may by notification, direct that these provisions will not apply in relation to any class or descriptions of companies or will apply in relation

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1 In case of Specified IFSC Public Company & IFSC Private Company - In sub-section (1) of Section 173, after the proviso, the following proviso shall be inserted, namely:-

"Provided further that a Specified IFSC public company shall hold the first meeting of the Board of Directors within sixty days of its incorporation and thereafter hold at least one meeting of the Board of Directors in each half of a calendar year.". Notification Dated 4th January 2017.

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thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

(ii) Exceptions [Section 173(5)]:

(a) A **One Person Company, small company and dormant company** shall be deemed to have complied with the provisions of section 173 if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.

(b) Provided that, a One Person Company in which there is only one director on its Board of Directors, it shall not be required to hold at least one Board meeting in each half of a calendar year. Thus, it is exempt from following the provisions of section 173(5).

Vide Notification G.S.R. 466(E) dated 5th June 2015, this sub-section 1 of section 173 shall apply to the company formed under section 8 of the Companies Act, 2013 only to the extent that the Board of Directors, of such companies shall hold at least one meeting within every six calendar months.

(iii) Participation in Board meeting [Section 173 (2)]:

(a) Section 173(2) allows directors to attend Board meetings in the following manner-



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

(b) Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

(c) However, the Central Government may by notification specify such matters as given under Rule 4 of *the Companies (Meetings of Board and its powers) Rules, 2014* which shall not be dealt with in a meeting through video conferencing and other audio visual means.

"Video conferencing or other audio visual" means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

As per Rule 4, the following matters shall not be dealt with in any meeting held

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through video conferencing or other audio visual means.-

(i) the approval of the annual financial statements;

(ii) the approval of the Board's report;

(iii) the approval of the prospectus;

(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under sub-section (1) of section 134 of the Act, and

(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

(d) Some of the key points related to meetings of Board that are held through conferencing or other audio visual means, as provided in Rule 3 of *the Companies (Meetings of Board and its Powers) Rules, 2014* are as under:

SL. No.	Key points related to meetings of Board that are held through conferencing or other audio visual means	For convening and conducting the Board meetings
1.	Every Company shall make necessary arrangements	to avoid failure of video or audio visual connection
2.	The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care-	(A) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures; (B) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorized participants at the Board meeting; (C) to record proceedings and prepare the minutes of the meeting; (D) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year. (E) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video

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		conferencing mode or other audio visual means; (F) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting. However, the differently abled persons may make a request to the Board to allow a person to accompany him.
3.	Notices of the meeting and the further process	(A) shall be sent to all the directors in accordance with the provisions of Section 173 (3) (B) shall inform the directors regarding the options available to them to participate through video conferencing mode or other audio visual means, along with all other information to enable the directors to participate through such mode; (C) A director intending to participate through video conferencing mode or other audio visual means shall communicate his intention to the chairman or the company secretary of the company. (D) If a director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect, to enable the company to make arrangements in this behalf. (E) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year. (F) In the absence of any such intimation from the director, it shall be assumed that he will attend the meeting in person.
4.	Process of a roll call at the Board Meeting	A director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.
5.	Scheduled venue of the meeting as mentioned in the notice convening the	shall be deemed to be the venue of the meeting which is conducted through video conferencing or other audio visual means authorized under

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	meeting	these rules and all recordings at such meeting shall be deemed to have been made at that place.
6.	Circulation of draft minutes of the meeting	among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board.
7.	After completion of meeting	Minutes shall be entered in the minute book signed by the chairperson

(iv) Notice of the Board meeting [Section 173 (3)]:

Period of notice		
at least 7 days' notice in writing	to all the directors at registered address	sent by hand delivery or by post or by electronic means

Shorter notice (than 7 days)		
to transact an urgent business	Atleast one independent director, if any, shall be present	In absence, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any

Option to participate through video conferencing mode or other audio visual means (Rule 3)
notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means

On receival of notice
a director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company in prior

No intimation from director of his participation through the electronic mode
it shall be assumed that the director shall attend the meeting in person

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(v) Penalty for failure to give notice: The Act under section 173(4) has prescribed a penalty of ₹ 25,000 on every officer of the Company[2] whose duty is to give notice under this section and who has failed to do so.

Example: Seafood Limited, a public limited company was incorporated on 1st April, 2016. The company has conducted four Board meetings during the financial year 2016-17 i.e. on 6th April, 2016, 28th August, 2016, 30th September, 2016 and 30th March, 2017.

(i) Has the company contravened the provisions of the Companies Act, 2013 in respect of the conduct of the meetings?

(ii) Will your answer differ if the company was incorporated under Section 8 of the Companies Act, 2013?

Answer: (i) Company has contravened the section 173 of the Companies Act, 2013 in respect of the conduct of the subsequent board meetings. The gap between two consecutive board meetings i.e. the meeting held on 6th April, 2016 and 28th August, 2016 is 143 days which is more than 120 days and similarly the gap between the meeting held on 30th September 2016 and 30th March 2017 is 181 days which is again more than 120 days.

(ii) In the case of company incorporated under section 8 of the Companies Act, 2013, since the board meetings have been conducted within 6 calendar months, so there is no contravention of the provision related to holding of board meetings.

Example: The Board of Directors of Infotech Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2014.They seek, your advice in respect of the following matters:

(i) Can the board meeting be held in Chennai through video conferencing, when all the directors of the company reside at Kolkata?

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

Answer: (i) There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place. Therefore, there is no difficulty in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with.

(ii) Section 173 (3) of the Companies Act, 2013 provides for the giving of notice of every

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[2] According to Secretarial Standard 1, any Director of a company may, at any time, summon a Meeting of the Board, and the Company Secretary or where there is no Company Secretary, any person authorised by the Board in this behalf, on the requisition of a Director, shall convene a Meeting of the Board, in consultation with the Chairman or in his absence, the Managing Director or in his absence, the Whole-time Director, where there is any, unless otherwise provided in the Articles.

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board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting. However, considering the importance of Board Meetings and the responsibilities placed on the directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings.

The Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda shall be given to the Directors at least seven days before the date of the Meeting, unless the Articles prescribe a longer period as a matter of good secretarial practice.

The articles of association of the company may make it mandatory to do so in almost all cases.

Example: XYZ Ltd. is a foreign collaborator in ABC Ltd. incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in the Articles of Association of a foreign collaborated company is valid.

Answer: In terms of the proviso to section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. No exception is made for any class or classes of companies.

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

If we examine the above provision, it is clear that the notice shall be sent by hand delivery or by post or by electronic means.

Hence, the sending of notice by e mail is an ordinary mode of sending notice of a board meeting under the Companies Act, 2013.

Therefore, in the given case the shorter notice is legally permitted with the only condition being the presence of the quorum and at least one independent director. The provision of the Articles in this regard is not relevant as the position is amply clear in the Act itself.

3. Quorum for meetings of Board [Section 174]

A quorum is the minimum number of qualified persons who must attend in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been

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properly held unless the quorum was present at that meeting.

Section 174 of the Companies Act, 2013 provides for Quorum for meetings of Board. According to this section:

(i) The quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.

(ii) The directors who participate by video conferencing or by other audio visual means shall also be counted for the purpose of determining the quorum at the meeting.

Further, the explanation as given in Rule 3 of *the Companies (Meetings of Board and its Powers) Rules,* 2014 provides that the director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

Vide Notification G.S.R.466(E) dated 5th June 2015 the companies covered under section 8 of the Companies Act, 2013 shall constitute quorum for the Board meeting, either eight members or 25% of its total strength whichever is less. Provided that quorum shall not be less than two members.

(iii) The continuing directors may notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.

(iv) [3]Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the quorum shall be the number of directors who are present at the meeting and not interested directors and are not be less than 2.

"Interested director" for the purposes of this sub section means a director within the meaning of section 184 (2). Under section 184(2) "interested director" means every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

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

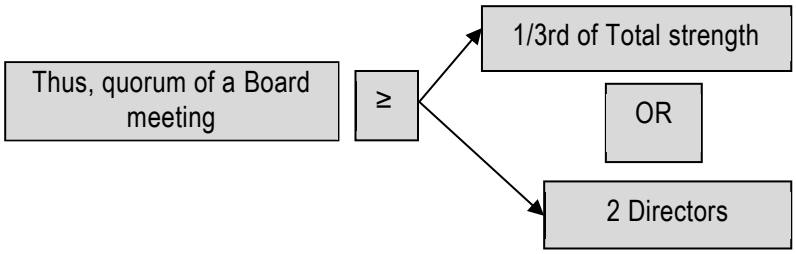
3 In case of Specified IFSC Public Company and IFSC Private Company - Section 174(3) shall apply with the exception that interested director may participate in such meeting provided the disclosure of his interest is made by the concerned director either prior or at the meeting. -Notification Dated 4th January, 2017.

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is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting:

However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.



Vide Notification No. G.S.R. 464(E) dated 5th June 2015, this Sub section (2) of section 184 shall apply on private company with the exception that the interested director may participate in such meeting after disclosure of his interest.

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

(vi) Exception: The provisions of section 174 are not applicable on One Person Company in which there is only one director on its Board of directors.

Notes:

1. For the purpose of calculating quorum, any fraction of a number shall be rounded off as one.
2. "Total strength" shall not include directors whose places are vacant.

Example: Discuss the following situations with respect to the quorum.

(a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant.

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

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Answer: (a) According to section 174(1) of the Companies Act, 2013, quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded of as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant, we find: 1/3 of (9-2) = 1/3 of 7 = 21/3 directors which will be rounded off as 3. Being higher than 2, therefore 3 directors would constitute the quorum for the Board meetings.

(b) Under section 174(3) of the Companies Act, 2013 if at any time the number of the interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of the directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. Accordingly, in the given problem, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the meeting, an item comes up for discussion in respect of which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 are present at the meeting and can transact the particular item of business.

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

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

Since the section specifies of exclusion of only national holiday, so any original /adjourned/committee meetings can be held on Sundays and other holidays except national holidays. So meeting can be held on Sunday.

4. Passing of resolution by circulation [Section 175]

Section 175 of the Companies Act, 2013, provides for Passing of resolution by circulation. According to this section:

(i) Requirements to pass resolution by circulation: The Act allows the Board of directors to pass resolution by Circulation also. No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation unless:

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The resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,

at their addresses registered with the company in India,

by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and

and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

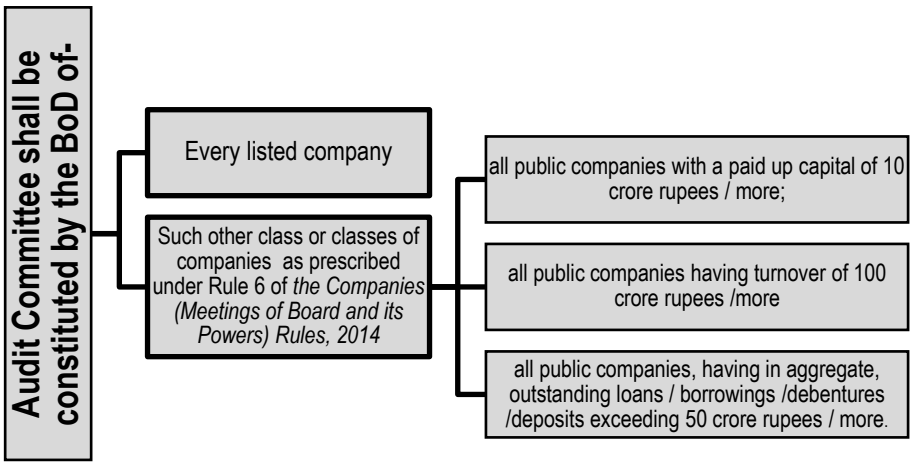
Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax. If at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

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

5. Audit committee [Section 177]

Section 177 of the Companies Act, 2013 provides for constitution of Audit committee. According to this section:

(i) Formation of an Audit Committee:



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Explanation - The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

(ii) Composition of an Audit committee: According to sub section 2 of section 177, the Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority.

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

Disclosure of composition of Audit Committee [Section 177(8)]: The Board's report under sub-section (3) of section 134 shall disclose the composition of an Audit Committee and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in such report along with the reasons therefor.

Vide Notification G.S.R. 466(E) 'Independent Directors forming a majority' is omitted in constitution of audit committee for the Companies covered under Section 8 of the Companies Act, 2013.

(iii) Responsibilities of an Audit Committee: According to sub section (4) of section 177, every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, *inter alia*, include,-

(a) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

In case of Government companies, in this clause, for the word "recommendation for appointment, remuneration and terms of appointment" the words "recommendation for remuneration" shall be substituted- Vide Notification no. G.S.R. 463(E), dated 5.6.15.

(b) review and monitor the auditor's independence and performance, and effectiveness of audit process;

(c) examination of the financial statement and the auditors' report thereon;

(d) approval or any subsequent modification of transactions of the company with related parties;

Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as prescribed under Rule 6A inserted by *Companies (Meeting of Board and its Powers) Second Amendment Rules, 2015;*

(e) scrutiny of inter-corporate loans and investments;

(f) valuation of undertakings or assets of the company, wherever it is necessary;

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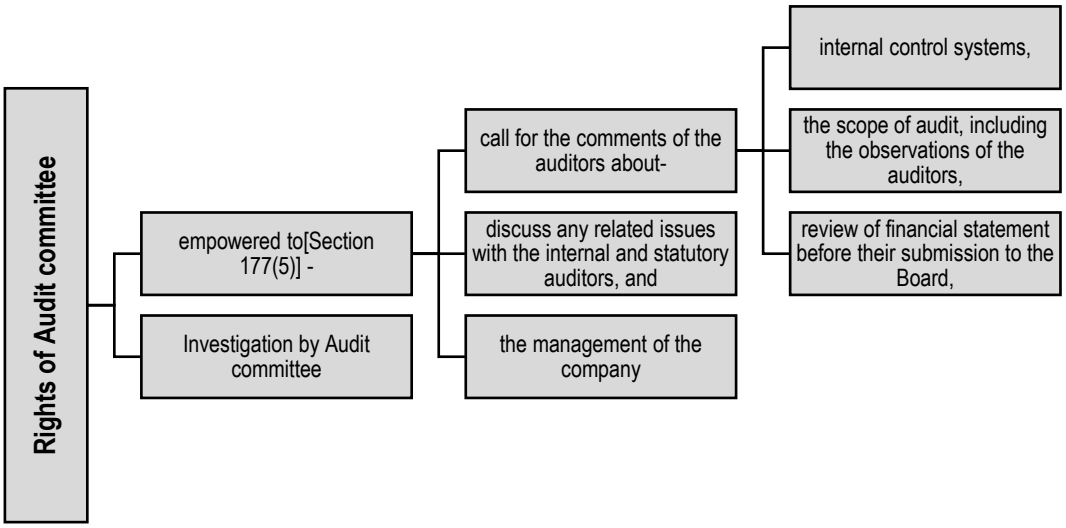
(g) evaluation of internal financial controls and risk management systems;

(h) monitoring the end use of funds raised through public offers and related matters.

(iv) Rights of Audit Committee:

(a) The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company. [Section 177(5)]

(b) The Audit Committee shall have authority to investigate into any matter in relation to the items specified in sub-section (4) or referred to it by the Board and for this purpose shall have power to obtain professional advice from external sources and have full access to information contained in the records of the company. [Section 177(6)]



(v) The auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it considers the auditor's report but shall not have the right to vote. [Section 177(7)]

Vigil mechanism

(i) Formation of vigil mechanism: According to section 177(9), a Vigil mechanism shall be formed by:

(a) Every listed company, and

(b) Such other prescribed classes of companies.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following classes of companies that shall constitute Vigil mechanism:

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(1) the Companies which accept deposits from the public;

(2) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.

(ii) Objective of formation of vigil mechanism:

(a) A vigil mechanism shall be formed for directors and employees to report genuine concerns in such manner as prescribed in *Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014*.

(b) The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. It is imperative for the company to disclose the details of the establishment of vigil mechanism on the website of the company and in Board's report.

According to Rule 7 of *the Companies (Meetings of Board and its Powers) Rules, 2014:*

(1) "Persons who use such mechanism" means employees and directors who avail the vigil mechanism.

(2) The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand

(3) In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.

(4) The employees and directors who avail of vigil mechanism may have direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases.

(5) In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

(vi) Penalty for contravention [Section 178(8)]:

Sl. No.	Who is liable	Quantum of liability
(a)	company	punishable with fine which shall be varying from 1 lakh to 5 lakh rupees, and
(b)	every officer of the company who is in	• punishable with imprisonment for a term extending to 1 year, or

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	default	• with fine varying from 25,000 to 1 lakh rupees, or • with both.

Note: In the case of Listed company formation, composition, responsibilities and rights of Audit committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.

6. Nomination and Remuneration Committee and Stakeholders Relationship Committee [Section 178][4]

Section 178 of the Companies Act, 2013 provides for Nomination and Remuneration Committee as well as Stakeholders Relationship Committee.

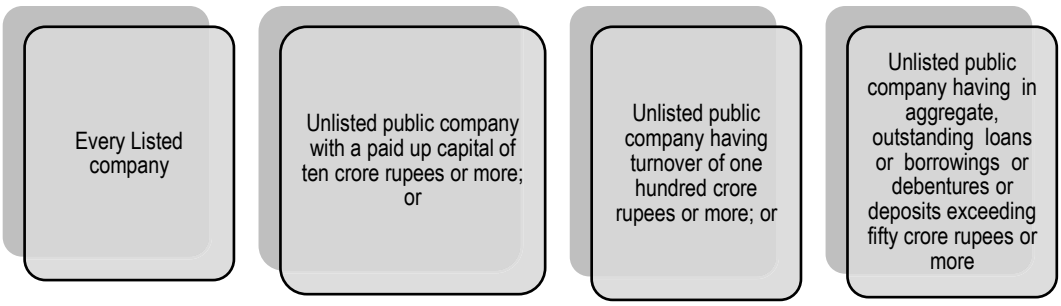
This section 178 shall not apply to the Companies covered under section 8 of the Companies Act, 2013.

In case of Government company- Sub-sections (2), (3) and (4) of Section 178, shall not apply except with regard to appointment of 'senior management' and other employees. - Notification dated 5th June, 2015.

Sections 178 (1) to (4) lay down the provisions in respect of the Nomination and Remuneration Committee as under:

Nomination and Remuneration Committee

(i) **Formation of nomination and remuneration committee by**:



Explanation- The paid up share capital or turnover or outstanding loans, or borrowings or debentures or deposits, as the case may be, as existing on the date of last audited Financial Statements shall be taken into account for the purposes of this rule.

(ii) **Composition of nomination and remuneration committee**:

[4] In case of Specified IFSC Public Company - Section 178 shall not apply. - Notification Dated 4th January 2017.

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(a) This committee shall consist of 3 or more non-executive directors out of which not less than one-half shall be independent directors.

(b) The Chairman (whether executive or non-executive) of the company shall not chair such a committee. However, he may be appointed as a member to the committee.

(c) The chairperson or in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

(iii) **Functions of the committee**

(a) The Nominations and Remuneration Committee shall formulate the criteria for determining qualifications; positive attributes and independence of a director recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees [Sub section (3)].

(b) identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down. [Sub-section (2)]

(c) recommend to the Board their appointment and removal of directors and senior management carry out evaluation of every director's performance.

(d) According to section 178(4), the Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) of section 178 ensure that—

- the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;
- relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and
- remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

It is imperative to disclose such a policy in Board's Report.

(iv) **Penalty for contravention**: Same as penalty mentioned in the topic of Audit Committee.

Note: In the case of Listed company formation, composition, responsibilities and rights of Nomination and Remuneration committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.

Stakeholders Relationship Committee (SRC)

Formation and functioning of SRC: Section 178 (5) and (6) lay down the provisions relating to the formation, constitution and functioning of the Stakeholders Relationship Committee as under:

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Sl. No.	Sub-sections	With respect to	Provisions says
(i)	(5)	Formation and constitution of stakeholder's relationship committee	The Board of Directors of a company which consists of more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee.
(ii)	(5)	Chairperson of stakeholder's relationship committee	It shall be headed by a chairperson who shall be a non-executive director and consist of such other members as may be decided by the Board.
(iii)	(6)	Objective of the committee	The Stakeholders Relationship Committed shall consider and resolve the grievances of security holders of the company. This committee shall protect the interests of all security holders, not merely the equity investors.
(iv)	(7)	Chairperson of committees	The chairperson of each of the above committees constituted under this section or, in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

Penalty for contravention: Section 178 (8) provides for the penalty for contravention of any of the provisions of either section 177 or 178 and has been explained on the above pages.

Exception: Provided that the non-consideration of a resolution of any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of section 178.

Here, for the purposes of section 178, the expression **''senior management''** means personnel of the company who are members of its core management team excluding Board of Directors comprising all members of management one level below the executive directors, including the functional heads.

Note: In the case of Listed company formation, composition, responsibilities and rights of Stakeholder Relationship committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.

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7. Powers of Board [Section 179]

Section 179 of the Companies Act, 2013 provides Powers of Board. According to this section:

(i) **BoD is entitled to exercise the same powers as the company is authorised:** The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

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

(ii) **Exception to Board's Power:** The Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

(iii) **Prospective effect:** No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made. [Sub-section (2)]

(iv) [5]**Powers of Board:** Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting [Sub-section 3]:

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

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

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

(d) to borrow monies;

(e) to invest the funds of the company;

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

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

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

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

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[5] In case of Specified IFSC Public Company and IFSC Private Company - In sub-section (3) of Section 179, after the second proviso, the following proviso shall be inserted, namely:-

"Provided also that in case of a Specified IFSC public company and IFSC Private Company , the Board can exercise powers by means of resolutions passed at the meetings of the Board or through resolutions passed by circulation.". Notification Dated 4th January 2017.

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(k) any other matter which may be prescribed in Rule 8 of *the Companies (Meetings of Board and its Powers) Rules, 2014.*

Exemption
Matters referred to in clauses (d), (e), and (f) of sub-section (3) of section 179 may be decided by the board by circulation instead of at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013.

Additionally, [6]Rule 8 of *the Companies (Meetings of Board and its Powers) Rules, 2014* has prescribed certain more powers that shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:

(1) to make political contributions;

(2) to appoint or remove KMP

(3) to appoint internal auditors and secretarial auditor;

(v) **Power to delegate certain powers of the Board**: The Board may, by a resolution passed at a meeting, delegate the powers specified in points (d) to (f) above, on such conditions as it may specify to:

1. any committee of directors,
2. the managing director,
3. the manager or any other principal officer of the company, or
4. the principal officer of the branch office (in the case of a branch office of the company).

Exemption to banking companies: However, the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Explanation I—Nothing in point (d) above shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II—In respect of dealings between a company and its bankers, the exercise

[6] Vide Notification No. G.S.R. 206(E) dated 18th March, 2015, in Rule 8 item numbers (3),(5),(6),(7),(8),and (9) and the entries relating thereto have been omitted by the *Companies(Meetings of Board and its Powers) Amendment Rules,* 2015.

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by the company of the power specified in point (d) above shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(vi) The company through the general meeting has powers to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section above. [Sub-section (4)]

8. Restrictions on powers of Board [Section 180][7]

Section 180 of the Companies Act, 2013 provides for Restrictions on powers of Board.

Exemption

This section is not applicable to private company as per the Notification no. 464(E), dated 5th June 2015.

According to this section:

(i) **BoD to exercise powers with the consent of the company passed by a special resolution**: The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

(a) To **sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company** or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

"Undertaking" shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent. of the total income of the company during the previous financial year;

The expression **"substantially the whole of the undertaking"** in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;

(b) To **invest otherwise in trust securities** the amount of compensation received by it as a result of any merger or amalgamation;

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

[7] In case of Specified IFSC Public Company - Section 180 Shall apply in case of a Specified IFSC public company, unless the articles of the company provides otherwise - Notification Dated 4th January 2017.

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The acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

"Temporary loans" means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;

(d) **Settlement of amount**: To remit, or give time for the repayment of, any debt due from a director.

(ii) **Limit of borrowing may be specified:** Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in point (c) above shall specify the total amount up to which monies may be borrowed by the Board of Directors.

(iii) **Exception:** Nothing contained in above point (a) with respect to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company shall affect—

(1) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith; or

(2) The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

(iv) **Imposition of condition**: Any special resolution passed by the company consenting to the transaction as is referred to in above point (a) may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

Exemption: Provided that, this sub section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

(v) **Effect on the debt made in excess of limit:** No debt incurred by the company in excess of the limit imposed by above point (c) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded. [Sub-section (5)]

Example: The Board of Directors of Stepping Stones Publications Ltd. at a meeting held on 15.1.2017 resolved to borrow a sum of ₹ 15 crores from a nationalized bank. Subsequently the said amount was received by the company. One of the Directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:

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(i) Share Capital ₹ 5 crores

(ii) Reserves and Surplus ₹ 5 crores

(iii) Secured Loans ₹ 15 crores

(iv) Unsecured Loans ₹ 5 crores

Advice the management of the company.

Answer: According to the provisions of Section 180(1)(c) of the Companies Act, 2013, there are restrictions on the borrowing powers to be exercised by the Board of directors. According to the said section, the borrowings should not exceed the aggregate of the paid up capital and free reserves. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case the proposed borrowing of ₹ 15 crores will exceed the limit mentioned. Thus, the borrowing will be beyond the powers of the Board of directors.

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

9. Company to contribute to bona fide and charitable funds, etc. [Section 181]

Section 181 of the Companies Act, 2013 provides for Company to contribute to bona fide charitable and other funds.

Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent. of its average net profits for the three immediately preceding financial years.

The expression "other funds" is wide enough to enable contributions of the kind, specified in the special resolution to be made by the company. [*Straw Products Ltd. Vs. Registrar of Companies [1969]*

Example: The Board of directors of Very Well Ltd., are contributing every year to a charitable organization a sum of ₹ 60, 000/-. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

Answer: Under section 181 of the Companies Act, 2013 the Board of Directors of a company is authorized to contribute to bonafide charitable and other funds. However, in case the aggregate amount of such contribution in any financial year exceeds five per cent. of its average net profits for the three immediately preceding financial years, prior permission of the company in general meeting shall be required.

The section does not make it mandatory for the company to have a profit for making a

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charitable contribution in a financial year. As the amount of donation is restricted to the average of previous 3 years' profits, it is possible for a company suffering a loss to make a contribution provided it is to a bonafide charitable fund.

In the present case, even though the company has incurred a loss it can contribute to the charitable fund only if it is a bonafide charitable fund and the amount is upto 5% of the average of the preceeding three years' profits. In case the contribution exceeds the limit, the prior approval of the members must be taken at a general meeting of the company.

10. Prohibitions and restrictions regarding political contributions [Section 182]

Section 182 of the Companies Act, 2013 deals with the provisions related to prohibitions and restrictions regarding political contributions. According to this section:

(i) **Contribution by company to political parties**: Notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party. Here, "political party" means a political party registered under section 29A of the Representation of the People Act, 1951.

(ii) **Exception:** [8]The following companies are not allowed to contribute to any political party:

(a) a Government company; and

(b) a company which has been in existence for less than three financial years.

(iii) **Required duly passed resolution for contribution:** No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making of the contribution authorised by it. [Section 182(1)]

(iv) **Other requirements**: Without prejudice to the generality of the provisions of sub-section (1),

(a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

(b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed,—

[8] Proviso given in this section 182(1) is omitted, and the other given proviso to this section is amended by the Finance Act, 2017, w.e.f 31.3.2017.

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(1) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

(2) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

(v) **Disclosure of contributed amount:** [9]Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates. [Section 182(3)]

(vi) **Mode of contribution**: [10]Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account:

Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.''[Section 182(3A)]

(vii) **Contribution made in contravention of the provision:** If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

The MCA vide General Circular 19/ 2013 dated 10th December 2013, issued a clarification on disclosures to be made under section 182 relating to 'Prohibition and restrictions regarding political contributions' of the Companies Act, 2013.

The circular says that, with the coming into force of the scheme relating to 'Electoral Trust Companies' under the Income Tax Act, 1961 read with Ministry of Finance Notification No. S.O. 309(E) dated 31st January, 2013, it will be expedient to explain the requirements of disclosure on part of a company of any amount or amounts contributed by it to any political parties under section 182(3) of the Companies Act, 2013.

The Ministry hereby clarifies that:

(i) Companies contributing any amount or amounts to an 'Electoral Trust Company' for contributing to a political party or parties are not required to make disclosures required under section 182(3) of Companies Act 2013. It will be sufficient, if the Accounts of the company disclose the amount released to an Electoral Trust Company.

[9] Sub-sections (3) was amended by the Finance Act, 2017, w.e.f. 31.3.2017.

[10] This section 3A has been inserted vide Finance Act, 2017, w.e.f. 31.3.2017.

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(ii) Companies contributing any amount or amounts directly to a political party or parties will be required to make the disclosures laid down in section 182(3) of the Companies Act, 2013.

(iii) Electoral trust companies will be required to disclose all amounts received by them from other companies/sources in their Books of Accounts and also disclose the amount or amounts contributed by them to a political party or parties as required by section 182(3) of Companies Act, 2013.

Example: The Board of Directors of LM Ltd., incorporated in 2015, propose to donate ₹ 50,000 to a political party during the Financial year ending 31st March, 2017. The average net profits determined in accordance with the provisions of the Companies Act, 2013 during the two immediately preceding financial years is ₹ 20,00,000. Whether the proposed donation is within the power of the Board of Directors of company.

Answer: As per section 182(1) of the Companies Act, 2013 any company may contribute any amount directly or indirectly to any political party except a government company and a company which has been in existence for less than three financial years.

In the given case, LM Ltd falls within the exception case. i.e., a company which has been in existence for less than three financial years. So LM Ltd. cannot donate amount to the political party.

Example: Sea Hawk Cycles Limited is a company incorporated four years ago. It has earned profits amounting ₹ 5 lakhs, ₹ 8 lakhs and ₹ 11 lakhs respectively during the last three financial years. The Board of Directors of the company propose to donate a sum of ₹ 50,000 to a political party. Whether the proposed donation is within the powers of the Board of Directors of the company.

Answer: According to section 182(1) of the Companies Act, 2013, a company except a Government Company and a company which has been in existence for not less than three financial years, can make political contributions, directly or indirectly, to any political party.

Further, the contribution shall be made by a company only after passing a resolution at meeting of the Board of Directors authorizing such contributions.

Yes, Sea Hawk Cycles Limited can contribute the amount in compliance with the applicable provisions of the Companies Act, 2013 by passing Board Resolution.

11. Power of Board and other persons to make contributions to national defence fund, etc. [Section 183]

Section 183 of the Companies Act, 2013 provides for Power of Board and other persons to make contributions to national defence fund, etc. According to the section:

(i) **Contribution of amount to National defence fund / other fund as approved by the**

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Central Government: The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and section 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

(ii) **Disclosure in profits and loss account:** Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the Fund referred to in point (i) as specified above, during the financial year to which the amount relates.

12. Disclosure of interest by director [Section 184]

Section 184 of the Companies Act, 2013 provides for Disclosure of interest by director. According to this section:

Section 184 is applicable on all directors of the company and all types of Companies.

(i) **When to disclose**: Every director shall:

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

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

(c) Whenever there is any change in the disclosures already made, then at the first Board meeting held after such change. [Section 184(1)]

(ii) **General Disclosure**: Every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as prescribed in Rule 9 of the *Companies (Meetings of Board and its Powers) Rules, 2014*. [Section 184(1)]

The said rule prescribes that the directors shall disclose his concern or interest, by giving a notice in writing in form MBP-1.

(iii) [11]**Specific Disclosure:** Whenever any director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting. Following are the circumstances

[11] In case of Specified IFSC Public Company - Sub-section (2) of section 184 shall apply with the exception that interested director may participate in such meeting provided the disclosure of his interest is made by the concerned director either prior or at the meeting. - Notification Dated 4th January 2017.

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where disclosure is necessary:

Whenever any director of the company, who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be.

However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested. [Section 184(2)]

In case of private company - Section 184 (2) shall apply; with the exception that the interested director may participate in such meeting after disclosure of his interest. - vide Notification G.S.R. 464(E), Notification dated 5th june, 2015.

Whereas with respect to the companies covered under section 8 of the Companies Act, 2013, vide Notification G.S.R. 466(E), dated 5th June 2015, the Section 184(2) shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.

(iv) **Consequences of non disclosure**:

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

(b) **Penalty:** If a director of the company contravenes the provisions of sub-section (1) or subsection (2) of section 184, such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees, or with both. [Section 184(3) & (4)]

(v) **No restriction on directors:** Nothing in section 184 shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company.

(vi) **Exception**: Section 184 shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the one company

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or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

Example: Company Y Ltd. entered into a contract with company Z with a paid-up capital of ₹ 50 lakhs. The director of Y company is holding equity shares of the nominal value of ₹ 50,000 in Z company. The director of Y Company did not disclose his interest at the Board meeting. Is the director liable for his act?

Answer: As per section 184 (2) of the Companies Act, 2013 the disclosure of interest by directors do not apply to any contract or arrangement within two companies where any of the directors of one company or two or more of them together holds or hold not more than 2% of the paid up share capital in the other company. In the present case, the holding of the director of Y company in company Z is less than 2% [(50,000/50,00,000)*100% = 1%], so the director of Y company is not liable.

13. Defects in appointment of directors not to invalidate actions taken [Section 176]

Section 176 of the Companies Act, 2013 provides of defects in appointment of directors, shall not to invalidate actions taken. According to this section:

(i) **No act done by a person as a director shall be deemed to be invalid**, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

(ii) **No validity to an act done after noticing of his appointment to be invalid or terminated:** Nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

Example: Mr. MTP was appointed as a director at the Annual General Meeting of a limited company held on 30th September, 2015 and he carried on his duties and functions as a director. In the month of August, 2016, it was found out that there were certain irregularities in his appointment and on 31st August, 2016, his appointment was declared invalid. But Mr. MTP continued to act as director even after 31st August, 2016. Whether the acts done by Mr. MTP are valid and binding upon the company?

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

The Proviso to section 176 further provide that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been noticed by the company to

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be invalid or to have terminated.

In view of the above provisions of section 176 of the Companies Act, 2013, the acts done by Mr. MTP upto the date of the irregularity in his appointment coming to the notice of the company will be deemed as valid and binding on the Company.

Any act done by him after the date on which the irregularity or defect in his appointment was noticed by the company will be deemed invalid. The acts done by Mr. MTP after 31st August, 2014 shall be deemed to be invalid and not binding upon the Company

14. Loan to directors, etc. [Section 185]

Section 185 of the Companies Act, 2013 provides for restrictions on loan to directors, etc. According to this section:

(i) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

(ii) The above restriction does not apply in the following circumstances:

(a) the giving of any loan to a managing or whole-time director—

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

(2) pursuant to any scheme approved by the members by a special resolution; or

(b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

[12](c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) Any guarantee given or security provided by a holding company in respect of any loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses(c) and (d) are utilized by the subsidiary company for its principal business activities. [Section 185(1)]

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[12] In case of Specified IFSC Public & Private Company - In Sub-section (1) of section 185, in the Explanation, for clause (c), the following clause shall be substituted, namely:-

"(c) any private company of which any such director is a director or member in which director of the lending company do not have direct or indirect shareholding through themselves or through their relatives and a special resolution is passed to this effect;". - Notification Dated 4th January, 2017

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(iii) If any loan is advanced or a guarantee is given or provided in contravention of the provisions of section 185, the following penalties shall be levied-

(a) **On Company:** Minimum- 5 lakhs and maximum- 25 lakhs

(b) **On defaulting director and the other person** to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person:

Imprisonment- Maximum 6 months, or,

Fine- Minimum- 5 lakhs and maximum- 25 lakhs, or,

Both imprisonment and fine.

***Explanation*:** The expression "to any other person in whom director is interested" means—

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

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

(c) any private company of which any such director is a director or member;

(d) 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

(e) 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. [Section 185(1)]

Thus, penalty is levied only on the company or director or person to whom the loan is given or guarantee or security is provided. However, all other persons who are knowingly a party to default has been kept outside the ambit of penalty clause of section 185.

*Vide Notification no. G.S.R. 465(E), dated 5th June 2015, section 185 shall not apply to the **Nidhis**, provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note.*

*Vide Notification G.S.R 464(E), dated 5th June 2015, section 185 shall not apply to a **private company**-*

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

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

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

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Vide notification G.S.R. 463(E), dated 5th June 2015, section 185 shall not apply to ***Government company*** *in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the state Government before making any loan or giving any guarantee or providing any security under the section.*

Example: Mr. DRT is a director of PCS Ltd. The said company is having sufficient liquid funds and Mr. DRT is in dire need of funds. In order to mitigate the hardship of Mr. DRT the board of directors of PCS Ltd. wants to lend ₹ 5 lakh to him and ₹ 2 lakh to his wife. State whether such loans can be given and if so under what conditions. What would be your answer if the company PCS Ltd. would have been PCS Private Ltd.

Answer: Loan to Director and his relative: According to section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Thus, in the instant case, if PCS Ltd. wants to lend ₹ 5 Lakh to Mr. DRT who is a director in PCS Ltd. and ₹ 2 Lakh to his wife, then it is in violation of section 185 of the Companies Act, 2013.

If PCS Ltd would have been PCS Private Ltd. than vide Notification no. G.S.R. 464 (E) dated 5th June 2015, Section 185 of the Companies Act, 2013 shall not apply to a Private companies in certain conditions.

15. Loan and Investment by Company [Section 186]

Section 186 of the Companies Act, 2013 deals with the provisions related to Loan and Investment by Company. According to this section:

Applicability: This section is applicable on both public as well as private company.

(i) [13]**Investment by company**: According to section 186(1), without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than 2 layers of investment companies: [Section 186(1)]

Exemption: However, the provisions of sub-section (1) shall not affect,—

(a) **Acquiring of company incorporated outside India:** a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

(b) **Subsidiary from having an investment subsidiary**: a subsidiary company from

[13] In case of Specified IFSC Public Company & Private Company - In Sub-section (1) of section 186 shall not apply. - Notification Date 4th January, 2017

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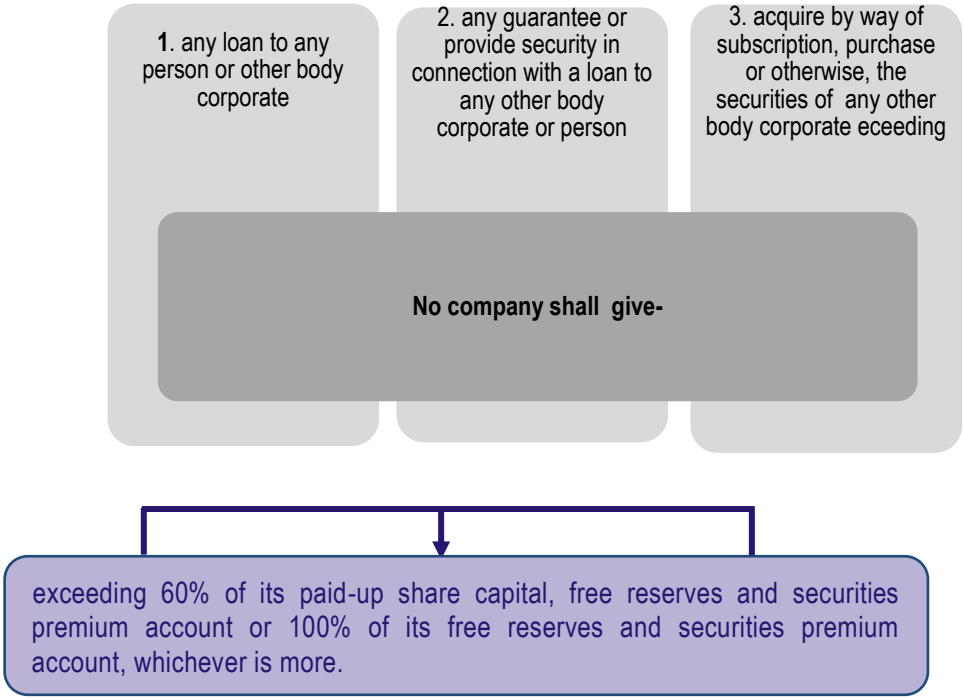
having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(ii) [14]**Limitation/restrictions on the company:** According to section 186 (2) of the Companies Act, 2013, there are three types of transactions:

(a) Loan

(b) Guarantee or security in connection with the loan

(c) Acquire by way of subscription, purchase or otherwise the securities of any other body corporate



Vide General Circular No, 04/2015, dated 10/3/2015 clarification has been issued on the applicability of provisions of section 186 of the Companies Act, 2013 relating to grant of loans and advances by Companies to their employees.

It has been clarified that loans and/or advances made by the companies to their employees, other than the managing or whole time directors (which is governed by

[14] In case of Specified IFSC Public Company and Private Company - In Sub-sections (2) and (3) of section 186 shall not apply if a company passes a resolution either at meeting of the Board of Directors or by circulation. - Notification Date 4th January, 2017.

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section 185) are not governed by the requirements of section 186 of the Companies Act, 2013.

This clarification will, however, be applicable if such loans/advances to employees are in accordance with the conditions of service applicable to employees and are also in accordance with the remuneration policy, in cases where such policy is required to be formulated.

It can be interpreted that company can do transactions given in headings 1, 2 or 3 in the diagram upto 60% of paid up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account (whichever is more) and restrictions apply only when such transactions exceeds the limits.

(iii) **Prior approval for exceeding limit** [Section 186(3)]: Prior approval by means of a special resolution passed at a general meeting shall be necessary where the giving of any loan or guarantee or providing any security or the acquisition exceeds the limits specified above.

According to the Rule 11 of the *Companies (Meetings of Board and its Powers) Rules, 2014,* where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of sub-section (3) of section 186 shall not apply:

Provided that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4) of section 186.

As per the Rule 13 of the *Companies (Meetings of Board and its Powers) Rules, 2014,* also provides that:

(a) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under section 186, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Explanation.- For the purpose of this rule, it is clarified that it would sufficient compliance if such special resolution is passed within one year from the date of notification of this section.

(b) A resolution passed at a general meeting in terms of sub-section (3) of section 186 to give any loan or guarantee or investment or providing any security or the acquisition under sub section (2) of section 186 shall specify the total amount up to

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which the Board of Directors are authorised to give such loan or guarantee, to provide such security or make such acquisition:

Provided, that the company shall disclose to the members in the financial statement the full particulars in accordance with the provision of sub-section (4) of section 186.

(iv) **Disclosure to members** [Section 186(4)]:

Company shall disclose to the members in the financial statement the full particulars of-		
loan given,	investment made or guarantee given or security provided,	the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.

(v) [15]**Unanimous resolution** [Section 186 (5)]: Any investment shall be made or loan or guarantee or security given by the company only after when the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting. The prior approval of the public financial institution concerned where any term loan is subsisting shall also be obtained.

However, prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in section 186(2) and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(vi) **Rate of interest on loan**: A loan under this section shall not be given at a rate of interest lower than the prevailing yield of one year, 3 year, 5 year or 10 year Government Security closest to the tenor of the loan. [Section 186 (7)]

Vide General circular no. 06/2015 dated 9th April, 2015 ministry has clarified that in cases where effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of one year, three year, five year or ten year, Government Security closest to the tenor of the loan, there is no violation of sub-section (7) of this section of the Companies Act, 2013.

[15] In case of Specified IFSC Public & Private Company - In Sub-section (5) of section 186 after the proviso, the following proviso shall be inserted -

"Provided that the Board can exercise powers under this sub-section by means of resolutions passed at meetings of the Board of Directors or through resolutions passed by circulation." - Notification Date 4th January, 2017.

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(vii) **No loan till default is subsisting**: No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting. [Section 186 (8)]

(viii) **Maintenance of register**: Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as prescribed In Rule 12 and MBP 2 of the *Companies (Meetings of Board and its Powers) Rules, 2014*: [Section 186 (9)]

According to Rule 12 of the *Companies (Meetings of Board and its Powers) Rules, 2014*:

(a) Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in *Form MBP 2* and enter therein separately, the particulars of loans and guarantees given, securities provided and acquisitions made as aforesaid.

(b) The entries in the register shall be made chronologically in respect of each such transaction within 7 days of making such loan or giving guarantee or providing security or making acquisition.

(c) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorised by the Board for the purpose.

(d) The entries in the register (either manual or electronic) shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

(e) The register can be maintained either manually or in electronic mode.

(f) The extracts from such register maintained may be furnished to any member of the company on payment of such fee as may be prescribed in the Articles of the company which shall not exceed 10 rupees for each page.

(ix) **Register to be kept at registered office:**

(a) This register shall be kept at the registered office of the company.

(b) It shall be open to inspection at such office and extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as prescribed in Rule 12. [Section 186 (10)]

(x) **Non-applicability of section 186:** Nothing contained in section 186, except sub-section (1) of section 186, shall apply—

(a) to a loan made, guarantee given or security provided by a banking company or an insurance company or a housing finance company in the ordinary course of

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its business or a company engaged in the business of financing of companies or of providing infrastructural facilities;

According to Rule 11(2) of *the Companies (Meetings of Board and its Powers) Rules, 2014,* the expression "business of financing of companies" shall include, with regard to a Non-Banking Financial Company registered with the Reserve Bank of India, "business of giving of any loan to a person or providing any guaranty or security for due repayment of any loan availed by any person in the ordinary course of its business".

(b) to any acquisition—

(1) made by a non-banking financial company registered under Chapter IIIB of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities:

Provided that exemption to non-banking financial company shall be in respect of its investment and lending activities;

(2) made by a company whose principal business is the acquisition of securities;

(3) of shares allotted in pursuance of section 62(1)(a) [Section 186 (11)]

(4) made by the banking company or an insurance company or a housing finance company, making acquisition of securities in the ordinary course of its business.

(xi) **Restriction on the inter-corporate loans/deposits:** Further, no company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits. [Section 186 (6)]

According to Rule 11(3) to *the Companies (Meetings of Board and its Powers) Rules, 2014,* no company registered under section 12 of the Securities and Exchange Board of India Act, 1992 and also covered under such class or classes of companies which may be notified by the Central Government in consultation with the Securities and Exchange Board, shall take any inter-corporate loan or deposits, in excess of the limits specified under the regulations applicable to such company, pursuant to which it has obtained certificate of registration from the Securities and Exchange Board of India.

(xii) **Power of Central Government to make Rules**: The Central Government may make rules for the purposes of this section. [Section 186 (12)]

(xiii) **Penalty:** If a company contravenes the provisions of section 186, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be

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less than 25,000 rupees but which may extend to 1,00,000 rupees. [Section 186 (13)]

For the purposes of section 186,

(a) the expression "investment company" means a company whose principal business is the acquisition of shares, debentures or other securities;

(b) the expression "infrastructure facilities" means the facilities specified in Schedule VI.

In case of Government Company - Section 186 shall not apply to:-

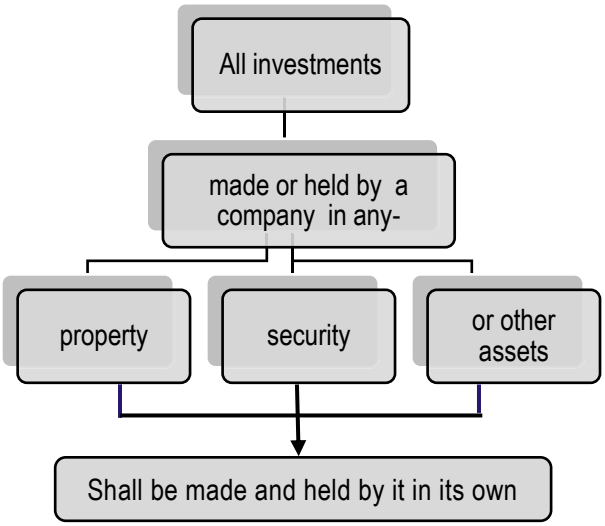
(a) a Government company engaged in defence production;

(b) a Government company, other than a listed company, in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before making any loan or giving any guarantee or providing any security or making any investment under the section. - Notification dated 5th june, 2015.

16. Investments of company to be held in its own name [Section 187]

Section 187 of the Companies Act, 2013 provides for Investments of company to be held in its own name. According to this section:

(i) **Investments by a company in its own name:**



However, the company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

(ii) **Deposition of assets, security etc. held by the company**: Nothing in this section shall be deemed to prevent a company—

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(a) from depositing with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or

(b) from depositing with, or transferring to, or holding in the name of, the State Bank of India or a scheduled bank, being the bankers of the company, shares or securities, in order to facilitate the transfer thereof:

Provided that if within a period of 6 months from the date on which the shares or securities are transferred by the company to, or are first held by the company in the name of, the State Bank of India or a scheduled bank as aforesaid, no transfer of such shares or securities takes place, the company shall, as soon as practicable after the expiry of that period, have the shares or securities re-transferred to it from the State Bank of India or the scheduled bank or, as the case may be, again hold the shares or securities in its own name; or

(c) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it;

(d) from holding investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.

(iii) **Maintenance of register by company in case of securities not held by it in its own name:** Where in pursuance of clause (d) of sub-section (ii), any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall maintain a register which shall contain such particulars as may be prescribed and such register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose.

Securities held by any person in which the company holds beneficial interest, compliance of section 89 requires declaration in respect of beneficial interest of any securities.

(iv) **In case of contravention**: If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

According to Rule 14 of the *Companies (Meetings of Board and its Powers) Rules, 2014*,

(a) Every company shall, from the date of its registration, maintain a register in Form *MBP3* and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the company shall also record the reasons for not holding the

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investments in its own name and the relationship or contract under which the investment is held in the name of any other person.

(b) The company shall also record whether such investments are held in a third party's name for the time being or otherwise.

(c) The register shall be maintained at the registered office of the company. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.

(d) The entries in the register shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

17. Related Party Transactions [Section 188]

'Related Party'- As per section 2(76) of the Companies Act, 2013, related party with reference to a company, means

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;

(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

[16](viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

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[16] In case of private company - Sub-clause (viii) of clause 76 of Section 2, Shall not apply with respect to section 188 - Notification dated 5th June, 2015.

In case of Specified IFSC Public Company - Sub-clause (viii) of clause (76) of Section 2 Shall not apply with respect to section 188.- Notification Dated 5th January, 2017

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(B) a subsidiary of a holding company to which it is also a subsidiary;

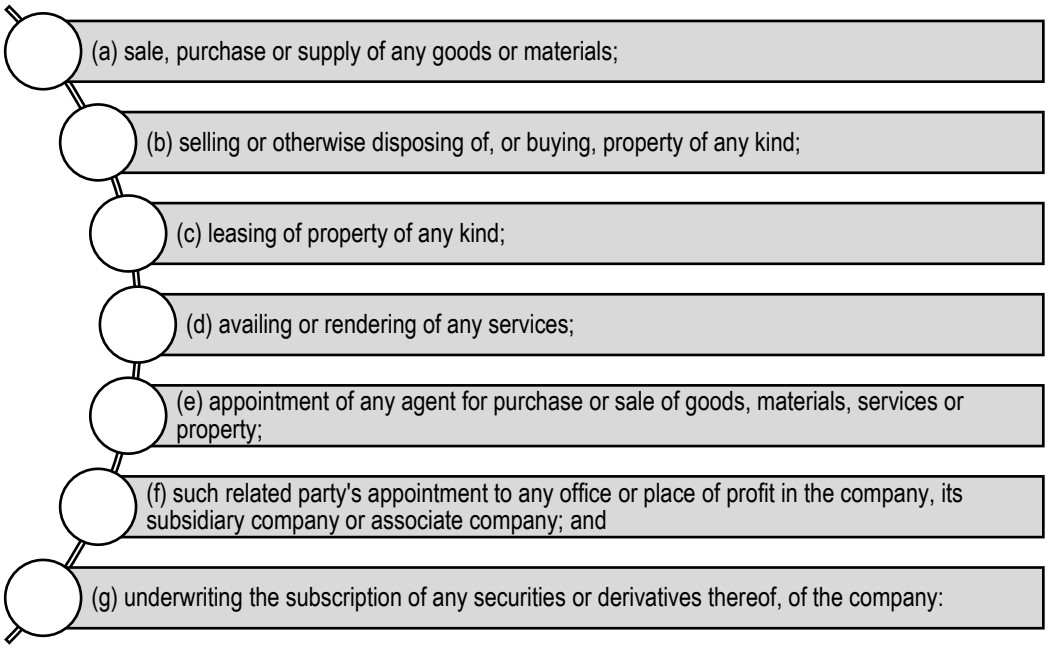
(ix) such other person as may be prescribed;

Rule 3 of the *Companies (Specification of Definitions Details) Rules, 2014* provides that For the purposes of sub-clause (ix) of clause (76) of section 2 of the Act, a director other than an independent director or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party. The persons covered in items (vi) and (vii) above shall not be related parties if advice, directions or instructions are given by them in a professional capacity.

1. Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT) with related party. According to this section:

(i) **Contracts with related parties which are covered under section 188** [Section 188(1)]: Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions[17] as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to the transaction.

Transactions referred in sub-section (1)



(ii) However, no contract or arrangement, in the case of a company having a paid-up

[17] For details regarding prescribed conditions please refer sub rule (1) of rule 15 of the *Companies (Meetings of Board and its Powers) Rules*, 2014.

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share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution. [First proviso to section 188(1)]

According to Rule 15(3) of *the Companies (Meetings of Board and its Powers) Rules, 2014* except with the prior approval of the company by a resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into,—

(A) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mentioned below -

Conditions with respect to transactions to be entered into with the prior approval	**Prescribed limits for the transactions to be entered into as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188**
sale, purchase or supply of any goods or materials, directly or through appointment of agent	Amounting to 10% or more of the turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188
selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent	Amounting to 10% or more of net worth of the company or rupees 100 crore, whichever is lower, as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188
leasing of property of any kind	Amounting to 10% or more of the net worth of the company or 10% or more of turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (c) of sub-section (1) of section 188
availing or rendering of any services, directly or through appointment of agent	Amounting to 10% or more of the turnover of the company or rupees 50 crore, whichever is lower, as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188:

Explanation—It is hereby clarified that the limits specified in sub-clauses (i) to (iv) shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(B) is for appointment to any office or place of profit in the company, its subsidiary

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company or associate company at a monthly remuneration **exceeding 2.5 lakh rupees as mentioned in clause (f) of subsection (1) of section 188; or**

(C) is for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company **exceeding 1% of the net worth as mentioned in clause (g) of sub-section (1) of section 188.**

Explanation -

- The Turnover or Net Worth referred in the above sub-rules shall be computed on the basis of the Audited Financial Statement of the preceding financial year.
- In case of a wholly owned subsidiary, the resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between the wholly owned subsidiary and the holding company.

2. **Transaction to be at arm's length prices**: Nothing as provided above shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis.

3. **The explanatory statement to be annexed to the notice** of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:—

(a) name of the related party;

(b) name of the director or key managerial personnel who is related, if any;

(c) nature of relationship;

(d) nature, material terms, monetary value and particulars of the contract or arrangement;

(e) any other information relevant or important for the members to take a decision on the proposed resolution."

No voting by related member: Further no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party. [Second proviso to section 188(1)]

The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified the scope of second proviso to section 188(1). [18]*The second proviso to subsection (1) of section 188 requires that no member of the company shall vote on a resolution to approve the contract or arrangement (referred to in the first proviso), if such a member is a related party. It is clarified that 'related party' referred to in the second proviso has to be*

[18] This second proviso to section 188(1) shall not apply to private company- Notification dated 5th june, 2015

In case of Specified IFSC Public Company - Second proviso to sub section (1) of section 188 shall not apply. - Notification Date 4th January, 2017

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construed with reference only to the contract or arrangement for which the said resolution is being passed. Thus, the term 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said resolution is being passed.

According to Rule 15(2) of *the Companies (Meetings of Board and its Powers) Rules, 2014,* where any director is interested in any contract or arrangement with a related party, such director shall not be present at the meeting during discussions on the subject matter of the resolution relating to such contract or arrangement.

Vide Notification G.S.R. 463(E) dated 5th June 2015, first and second proviso to section 188(1) shall not apply to -(a) a government company in respect of contracts or arrangements entered into by it with any other government company; (b) a government company, other than a listed company, in respect of contracts or arrangements other than those referred to in clause(a), in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or as the case may be, the state Government before entering into such contract or arrangement.

4. **Passing of resolution is not necessitated:** Provided also that the requirement of passing resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

Explanation—

(a) the **expression "office or place of profit" means** any office or place—

(1) **where such office or place is held by a director**, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(2) **where such office or place is held by an individual other than a director or by any firm, private company or other body corporate**, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression **"arm's length transaction" means** a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

5. **Related party transaction can be voidable at the option at the Board** [Section 188 (3)]: A contract or arrangement shall be voidable at the option of the Board:

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(a) **Contract / arrangement entered without obtaining the consent of the Board or approval by a resolution:** Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting as required under section 186(1), and

(b) **No ratification by Board /shareholders:** if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into.

Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

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

6. Penalty for contravention [Section 188 (5)]:

In the case of a-	Liability
listed company	Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall- be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees, or with both; and
any other company	Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall- be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees.

7. Related party transaction to be mentioned in Board's report [Section 188 (2)]: Every contract or arrangement entered into under sub section (1), shall be referred to in the Board's report to the shareholders along with the justification for entering into such contract or arrangement.

Applicability of Section 188 to corporate restructuring, amalgamations etc.: *The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified that transactions arising out of Compromises, Arrangements and Amalgamations dealt with under specific provisions of the Companies Act, 2013, will not attract the requirements of section 188 of the Companies Act, 2013.*

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18. Register of contracts or arrangements in which directors are interested [Section 189]

Section 189 of the Companies Act, 2013 provides for Register of contracts or arrangements in which directors are interested. According to this section:

(i) **Maintenance of register of contracts or arrangements [Section 189(1)]:** Section 189 of the Companies Act, 2013 makes it mandatory for all companies to keep one or more registers giving separately the particulars of all contracts or arrangements as required under:

(a) section 184(2) [Disclosure of interest by director] or

(b) section 188 [Related party transaction].

(ii) **Registers to be signed [Section 189(1)]:** The register shall be prepared in such manner and containing such particulars as may be prescribed and after entering the particulars, the duly filled and updated register or registers shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

(iii) **Manner of preparation of register:** Such register shall be prepared in such manner and contain such particulars as may be prescribed. [Section 189(1)]

According to Rule 16 of the *Companies (Meetings of Board and its Powers) Rules, 2014*, every company shall maintain one or more registers in Form MBP 4, and contain such particulars as required therein.

(iv) **Disclosure to be made by director or KMP [Section 189(2)]:** Every director or key managerial personnel shall, within a period of 30 days of his appointment, or relinquishment of his office, as the case may be, disclose to the company the particulars specified in section 184(1) relating to his concern or interest in the other associations which are required to be included in the register under that sub-section or such other information relating to himself as may be prescribed.

(v) **Register to be kept at registered office [Section 189(3)]:** The register shall be kept at the registered office of the company and it shall be open for inspection at such office during business hours.

(vi) **Extracts from register [Section 189(3)]:** Extracts may be taken from the register, and copies thereof as may be required by any member of the company shall be furnished by the company to such extent, in such manner, and on payment of such fees as may be prescribed.

According to *the Companies (Meetings of Board and its Powers) Rules, 2014*, such fee will be as provided in the articles of the company, subject to the maximum of ₹ 10 for each page.

(vii) **Register to be produced at AGM [Section 189(4)]:** The register shall also be produced at the commencement of every annual general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. Thus, even a proxy has the rights to inspect the Register.

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(viii) **Exceptions [Section 189(5)]:** Nothing contained in section 189(1) shall apply to any contract or arrangement-

(a) for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed 5,00,000 rupees in the aggregate in any year; or

(b) by a banking company for the collection of bills in the ordinary course of its business.

(ix) **Penalty [Section 189(6)]:** Every director who fails to comply with the provisions of this section and the rules made thereunder shall be liable to a penalty of 25,000 rupees.

Whereas with respect to the companies covered under section 8 of the Companies Act, 2013, vide Notification G.S.R. 466(E), dated 5th June 2015, the Section 184(2) shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.

19. Contract of employment with managing or whole- time directors [Section 190]

Section 190 of the Companies Act, 2013 provides for Contract of employment with managing or whole- time directors. According to this section:

(i) **Maintenance of copy of contract of employment:** Every company shall keep at its registered office,—

(a) **where a contract of service with a managing or whole-time director is in writing**, a copy of the contract; or

(b) **where such a contract is not in writing**, a written memorandum setting out its terms.

(ii) **Inspection:** The copies of the contract or the memorandum shall be open to inspection by any member of the company without payment of fee.

(iii) **Penalty for default:** The Company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each default.

(iv) **Exception:** The provisions of this section shall not apply to a private company.

20. Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares [Section 191]

Section 191 of the Companies Act, 2013 provides for Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares. According to this section:

(i) Section 191 lays down elaborate provisions for regulating payment of compensation to directors for loss of office, etc., in connection with transfer of undertaking, property or shares.

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(ii) **Application of provisions**: These provisions apply to all companies.

(iii) According to sub section (1), no director of a company shall, in connection with

(a) the transfer of the whole or any part of any undertaking or property of the company; or

(b) the transfer to any person of all or any of the shares in a company being a transfer resulting from—

(1) an offer made to the general body of shareholders.

(2) an offer made by or on behalf of some other body corporate with a view to a company becoming a subsidiary company of such body corporate or a subsidiary company of its holding company;

(3) an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than 1/3rd of the total voting power at any general meeting of the company; or

(4) any other offer which is conditional on acceptance to a given extent,

- receive any payment by way of compensation for loss of office, or
- as consideration for retirement from office, or
- in connection with such loss or retirement from such company or
- from the transferee of such undertaking or property, or
- from the transferees of shares or
- from any other person, not being such company,

unless particulars as may be prescribed with respect to the payment proposed to be made by such transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

(iv) However, nothing in sub-section (1) shall affect any payment made by a company to a managing director or whole-time director or manager of the company by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement subject to limits or priorities, as prescribed in *Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014*. [sub – section (2)].

(v) If the above payment is not approved for want of quorum either in a meeting or an adjourned meeting, the proposal shall not be deemed to have been approved.

(vi) Where a director of a company receives payment of any amount in contravention of sub-section (1) or the proposed payment is made before it is approved in the meeting, the

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amount so received by the director shall be deemed to have been received by him in trust for the company.

(vii) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(viii) Nothing in this section shall be taken to prejudice the operation of any law requiring disclosure to be made with respect to any payment received under this section or such other like payments made to a director.

According to Rule 17 of *the Companies (Meetings of Board and its Powers) Rules, 2014,*

(1) No director of a company shall receive any payment by way of compensation in connection with any event mentioned in sub-section (1) of section 191 unless the following particulars are disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount —

(a) name of the director;

(b) amount proposed to be paid;

(c) event due to which compensation become payable;

(d) date of Board meeting recommending such payment;

(e) basis for the amount determined;

(f) reason or justification for the payment;

(g) manner of payment - whether payable in cash or otherwise and how;

(h) sources of payment; and

(i) any other relevant particulars as the Board may think fit.

(2) Any payment made by a company by way of compensation for the loss of office or as a consideration for retirement from office or in connection with such loss or retirement, to a managing director or whole time director or manager of the company shall not exceed the limit as set out under section 202.

(3) No payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if —

(a) the company is in default in repayment of public deposits or payment of interest thereon;

(b) the company is in default in redemption of debentures or payment of interest thereon;

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(c) the company is in default in repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;

(d) the company is in default in payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);

(e) there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and

(f) the company has not paid dividend on preference shares or not redeemed preference shares on due date.

Explanation: Pending notification of sub-section (1) of section 247 (i.e., Registered valuers) of the Act and finalisation of qualifications and experience of valuers, valuation of stocks, shares, debentures, securities etc. will be conducted by an independent merchant banker who is registered with the Securities and Exchange Board of India or an independent chartered accountant in practice having a minimum experience of 10 years.

21. Restriction on non-cash transactions involving directors [Section 192]

Section 192 of the Companies Act, 2013 specifies restriction on non-cash transactions involving directors. According to this section:

(i) **Restriction on acquiring assets for consideration other than cash:** No company shall enter into an arrangement by which—

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

(b) **the company acquires** or is to acquire assets for consideration other than cash, from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

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(ii) **Value of the assets by registered valuer:**[19] The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

(iii) **In case of contravention:** Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless-

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

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

22. Contracts by One Person Company [Section 193]

Section 193 of the Companies Act, 2013 provides for Contracts by One Person Company. According to this section:

(i) Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. However, if contracts are entered into by the company in the ordinary course of its business then such ensurance shall not be necessary.

(ii) The company shall inform the Registrar about every such contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors within a period of 15 days of the date of approval by the Board of Directors.

23. Prohibition on forward dealings in securities of company by director or key managerial personnel [Section 194]

Section 194 of the Companies Act, 2013 provides for Prohibition on forward dealings in securities of company by director or key managerial personnel. According to this section:

(i) **Restrictions on the forward dealings in securities:** No director of a company or any of its key managerial personnel shall buy in the company, or in its holding, subsidiary or associate company—

[19] Registered valuer is defined in section 247, however this section is not yet notified.

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(a) **a right to call for delivery or a right to make delivery** at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or

(b) **a right, as he may elect, to call for delivery or to make delivery** at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures.

(ii) **Punishment in case of contravention:** If a director or any key managerial personnel of the company contravenes the above provisions, such director or key managerial personnel shall be punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(iii) **Acquisition of securities in contravention:** Where a director or other key managerial personnel acquires any securities in contravention, he shall along with fine and imprisonment mentioned above, also be liable to surrender the same to the company and the company shall not register the securities so acquired in his name in the register, and if they are in dematerialised form, it shall inform the depository not to record such acquisition and such securities, in both the cases, shall continue to remain in the names of the transferors.

(iv) **''relevant shares'' and ''relevant debentures''** mean shares and debentures of the company in which the concerned person is a whole-time director or other key managerial personnel or shares and debentures of its holding and subsidiary companies.

Note: In addition to above provisions, Regulations issued by SEBI on the subject would also be applicable in such matters.

24. Prohibition on insider trading of securities [Section 195]

Section 195 of the Companies Act, 2013 provides for Prohibition on insider trading of securities. According to this section:

(i) **Prohibition:** No person including any director or key managerial personnel of a company shall enter into insider trading. But if any communication is required in the ordinary course of business or profession or employment or under any law, then the above prohibition does not apply.

(ii) **"Insider trading" means—**

(a) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have

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access to any non-public price sensitive information in respect of securities of company; or

(b) An act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;

(iii) **"price-sensitive information**" means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

(iv) **In case of default:** If any person contravenes the provisions of this section, he shall be punishable with-

- imprisonment for a term which may extend to five years or
- with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or
- with both.

Note: In addition to above provisions, Regulations issued by SEBI on the subject would also be applicable in such matters.

RELEVANT AMENDMENTS

1. **Exemptions to Private Companies Vide Notification G.S.R. 583(E) Dated 13TH June, 2017**

The Central Government amends the Notification G.S.R. 464(E), dated 5th June 2015. Following are the amendments:

(i) With respect to Section 173(5), the following sub- section shall be substituted:

(5) A One Person Company, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days:

Provided that nothing contained in this subsection and in section 174 shall apply to One person Company in which there is only one director on its Board of Directors.

(ii) With respect to section 174(3)-

It shall apply with the exception that the interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.

2. **Insertion of Paragraph 2A in the principal notification G.S.R. 464(E), dated 5th June 2015 Vide Notification G.S.R. 583(E) Dated 13TH June, 2017**

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In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:- "2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.".

3. **Exemptions to Companies covered section 8 of the Companies Act, 2013 Vide Notification G.S.R. 584(E) Dated 13TH June, 2017**

The Central Government amends the Notification G.S.R. 466(E), dated 5th June 2015. Following are the amendments:

In section 186(7)- following proviso shall be inserted-

Provided that nothing contained in this sub-section shall apply to a company in which twenty-six per cent. or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding Industrial Research and Development projects in furtherance objects as stated in its memorandum of association.".

4. **Insertion of Paragraph 2A in the principal notification G.S.R. 466 (E), dated 5th June 2015 Vide Notification G.S.R. 584(E) Dated 13TH June, 2017**

In the principal notification, after paragraph 2, the following paragraph shall be inserted, namely:- "2A. The exceptions, modifications and adaptations provided in column (3) of the aforesaid Table shall be applicable to a company covered under section 8 of the said Act which has not committed a default in filing its financial statements under section 137 or annual return under section 92 of the said Act with the Registrar."

5. **Enforcement of the Companies (Meetings of Board and its Powers) Second Amendment Rules, 2017 vide Notification G.S.R. 880(E) Dated 13TH July 2017**

The Central Government hereby makes the following rules further to amend the Companies (Meetings of Board and its Powers) Rules, 2014.

Following are the amendments:

(1) In rule 3 for clause (e), the following shall be substituted, -

"(e) Any director who intends to participate in the meeting through electronic mode may intimate about such participation at the beginning of the calendar year and such declaration shall be valid for one year: Provided that such declaration shall not debar him from participation in the meeting in person in which case he shall intimate the company sufficiently in advance of his intention to participate in person."

(2) In the principal rules, for rule 6, the following rule shall be substituted, namely:-

"6. Committees of the Board. - The Board of directors of every listed company and a company covered under rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 shall constitute an 'Audit Committee' and a 'Nomination and Remuneration Committee of the Board'.

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6. **Enforcement of the Companies (Restriction on number of layers) Rules, 2017 in exercise of the powers conferred under proviso to clause (87) of section 2 Vide notification G.S.R. 1176(E), dated 20th September 2017**

Restriction on number of layers for certain classes of holding companies-

(1) On and from the date of commencement of these rules, no company, other than a company belonging to a class specified in sub-rule (2) , shall have more than two layers of subsidiaries:

Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country:

Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

(2) **The provisions of this rule shall not apply to the following classes of companies, namely:—**

(a) a banking company as defined in the Banking Regulation Act, 1949

(b) a non-banking financial company as defined in the Reserve Bank of India Act, 1934 which is registered with the Reserve Bank of India and considered as systematically important non-banking financial company by the Reserve Bank of India;

(c) an insurance company being a company which carries on the business of insurance in accordance with provisions of the Insurance Act, 1938 and the Insurance Regulatory Development Authority Act, 1999

(d) a Government company referred to in clause (45) of section 2 of the Companies Act.

(3) The provisions of this rule shall not be in derogation of the proviso to sub-section (1) of section 186 of the Act.

(4) Every company, other than a company referred to in sub-rule (2), existing on or before the commencement of these rules, which has number of layers of subsidiaries in excess of the layers specified in sub-rule (1) –

(i) shall file, with the Registrar a return disclosing the details specified therein, within a period of one hundred and fifty days from the date of publication of these rules in the Official Gazette;

(ii) shall not, after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date; and (iii) shall not, in case one or more layers are reduced by it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in sub rule (1), whichever is more.

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(5) If any company contravenes any provision of these rules the company and every officer of the company who is in default shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 173	In section 173 of the principal Act, in sub-section (2), after the first proviso, the following proviso shall be inserted, namely:— "Provided further that where there is quorum in a meeting through physical presence of directors, any other director may participate through video conferencing or other audio visual means in such meeting on any matter specified under the first proviso.".	Not notified till 30th April, 2018
Amendment of section 177.	In section 177 of the principal Act,— (i) in sub-section (1), for the words "every listed company", the words "every listed public company" shall be substituted; (ii) in sub-section (4), in clause (iv), after the proviso, the following provisos shall be inserted, namely:— "Provided further that in case of transaction, other than transactions referred to in section 188, and where Audit Committee does not approve the transaction, it shall make its recommendations to the Board: Provided also that in case any transaction involving any amount not exceeding one crore rupees is entered into by a director or officer of the company without obtaining the approval of the Audit Committee and it is not ratified by the Audit Committee within three months from the date of the transaction, such transaction shall be voidable at the option of the Audit Committee and if the transaction is with the related party to any director or is authorised by any other director, the director concerned shall indemnify the company against any loss incurred by it: Provided also that the provisions of this clause shall not apply to a transaction, other than a transaction referred to in section 188, between a holding company and its wholly owned subsidiary company."	Not notified till 30th April, 2018
Amendment of Section 178	In section 178 of the principal Act,— (i) in sub-section (1), for the words "every listed company", the words "every listed public company" shall be	Not notified till 30th April, 2018

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	substituted; (ii) in sub-section (*2*), for the words "shall carry out evaluation of every director's performance", the words "shall specify the manner for effective evaluation of performance of Board, its committees and individual directors to be carried out either by the Board, by the Nomination and Remuneration Committee or by an independent external agency and review its implementation and compliance" shall be substituted; (iii) in sub-section (*4*), in clause (*c*), for the proviso, the following proviso shall be substituted, namely:— "Provided that such policy shall be placed on the website of the company, if any, and the salient features of the policy and changes therein, if any, along with the web address of the policy, if any, shall be disclosed in the Board's report."; (iv) in sub-section (*8*), in the proviso, for the words "non-consideration of resolution of any grievance", the words "inability to resolve or consider any grievance" shall be substituted.	
Amendment of Section 180	In section 180 of the principal Act, in sub-section (*1*), in clause (*c*), for the words "paid-up share capital and free reserves", the words "paid-up share capital, free reserves and securities premium" shall be substituted.	Notified till 30th April, 2018
Amendment of Section 184	In section 184 of the principal Act,— (i) in sub-section (4), the words "shall not be less than fifty thousand rupees but which" shall be omitted; (ii) in sub-section (5), for clause (b), the following clause shall be substituted, namely:— "(*b*) shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold not more than two per cent. of the paid-up share capital in the other company or the body corporate."	Notified till 30th April, 2018
Substitution of new section for section 185. Loan to Directors	For section 185 of the principal Act, the following section shall be substituted, namely:— '185. (*1*) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—	Not notified till 30th April, 2018

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	(a) any director of company, or of a company which is its holding company or any partner or relative of any such director; or (b) any firm in which any such director or relative is a partner. (*2*) A company may advance any loan including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken by any person in whom any of the director of the company is interested, subject to the condition that— (a) a special resolution is passed by the company in general meeting: Provided that the explanatory statement to the notice for the relevant general meeting shall disclose the full particulars of the loans given, or guarantee given or security provided and the purpose for which the loan or guarantee or security is proposed to be utilised by the recipient of the loan or guarantee or security and any other relevant fact; and (*b*) the loans are utilised by the borrowing company for its principal business activities. *Explanation.*—For the purposes of this sub-section, the expression "any person in whom any of the director of the company is interested" means— (*a*) any private company of which any such director is a director or member; (*b*) 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 (*c*) 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. (*3*) Nothing contained in sub-sections (*1*) and (*2*) shall apply to— (a) the giving of any loan to a managing or whole-time director— (i) as a part of the conditions of service extended by the company to all its employees; or (ii) pursuant to any scheme approved by the members by a special resolution; or (b) a company which in the ordinary course of its business	

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	provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the rate of prevailing yield of one year, three years, five years or ten years Government security closest to the tenor of the loan; or (c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or (d) any guarantee given or security provided by a holding company in respect of loan made by any bank or financial institution to its subsidiary company: Provided that the loans made under clauses (*c*) and (*d*) are utilized by the subsidiary company for its principal business activities. (*4*) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,— (i) the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; (ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees; and (iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.'	
Amendment of section 186.	In section 186 of the principal Act,— (i) in sub-section (2), the following Explanation shall be inserted, namely:— *'Explanation.*—For the purposes of this sub-section, the word "person" does not include any individual who is in the employment of the company.'; (ii) for sub-section (3), the following sub-section shall be substituted, namely:— '(*3*) Where the aggregate of the loans and investment	Not notified till 30th April, 2018

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	so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under sub-section (*2*), no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting: Provided that where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of this sub-section shall not apply: Provided further that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (*4*).". (iii) for sub-section (11), the following sub-section shall be substituted, namely:— "(*11*) Nothing contained in this section, except sub-section (*1*), shall apply— (a) to any loan made, any guarantee given or any security provided or any investment made by a banking company, or an insurance company, or a housing finance company in the ordinary course of its business, or a company established with the object of and engaged in the business of financing industrial enterprises, or of providing infrastructural facilities; (*b*) to any investment— (*i*) made by an investment company; (*ii*) made in shares allotted in pursuance of clause (*a*) of sub-section (*1*) of section 62 or in shares allotted in pursuance of rights issues made by a body corporate; (*iii*) made, in respect of investment or lending activities, by a non-banking financial company registered under Chapter III-B of the Reserve Bank of	

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	India Act, 1934 and whose principal business is acquisition of securities."; (iv) in the *Explanation*, in clause (*a*), after the words "other securities" the following shall be inserted, namely:— "and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income."	
Amendment of section 188.	In section 188 of the principal Act,— (i) in sub-section (1), after the second proviso, the following proviso shall be inserted, namely:— "Provided also that nothing contained in the second proviso shall apply to a company in which ninety per cent. or more members, in number, are relatives of promoters or are related parties:" (ii) in sub-section (3), for the words "shall be voidable at the option of the Board", the words "shall be voidable at the option of the Board or, as the case may be, of the shareholders" shall be substituted.	Notified till 30th April, 2018
Omission of section 194	Section 194 of the principal Act shall be omitted.	Notified till 30th April, 2018
Omission of section 195	Section 195 of the principal Act shall be omitted.	Notified till 30th April, 2018

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6

Inspection, Inquiry and Investigation

1. Introduction

It became imperative for the Central Government to assume certain powers to investigate the affairs of the company in appropriate cases particularly where there was reason to believe that the business of the company was being conducted with the intent to defraud its creditors or members or for a fraudulent or unlawful purpose, or in any manner oppressive of any of its members. Chapter XIV contains Sections 206 to 229 of the Companies Act, 2013; deals with the provisions relating to Inspection, Inquiry and Investigation into the affairs of company.

POWERS GIVEN UNDER COMPANIES ACT, 2013

Authorities	Powers
Registrar under sections 206, 207, 208 & 209	Call for information, inspection of books of account, books, papers and explanations and order for inquiry in section 206, submission of inspection report in 208, Search and seizure in 209, Shall have all the powers as are vested in a civil court in section 207.
Inspector under sections 206, 207, 208, 209 & 216	call for the books of account and other books and papers under section 206, make an inspection or inquiry under section 206, Shall have all the powers as are vested in a civil court in section 207, submit inspection report in section 208, Search and seizure of documents in 209, To investigate on matters relating to company and its membership for determining ownership of company in section 216.
Central Government under sections 206, 210, 211, 212, 216 & 224	May authorize any statutory authority to carry out the Inspection of books of accounts of company in 206, Investigate into affairs of company in 210, Appointment of inspectors to investigate into affairs of the company and to report there on in section 210, Establishment of SFIO in 211, Assignment the investigation into the affairs of company by SFIO in section 212, Appointment of inspector to investigate on matters relating to company and its membership for determining ownership of company in section 216, Actions may be taken in

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	pursuance of inspector's report in section 224
Regional director in section 206	Appoint inspector for inspection of books and papers of company in section 206
Tribunal under section 213, 221, 222	Pass an order for investigation into company's affairs in other cases under section 213, for freezing of assets of company on inquiry and investigation in section 221, for imposing restrictions upon securities. In section 222

2. Power to call for information, inspect books and conduct inquiries (Section 206 of the Companies Act, 2013)

Section 206 of the Companies Act, 2013 provides for the power to call for information, inspect books and conduct inquiries.

Concerned authorities	In the given circumstances	Have following Powers
Registrar under section 206 (1)	On a scrutiny of any document filed by a company or on any information received by him, the Registrar is of the opinion that any further information or explanation or any further documents relating to the company is necessary	may by a written notice require the company— (a) to furnish in writing such information or explanation; or (b) to produce such documents,
Registrar under section 206 (3)	(a) If no information or explanation is furnished, or (b) If on an examination of the documents furnished, he is of the opinion that the information or explanation furnished is inadequate; or (c) If he is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and the information or documents do not disclose a full and fair statement of the information required.	may by another written notice call on the company to produce for his inspection such further books of account, books, papers and explanations as he may required
Registrar under section 206(4)	(1) on the basis of information available with or furnished to him; or (2) on a representation made to	may call on the company to furnish in writing any information or explanation on matters specified in the

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	him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act; or (3) the grievances of investors are not being addressed,	order and carry out such inquiry
Central Government [Section 206 (6)]	if is satisfied that the circumstances so warrant [Section 206 (5)]	direct inspection of books and papers of a company by an inspector appointed by it for the purpose
Central Government [Section 206 (6)]	having regard to the circumstances	by general or special order, authorise any statutory authority to carry out the inspection of books of account of a company or class of companies [Section 206 (6)].

According to this section:

(i) Power of the Registrar to call for information, explanation or documents: According to section 206(1) of the Companies Act, 2013, where on a scrutiny of any document filed by a company or on any information received by him, the Registrar is of the opinion that any further information or explanation or any further documents relating to the company is necessary, he may by a written notice require the company—

(a) to furnish in writing such information or explanation; or

(b) to produce such documents,

within such reasonable time, as may be specified in the notice.

(ii) Duty of the company and its officers: On the receipt of a notice under sub-section (1) of section 206, it shall be the duty of the company and of its officers concerned to furnish such information or explanation to the best of their knowledge and power and to produce the documents to the Registrar within the time specified or extended by the Registrar [Section 206 (2)].

Duty of past officers of the company: According to the proviso to sub-section (2) of section 206, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called

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upon by the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

(iii) Additional written notice by the Registrar [Section 206 (3)]: The Registrar may by another written notice call on the company to produce for his inspection such further books of account, books, papers and explanations as he may require at such place and at such time as he may specify in the notice:

(a) If no information or explanation is furnished to the Registrar within the time specified under Section 206 (1); or

(b) If the Registrar on an examination of the documents furnished is of the opinion that the information or explanation furnished is inadequate; or

(c) If the Registrar is satisfied on a scrutiny of the documents furnished that an unsatisfactory state of affairs exists in the company and the information or documents do not disclose a full and fair statement of the information required.

Provided that, before any notice is served under this sub-section, the Registrar shall record his reasons in writing for issuing such notice.

(iv) Inquiry by the Registrar [Section 206 (4)]:

(a) The Registrar may call on the company to furnish in writing any information or explanation on matters specified in the order within such time as he may specify therein and carry out such inquiry as he deems fit after providing the company a reasonable opportunity of being heard, if the Registrar is satisfied:

(1) on the basis of information available with or furnished to him; or

(2) on a representation made to him by any person that the business of a company is being carried on for a fraudulent or unlawful purpose or not in compliance with the provisions of this Act; or

(3) the grievances of investors are not being addressed,

(b) Before calling the company to furnish in writing any information or explanations and carrying out inquiry, the Registrar has to inform the company of the allegations made against it by a written order.

(c) The Central Government may, if it is satisfied that the circumstances so warrant, direct the Registrar or an inspector appointed by it for the purpose to carry out the inquiry under this sub-section.

(d) It is further provided that where business of a company has been or is being carried on for a fraudulent or unlawful purpose, every officer of the company who is in default shall be punishable for fraud in the manner as provided in section 447.

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(v) Inspection by Central Government: Without prejudice to the foregoing provisions of this section, the Central Government may, if it is satisfied that the circumstances so warrant, direct inspection of books and papers of a company by an inspector appointed by it for the purpose [Section 206 (5)].

(vi) The Central Government may, having regard to the circumstances by general or special order, authorise any statutory authority to carry out the inspection of books of account of a company or class of companies [Section 206 (6)].

(vii) Failure to furnish information: If a company fails to furnish any information or explanation or produce any document required under this section, the company and every officer of the company, who is in default shall be punishable with a fine which may extend to 1 lakh rupees and in the case of a continuing failure, with an additional fine which may extend to 500 rupees for every day after the first during which the failure continues [Section 206 (7)].

3. Conduct of inspection and inquiry (Section 207 of the Companies Act, 2013)

Section 207 of the Companies Act, 2013 provides for the conduct of inspection and inquiry as follows:

(i) Duty of director, officer or employee [Sub-Section (1)]: Where a Registrar or inspector calls for the books of account and other books and papers under section 206, it shall be the duty of every director, officer or other employee of the company:

(a) to produce all such documents to the Registrar or inspector; and

(b) to furnish him with such statements, information or explanations in such form as the Registrar or inspector may require; and

(c) to render all assistance to the Registrar or inspector in connection with such inspection.

(ii) Powers of the Registrar or inspector [Sub-section (2) and (3)]:

(a) The Registrar of inspector making an inspection or inquiry under section 206 may, during the course of such inspection or inquiry, as the case may be,—

(1) make or cause to be made copies of books of account and other books and papers; or

(2) place or cause to be placed any marks of identification in such books in token of the inspection having been made.

(b) The Registrar or inspector making an inspection or inquiry shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—

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(1) the discovery and production of books of account and other documents, at such place and time as may be specified by such Registrar or inspector making the inspection or inquiry;

(2) summoning and enforcing the attendance of persons and examining them on oath; and

(3) inspection of any books, registers and other documents of the company at any place.

(iii) Penalty for Contravention [sub-section (4)]: If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to 1 year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees.

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

4. Report on inspection made (Section 208 of the Companies Act, 2013)

Section 208 of the Companies Act, 2013 provides for the submission of the report on inspection made. According to this section:

The Registrar or inspector shall, after the inspection of the books of account or an inquiry under section 206 and other books and papers of the company under section 207, submit a report in writing to the Central Government along with such documents, if any and such report may, if necessary, include a recommendation that further investigation into the affairs of the company is necessary giving his reasons in support.

5. Search and seizure (Section 209 of the Companies Act, 2013)

Section 209 of the Companies Act, 2013 provides for search and seizure. According to this section:

(i) Circumstances for seizure [Sub-section (1)]: Where, upon information in his possession or otherwise, the Registrar or inspector has reasonable ground to believe that the books and papers of

(a) a company, or relating to

(b) the key managerial personnel or

(c) any director or

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(d) auditor or

(e) company secretary in practice if the company has not appointed a company secretary, are likely to be destroyed, mutilated, altered, falsified or secreted,

(f) he may, after obtaining an order from the Special Court for the seizure of such books and papers,—

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

(2) seize such books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books or papers at its cost.

(ii) Period of seizure [Sub-section (2)]:

Original period of seizure: The Registrar or inspector shall return the books and papers seized under sub-section (1), as soon as may be, and in any case not later than 180th day after such seizure, to the company from whose custody or power such books or papers were seized.

*Further period of seizure***:** The books and papers may be called for by the Registrar or inspector for a further period of 180 days by an order in writing if they are needed again.

(iii) Taking of copies, placing identification marks [second proviso to sub-section (2)]: The Registrar or inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such other manner as he considers necessary.

(iv) Applicability of the provisions of the Code of Criminal Procedure, 1973 [Sub-section (3)]: The provisions of the Code of Criminal Procedure, 1973 relating to searches or seizures shall apply, *mutatis mutandis*, to every search and seizure made under this section.

Example: A group of creditors of Mac Trading Limited makes a complaint to the Registrar of Companies, Hyderabad alleging that the management of the company is indulging in destruction and falsification of the accounting records of the company. The complainants request the Registrar to take immediate steps to seize the records of the company so that the management may not be allowed to tamper with the records. The complaint was received at 10 A.M. on 1st July 2017 and the ROC entered the premises at 10.30 A.M. for the search. Examine the powers of the Registrar to seize the books of the company.

Answer: According to the provisions, Registrar may enter and search the place where such books or papers are kept and seize them only after obtaining an order from the Special Court.

Since in the given question, Registrar entered the premises for the search and seizure of books of the company without obtaining an order from the Special Court, he is not authorised to seize the books of the Mac Trading Limited.

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6. Investigation into affairs of company (Section 210 of the Companies Act, 2013)

Section 210 of the Companies Act, 2013 provides for Investigation into affairs of company. According to this section:

(i) Investigation in the opinion of Central Government: Where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company,—

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

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

(c) in public interest,

it may order an investigation into the affairs of the company. [Sub-section (1)]

(ii) Investigation on the order by a court or the Tribunal: Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company [Sub-section (2)].

(iii) Appointment of inspectors: For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct [Sub-section (3)].

According to the *Companies (Inspection, investigation and inquiry) Rules, 2014:*

(i) The Central Government may before appointing an inspector under sub-section (3) of Section 210, require the applicant to give a security not exceeding 25,000 rupees for payment of the costs and expenses of investigation as per the criteria given in the said rule.

(ii) Further, the above referred security shall be refunded to the applicant if the investigation results in prosecution.

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

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

Answer: The shareholders' application will not be accepted as under 210 of the Companies Act, 2013, Central Government may order an investigation into affairs of the company on the intimation of a special resolution passed by a company that the affairs of the company ought to be investigated and then may appoint the inspectors. Here, 101 out of total 500 shareholders of the company have made an application to the Central Government to appoint an inspector to carry out investigation but it is not sufficient as the company has not passed the special resolution.

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7. Establishment of Serious Fraud Investigation Office (Section 211 of the Companies Act, 2013)

Section 211 of the Companies Act, 2013 provides for the establishment of Serious Fraud Investigation Office as under:

(i) Setting up of Serious Fraud Investigation Office (SFIO) [Section 211 (1)]: The Central Government shall, by notification, establish an office to be called the Serious Fraud Investigation Office to investigate frauds relating to a company.

(ii) Continuation of earlier SFIO: Until the SFIO as mentioned above is established, the Serious Fraud Investigation Office set-up by the Central Government in terms of the Government of India Resolution No. 45011/16/2003-Adm-I, dated 2nd July, 2003 shall be deemed to be the Serious Fraud Investigation Office for the purpose of this section.

(iii) Composition of SFIO [Section 211 (2)]: The SFIO shall be:

(a) Headed by a Director, and

(b) Consist of such number of experts from the following fields to be appointed by the Central Government from amongst persons of ability, integrity and experience in,—



(iv) Appointment of Director: The Central Government shall, by notification, appoint a Director in the SFIO, who shall be an officer not below the rank of a Joint Secretary to the Government of India having knowledge and experience in dealing with matters relating to corporate affairs [Section 211 (3)].

(v) Appointment of Experts Officers & Employees: The Central Government may appoint such experts and other officers and employees in the SFIO as it considers necessary for the efficient discharge of its functions under this Act [Section 211 (4)].

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According to Rule 3 of the *Companies (Inspection, Investigation and Inquiry) Rules, 2014,* the Central Government may appoint persons having expertise in the fields of investigations, cyber forensics, financial accounting, management accounting, cost accounting and any other fields as may be necessary for the efficient discharge of Serious Fraud Investigation Office (SFIO) functions under the Act.

(vi) Terms and conditions of service: The terms and conditions of service of Director, experts, and other officers and employees of the SFIO shall be such as may be prescribed [Section 211 (5)].

The terms and conditions of service of the above mentioned officers have been laid down in the Rule 4 of the *Companies (Inspections, Investigations and Inquiry) Rules, 2014.*

8. Investigation into affairs of Company by Serious Fraud Investigation Office (Section 212 of the Companies Act, 2013)

Section 212 of the Companies Act, 2013 provides for Investigation into affairs of Company by the Serious Fraud Investigation Office (SFIO). According to this section:



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(i) According to section 212(1), without prejudice to the provisions of section 210, where the Central Government -

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

(b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;

(c) in the public interest; or

(d) on request from any Department of the Central Government or a State Government,

is of the opinion that it is necessary to investigate into the affairs of a company by the SFIO, the Central Government may, by order, assign the investigation into the affairs of the said company to the SFIO.

On receipt of such order, the Director, SFIO may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(ii) Where any case has been assigned by the Central Government to the SFIO for investigation under this Act, no other investigating agency of Central Government or any State Government shall proceed with investigation in such case in respect of any offence under this Act. In case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this Act to SFIO [Sub section (2)].

(iii) Where the investigation into the affairs of a company have been assigned by the Central Government to SIFO, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) and submit its report to the Central Government within such period as may be specified in the order [Sub section (3)]

(iv) The Director, SFIO shall cause the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217 [Sub section (4)]

(v) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation [Sub section (5)]

(vi) As per sub-section (6), offences covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

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(b) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

However, a person, who, is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

Provided further that the Special Court shall not take cognizance of any offence referred in point (vi) except upon a complaint in writing made by—

(a) the Director, SFIO; or

(b) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(vii) The limitation on granting of bail specified in sub section (6) above is in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force on granting of bail [Sub section (7)].

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

(ix) The Director, Additional Director or Assistant Director of SFIO shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the SFIO in a sealed envelope, in such manner as may be prescribed and the SFIO shall keep such order and material for such period as may be prescribed. [Sub section (9)]

(x) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction. The period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court. [Sub section (10)]

(xi) The SFIO shall submit an interim report to the Central Government, if the Central Government so directs [Sub section (11)].

(xii) The SFIO shall submit the investigation report to the Central Government on completion of the investigation [sub section (12)].

(xiii) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court [Sub section (13)].

(xiv) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the SFIO to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected

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with the affairs of the company [Sub section (14)].

(xv) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973 [Sub section (15)].

(xvi) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by SFIO under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed [Sub section (16)].

(xvii) In case SFIO has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the SFIO [Sub section (17) (a)].

(xviii) The SFIO shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law [Sub section (17) (b)].

9. Investigation into company's affairs in other cases (Section 213 of the Companies Act, 2013)

Section 213 deals with the Investigation into Company's Affairs in other cases. According to this section:

Cognizance of offence by Tribunal: The Tribunal may,—

(a) on an application made by—

(i) not less than one hundred members or members holding not less than one-tenth of the total voting power, in the case of a company having a share capital; or

(ii) not less than one-fifth of the persons on the company's register of members, in the case of a company having no share capital, and supported by such evidence as may be necessary for the purpose of showing that the applicants have good reasons for seeking an order for conducting an investigation into the affairs of the company; or

(b) **Order by tribunal:** On an application made to it by any other person or otherwise, if it is satisfied that there are circumstances suggesting that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other person or otherwise for a fraudulent or unlawful purpose, or in a manner oppressive to any of its members or that the company was formed for any fraudulent or unlawful purpose;

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(ii) persons concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud, misfeasance or other misconduct towards the company or towards any of its members; or

(iii) the members of the company have not been given all the information with respect to its affairs which they might reasonably expect, including information relating to the calculation of the commission payable to a managing or other director, or the manager, of the company,

order, after giving a reasonable opportunity of being heard to the parties concerned, that the affairs of the company ought to be investigated by an inspector or inspectors appointed by the Central Government and where such an order is passed, the Central Government shall appoint one or more competent persons as inspectors to investigate into the affairs of the company in respect of such matters and to report thereupon to it in such manner as the Central Government may direct:

(c) **Punishment in case of guilty:** If after investigation, it is proved that—

(i) the business of the company is being conducted with intent to defraud its creditors, members or any other persons or otherwise for a fraudulent or unlawful purpose, or that the company was formed for any fraudulent or unlawful purpose; or

(ii) any person concerned in the formation of the company or the management of its affairs have in connection therewith been guilty of fraud,

then, every officer of the company who is in default and the person or persons concerned in the formation of the company or the management of its affairs shall be punishable for fraud in the manner as provided in section 447.

10. Security for payment of costs and expenses of investigation (Section 214 of the Companies Act, 2013)

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

Where an investigation is ordered by the Central Government in pursuance of clause (b) of sub-section (1) of section 210, or in pursuance of an order made by the Tribunal under section 213, the Central Government may before appointing an inspector under sub-section (3) of section 210 or clause (b) of section 213, require the applicant to give such security not exceeding 25,000 rupees as may be prescribed, as it may think fit, for payment of the costs and expenses of the investigation. Such security shall be refunded to the applicant if the investigation results in prosecution.

11. Firm, body corporate or association not to be appointed as inspector (Section 215 of the Companies Act, 2013)

Section 215 of the Companies Act, 2013 provides that no firm, body corporate or other association shall be appointed as an inspector.

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12. Investigation of ownership of company (Section 216 of the Companies Act, 2013)

Section 216 of the Companies Act, 2013 provides for Investigation of ownership of company as under:

(i) As per sub section (1), where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons—

  (a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or

  (b) who are or have been able to control or to materially influence the policy of the company.

(ii) Without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1). [Sub-section (2)]

(iii) While appointing an inspector under sub-section (1), the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures [Sub-section (3)]

(iv) Subject to the terms of appointment of an inspector, his powers shall extend to the investigation of any circumstances suggesting the existence of any arrangement or understanding which, though not legally binding, is or was observed or is likely to be observed in practice and which is relevant for the purposes of his investigation [Sub-section (4)]

13. Procedure, powers, etc., of inspectors (Section 217 of the Companies Act, 2013)

Section 217 of the Companies Act, 2013 provides for procedure, powers, etc., of inspectors as under:

(i) As per sub- section (1), it shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person —

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(a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(ii) The inspector may require any body corporate, other than a body corporate referred in point (i) to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation [Sub section (2)].

(iii) The inspector shall not keep in his custody any books and papers produced under point (i) or point (ii) for more than 180 days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced [Sub section (3)].

However, the books and papers may be called for by the inspector if they are needed again for a further period of 180 days by an order in writing.

(iv) As per sub-section (4), an inspector may examine on oath—

(a) any of the persons referred to in point (i); and

(b) any other person with the prior approval of the Central Government,

in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally.

However, in case of an investigation under section 212, the prior approval of Director, SFIO shall be sufficient under point (b) above (instead of the Central Government).

(v) As per sub- section (5), notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government making an investigation under this chapter, shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters, namely:—

(a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;

(b) summoning and enforcing the attendance of persons and examining them on oath; and

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(c) inspection of any books, registers and other documents of the company at any place.

(vi) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees [Sub section (6) (i)].

If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company [Sub section (6) (ii)].

(vii) The notes of any examination under sub section (4) above, shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him [Sub section (7)].

(viii) As per sub-section (8), if any person fails without reasonable cause or refuses—

(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under point (i) or point (ii) to produce;

(b) to furnish any information which is his duty under point (ii) to furnish;

(c) to appear before the inspector personally when required to do so under point (iv) or to answer any question which is put to him by the inspector in pursuance of that point; or

(d) to sign the notes of any examination referred to in sub section (7) above,

he shall be punishable with imprisonment for a term which may extend to 6 months and with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, and also with a further fine which may extend to 2,000 rupees for every day after the first during which the failure or refusal continues.

(ix) The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require [Sub section (9)].

(x) The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State [Sub section (10)].

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(xi) Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 if, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request [Sub section (11)].

Provided that, the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

Provided further that every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

According to Rule 6 of the *Companies (Inspection, investigation and inquiry) Rules, 2014*, the 'letter of request', in terms of section 217, shall be transmitted in such manner as specified by the Ministry of Corporate Affairs.

(xii) Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within 30 days or such extended time as the court may allow for further action [Sub section (12)].

Provided that the evidence taken or collected as above or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

14. Protection of employees during investigation (Section 218 of the Companies Act, 2013)

Section 218 of the Act deals with the protection of Employees during Investigation.

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(1) **Approval of tribunal to take action against the employee:** Notwithstanding anything contained in any other law for the time being in force, if—

(a) **during the course of any investigation of the affairs** and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or

(b) **during the pendency of any proceeding** against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

(i) to discharge or suspend any employee; or

(ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or

(iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

(2) **Action against employee:** If the company, other body corporate or person concerned does not receive within thirty days of making of application under sub-section (1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

(3) **Appeal:** If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal in such manner and on payment of such fees as may be prescribed.

(4) **Final and Binding order:** The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

(5) **Over-riding effect:** For the removal of doubts, it is hereby declared that the provisions of this section shall have effect without prejudice to the provisions of any other law for the time being in force.

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Tribunal's Objection On the action Proposed by Company/ Body Corporate/ Person	Objection not Received	Company can terminate / punish the employee	
	Objection Received	Company / Employee can apply to the Appeallte Tribunal	The decision of Appellate Tribunal shall be Final.

15. Powers of inspector

1. To conduct investigation into affairs of related companies, etc. (Section 219 of the Companies Act, 2013)

Section 219 of the Companies Act, 2013 provides for power of inspector to conduct investigation into affairs of related companies, etc. as under:

(i) Investigation into affairs of related companies: If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, can also investigate the affairs of—

(a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;

(b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;

(c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or

(d) any person who is or has at any relevant time been the company's managing director or manager or employee.

(ii) Report of inspector: The inspector shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

2. Seizure of documents by inspector (Section 220 of the Companies Act, 2013)

Section 220 of the Companies Act, 2013 provides for seizure of documents by inspector as under:

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(i) Seizure of books and papers [Sub section (1)]: Where in the course of an investigation under this Chapter, the inspector has reasonable grounds to believe that the books and papers of, or relating to, any company or other body corporate or managing director or manager of such company are likely to be destroyed, mutilated, altered, falsified or secreted, the inspector may —

(a) enter, with such assistance as may be required, the place or places where such books and papers are kept in such manner as may be required; and

(b) seize books and papers as he considers necessary after allowing the company to take copies of, or extracts from, such books and papers at its cost for the purposes of his investigation.

(ii) Time period for keeping books and papers [Sub section (2)]: The inspector shall keep in his custody the books and papers seized under this section for such a period not later than the conclusion of the investigation as he considers necessary and thereafter shall return the same to the company or the other body corporate, or, as the case may be, to the managing director or the manager or any other person from whose custody or power they were seized.

(iii) Extracts of books and papers: The inspector may, before returning such books and papers as aforesaid, take copies of, or extracts from them or place identification marks on them or any part thereof or deal with the same in such manner as he considers necessary.

(iv) Application of provisions of Cr. PC.: The provisions of the Code of Criminal Procedure, 1973, relating to searches or seizures shall apply *mutatis mutandis* to every search or seizure made under this section.

3. Freezing of Assets of Company on Inquiry and Investigation (Section 221 of the Companies Act, 2013)

Section 221 of the Act deals with the Freezing of Assets of Company on Inquiry and Investigation. According to this section:

(i) **Order of the tribunal:** Where it appears to the Tribunal, on a reference made to it by the Central Government or in connection with any inquiry or investigation into the affairs of a company under this Chapter or on any complaint made by such number of members as specified under sub-section (1) of section 244 or a creditor having one lakh amount outstanding against the company or any other person having a reasonable ground to believe that the removal, transfer or disposal of funds, assets, properties of the company is likely to take place in a manner that is prejudicial to the interests of the company or its shareholders or creditors or in public interest, it may by order direct that such transfer, removal or disposal shall not take place during such period not exceeding three years as

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may be specified in the order or may take place subject to such conditions and restrictions as the Tribunal may deem fit.

(ii) **Punishment in case of contravention of order of tribunal:** In case of any removal, transfer or disposal of funds, assets, or properties of the company in contravention of the order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees, or with both.

4. Imposition of Restrictions upon Securities (Section 222 of the Companies Act, 2013)

Section 222 of the Act deals with the Imposition of Restrictions upon Securities. According to this section:

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

(ii) **Punishment in case of contravention to an order:** Where securities in any company are issued or transferred or acted upon in contravention of an order of the Tribunal under sub-section (1), the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees, or with both.

16. Inspector's report (Section 223 of the Companies Act, 2013)

Section 223 of the Companies Act, 2013 lays down the following provisions in respect of the Inspector's report on investigation conducted under this chapter:

(i) Submission of interim report and final report [Sub section (1)]: An inspector appointed under this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) may, and if so directed by the Central Government shall, submit interim reports to that Government, and on the conclusion of the investigation, shall submit a final report to the Central Government.

(ii) Report to be writing or printed [Sub section (2)]: Every report made under sub section (1) above, shall be in writing or printed as the Central Government may direct.

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(iii) Obtaining copy or report [Sub section (3)]: A copy of the above report may be obtained by making an application in this regard to the Central Government.

(iv) Authentication of report [Sub section (4)]: The report of any inspector appointed under this Chapter shall be authenticated either—

(a) by the seal, if any, of the company whose affairs have been investigated; or

(b) by a certificate of a public officer having the custody of the report, as provided under section 76 of the Indian Evidence Act, 1872,

and such report shall be admissible in any legal proceeding as evidence in relation to any matter contained in the report.

(v) Exceptions [Sub section (5)]: Nothing in this section shall apply to the report referred to in section 212 of the Companies Act, 2013.

17. Actions to be taken in pursuance of inspector's report (Section 224 of the Companies Act, 2013)

Section 224 of the Companies Act, 2013 provides the following provisions in respect of the actions to be taken in pursuance of inspector's report:

(i) If, from an inspector's report, made under section 223, it appears to the Central Government that any person has, in relation to the company or in relation to any other body corporate or other person whose affairs have been investigated under this Chapter been guilty of any offence for which he is criminally liable, the Central Government may prosecute such person for the offence and it shall be the duty of all officers and other employees of the company or body corporate to give the Central Government the necessary assistance in connection with the prosecution [Sub section (1)].

(ii) As per sub-section (2), if any company or other body corporate is liable to be wound up under this Act or under the Insolvency and Bankruptcy Code, 2016 and it appears to the Central Government from any such report made under section 223 that it is expedient so to do by reason of any such circumstances as are referred to in section 213, the Central Government may, unless the company or body corporate is already being wound up by the Tribunal, cause to be presented to the Tribunal by any person authorised by the Central Government in this behalf—

(a) a petition for the winding up of the company or body corporate on the ground that it is just and equitable that it should be wound up;

(b) an application under section 241; or

(c) both.

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(iii) As per sub-section (3), if from any such report as aforesaid, it appears to the Central Government that proceedings ought, in the public interest, to be brought by the company or any body corporate whose affairs have been investigated under this Chapter—

(a) for the recovery of damages in respect of any fraud, misfeasance or other misconduct in connection with the promotion or formation, or the management of the affairs, of such company or body corporate; or

(b) for the recovery of any property of such company or body corporate which has been misapplied or wrongfully retained,

the Central Government may itself bring proceedings for winding up in the name of such company or body corporate.

(iv) The Central Government, shall be indemnified by such company or body corporate against any costs or expenses incurred by it in, or in connection with, any proceedings brought by virtue of sub-section (3) [Sub section (4)].

(v) Where the report made by an inspector states that fraud has taken place in a company and due to such fraud any director, key managerial personnel, other officer of the company or any other person or entity, has taken undue advantage or benefit, whether in the form of any asset, property or cash or in any other manner, the Central Government may file an application before the Tribunal for appropriate orders with regard to disgorgement of such asset, property, or cash, as the case may be, and also for holding such director, key managerial personnel, officer or other person liable personally without any limitation of liability.

18. Expenses of investigation (Section 225 of the Companies Act, 2013)

Section 225 of the Companies Act, 2013 lays down the following provisions in respect of expenses of investigation:

(i) As per sub-section (1), the expenses of, and incidental to, an investigation by an inspector appointed by the Central Government under this Chapter (Chapter XIV-Inspection, Inquiry and Investigation) other than expenses of inspection under section 214 (Security for payment of costs and expenses of investigation) shall be defrayed in the first instance by the Central Government, but shall be reimbursed by the following persons to the extent mentioned below, namely:—

(a) any person who is convicted on a prosecution instituted, or who is ordered to pay damages or restore any property in proceedings brought, under section 224, to the extent that he may in the same proceedings be ordered to pay the said expenses as may be specified by the court convicting such person, or ordering him to pay such damages or restore such property, as the case may be;

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(b) any company or body corporate in whose name proceedings are brought as aforesaid, to the extent of the amount or value of any sums or property recovered by it as a result of such proceedings;

(c) unless, as a result of the investigation, a prosecution is instituted under section 224,—

(1) any company, body corporate, managing director or manager dealt with by the report of the inspector; and

(2) the applicants for the investigation, where the inspector was appointed under section 213,

to such extent as the Central Government may direct.

(ii) Any amount for which a company or body corporate is liable under clause (b) above shall be a first charge on the sums or property mentioned in that clause [Sub section (2)].

19. Voluntary Winding up of Company, etc., Not to Stop Investigation Proceedings (Section 226 of the Companies Act, 2013)

Section 226 of the Companies Act, 2013 provides the following provisions:

An investigation under this Chapter may be initiated notwithstanding, and no such investigation shall be stopped or suspended by reason only of, the fact that—

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

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

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

Where a winding up order is passed by the Tribunal in a proceeding referred to in clause (c), the inspector shall inform the Tribunal about the pendency of the investigation proceedings before him and the Tribunal shall pass such order as it may deem fit.

Nothing in the winding up order shall absolve any director or other employee of the company from participating in the proceedings before the inspector or any liability as a result of the finding by the inspector.

20. Legal Advisers and bankers not to disclose certain information (Section 227 of the Companies Act, 2013)

Section 227 of the Companies Act, 2013 provides for non-disclosure of certain information by certain persons.

Nothing in this Chapter shall require the disclosure to the Tribunal or to the Central Government or to the Registrar or to an inspector appointed by the Central Government—

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(a) **by a legal adviser**, of any privileged communication made to him in that capacity, except as respects the name and address of his client; or

(b) **by the bankers** of any company, body corporate, or other person, of any information as to the affairs of any of their customers, other than such company, body corporate, or person.

21. Investigation etc. of foreign companies (Section 228 of the Companies Act, 2013)

Section 228 of the Companies Act, 2013 provides for Investigation etc. of foreign companies. According to this section:

The provisions of this Chapter (Chapter XIV- Inspection, Inquiry and Investigation) shall apply *mutatis mutandis* to inspection, inquiry or investigation in relation to foreign companies.

22. Penalty for furnishing false statement, mutilation, destruction of documents (Section 229 of the Companies Act, 2013)

Section 229 of the Companies Act, 2013 lays down the following penalty for furnishing false statement, mutilation, destruction of documents:

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,—

(a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;

(b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or

(c) provides an explanation which is false or which he knows to be false,

(d) he shall be punishable for fraud in the manner as provided in section 447.

RELEVANT AMENDMENTS

1. Enforcement of Section 212(8), (9), & (10) vide Notification S.O. 2751(E) dated 24th of August, 2017

The Central Government notified the provisions of sub-sections (8), (9) and sub-section (10) of section 212 of the Companies Act, 2013 with effect from 24th day of August, 2017.

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2. Enforcement of the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017 Vide Notification G.S.R. 1062(E) dated 24th Of August 2017

In exercise of the powers conferred under sub-section (1) of section 469 read with section 212 of the Companies Act, 2013, Central Government enforced the Companies (Arrests in connection with Investigation by Serious Fraud Investigation Office) Rules, 2017.

According to the Rule where any person has been guilty of any offence punishable under section 212 of the Act, he may be arrested as per the respective rules.

For details see http://www.mca.gov.in/Ministry/pdf/SFIORule_25082017.pdf

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 216.	In section 216 of the principal Act, in sub-section (*1*),— (*i*) in clause (*b*), for the word "company", the words "company; or" shall be substituted; (*ii*) after clause (*b*), the following clause shall be inserted, namely:— "(c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company.".	Not notified till 30th April, 2018
Amendment of section 223.	In section 223 of the principal Act, in sub-section (*3*), after the words "may be obtained", the words "by members, creditors or any other person whose interest is likely to be affected" shall be inserted.	Notified till 30th April, 2018.

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7

Compromises, Arrangements and Amalgamations

1. Introduction

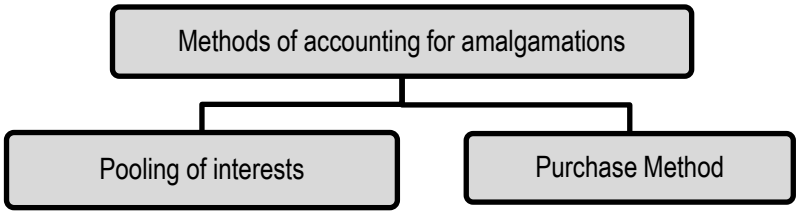
Mergers and acquisitions have always been a topic of corporate interest in the modern times. The complexity of the laws governing these modes of corporate restructuring makes them even more intriguing and mystifying.

Amalgamation

- Amalgamation means an amalgamation pursuant to the provisions of the Companies Act, 2013 or any other statute which may be applicable to companies and includes 'merger'.
- Transferor company means the company which is amalgamated into another company.
- Transferee company means the company into which a transferor company is amalgamated.

Types of Amalgamations

Amalgamations fall into two broad categories. In the first category are those amalgamations where there is a genuine pooling not merely of the assets and liabilities of the amalgamating companies but also of the shareholders' interests and of the businesses of these companies. These are known as Amalgamation in nature of merger. In the second category are those amalgamations which are in effect a mode by which one company acquires another company and, as a consequence, the shareholders of the company which is acquired normally do not continue to have a proportionate share in the equity of the combined company, or the business of the company which is acquired is not intended to be continued. Such amalgamations are amalgamations in the nature of 'purchase'.



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Amalgamation in the Nature of Merger

Amalgamation in the nature of merger is an amalgamation which satisfies all the following conditions.

(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

(ii) Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

(iii) The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.

(iv) The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.

(v) No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

Amalgamation in the Nature of Purchase

Amalgamation in the nature of purchase is an amalgamation which does not satisfy any one or more of the conditions specified above.

Methods of Accounting for Amalgamations

There are two main methods of accounting for amalgamations.

- the pooling of interests method and
- the purchase method.

Chapter XV (Section 230 to 240) of Companies Act, 2013 contains provisions on 'Compromises, Arrangements and Amalgamations', that covers compromise or arrangements, mergers and amalgamations, Corporate Debt Restructuring, demergers, fast track mergers for small companies/ holding subsidiary companies, cross border mergers, takeovers, amalgamation of companies in public interest etc. This chapter is a complete code in itself which contains provisions regarding all forms of compromises with creditors and arrangements with members. The procedural aspects involved such as format of application to be made to National Company Law Tribunal, form of notice and the procedural aspects involved with respect to the substantive law are covered under the Rules made under Chapter XV of the Act.

Important aspects of this chapter are as follows:

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(i) This chapter provides the provisions which specifies the detailed disclosures to be made during the process of corporate restructuring. This requirement of extensive disclosures is to ensure transparency and allows stakeholders to take decisions.

(ii) Introduction of voting by way of postal ballot, will ensure larger public participation.

(iii) Introduction of concept of dispensation by providing a threshold for the dispensation of creditors meetings.

(iv) This chapter also requires serving of notices to the various statutory authorities with regard to the scheme, arrangement or restructuring, so that participation of various regulators may assist the tribunal to take a informed decision.

(v) Provision related to takeover of listed companies through the scheme of compromise or arrangement, emphasis on the pricing guidelines which the SEBI would prescribe ensuring uniformity in law.

(vi) This chapter also provides of a provision which prohibits the maintenance of treasury stock. The practice of indirectly holding investments through intermediaries is now prohibited and cannot be structured by companies.

(vii) Exit options to shareholders through pre-determined formula or valuation can be given on merger of listed company with an unlisted company.

(viii) Statement certifying implementation of the scheme shall be given by Chartered Accountant or Company Secretary.

(ix) The provision in this chapter are in compliance with the SEBI regulations and guidelines issued by RBI.

(x) This chapter provides for Fast Track amalgamations between-

(i) 2/more small companies, or

(ii) Holding company and its wholly owned subsidiaries.

(xi) Enables cross border amalgamations between Indian Companies and Foreign companies.

(xii) Lays the mechanism under which the transferee company under a scheme or contract can acquire shares of dissenting shareholders.

(xiii) Provides of exit method for minority shareholders, and promoters to have 100% promoter entity. So that balance between the interests of the promoters and minority shareholders may be maintained.

(xiv) This chapter also provides the process of amalgamation of companies for public interest.

(xv) Books and Papers of the amalgamating company/ the company in which shares have been acquired by another company shall not be disposed of on prior permission of the Central Government.

(xvi) Liability of the officers of the transferor company on any offence committed under this Act shall be retrospective even after the merger, amalgamation or acquisition.

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2. Power to Compromise or Make Arrangements with Creditors and Members [Section 230]

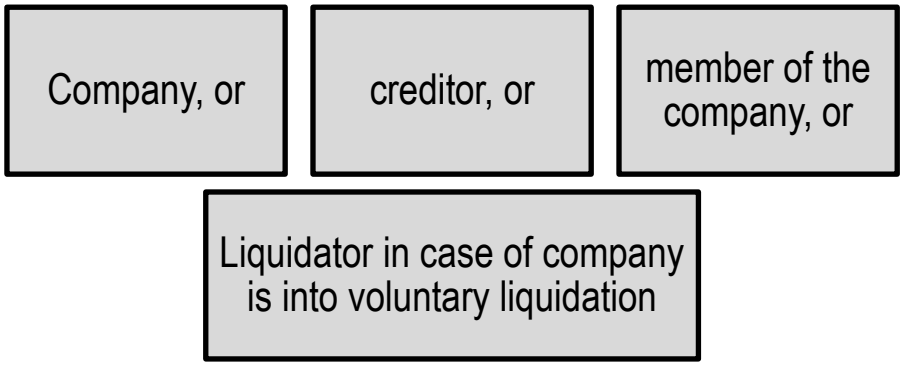
Section 230 of the Companies Act, 2013 contains the powers of the Tribunal on the filing of application for the compromise or arrangement. According to this section:

(1) **Power of Tribunal on an application filed for a compromise /arrangement [Sub-section 1)]:** Where a compromise or arrangement is proposed between—

(a) a company and its creditors or any class of them; or

(b) a company and its members or any class of them,

the Tribunal may, on the application of the-



order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation—For the purposes of this sub-section, arrangement includes a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods.

(2) **Disclosures by applicant [Sub-section (2)]:** The company or any other person, by whom an application is made, shall disclose to the Tribunal by affidavit—

(a) **all material facts** relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) **reduction of share capital** of the company, if any, included in the compromise or arrangement;

(c) **any scheme of corporate debt restructuring** consented to by not less than seventy-five per cent. of the secured creditors in value, including—

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(i) a creditor's responsibility statement in the prescribed form;

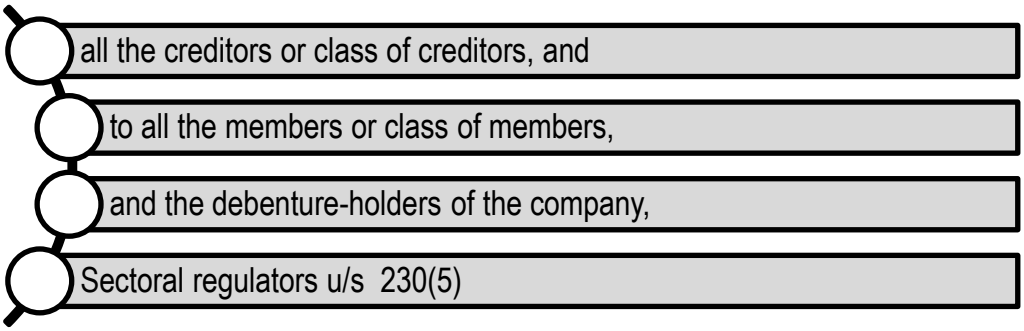
(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3) **Notice of meeting conducted on order of Tribunal [Sub-section (3)]:** Where a meeting is proposed to be called in pursuance of an order of the Tribunal, a notice of such meeting shall be sent to-



individually at the address registered with the company.

Annexure with Notice: Notice of meeting shall be accompanied by a statement disclosing the

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Annexure with Notice

details of the compromise or arrangement,
a copy of the valuation report, if any, and
explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and
the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
such other matters as may be as prescribed under *Rule 6 of the Companies (Compromises, arrangements and amalgamations) Rules, 2016*.

Advertisement of notice: Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as prescribed under Rule 7 of the *Companies (Compromises, arrangements and amalgamations) Rules, 2016.*

Time period for the receipt of the copies of the compromise or arrangement: Where the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

(4) **Notices to sectoral regulators to make representation, if likely to be affected by the compromise or arrangement [Sub-section (5)]:** A notice along with all the documents in such form as may be prescribed shall also be sent to-

- the Central Government,
- the income-tax authorities,
- the Reserve Bank of India,
- the Securities and Exchange Board,
- the Registrar,
- the respective stock exchanges,
- the Official Liquidator,
- the Competition Commission of India established under the Competition Act, 2002, if necessary,
- and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and

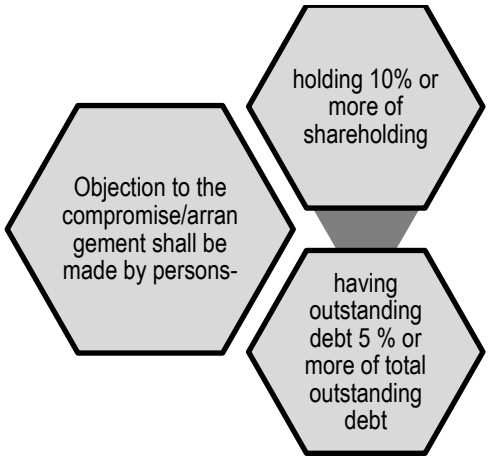
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shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

(5) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement. [Sub-section (9)]

(6) Vote to the adoption of the compromise or arrangement [Sub-section (4)]: A notice shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice:

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than ten per cent of the shareholding or having outstanding debt amounting to not less than five per cent of the total outstanding debt as per the latest audited financial statement.



(7) **Binding order of Tribunal [Sub-section (6)]:** Where, at a meeting held, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound up, on the liquidator, "appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be," and the contributories of the company.

(8) **Particulars to be stated in the order [Sub-section (7)]:** An order made by the Tribunal, shall provide for all or any of the following matters, namely:—

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(a) **where the compromise or arrangement provides for conversion of preference shares into equity shares**, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;

(b) the **protection of any class** of creditors;

(c) if the compromise or arrangement results in the **variation of the shareholders' rights**, it shall be given effect to under the provisions of section 48;

(d) if **the compromise or arrangement is agreed to by the creditors** under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction (BIFR) established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;

(e) **such other matters** including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(9) **Filing of order of tribunal with registrar [Sub-section (8)]:** The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.

(10) **Exemption in relation to buy-back of securities [sub-section (10)]:** No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.

[1]**[**(11) **Inclusion of takeover offer [Sub-section (11)]:** Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:

Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

(12) **Application to tribunal by aggrieved party [Sub-section (12)]:** An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit**.]**

[1]Sub-sections (11) and (12) are yet to be notified.

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Explanation—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

Since reduction of share capital requires an application to Tribunal by company after passing Special Resolution and on confirmation by Tribunal, reduction of share capital gets effected. However, in the case of compromise under section 230 if that results into reduction of capital, compliance of section 66 is not required to be made separately in such cases.

3. Power of Tribunal to enforce compromise or arrangement [Section 231]

(1) **Power of tribunal to enforce the order:** Where the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it—

(a) shall have power **to supervise the implementation** of the compromise or arrangement; and

(b) may, at the time of making such order or at any time thereafter, **give such directions** in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

(2) **Winding up order by tribunal:** If the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding up the company and such an order shall be deemed to be an order made under section 273.

(3) **Retrospective effect of order:** The provisions of this section shall, so far as may be, also apply to a company in respect of which an order has been made before the commencement of this Act sanctioning a compromise or an arrangement.

4. Merger and Amalgamation of Companies [Section 232]

(1) **Filing of an application for purpose of reconstruction or companies involving merger/ amalgamation or transfer of undertaking, property etc.:** Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

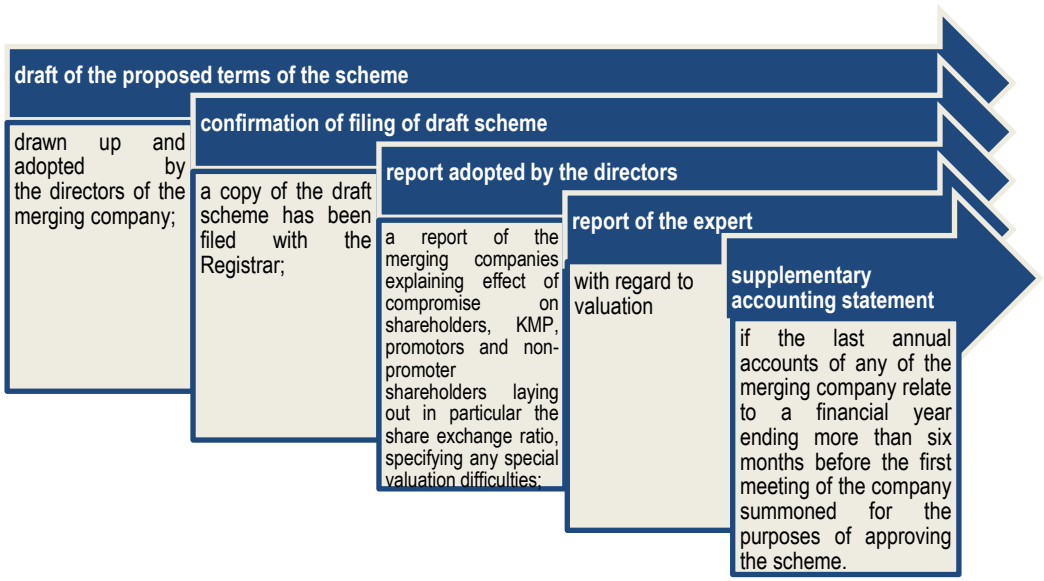
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(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies,

the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply *mutatis mutandis*.

(2) **Circulation of information for the meeting by the merging companies / the companies in respect of which a division is proposed :** Where an order has been made by the Tribunal as above, merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—



(a) the **draft of the proposed terms of the scheme** drawn up and adopted by the directors of the merging company;

(b) **confirmation that a copy of the draft scheme has been filed** with the Registrar;

(c) a **report adopted by the directors of the merging companies** explaining effect of compromise on each class of shareholders, key managerial personnel, promotors

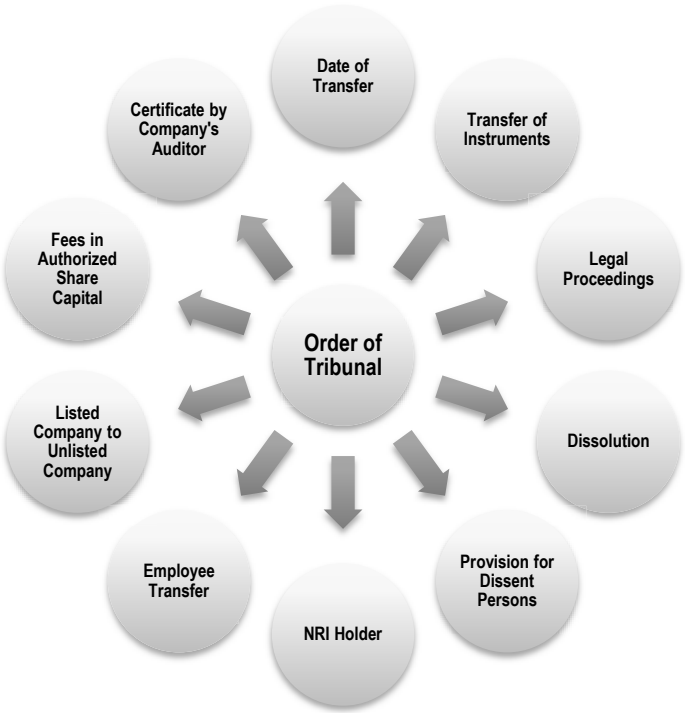
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and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

(d) **the report of the expert** with regard to valuation, if any;

(e) a **supplementary accounting statement** if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

(3) **Order of tribunal on the agreement of compromise or arrangement:** The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—



(a) **the transfer to the transferee company** of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

(b) **the allotment or appropriation by the transferee company** of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

Provided that a transferee company shall not, as a result of the compromise or

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arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

(c) **the continuation by or against the transferee company of any legal proceedings** pending by or against any transferor company on the date of transfer;

(d) **dissolution, without winding-up**, of any transferor company;

(e) **the provision to be made for any persons who**, within such time and in such manner as the Tribunal directs, **dissent from the compromise or arrangement**;

(f) **where share capital is held by any non-resident shareholder** under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

(g) **the transfer of the employees of the transferor company** to the transferee company;

(h) **where the transferor company is a listed company and the transferee company is an unlisted company**,—

(A) the transferee company shall remain an unlisted company until it becomes a listed company;

(B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

(i) **where the transferor company is dissolved**, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) such **incidental, consequential and supplemental matters** as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless **a certificate by the company's auditor has been filed with the Tribunal** to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

(4) **Effect of an order of tribunal:** Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to

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the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

(5) **Filing of certified copy of order with registrar:** Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

(6) **Effective date specified in scheme:** The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

(7) **Filing of duly certified statement of compliance of scheme with registrar:** Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

(8) **In case of contravention:** If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Explanation— For the purposes of this section,—

(i) **in a scheme involving a merger**, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company, it is a merger by formation of a new company;

(ii) **references to merging companies** are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;

(iii) **a scheme involves a division**, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and

(iv) **property includes** assets, rights and interests of every description and liabilities include debts and obligations of every description.

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5. Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority [Section 235]

(1) **Basic requirements as to acquisition of shares:**

- The scheme or contract involving the transfer of shares or any class of shares in a company (the transferor company) to another company (the transferee company) has been approved by the holders of not less than 9/10th in value of the shares whose transfer is involved.
- The approval from 9/10th shareholders in value shall be received within four months after making of an offer in that behalf by the transferee company.
- The shares already held at the date of the offer by Transferee Company, or by a nominee of the transferee company or its subsidiary companies shall not be counted for this purpose.
- The transferee company shall express his desire to acquire the remaining shares of dissenting shareholders within two months after the expiry of the said four months and shall give notice in the prescribed manner to any dissenting shareholder that it desires to acquire his shares

(2) Order of Tribunal to acquire shares of dissenting shareholders: Where a notice under sub-section (1) is given, the transferee company shall, unless on an application made by the dissenting shareholder to the Tribunal, within one month from the date on which the notice was given and the Tribunal thinks fit to order otherwise, be entitled to 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.

(3) **Application by dissenting shareholders**:

(i) Where a notice has been given by the transferee company **on an application made by the dissenting shareholder** and the Tribunal has not, made an order to the contrary i.e. order made in favour of the company- the transferee company shall, on the expiry of one month from the date on which the notice has been given, or,

(ii) if an application to the Tribunal by the dissenting shareholder is then pending, - Nothing is required to be done.

(iii) after that **application has been disposed of**-

shall send a copy of the notice to the transferor company together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferor company and on its own behalf by the transferee company, and pay or transfer to the transferor company- the amount or other

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consideration representing the price payable by the transferee company for the shares which that company is entitled to acquire,.

(iv) The **transferor company shall—**

(a) thereupon register the transferee company as the holder of those shares; and

(b) within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee company.

(4) **Separate Bank account for disbursement to entitled shareholders:** Any sum received by the transferor company under this section shall be paid into a separate bank account, and any such sum and any other consideration so received shall be held by that company in trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received and shall be disbursed to the entitled shareholders within sixty days.

(5) **Scheme/contract made before the commencement of Act:** In relation to an offer made by a transferee company to shareholders of a transferor company before the commencement of this Act, this section shall have effect with the following modifications, namely:—

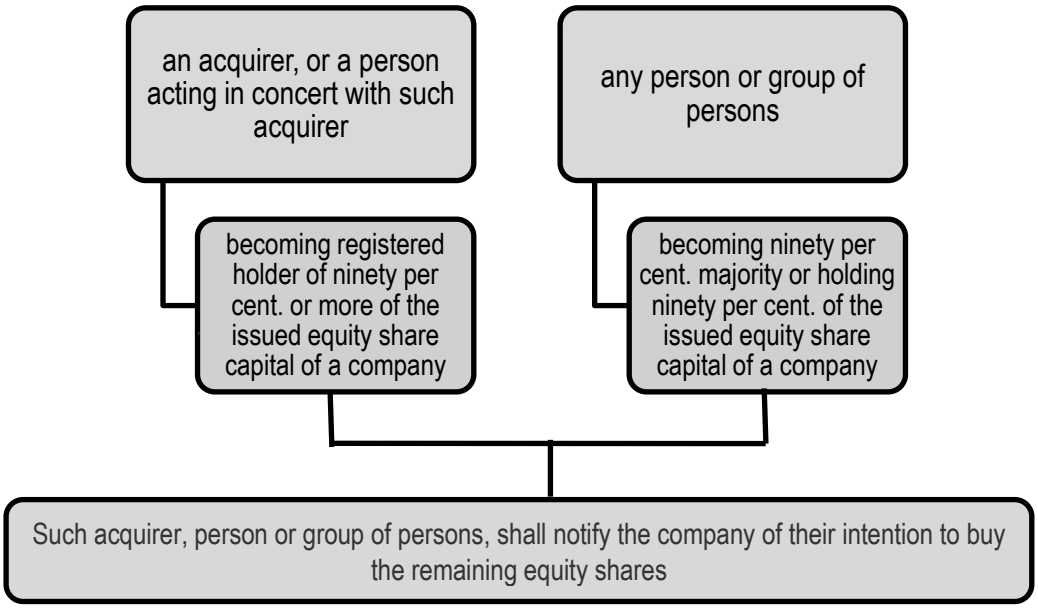
(a) in sub-section (1), for the words "the shares whose transfer is involved other than shares already held at the date of the offer by, or by a nominee of, the transferee company or its subsidiaries,", the words "the shares affected" shall be substituted; and

(b) in sub-section (3), the words "together with an instrument of transfer, to be executed on behalf of the shareholder by any person appointed by the transferee company and on its own behalf by the transferor company" shall be omitted.

Explanation—For the purposes of this section, **"dissenting shareholder**" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer his shares to the transferee company in accordance with the scheme or contract.

6. Purchase of Minority Shareholding [Section 236]

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(1) **Notify to company for purchase of minority shareholding:**

- In the event of an acquirer, or a person acting in concert with such acquirer - becoming registered holder of ninety per cent. or more of the issued equity share capital of a company, or
- in the event of any person or group of persons- becoming ninety per cent. majority or holding ninety per cent. of the issued equity share capital of a company,

by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.

(2) **Offer of equity shares to minority shareholders by acquirer, person or group of persons:** The acquirer, person or group of persons shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with Rule 27.

(3) **Offer to majority shareholder to purchase the minority equity shareholding:** The minority shareholders of the company may offer to the majority shareholders to purchase the minority equity shareholding of the company at the price determined in accordance with Rule 27.

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(4) **Deposit of amount in separate bank account:** The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them under sub-section (2) or sub-section (3), as the case may be, in a separate bank account to be operated by the transferor company for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days:

Provided that such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.

(5) **Role of Transferor Company to act as a transfer agent in the event of purchase:** In the event of a purchase under this section, the transferor company shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.

(6) **Transferor company to issue shares:** In the absence of a physical delivery of shares by the shareholders within the time specified by the company,

- the share certificates shall be deemed to be cancelled, and
- the transferor company shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law, and
- make payment of the price out of deposit made under sub-section (4) by the majority in advance to the minority by despatch of such payment.

(7) **Right of shareholders to make an offer for sale of minority equity shareholding:** In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for-

- any shareholder or shareholders who have died or ceased to exist, or
- whose heirs, successors, administrators or assignees have not been brought on record by transmission,

the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.

(8) **Sharing of additional compensation:** Where the shares of minority shareholders have been acquired in pursuance of this section, and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement,-

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the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.

Explanation—For the purposes of this section, the expressions "acquirer" and "person acting in concert" shall have the meanings respectively assigned to them in clause (b) and clause (e) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.

Example: The issued equity share capital of ABC Limited is INR 50 Crores and 90% of such issued capital has been acquired by the XYZ Limited as a part of Amalgamation. In remaining minority shareholding of INR 5 crores, INR 4 crores has been held by Person "A". Hence, if he negotiate with the company with price higher then the decided under the scheme. The extra amount / compensation received by person "A" shall be allocated to all minority shareholders on pro rata basis.

(9) **Determination of price for purchase of minority shareholders:** Rule 27 prescribes that the Registered valuer shall determine the price to be paid by the acquirer, person or group of persons referred to in sub-section (1) of section 236 of the Act for purchase of equity shares of the minority shareholders of the company in accordance with the prescribed rules.

(10) **On failure of acquisition of shares:** When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—

(a) the shares of the company of the residual minority equity shareholder had been delisted; and

(b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

7. Power of Central Government to Provide for Amalgamation of Companies in Public Interest [Section 237]

(1) Central Government may by order provide for amalgamation in the public interest: Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

(2) Continuation by or against the transferee company of any legal proceedings: The order may also provide for the continuation by or against the transferee company of any

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legal proceedings pending by or against any transferor company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.

(3) Same Interest Rights or Compensation: Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.

(4) Appeal by aggrieved person on assessment of compensation: Any person aggrieved by any assessment of compensation made by the prescribed authority under sub-section (3) may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.

(5) Requirements for passing of an order: No order shall be made under this section unless—

(a) a copy of the proposed order has been sent in draft to each of the companies concerned;

(b) the time for preferring an appeal under sub-section (4) has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and

(c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of shareholders therein, or from any creditors or any class of creditors thereof.

(6) Copies to be presented to parliament: The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

8. Registration of offer of Schemes involving transfer of shares [Section 238]

(1) Registration of circular/ offer involving transfer of shares: In relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235,—

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(a) **every circular containing such offer and recommendation** to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as prescribed in Rule 28;

(b) **every such offer** shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and

(c) **every such circular shall be presented to the Registrar** for registration and no such circular shall be issued until it is so registered:

Provided that the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application.

(2) Appeal against the order of the registrar: An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

(3) In care of failure of registration: The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section (1), shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees.

9. Preservation of Books and Papers of Amalgamated Companies [Section 239]

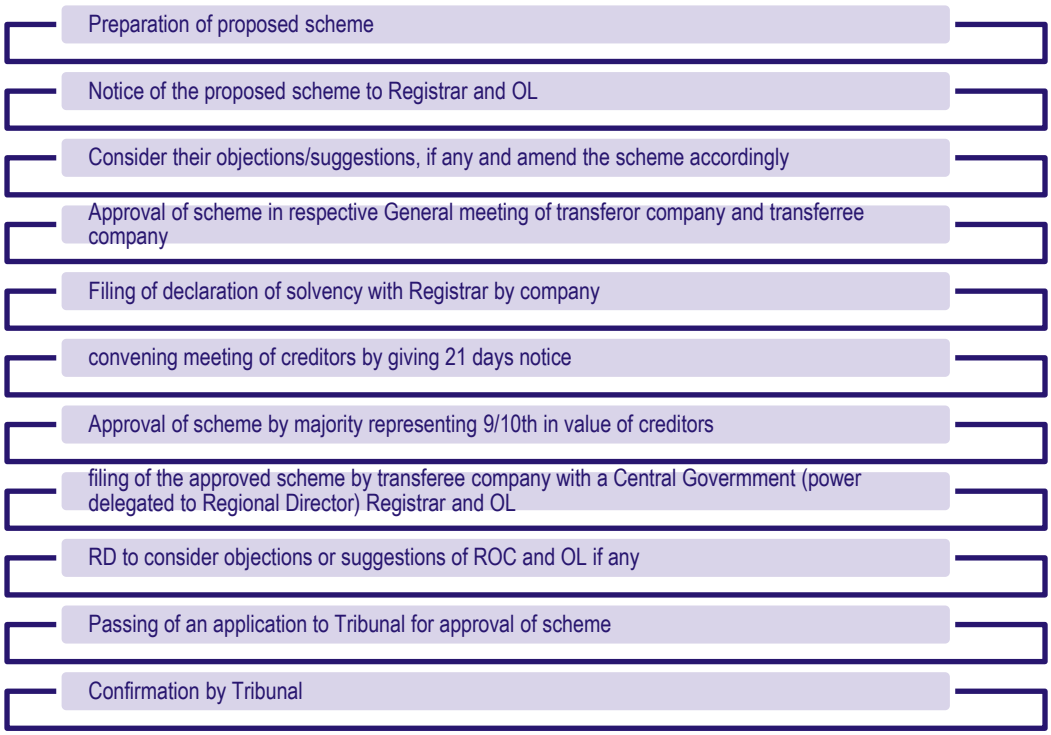
The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

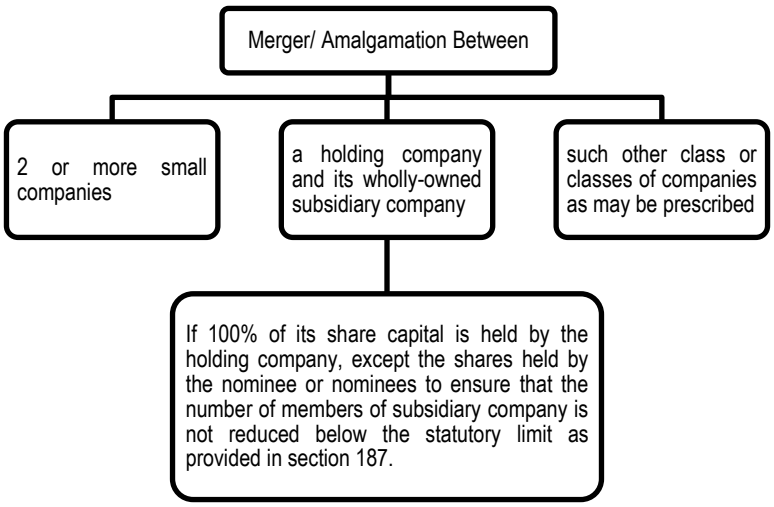
10. Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc. [Section 240]

Retrospective effect of liability: Notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

11. FAST TRACK MODE OF Merger or Amalgamation of Certain Companies [Section 233]

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(1) **Companies who may enter into scheme of merger or amalgamation:** A scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as given in *Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016*, subject to the following, namely:—

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(a) a **notice of the proposed scheme inviting objections or suggestions**, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;

(b) the **objections and suggestions received are considered by the companies** in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;

(c) each of the companies involved in the merger files a **declaration of solvency**, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and

(d) the **scheme is approved by majority** representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

(2) Filing of copy of scheme with the Central Government, Registrar and the Official Liquidator: The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.

(3) On the receipt of the scheme if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.

If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days.

If no such communication is made, it shall be presumed that he has no objection to the scheme.

(4) Filing of application by Central government with Tribunal: If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal **within a period of sixty days of the receipt of the scheme,** stating its objections and requesting that the Tribunal may consider the scheme under section 232.

(5) Passing of an order of Tribunal: On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down

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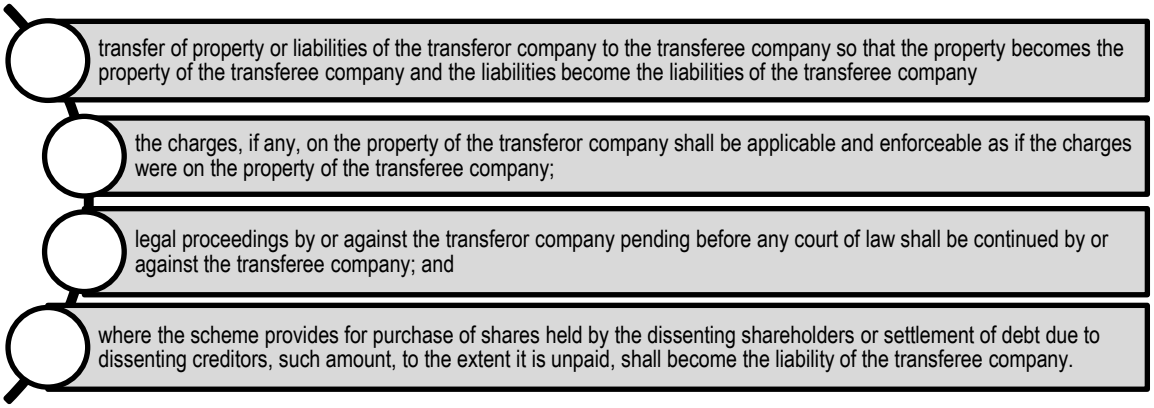
in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit:

Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.

(6) Communication of an order to registrar: A copy of the order confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.

(7) The registration of the scheme, shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

(8) Effect of Registration of Scheme: The registration of the scheme shall have the following effects, namely:—



(9) Effect of merger and amalgamation on transferee: A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

(10) Filing of an application by transferee company with the Registrar: The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital:

Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.

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(11) Applicability of the provisions: The provisions of this section shall *mutatis mutandis* apply to-

- a company or companies specified in sub-section (1) in respect of a scheme of compromise or arrangement referred to in section 230, or
- division or transfer of a company referred to clause (b) of subsection (1) of section 232.

(12) The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.

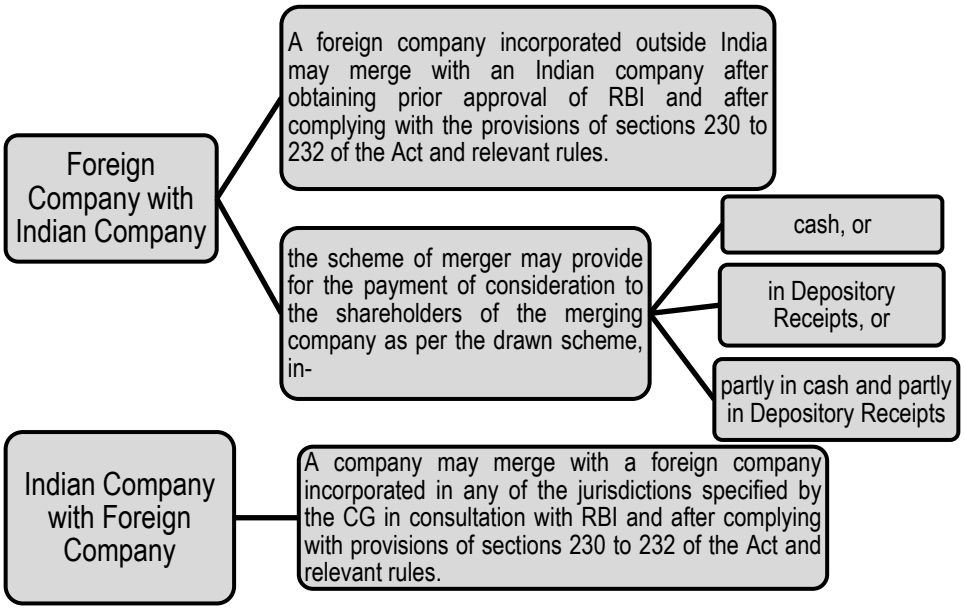
(13) A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

(14) According to sub-rule (8) of Rule 25, it is clarified that with respect to schemes of arrangements or compromise falling within the purview of section 233 of the Act, the concerned companies may, at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act, including where the condition prescribed in clause (d) of sub-section (1) of section 233 of the Act has not been met.

12. Merger or Amalgamation of Company with Foreign Company [Section 234]

The provisions given in this section is also known as provision related to cross border merger.

The expression "**foreign company"** means any company or body corporate incorporated outside India whether having a place of business in India or not.



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RELEVANT AMENDMENTS

1. **Exemptions to Government Companies Vide Notification G.S.R. 582(E) Dated 13th June, 2017**

   The Central Government amends the Notification G.S.R. 463(E), dated 5th June 2015. Following are the amendments:

   The word "Tribunal "wherever it occurs in sections 230 to 232, the words "Central Government" shall be substituted.

2. **Amendments through the Companies (Amendment) Act, 2017**

Relevant sections	Amendment	Status
Amendment of section 236.	In section 236 of the principal Act, in sub-sections (*4*), (*5*) and (*6*), for the words, "transferor company", wherever they occur, the words "company whose shares are being transferred" shall be substituted.	Notified till 30th April, 2018.

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8

Prevention of Oppression and Mismanagement

1. Introduction

To begin with, let us understand the basic concept hidden behind this chapter. Why would the company law even introduce such a thing, when all the provisions are super clear and explanatory? Because, the law evaders find a way to the loophole. Okay, let's see this more clearly – imagine a situation of a company say, Rexagon Private Limited, which has 7 shareholder – Abhishek, Archit, Ankur, Anupam, Himanshu, Manas and Rajan. Out of these, Abhishek, Archit and Ankur hold around 94% of the shares of the company. Now, at the general meeting of the company, when any resolution is required to be passed – ordinary or special, the resolution shall be passed in the favour, if these three people vote in the favour of the resolution, since they form a majority. Therefore, the voice of the minority shareholders – Anupam, Himanshu, Manas and Rajan won't be heard.

This is because the corporate law works on the principle of democracy and it becomes more vulnerable because it is reckoned with the number of shares and not with the number of individuals involved. This is known as the famous **'Rule of Majority'** or which is also called the '***Foss v. Harbottle***' Rule, which is a landmark judgment in the history of company law. It states that the ones who hold majority of shares "rule" the company (*Foss v. Harbottle (1843) 2 Hare 461).* The judgment held that if the majority shareholders have made a decision to take or not to take a certain action, it shall be respected. Also, the courts are not expected to ordinarily intervene to protect the minority interest affected by resolution.



What happened in Foss v. Harbottle? In the said case, two shareholders commenced legal action against the promoters and directors of the company alleging that they had misapplied the company assets and had improperly mortgaged the company property. The Court rejected the two shareholders' plea and held that a breach of duty by the directors of the company was a wrong done to the company for which it (i.e. the company) alone could sue. In other words, the proper plaintiff in that case was the company and not the two individual shareholders. Thus, the Foss v. Harbottle derives two major rules or principles of the company law – first, a company is a legal entity separate from its shareholders; and second that the Court will not

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interfere with the internal management of companies acting within their powers. Therefore, where an ordinary majority of members can ratify the act, the Court will not interfere.

However, the said rule has 4 exceptions, which are as follows –

- *Ultra-vires* or illegal acts;
- Transactions requiring special majorities;
- Personal Rights; and
- The "fraud on the minority" exception.

This Chapter focuses on the last exception as mentioned above.

Oppression



Let us understand the meaning of 'oppression' as used in the Act. The meaning of the term "oppression" as explained by Lord Cooper in the Scottish case of *Elder v. Elder & Watson Ltd*. was cited with approval by Wanchoo J. of the Supreme Court of India in *Shanti Prasad Jain v. Kalinga Tubes*. He said that the conduct of complained of, should at least involve a visible departure from the standards of their dealing, and violations of conditions of fair play on which every shareholder who entrusts his money to company, is entitled to rely.

The complaining member must show that he is suffering from oppression in his capacity as a member and not in any other capacity.

To constitute oppression, persons concerned with the management of the company's affairs must, in connection thereof, be guilty of fraud, misfeasance or misconduct towards the members. It does not include mere domestic disputes between directors and members, or lack of confidence between one set of members and others.

It was observed in *Rao (V.M.) v. Rajeshwari Ramakrishnan* that the oppression complained off must affect a person in his capacity or character as a member of the company; harsh or unfair treatment in other capacity, e.g., as a director or a creditor is outside the purview of this chapter.

There must be a continuous acts constituting oppression up to the date of the petition.

The events have to be considered not in isolation but as a part of a continuous suffering.

The conduct complained of, can be said to be "oppression" only when it could be said that it is burdensome, harsh and wrongful; involves at least an element of lack of probity and fair dealing to a member in matters of his proprietary right as a shareholder.

How Act explained oppression and mismangagement: The Act defines that

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(i) If affairs of a company have been or are been conducted prejudicial to public interest or in a manner prejudicial or oppressive to any member or prejudicial to the interest of company, there is a case of oppression or mismanagement.

(ii) Any material change that has taken place in management or control of a company and that by reason of such change it is likely that the affairs of a company will be conducted prejudicial to interest of its member or company, that would also be considered as oppression or mismanagement.

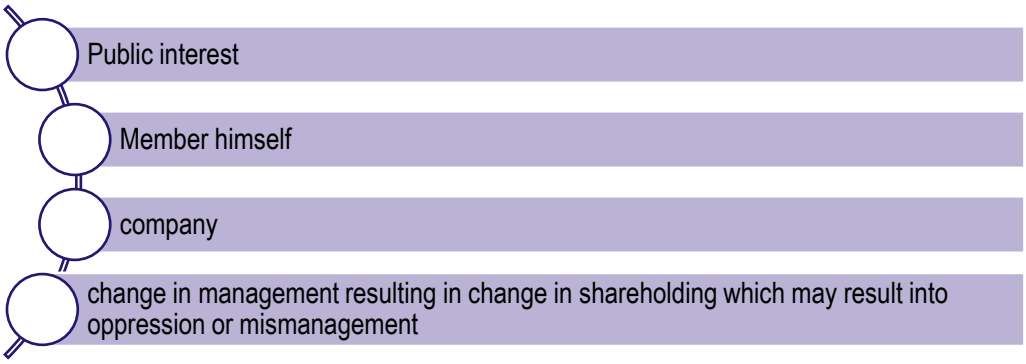
2. Application to Tribunal for Relief in Cases of Oppression, etc. [Section 241]

The section seeks to provide the circumstances in which an application may be made to the Tribunal by any member of a company or by the Central Government for relief in cases of oppression and mismanagement in the affairs of the company.

(1) **Right to apply by member:** Any member of a company who complains that—

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

(b) the material change, not being a change brought about by, or in the interests of, any creditors, including debenture holders or any class of shareholders of the company, has taken place in the management or control of the company, whether by an alteration in the Board of Directors, or manager, or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to its interests or its members or any class of members, may apply to the Tribunal, provided such member has a right to apply under section 244, for an order under this Chapter.



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Section 241(1) addresses complaints on the conducts of the company's affairs, which could be a prejudicial to public interest and prejudicial or oppressive to the members or the company.

The provision gives the members, the right to move the Tribunal not only on complaints of oppression but also on complaints that the conduct of the affairs of the company have been or are 'prejudicial' to them.

Thus, section 241(1)(a) also includes past acts of oppression.

This section also corresponds to the remedy for mismanagement in the affairs of the company. It states that a member can complain "that the affairs of a company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company".

So, a company can complain in case a material change in the management is likely to be prejudicial to the interests of the members.

(2) **Central Government suo moto to apply the Tribunal:** The Central Government, if it is of the opinion that the affairs of the company are being conducted in a manner prejudicial to public interest, it may itself apply to the Tribunal for an order under this Chapter.

Examples

1. A shareholder was reduced to a minority status since the company had increased the capital and allotted the additional shares in a manner that resulted in a new majority. As against a petition filed by this shareholders, the majority shareholders offered to restore his status back to the existing before the increase of capital, if the management of another company was handed over to them. Such a transfer of management of another company, does not come under the purview of this section.
2. In an application filed to the Tribunal, claiming oppression, a shareholder who is also the director of the company cannot claim compensation by way of salary paid to other directors. Shareholders can share the dividend of the company, if it is declared but cannot seek directions to be compensated. The payment of salary is a question that concerns the Board of Directors and not the Tribunal.
3. Failure to declare dividend does not amount to oppression. (*Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd*).
4. A shareholder died. A petition was filed by his legal heir who was in the position of a minority shareholder. Can the application filed by the legal heir to the Tribunal, be maintainable in court?

   The legal heir of the deceased shareholder with minority status is entitled to file the petition.
5. Where a person without being so appointed, was acting as a Managing Director and was discharging his functions as such, whether with or without the knowledge of the members, a member could not claim that it was an act of oppression, by filing an application with the Tribunal.
6. While obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression *(Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth).*

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3. Right to apply under section 241 [Section 244]

The section is linked to section 241 of the Act, and provides for the eligibility of members who hold the right to file the application under section 241 for oppression and mismanagement with the Tribunal. These qualification as provided in section 244 ensure that only the persons with sufficient interest in the affairs of the company can file the petition under section 241 of the Act.

(1) Members having right to apply: The following members of a company shall have the right to apply under section 241, namely:—

(a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one-tenth of the total number of its members, whichever is less, or any member or members holding not less than one tenth of the issued share capital of the company, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

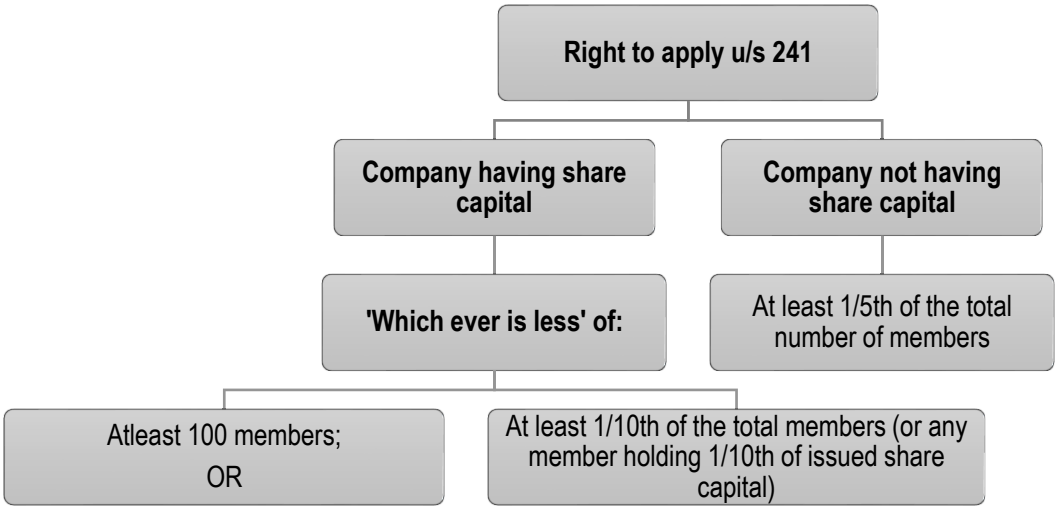
(b) **in the case of a company not having a share capital**, not less than one-fifth of the total number of its members:

Provided that the Tribunal may, on an application made to it in this behalf, waive all or any of the requirements specified in clause (a) or clause (b)so as to enable the members to apply under section 241. (Thus, The section also enables the members not meeting the membership qualification in section 244(1) to file an application with the Tribunal for waiver of these requirements for filing the petition.)

Explanation—For the purposes of this sub-section, where any share or shares are held by two or more persons jointly, they shall be counted only as one member.

(2) Entitlement to members to make an application: Where any members of a company are entitled to make an application under subsection (1), any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

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Examples

1. In case, where the shareholding of the petitioner-member gets reduced to below 10 per cent because of fresh issue/allotment of shares, which is challenged as oppressive, the maintainability of the petition would be reduced after determining the validity of the issue of allotment. The petition shall be maintainable and the petitioner-member shall be entitled to relief.
2. The requirement of shareholding up to the prescribed percentage is mandatory. It must be shown with the help of documentary evidence. Possession of share certificates is a prima facie proof that the petitioner is a shareholder. There is a presumption that a share certificate is a valid title to shares.
3. Shareholding and membership is reckoned not on the basis of the subscribed or paid-up share capital, but on the basis of the 'issued' share capital. For instance, a company may have issued a capital of 50 lakh rupees divided into 50,000 shares of 100 rupees each, but only 45,000 shares may have been subscribed for. The remaining shares will then be left to be disposed of in such a manner as the Board of Directors think best in the interests of the company. 'Issued' share capital would include both equity and preference share capital.
4. The consent to be given by a shareholder is reckoned at the beginning of the proceedings. The withdrawal of consent by any shareholder during the course of proceedings shall not affect the maintainability of the petition [*Rajamundhry Electric Corporation Vs. V. Nageswar Rao A.I.R. (1956) Sc. 2013.]*

4. Powers of Tribunal [Section 242]

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(1) **Order passed by the tribunal:** If, on any application made under section 241, the Tribunal is of the opinion—

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

(2) **Nature of orders that can be passed by the Tribunal:** Without prejudice to the generality of the powers under sub-section (1), an order under that sub-section may provide for—

(a) the regulation of conduct of affairs of the company in future;

(b) the purchase of shares or interests of any members of the company by other members thereof or by the company;

(c) in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;

(d) restrictions on the transfer or allotment of the shares of the company;

(e) the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case;

(f) the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e):

Provided that no such agreement shall be terminated, set aside or modified except after due notice and after obtaining the consent of the party concerned;

(g) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application under this section, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference;

(h) removal of the managing director, manager or any of the directors of the company;

(i) recovery of undue gains made by any managing director, manager or director during

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the period of his appointment as such and the manner of utilisation of the recovery including transfer to Investor Education and Protection Fund or repayment to identifiable victims;

(j) the manner in which the managing director or manager of the company may be appointed subsequent to an order removing the existing managing director or manager of the company made under clause (h);

(k) appointment of such number of persons as directors, who may be required by the Tribunal to report to the Tribunal on such matters as the Tribunal may direct;

(l) imposition of costs as may be deemed fit by the Tribunal;

(m) any other matter for which, in the opinion of the Tribunal, it is just and equitable that provision should be made.

(3) **Filing of copy of order of tribunal:** A certified copy of the order of the Tribunal shall be filed by the company with the Registrar within 30 days of the order of the Tribunal.

(4) **Interim order:** The Tribunal may, on the application of any party to the proceeding, make any interim order which it thinks fit for regulating the conduct of the company's affairs upon such terms and conditions as appear to it to be just and equitable.

(5) **Alteration through order of the tribunal:** Where an order of the Tribunal makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any, permitted in the order, to make, without the leave of the Tribunal, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles.

(6) **Punishment in case of contravention:** If a company contravenes the provisions of sub-section (5) [i.e. not amending the memorandum or articles of association of the company, in a manner consistent with orders passed for alteration of these documents], the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

(7) **Altered provision shall apply:** The alterations made by the order in the memorandum or articles of a company shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act and the said provisions shall apply accordingly to the memorandum or articles so altered.

(8) **Certified copy of altered order shall be filed with the Registrar:** A certified copy of every order altering, or giving leave to alter, a company's memorandum or articles, shall within 30 days after the making thereof, be filed by the company with the Registrar who shall register the same.

Examples

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1. Mere lack of confidence among members themselves resulting in certain acts of irregularities or illegalities cannot be held to be oppressive *per se*. A case of oppression as well as mismanagement has to be made out by the petitioners substantiating that the acts complained of have caused prejudice to the interest of the company and its members and shareholders to have a cause of action to attract the provisions of the Act.

2. Directorial complaints cannot be entertained in such a petition unless it is a composite complaint and is in the case of a company in the nature of *quasi* – partnership (i.e. small partnerships of a limited number of individuals which, although operating as a limited company, run as if they are partnership between those individuals at the control.

3. The matter of selection and appointment of dealers of the company's products is not within the ambit and scope of the proceedings under section 241 (erstwhile section of the Act). In a tripartite agreement with the government, a project was assigned to the company. In this case, the right to manage the affairs of the company is vested in the majority of the shareholders and not in the person who might have procured the project for the company.

4. The decisions relating to the operation of the company's bank accounts are a part of the managerial power of the directors. The mere fact that a director is not being associated with the operation of the company's bank accounts, does not constitute oppression or mismanagement. *(Sudha M. Singh v. Eagle Cones Pvt. Ltd (2000) 36 CLA 189)*[1]

5. The decision of the Board of Directors to write-off bad debts is a commercial decision and does not require any judicial interference.

6. The members of the company, Minions Private Limited have filed an application for oppression in the company. To prove their facts, the members have requested for the inspection of documents of the company, which the company denied to provide. Discuss, whether this amount to oppression?

   The right to inspection of documents and books of account of a company is not limited to the Board of directors. In order to prove allegations made in a petition under section 241 (erstwhile section of the Act), the shareholders are entitled to be allowed inspection of the books of account and other relevant papers of the company. However, mere denial of inspection, whether during the pendency of the petition or before it, does not amount to an act of oppression as held in the case of *Lalita Rajya Lakshmi v. Indian Motor Co. (Hazaribagh) Ltd. (1962) 32 Com Cases 207*. If a petitioner cannot make out a case of mismanagement and oppression, because he was unable to collect materials for the purpose, it is not for the court to direct the directors of the company to offer inspection of the company's books and accounts so as to enable a petitioner to collect materials for the petition under the Act.

7. In deciding an application under section 241 and 242 (erstwhile section of the Act), the Tribunal has to bear in mind that the act of oppression must be a continuing one. A

[1] *Chapter XVI – Prevention of Oppression and Mismanagement - Ramaiya*

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single act of renting out the premises of the company without the knowledge of the members cannot be termed as oppression or mismanagement.

8. The power to issue shares should be exercised bona-fide in the interest of the company and not for benefiting the directors or any other group. The directors are in a fiduciary position with the company and must exercise their power to issue the shares for the benefit of the company. If the power is exercised solely for their personal benefit, the Tribunal may interfere and prevent the directors from doing so. The act of issue of further shares by the directors of a company for the purpose of converting a majority into minority is a grave act of oppression.

5. Consequences of termination or modification of certain agreements [Section 243]

(1) **Consequence of termination or modifications of certain agreements by an order passed by the Tribunal:** Where an order made under section 242 terminates, sets aside or modifies an agreement such as is referred to in sub-section (2) of that section,—

(a) such order shall not give rise to any claims whatever against the company by any person for damages or for compensation for loss of office or in any other respect either in pursuance of the agreement or otherwise;

(b) no managing director or other director or manager whose agreement is so terminated or set aside shall, for a period of five years from the date of the order terminating or setting aside the agreement, without the leave of the Tribunal, be appointed, or act, as the managing director or other director or manager of the company:

Provided that the Tribunal shall not grant leave under this clause unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given a reasonable opportunity of being heard in the matter.

(2) **Penalty:** Any person who knowingly acts as a managing director or other director or manager of a company in contravention of clause (b) of sub-section (1), and every other director of the company who is knowingly a party to such contravention, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five lakh rupees, or with both.

6. Class action [Section 245]

This section introduces the concept of class action by shareholders and depositors of a company with substantive remedies. Under section 245 of the act, members and depositors, or an individual member or depositor, can file a petition for reliefs, if they are of the opinion that the affairs



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of the company are being managed or conducted in a manner prejudicial to the interests of the company, its members or depositors.

According to section 245:

(1) **Filing of application before the Tribunal on behalf of the members or depositors:** Such number of member or members, depositor or depositors or any class of them, as the case may be, as are indicated in sub-section (2) may, if they are of the opinion that the management or conduct of the affairs of the company are being conducted in a manner prejudicial to the interests of the company or its members or depositors, file an application before the Tribunal on behalf of the members or depositors for seeking all or any of the following orders, namely:—

(a) to restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) to restrain the company from committing breach of any provision of the company's memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by mis-statement to the members or depositors;

(d) to restrain the company and its directors from acting on such resolution;

(e) to restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) to restrain the company from taking action contrary to any resolution passed by the members;

(g) to claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;

(h) to seek any other remedy as the Tribunal may deem fit.

(2) **Required number of members to apply:**

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(i) The requisite number of members provided in sub-section (1) shall be as under:—

(a) **in the case of a company having a share capital**, not less than one hundred members of the company or not less than such percentage of the total number of its members as may be prescribed, whichever is less, or any member or members holding not less than such percentage of the issued share capital of the company as may be prescribed, subject to the condition that the applicant or applicants has or have paid all calls and other sums due on his or their shares;

(b) **in the case of a company not having a share capital**, not less than one-fifth of the total number of its members.

(ii) **The requisite number of depositors** provided in sub-section (1) shall not be less than one hundred depositors or not less than such percentage of the total number of depositors as may be prescribed, whichever less is, or any depositor or depositors to whom the company owes such percentage of total deposits of the company as may be prescribed.

(3) **Requirement for consideration of application:** In considering an application under sub-section (1), the Tribunal shall take into account, in particular—

(a) whether the member or depositor is acting in good faith in making the application for seeking an order;

(b) any evidence before it as to the involvement of any person other than directors or officers of the company on any of the matters provided in clauses (a) to (f) of subsection (1);

(c) whether the cause of action is one which the member or depositor could pursue in his own right rather than through an order under this section;

(d) any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(e) where the cause of action is an act or omission that is yet to occur, whether the act or omission could be, and in the circumstances would be likely to be—

(i) authorised by the company before it occurs; or

(ii) ratified by the company after it occurs;

(f) where the cause of action is an act or omission that has already occurred, whether the act or omission could be, and in the circumstances would be likely to be, ratified by the company.

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(4) **In case of admission of application:** If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:—

(a) public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) two class action applications for the same cause of action shall not be allowed;

(d) the cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible for any oppressive act.

(5) **Remedy:** Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

(6) **Order shall be binding:** Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

(7) **Punishment for non-compliance**: Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

In addition to this punishment, penalties given under sections 337 to 341 (both inclusive) shall also apply.

(8) **Application filed is frivolous/vexatious:** Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

(9) **Exemption from application of section**: Nothing contained in this section shall apply to a banking company.

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(10) **Application may be filed on behalf of affected persons:** Subject to the compliance of this section, an application may be filed or any other action may be taken under this section by any person, group of persons or any association of persons representing the persons affected by any act or omission, specified in sub-section (1).

7. Application of certain provisions to proceedings under section 241 or section 245 [Section 246]

The provisions of sections 337, 338, 339, 340 and 341 (both inclusive) related to winding up, shall apply *mutatis mutandis*, in relation to an application made to the Tribunal under section 241 or section 245.

Penalty for Frauds by Officers [Section 337]

Liability Where Proper Accounts not Kept [Section 338]

Liability for Fraudulent Conduct of Business[Section 339]

Power of Tribunal to Assess Damages Against Delinquent Directors, etc.[Section 340]

Liability Under Sections 339 and 340 to Extend to Partners or Directors in Firms or Companies [Section 341]

[All these sections are covered under chapter i.e. Winding Up]

In other words:

- The section seeks to provide that the provisions of the section 337 to 341 relating to power to punish for contempt of Tribunal shall apply in relation to a fraudulent application made to the Tribunal for oppression and mismanagement.
- The provisions of section 337 – 341 deal with offences by officers, contributories and promoters of a company after its winding up and provide for penalties and recompense for falsification of books, frauds committed by officers, failure to keep proper accounts, fraudulent conduct of business, and the power to access damages against such delinquent officers, including partners and directors when a firm or a body is involved.

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9

Revival and Rehabilitation of Sick Companies

The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA) received presidential assent on 8 January, 1986 and had been in operation since then. The prime objective of the SICA was the timely detection of sick or potentially sick companies owning industrial undertakings, and their speedy revival, wherever possible, or closure thereof. The Companies (Second Amendment) Act, 2002 inserted sections 424-A to 424-L that deal with sick companies to be administered by the Tribunal, in the Companies Act, 1956. The Repeal Act also was passed in 2004. However, neither of the amendments were notified or became operative. The Companies Act, 2013 also included section 253 to 269 dealing with sick companies, but were not notified or made operative. The Insolvency and Bankruptcy Code, 2016 (Insolvency Act) amended the Companies Act, 2013 to delete the provisions relating to sick companies. It also amended the Repeal Act to allow companies having pending proceedings under the SICA to approach the National Company Law Tribunal (NCLT) under the provisions of the Insolvency Act (preamendment applicable provisions were under the Companies Act, 1956) within the specified time without payment of fees.

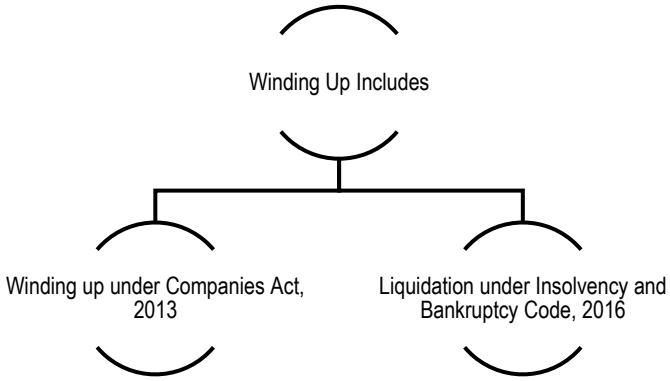
This chapter is not applicable for students.

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10
Winding Up

1. Introduction

As per Section 2(94A) of the Companies Act, 2013, winding up" means winding up under this Act or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable.



Chapter XX of the Companies Act, 2013 of Winding up is comprised of four parts.

Introductory (Section 270)

Part I: Winding up by the tribunal (Section 271-303),

Part II: Voluntary winding up (Section 304- 323), Omitted

Part III: Provisions applicable to every mode of winding up (Section 324-358),

Part IV: Official Liquidators (Section 359 -365),

Following are the important aspect of the chapter of winding up-

(i) This chapter contains provisions for winding up of companies registered under the Act and under the previous companies' laws.

(ii) This chapter XX is broadly discussed here under four headings, Introductory section, Part I regulates the process of winding up by the tribunal, Part II directs the process for voluntary winding up, Part III contains provisions which are applicable to every mode of winging up and Part IV provides for a summary procedure for winding up for companies

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having assets of a book value not exceeding Rupees 1 crore.

(iii) This chapter also provides panel of professionals as company liquidators, who carry out the responsibilities of a liquidator in the winding up of company.

(iv) Part II of this chapter deals with the voluntary winding up of companies. This part had been omitted in the Companies Act, 2013 vide enforcement of the Insolvency and Bankruptcy Code, 2016. So now this part regulating the voluntary winding up is regulated by the Insolvency and Bankruptcy Code, 2016.

2. Modes of Winding Up [Section 270]

The provisions of Part I shall apply to the winding up of a company by the Tribunal under this Act.

Part I: Winding up by the Tribunal [Section 271 – 303]

3. Circumstances in Which Company May be Wound Up by Tribunal [Section 271]

A company may, on a petition under section 272, be wound up by the Tribunal,—

(a) if the company has, by special resolution, resolved that the company be wound up by the Tribunal;

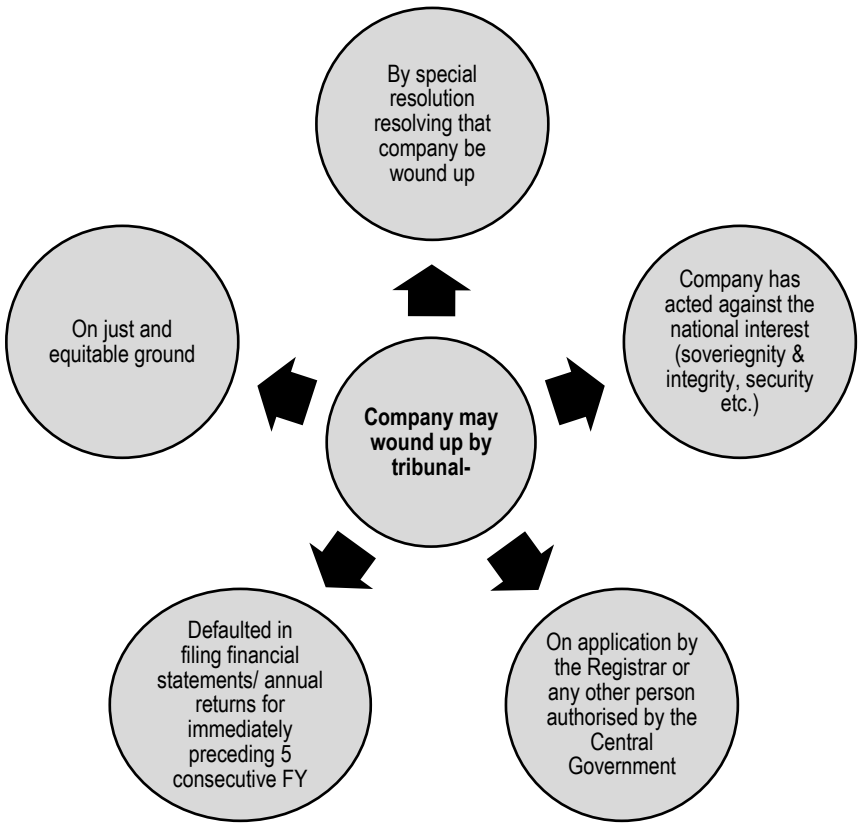
(b) if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

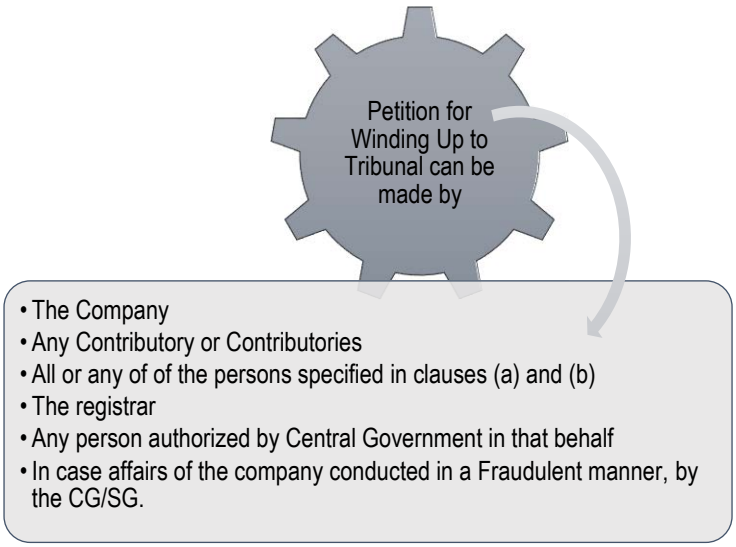
(e) if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

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4. Petition for Winding up [Section 272]

(1) Petition may be presented by:



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Subject to the provisions of this section, a petition to the Tribunal for the winding up of a company shall be presented by—

(a) the company;

(b) any contributory or contributories;

(c) all or any of the persons specified in clauses (a) and (b);

(d) the Registrar;

(e) any person authorised by the Central Government in that behalf; or

(f) in a case falling under clause (b) of section 271, by the Central Government or a State Government.

(2) Petition by contributory: A contributory shall be entitled to present a petition for the winding up of a company.

Shares in respect of which he is a contributory or some of them were either originally allotted to him or have been held by him, and registered in his name, for at least six months during the eighteen months immediately before the commencement of the winding up or have devolved on him through the death of a former holder.

Contributory can file petition ignoring the following points

- He may be the holder of fully paid-up shares.
- The company may have no assets at all.
- The company may have no surplus assets left for distribution among the shareholders after the satisfaction of its liabilities.

(3) Petition by registrar: The Registrar shall be entitled to present a petition for winding up under section 271, except on the grounds specified in clause (a) or clause (e) of that sub-section.

Provided that the Registrar shall obtain the previous sanction of the Central Government to the presentation of a petition:

Provided further that the Central Government shall not accord its sanction unless the company has been given a reasonable opportunity of making representations.

(4) Petition presented by company: A petition presented by the company for winding up before the Tribunal shall be admitted only if accompanied by a statement of affairs in such form and in such manner as may be prescribed.

(5) Copy of petition with registrar: A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall, without prejudice to any other provisions, submit his views to the Tribunal within sixty days of receipt of such petition.

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5. Powers of Tribunal [Section 273]

(1) Order passed by tribunal: The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:—

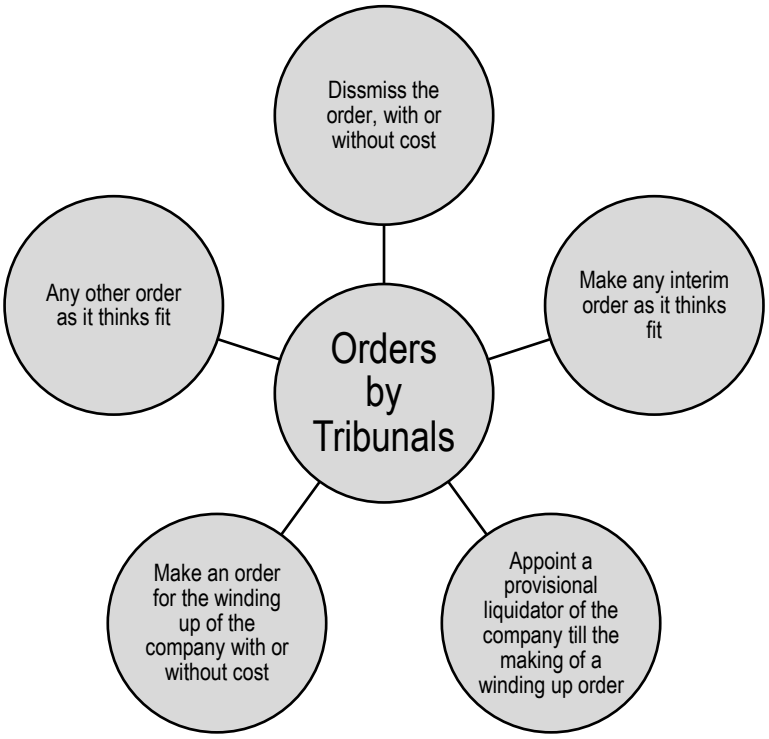
(a) dismiss it, with or without costs;

(b) make any interim order as it thinks fit;

(c) appoint a provisional liquidator of the company till the making of a winding up order;

(d) make an order for the winding up of the company with or without costs; or

(e) any other order as it thinks fit:



Time limit for passing of an order: An order under this sub-section shall be made within ninety days from the date of presentation of the petition.

Notice to company on appointing of provisional liquidator: Before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice.

Tribunal shall not refuse to make a winding up order: The Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been

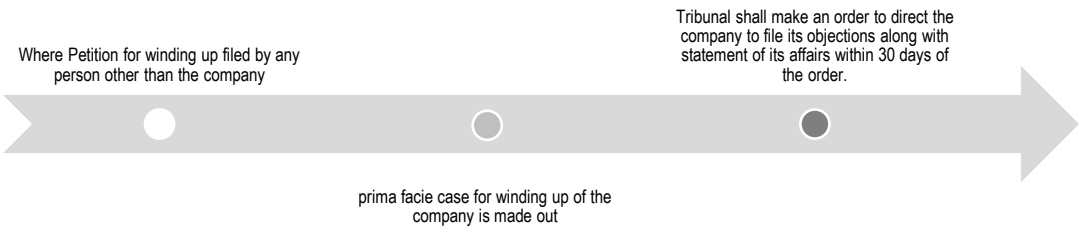
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mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

(2) Tribunal make order for any other remedy on just and equitable ground: Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

6. Directions for Filing Statement of Affairs [Section 274]

(1) Tribunal may order company to file a statement of its affairs: Where a petition for winding up is filed before the Tribunal by any person other than the company, the Tribunal shall, if satisfied that a prima facie case for winding up of the company is made out, by an order direct the company to file its objections along with a statement of its affairs within thirty days of the order in such form and in such manner as may be prescribed.



Extension of time for filing: The Tribunal may allow a further period of thirty days in a situation of contingency or special circumstances.

Deposit of security: The Tribunal may direct the petitioner to deposit such security for costs as it may consider reasonable as a precondition to issue directions to the company.

(2) Punishment for not filing of the statement of affairs: A company, which fails to file the statement of affairs as referred to in sub-section (1), shall forfeit the right to oppose the petition and such directors and officers of the company as found responsible for such non-compliance, shall be liable for punishment under sub-section (4).

(3) Officers to pay cost of the company, book of accounts completed and audited to the Liquidator : The directors and other officers of the company, in respect of which an order for winding up is passed by the Tribunal under clause (d) of sub-section (1) of section 273, shall, within a period of thirty days of such order, submit, at the cost of the company, the books of account of the company completed and audited up to the date of the order, to such liquidator and in the manner specified by the Tribunal.

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(4) Contravention of section: If any director or officer of the company contravenes the provisions of this section, the director or the officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than ` twenty-five thousand but which may extend to ` five lakh, or with both.

(5) Complaint to be presented before special court may be filed by: The complaint may be filed in this behalf before the Special Court by Registrar, provisional liquidator, Company Liquidator or any person authorised by the Tribunal.

7. Company Liquidators and their Appointments [Section 275]

(1) Appointment of official liquidator: For the purposes of winding up of a company by the Tribunal, the Tribunal at the time of the passing of the order of winding up, shall appoint an Official Liquidator or a liquidator from the panel maintained as the Company Liquidator.

(2) Appointment of provisional liquidator or the Company Liquidator by tribunal: The provisional liquidator or the Company Liquidator, as the case may, shall be appointed by the Tribunal from amongst the insolvency professionals registered under the Insolvency and Bankruptcy Code, 2016.

(3) Tribunal may limit the powers of a provisional liquidator: Where a provisional liquidator is appointed by the Tribunal, the Tribunal may limit and restrict his powers by the order appointing him or it or by a subsequent order, but otherwise he shall have the same powers as a liquidator.

(4) Tribunal to specify the terms and conditions of appointment of provisional liquidator: The terms and conditions of appointment of a provisional liquidator or Company Liquidator and the fee payable to him or it shall be specified by the Tribunal on the basis of task required to be performed, experience, qualification of such liquidator and size of the company.

(5) Filing of declaration by liquidator on appointment: On appointment as provisional liquidator or Company Liquidator, as the case may be, such liquidator shall file a declaration within seven days from the date of appointment in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the Tribunal and such obligation shall continue throughout the term of his appointment.

(6) Appointment of provisional liquidator as the company liquidator: While passing a winding up order, the Tribunal may appoint a provisional liquidator, if any, appointed under clause (c) of sub-section (1) of section 273, as the Company Liquidator for the conduct of the proceedings for the winding up of the company.

8. Removal and Replacement of Liquidator [Section 276]

(1) Removal of provisional liquidator or the Company Liquidator: The Tribunal may, on a reasonable cause being shown and for reasons to be recorded in writing, remove the

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provisional liquidator or the Company Liquidator, as the case may be, as liquidator of the company on any of the following grounds, namely:—

(a) misconduct;

(b) fraud or misfeasance;

(c) professional incompetence or failure to exercise due care and diligence in performance of the powers and functions;

(d) inability to act as provisional liquidator or as the case may be, Company Liquidator;

(e) conflict of interest or lack of independence during the term of his appointment that would justify removal.

(2) Transfer of work of liquidators: In the event of death, resignation or removal of the provisional liquidator or as the case may be, Company Liquidator, the Tribunal may transfer the work assigned to him or it to another Company Liquidator for reasons to be recorded in writing.

(3) Recover of loss or damage from liquidator: Where the Tribunal is of the opinion that any liquidator is responsible for causing any loss or damage to the company due to fraud or misfeasance or failure to exercise due care and diligence in the performance of his or its powers and functions, the Tribunal may recover or cause to be recovered such loss or damage from the liquidator and pass such other orders as it may think fit.

(4) Reasonable opportunity of being heard to the provisional liquidator: The Tribunal shall, before passing any order under this section, provide a reasonable opportunity of being heard to the provisional liquidator or, as the case may be, Company Liquidator.

9. Intimation to Company Liquidator, Provisional Liquidator and Registrar [Section 277]

(1) Intimation of an order of tribunal: Where the Tribunal makes an order for-

- appointment of provisional liquidator or
- the winding up of a company,

it shall, within a period not exceeding seven days from the date of passing of the order, cause intimation thereof to be sent to the-

- Company Liquidator or provisional liquidator, as the case may be, and
- the Registrar.

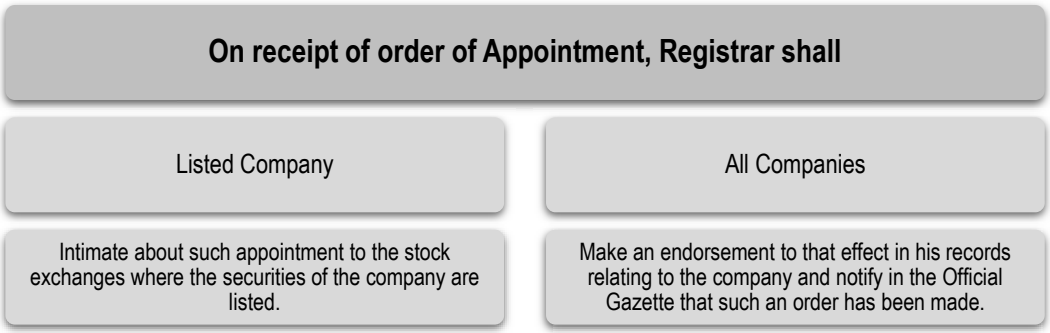
(2) Registrar to intimate of an order:

With respect to all companies- On receipt of the copy of order of appointment of provisional liquidator or winding up order, the Registrar shall make an endorsement to

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that effect in his records relating to the company and notify in the Official Gazette that such an order has been made, and

In the case of a listed company, the Registrar shall intimate about such appointment or order, as the case may be, to the stock exchange or exchanges where the securities of the company are listed.



(3) Winding up order shall be deemed to be notice of discharge: The winding up order shall be deemed to be a notice of discharge to the officers, employees and workmen of the company, except when the business of the company is continued.

(4) Constitution of winding up committee to monitor liquidation proceedings: Within three weeks from the date of passing of winding up order, the Company Liquidator shall make an application to the Tribunal for constitution of a winding up committee to assist and monitor the progress of liquidation proceedings by the Company Liquidator in carrying out the function as provided in sub-section (5) and such winding up committee shall comprise of the following persons, namely:—

(i) official Liquidator attached to the Tribunal;

(ii) nominee of secured creditors; and

(iii) a professional nominated by the Tribunal.

(5) Functions of winding up committee: The Company Liquidator shall be the convener of the meetings of the winding up committee which shall assist and monitor the liquidation proceedings in following areas of liquidation functions, namely:—

(i) taking over assets;

(ii) examination of the statement of affairs;

(iii) recovery of property, cash or any other assets of the company including benefits derived therefrom;

(iv) review of audit reports and accounts of the company;

(v) sale of assets;

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(vi) finalisation of list of creditors and contributories;

(vii) compromise, abandonment and settlement of claims;

(viii) payment of dividends, if any; and

(ix) any other function, as the Tribunal may direct from time to time.

(6) Submission of report & minutes of meetings of the committee before tribunal: The Company Liquidator shall place before the Tribunal a report along with minutes of the meetings of the committee on monthly basis duly signed by the members present in the meeting for consideration till the final report for dissolution of the company is submitted before the Tribunal.

(7) Company liquidator to prepare draft final report: The Company Liquidator shall prepare the draft final report for consideration and approval of the winding up committee.

(8) Submission of approved final report before the tribunal for passing of dissolution order: The final report so approved by the winding up committee shall be submitted by the Company Liquidator before the Tribunal for passing of a dissolution order in respect of the company.

10. Effect of Winding up order [Section 278]

The order for the winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

11. Stay of Suits, etc., on Winding up Order [Section 279]

(1) Suit or legal proceeding can be commenced after winding up order/appointment of liquidator only with permission of tribunal: When a winding up order has been passed or a provisional liquidator has been appointed, no suit or other legal proceeding shall be commenced, or if pending at the date of the winding up order, shall be proceeded with, by or against the company, except with the leave of the Tribunal and subject to such terms as the Tribunal may impose.

It is further provided that any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within sixty days.

(2) In case proceeding pending in appeal: Nothing in sub-section (1) shall apply to any proceeding pending in appeal before the Supreme Court or a High Court.

12. Jurisdiction of Tribunal [Section 280]

The Tribunal shall have jurisdiction to entertain, or dispose of,—

(a) any suit or proceeding by or against the company;

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(b) any claim made by or against the company, including claims by or against any of its branches in India;

(c) any application made under section 233 [Fast track merger];

(d) any question of priorities or any other question whatsoever, whether of law or facts, including those relating to assets, business, actions, rights, entitlements, privileges, benefits, duties, responsibilities, obligations or in any matter arising out of, or in relation to winding up of the company, whether such suit or proceeding has been instituted, or is instituted, or such claim or question has arisen or arises or such application has been made or is made or such scheme has been submitted, or is submitted, before or after the order for the winding up of the company is made.

13. Submission of Report by Company Liquidator [Section 281]

(1) Particulars to be mentioned in the report of company liquidator: Where the Tribunal has made a winding up order or appointed a Company Liquidator, such liquidator shall, within sixty days from the order, submit to the Tribunal, a report containing the following particulars, namely:—

Contents of Liquidator's Report

- The nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company. The valuation of the assets shall be obtained from registered valuers for this purpose. The nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company. The valuation of the assets shall be obtained from registered valuers for this purpose.
- Amount of capital issued, subscribed and paid-up
- Amount of capital issued, subscribed and paid-up
- The existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and
- The existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and
- In the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given In the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given
- The debts due to the company and the names, addresses and occupations of the

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persons from whom they are due and the amount likely to be realised on account thereof

- The debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof
- Guarantees, if any, extended by the company
- List of contributories and dues, if any, payable by them and details of any unpaid call
- Details of trade marks and intellectual properties, if any, owned by the company
- Details of subsisting contracts, joint ventures and collaborations, if any
- Details of holding and subsidiary companies, if any
- Details of legal cases filed by or against the company
- Any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include

(2) Duties of liquidator to give desirable information in the report: The Company Liquidator shall include in his report the manner in which the company was promoted or formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any officer of the company in relation to the company since the formation thereof and any other matters which, in his opinion, it is desirable to bring to the notice of the Tribunal.

(3) Report on viability of business of the company: The Company Liquidator shall also make a report on the viability of the business of the company or the steps which, in his opinion, are necessary for maximising the value of the assets of the company.

(4) Any other necessitated report: The Company Liquidator may also, if he thinks fit, make any further report or reports.

(5) Inspection of reports: Any person describing himself in writing to be a creditor or a contributory of the company shall be entitled by himself or by his agent at all reasonable times to inspect the report submitted in accordance with this section and take copies thereof or extracts therefrom on payment of the prescribed fees.

14. Directions of Tribunal on Report of Company Liquidator [Section 282]

(1) Time limit for the proceeding shall be fixed: The Tribunal shall, on consideration of the report of the Company Liquidator, fix a time limit within which the entire proceedings shall be completed and the company be dissolved:

Revision of time limit: The Tribunal may, if it is of the opinion, at any stage of the proceedings, or on examination of the reports submitted to it by the Company Liquidator

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and after hearing the Company Liquidator, creditors or contributories or any other interested person, that it will not be advantageous or economical to continue the proceedings, revise the time limit within which the entire proceedings shall be completed and the company be dissolved.

(2) Order of tribunal: The Tribunal may, on examination of the reports submitted to it by the Company Liquidator and after hearing the Company Liquidator, creditors or contributories or any other interested person, order sale of the company as a going concern or its assets or part thereof.

The Tribunal may, where it considers fit, appoint a sale committee comprising such creditors, promoters and officers of the company as the Tribunal may decide to assist the Company Liquidator in sale under this sub-section.

(3) Tribunal may order for investigation against the company in respect of commission of fraud: Where a report is received from the Company Liquidator or the Central Government or any person that a fraud has been committed in respect of the company, the Tribunal shall, without prejudice to the process of winding up, order for investigation under section 210, and on consideration of the report of such investigation it may pass order and give directions under sections 339 to 342 or direct the Company Liquidator to file a criminal complaint against persons who were involved in the commission of fraud.

(4) Tribunal to take measures to safe guard the assets of the company: The Tribunal may order for taking such steps and measures, as may be necessary, to protect, preserve or enhance the value of the assets of the company.

(5) Tribunal may pass such other order /directions as it may consider fit: The Tribunal may pass such other order or give such other directions as it considers fit.

15. Custody of Company's Properties [Section 283]

S. No.	Provision	It states that-
1.	Where a winding up order has been made or where a provisional liquidator has been appointed-	the liquidator, shall, on the order of the Tribunal immediately take into his or its custody or control – • all the property, • effects and • actionable claims to which the company is or appears to be entitled to and take such steps and measures, as may be necessary, to protect and preserve the properties of the company.
2.	Computation of custody time	all the property and effects of the

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	period	company shall be deemed to be in the custody of the Tribunal from the date of the order for the winding up of the company
3.	On an application by the Company Liquidator, the tribunal may order to pay /deliver etc. any money, property etc. of the company to the Liquidator.	The Tribunal may, at any time after the making of a winding up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company,- • to pay, • deliver, • surrender or • transfer forthwith, or • within such time as the Tribunal directs, - to the Company Liquidator, • any money, property or books and papers in his custody or under his control to which the company is or appears to be entitled.

16. Promoters, Directors, etc., to cooperate with Company Liquidator [Section 284]

(1) Persons to extend full cooperation to the liquidators: The promoters, directors, officers and employees, who are or have been in employment of the company or acting or associated with the company shall extend full cooperation to the Company Liquidator in discharge of his functions and duties.

(2) On failure to discharge obligations: Where any person, without reasonable cause, fails to discharge his obligations under sub-section (1), he shall be punishable with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

17. Settlement of List of Contributories and Application of Assets [Section 285]

(1) Tribunal to perform acts: As soon as may be after the passing of a winding up order by the Tribunal, the Tribunal shall -

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- settle a list of contributories,
- cause rectification of register of members in all cases where rectification is required in pursuance of this Act, and
- shall cause the assets of the company to be applied for the discharge of its liability.

Provided that where it appears to the Tribunal that it would not be necessary to make calls on or adjust the rights of contributories, the Tribunal may dispense with the settlement of a list of contributories.

(2) Identifying contributories on the basis of nature of rights: In settling the list of contributories, the Tribunal shall distinguish between those who are contributories in their own right and those who are contributories as being representatives of, or liable for the debts of, others.

(3) Persons liable to contribute to the assets on certain conditions: While settling the list of contributories, the Tribunal shall include every person, who is or has been a member, who shall be liable to contribute to the assets of the company an amount sufficient for payment of the debts and liabilities and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, subject to the following conditions, namely:—

Sl. No.	Liabilities	Conditions describe the liabilities to contribute towards the assets
1.	a person who has been a member shall not be liable to contribute	if he has ceased to be a member for the preceding one year or more before the commencement of the winding up
2.	a person who has been a member shall not be liable to contribute in respect of any debt or liability of the company	If such debt or liability contracted after he ceased to be a member
3.	a person who has been a member shall be liable to contribute	When 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
4.	in the case of a company limited by shares	no contribution shall be required from any person, who is or has been a member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;
5.	in the case of a company limited by guarantee	if the company has a share capital, such member shall be liable to contribute to

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		the extent of any sum unpaid on any shares held by him as if the company were a company limited by shares.

18. Obligations of Directors and Managers [Section 286]

Unlimited liability of a person in the case of a limited company: In the case of a limited company, any person who is or has been a director or manager, whose liability is unlimited under the provisions of this Act, shall, in addition to his liability, if any, to contribute as an ordinary member, be liable to make a further contribution as if he were at the commencement of winding up, a member of an unlimited company:

Provided that —

(a) Person ceased to hold office for a year or more: A person who has been a director or manager shall not be liable to make such further contribution, if he has ceased to hold office for a year or upwards before the commencement of the winding up;

(b) Persons not liable to contribute any debt/ liability of the company after he ceased to hold office: A person who has been a director or manager shall not be liable to make such further contribution in respect of any debt or liability of the company contracted after he ceased to hold office;

(c) Persons not liable unless tribunal deems it necessary to satisfy the debts and liabilities: subject to the articles of the company, a director or manager shall not be liable to make such further contribution unless the Tribunal deems it necessary to require the contribution in order to satisfy the debts and liabilities of the company, and the costs, charges and expenses of the winding up.

19. Advisory Committee [Section 287]

(1) Appointment of advisory committee: The Tribunal may, while passing an order of winding up of a company, direct that there shall be, an advisory committee to advise the Company Liquidator and to report to the Tribunal on such matters as the Tribunal may direct.

(2) Composition: The advisory committee appointed by the Tribunal shall consist of not more than twelve members, being-

- creditors and contributories of the company, or
- such other persons in such proportion

as the Tribunal may, keeping in view the circumstances of the company under liquidation, direct.

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(3) Conduct of meeting: The Company Liquidator shall convene a meeting of creditors and contributories, as ascertained from the books and documents, of the company within thirty days from the date of order of winding up for enabling the Tribunal to determine the persons who may be members of the advisory committee.

(4) Right to inspection of documents: The advisory committee shall have the right to inspect the books of account and other documents, assets and properties of the company under liquidation at a reasonable time.

(5) Procedure for the conduct of meeting and business shall be as prescribed by rules: The provisions relating to the convening of the meetings, the procedure to be followed thereat and other matters relating to conduct of business by the advisory committee shall be such as may be prescribed.

(6) Company liquidator shall be chairperson: The meeting of advisory committee shall be chaired by the Company Liquidator.

20. Submission of Periodical Reports to Tribunal [Section 288]

(1) Periodical reports to the tribunal: The Company Liquidator shall make periodical reports to the Tribunal and in any case make a report at the end of each quarter with respect to the progress of the winding up of the company in such form and manner as may be prescribed.

(2) Review of orders by tribunal: The Tribunal may, on an application by the Company Liquidator, review the orders made by it and make such modifications as it thinks fit.

21. Powers and Duties of Company Liquidator [Section 290]

(1) Powers of Company Liquidator: Subject to directions by the Tribunal, if any, in this regard, the Company Liquidator, in a winding up of a company by the Tribunal, shall have the power—

(a) **to carry on the business** of the company so far as may be necessary for the beneficial winding up of the company;

(b) **to do all acts and to execute**, in the name and on behalf of the company, all deeds, receipts and other documents, and for that purpose, to use, when necessary, the company's seal;

(c) **to sell the immovable and movable property and actionable claims** of the company by public auction or private contract, with power to transfer such property to any person or body corporate, or to sell the same in parcels;

(d) **to sell the whole of the undertaking** of the company as a going concern;

(e) **to raise any money r**equired on the security of the assets of the company;

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(f) **to institute or defend any suit**, prosecution or other legal proceeding, civil or criminal, **in the name and on behalf of the company;**

(g) to invite and **settle claim of creditors, employees or any other claimant** and distribute sale proceeds in accordance with priorities established under this Act;

(h) to **inspect the records** and returns of the company on the files of the Registrar or any other authority;

(i) to **prove rank and claim in the insolvency** of any contributory for any balance against his estate, and to receive dividends in the insolvency, in respect of that balance, as a separate debt due from the insolvent, and rateably with the other separate creditors;

(j) to **draw, accept, make and endorse any negotiable instruments** including cheque, bill of exchange, hundi or promissory note in the name and on behalf of the company, with the same effect with respect to the liability of the company as if such instruments had been drawn, accepted, made or endorsed by or on behalf of the company in the course of its business;

(k) **to take out, in his official name, letters of administration** to any deceased contributory, and to do in his official name any other act necessary for obtaining payment of any money due from a contributory or his estate which cannot be conveniently done in the name of the company, and in all such cases, the money due shall, for the purpose of enabling the Company Liquidator to take out the letters of administration or recover the money, be deemed to be due to the Company Liquidator himself;

(l) **to obtain any professional assistance** from any person or appoint any professional, in discharge of his duties, obligations and responsibilities and for protection of the assets of the company, appoint an agent to do any business which the Company Liquidator is unable to do himself;

(m) **to take all such actions, steps, or to sign, execute and verify any paper, deed, document**, application, petition, affidavit, bond or instrument as may be necessary,—

  (i) for winding up of the company;

  (ii) for distribution of assets;

  (iii) in discharge of his duties and obligations and functions as Company Liquidator; and

(n) **to apply to the Tribunal for such orders or directions** as may be necessary for the winding up of the company.

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(2) Powers of Liquidator shall be under control of tribunal: The exercise of powers by the Company Liquidator shall be subject to the overall control of the Tribunal.

(3) Other duties: the Company Liquidator shall perform such other duties as the Tribunal may specify in this behalf.

22. Provision for Professional Assistance to Company Liquidator [Section 291]

(1) Company liquidator to appoint one/more professionals: The Company Liquidator may, with the sanction of the Tribunal, appoint one or more chartered accountants or company secretaries or cost accountants or legal practitioners or such other professionals on such terms and conditions, as may be necessary, to assist him in the performance of his duties and functions under this Act.

(2) Disclose of conflict of interest: Any person appointed under this section shall disclose forthwith to the Tribunal in the prescribed form any conflict of interest or lack of independence in respect of his appointment.

23. Exercise and Control of Company Liquidator's Powers [Section 292]

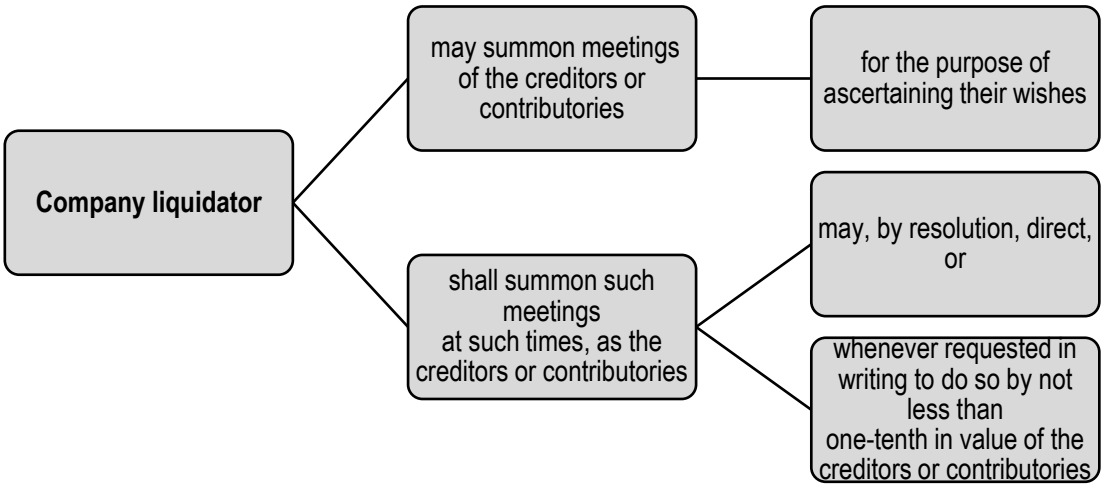
(1) Administration & Distribution of assets: The Company Liquidator shall, in the administration of the assets of the company and the distribution thereof among its creditors, have regard to any directions which may be given by-

- the resolution of the creditors or contributories at any general meeting, or
- by the advisory committee.

(2) Direction given by creditors or contributories shall override: Any directions given by the creditors or contributories at any general meeting shall, in case of conflict, be deemed to override any directions given by the advisory committee.

(3) Summons from Company Liquidator—

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(4) Apply to Tribunal against the decision of Company Liquidator: Any person aggrieved by any act or decision of the Company Liquidator may apply to the Tribunal, and the Tribunal may confirm, reverse or modify the act or decision complained of and make such further order as it thinks just and proper in the circumstances.

24. Books to be kept by Company Liquidator [Section 293]

(1) Company liquidator to maintain proper books for records of entries or minutes: The Company Liquidator shall keep proper books in such manner, as may be prescribed, in which he shall cause entries or minutes to be made of proceedings at meetings and of such other matters as may be prescribed.

(2) Inspection of such books: Any creditor or contributory may, subject to the control of the Tribunal, inspect any such books, personally or through his agent.

25. Audit of Company Liquidator's Accounts [Section 294]

(1) Maintenance of books of accounts: The Company Liquidator shall maintain proper and regular books of account including accounts of receipts and payments made by him in such form and manner as may be prescribed.

(2) Presentation of an account of the receipts and payments to the tribunal: The Company Liquidator shall, at such times as may be prescribed but not less than twice in each year during his tenure of office, present to the Tribunal an account of the receipts and payments as such liquidator in the prescribed form in duplicate, which shall be verified by a declaration in such form and manner as may be prescribed.

(3) Audit of accounts: The Tribunal shall cause the accounts to be audited in such manner as it thinks fit, and for the purpose of the audit, the Company Liquidator shall furnish to the Tribunal with such vouchers and information as the Tribunal may require, and the

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Tribunal may, at any time, require the production of, and inspect, any books of account kept by the Company Liquidator.

(4) Filing of copy of accounts with the tribunal and the registrar: When the accounts of the company have been audited, one copy thereof shall be filed by the Company Liquidator with the Tribunal, and the other copy shall be delivered to the Registrar which shall be open to inspection by any creditor, contributory or person interested.

(5) Accounts related to a government companies: Where an account referred to in sub-section (4) relates to a Government company, the Company Liquidator shall forward a copy thereof—

(a) to the Central Government, if that Government is a member of the Government company; or

(b) to any State Government, if that Government is a member of the Government company; or

(c) to the Central Government and any State Government, if both the Governments are members of the Government company.

(6) Summary of accounts to be communicated to every creditor and contributory: The Company Liquidator shall cause the accounts when audited, or a summary thereof, to be printed, and shall send a printed copy of the accounts or summary thereof by post to every creditor and every contributory:

The Tribunal may dispense with the compliance of the provisions of this sub-section in any case it deems fit.

26. Payment of Debts by Contributory and Extent of Set-off [Section 295]

(1) Tribunal to pass an order to pay any money due: The Tribunal may, at any time after passing of a winding up order, pass an order requiring any contributory for the time being on the list of contributories to pay, in the manner directed by the order, any money due to the company, from him or from the estate of the person whom he represents, exclusive of any money payable by him or the estate by virtue of any call in pursuance of this Act.

(2) Order of Tribunal: The Tribunal, in making an order, may,—

in the case of an unlimited company	allow to the contributory, by – • way of set-off, any money due to him, or • to the estate which he represents, from the company, on any independent dealing or contract with the company.

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	But not any money due to him as a member of the company in respect of any dividend or profit;
in the case of a limited company	allow to any director or manager whose liability is unlimited, or to his estate, such set-off.

(3) Payment of money due against any subsequent call: In the case of any company, whether limited or unlimited, when all the creditors have been paid in full, any money due on any account whatever to a contributory from the company may be allowed to him by way of set-off against any subsequent call.

27. Power of Tribunal to Make Calls [Section 296]

The Tribunal may, at any time after the passing of a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company,—

(a) make calls on all or any of the contributories for the time being on the list of the contributories, to the extent of their liability, for payment of any money which the Tribunal considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves; and

(b) make an order for payment of any calls so made.

28. Adjustment of Rights of Contributories [Section 297]

The Tribunal shall adjust the rights of the contributories among themselves and distribute any surplus among the persons entitled thereto.

29. Power to Order Costs [Section 298]

In case assets of a company being insufficient to satisfy its liabilities: The Tribunal may, in the event of the assets of a company being insufficient to satisfy its liabilities, make an order for the payment out of the assets, of the costs, charges and expenses incurred in the winding up, in such order of priority inter se as the Tribunal thinks just and proper.

30. Power to Summon Persons Suspected of Having Property of Company, etc. [Section 299]

(1) Summons: The Tribunal may,

- at any time after the appointment of a provisional liquidator, or
- the passing of a winding up order,

Summon before it –

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- any officer of the company or
- person known or
- suspected to have in his possession any property or books or papers, of the company, or
- known or suspected to be indebted to the company, or
- any person whom the Tribunal thinks to be capable of giving information

concerning the promotion, formation, trade, dealings, property, books or papers, or affairs of the company.

(2) Examination: The Tribunal may examine any officer or person so summoned on oath concerning the matters aforesaid, either by –

- word of mouth or
- on written interrogatories or
- on affidavit and

may, in the first case, reduce his answers to writing and require him to sign them.

(3) Production of books and papers: The Tribunal may require any officer or person so summoned to produce any books and papers relating to the company in his custody or power, but, where he claims any lien on books or papers produced by him, the production shall be without prejudice to such lien, and the Tribunal shall have power to determine all questions relating to that lien.

(4) Liquidator to file a report in respect of debt or property of the company: The Tribunal may direct the liquidator to file before it a report in respect of debt or property of the company in possession of other persons.

(5) Order: If the Tribunal finds that—

(a) a **person is indebted to the company**, the Tribunal may order him to pay to the provisional liquidator or, as the case may be, the liquidator at such time and in such manner as the Tribunal may consider just, the amount in which he is indebted, or any part thereof, either in full discharge of the whole amount or not, as the Tribunal thinks fit, with or without costs of the examination;

(b) a **person is in possession of any property belonging to the company**, the Tribunal may order him to deliver to the provisional liquidator or, as the case may be, the liquidator, that property or any part thereof, at such time, in such manner and on such terms as the Tribunal may consider just.

(6) Person summoned fails to appear: If any officer or person so summoned fails to appear before the Tribunal at the time appointed without a reasonable cause, the

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Tribunal may impose an appropriate cost.

(7) Execution of order: Every order made under sub-section (5) shall be executed in the same manner as decrees for the payment of money or for the delivery of property under the Code of Civil Procedure, 1908.

(8) Discharge of liability: Any person making any payment or delivery in pursuance of an order made under sub-section (5) shall by such payment or delivery be, unless otherwise directed by such order, discharged from all liability whatsoever in respect of such debt or property.

31. Power to Order Examination of Promoters, Directors, etc. [Section 300]

(1) Power of tribunal to order the person to attend and be examined before the tribunal: Where an order has been made for the winding up of a company by the Tribunal, and the Company Liquidator has made a report to the Tribunal under this Act, stating that in his opinion a fraud has been committed by any person in the promotion, formation, business or conduct of affairs of the company since its formation, the Tribunal may, after considering the report, direct that-

- such person or officer shall attend before the Tribunal on a day appointed by it for that purpose, and
- be examined as to the promotion or formation or the conduct of the business of the company or as to his conduct, and
- dealings as an officer thereof.

(2) Participation of Company liquidator in the examination: The Company Liquidator shall take part in the examination, and for that purpose he or it may, if specially authorised by the Tribunal in that behalf, employ such legal assistance as may be sanctioned by the Tribunal.

(3) Examination on oath: The person shall be examined on oath and shall answer all such questions as the Tribunal may put, or allow to be put, to him.

(4) Rights available to the person to be examined: A person ordered to be examined under this section—

(a) shall, before his examination**, be furnished at his own cost with a copy of the report** of the Company Liquidator; and

(b) **may at his own cost employ chartered accountants or company secretaries or cost accountants or legal practitioners** entitled to appear before the Tribunal under section 432, who shall be at liberty to put to him such questions as the Tribunal may consider just for the purpose of enabling him to explain or qualify any answers given by him.

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(5) **Appearing of company liquidator on hearing of an application applied by person being freed from charges:** If any such person applies to the Tribunal to be exculpated from any charges made or suggested against him, it shall be the duty of the Company Liquidator to appear on the hearing of such application and call the attention of the Tribunal to any matters which appear to the Company Liquidator to be relevant.

(6) **Order for payment of costs:** If the Tribunal, after considering any evidence given or hearing witnesses called by the Company Liquidator, allows the application made under sub-section (5), the Tribunal may order payment to the applicant of such costs as it may think fit.

(7) **Records of the examinations in writing:** Notes of the examination shall be taken down in writing, and shall be read over to or by, and signed by, the person examined, a copy be supplied to him and may thereafter be used in evidence against him, and shall be open to inspection by any creditor or contributory at all reasonable times.

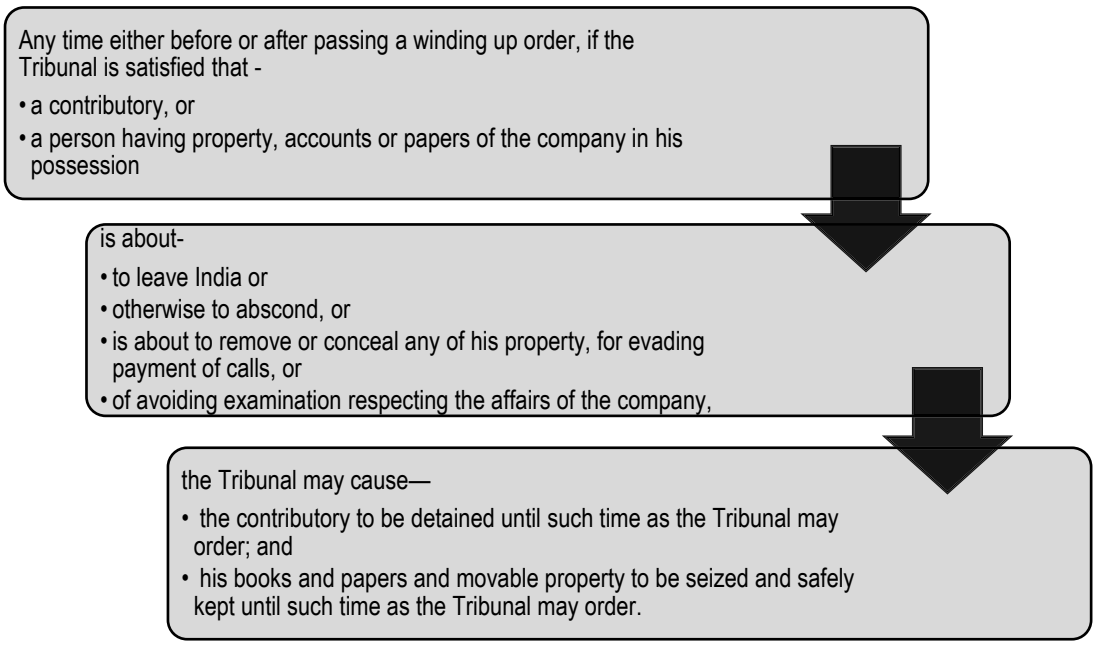
(8) **Adjournment:** The Tribunal may, if it thinks fit, adjourn the examination from time to time.

(9) **Examination can be before any person/authority:** An examination under this section may, if the Tribunal so directs, be held before any person or authority authorised by the Tribunal.

(10) **Exercise of tribunal powers by the concerned person /authority:** The powers of the Tribunal under this section as to the conduct of the examination, but not as to costs, may be exercised by the person or authority before whom the examination is held in pursuance of sub-section (9).

32. Arrest of Person Trying to Leave India or Abscond [Section 301]

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33. Dissolution of Company by Tribunal [Section 302]

S. No.	Condition	Effect
1.	When the affairs of a company have been completely wound up	the Company Liquidator shall make an application to the Tribunal for dissolution of such company
2.	Tribunal shall on an application filed by the Company Liquidator, or when the Tribunal is of the opinion that it is just and reasonable in the circumstances that an order for the dissolution of the company should be made	Tribunal shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly
3.	Copy of the order shall, within thirty days from the date thereof, be forwarded by the Company Liquidator to the Registrar	Registrar shall record in the register relating to the company a minute of the dissolution of the company
4.	If the Company Liquidator makes a default in forwarding a copy of the order within the period specified	the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the default continues

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34. Appeals from Orders Made Before Commencement of Act [Section 303]

Prospective effect: Nothing in this Chapter shall affect the operation or enforcement of any order made by any Court in any proceedings for the winding up of a company immediately before the commencement of this Act and an appeal against such order shall be filed before such authority competent to hear such appeals before such commencement.

(Part II- Voluntary winding up) Sections 304- 323 (Omitted)

Provisions under Companies Act, 2013 stands omitted due to section 255 of Insolvency & Bankruptcy Code, 2016 and section 59 covered under Chapter V of Insolvency & Bankruptcy Code, 2016 has been notified on 01.04.2017.

Part III—Provisions Applicable to Every Mode of Winding Up

35. Debts of all Descriptions to be Admitted to Proof [Section 324]

In every winding up (subject, in the case of insolvent companies, to the application in accordance with the provisions of this Act or of the law of insolvency), -

- all debts payable on a contingency, and
- all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages,

shall be admissible to proof against the company, a just estimate being made, so far as possible, of the value of such debts or claims as may be subject to any contingency, or may sound only in damages, or for some other reason may not bear a certain value.

36. Overriding Preferential Payments [Section 326]

(1) Debts to be paid in priority: In the winding up of a company under this Act, the following debts shall be paid in priority to all other debts:—

(a) workmen's dues; and

(b) where a secured creditor has realised a secured asset, so much of the debts due to such secured creditor as could not be realised by him or the amount of the workmen's portion in his security (if payable under the law), whichever is less, pari passu with the workmen's dues:

In case of the winding up of a company, the sums referred to in sub-clauses (i) and (ii) of clause (b) of the *Explanation*, which are payable for a period of two years preceding the winding up order or such other period as may be prescribed, shall be paid in priority to all other debts (including debts due to secured creditors), within a period of thirty days of

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sale of assets and shall be subject to such charge over the security of secured creditors as may be prescribed.

(2) Proviso mentioning the debts shall be paid in full: The debts payable under the proviso to sub-section (1) shall be paid in full before any payment is made to secured creditors and thereafter debts payable under that subsection shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

Example

The value of the security of a secured creditor of a company is ₹ 1,00,000. The total amount of the workmen's dues is ₹ 1,00,000. The amount of the debts due from the company to its secured creditors is ₹ 3,00,000. The aggregate of the amount of workmen's dues and the amount of debts due to secured creditors is ₹ 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is ₹ 25,000.

Explanation—For the purposes of this section, and section 327—

(a) **"workmen"**, in relation to a company, means the employees of the company, being workmen within the meaning of clause (s) of section 2 of the Industrial Disputes Act, 1947;

(b) "**workmen's dues",** in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:—

(i) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any workman in respect of services rendered to the company and any compensation payable to any workman under any of the provisions of the Industrial Disputes Act, 1947.

(ii) all accrued holiday remuneration becoming payable to any workman or, in the case of his death, to any other person in his right on the termination of his employment before or by the effect of the winding up order or resolution;

(iii) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company or unless the company has, at the commencement of the winding up, under such a contract with insurers as is mentioned in section 14 of the Workmen's Compensation Act, 1923 (19 of 1923), rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any workman of the company;

(iv) all sums due to any workman from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the workmen, maintained by the company;

(c) **"workmen's portion"**, in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the

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amount of the workmen's dues bears to the aggregate of the amount of workmen's dues and the amount of the debts due to the secured creditors.

37. Preferential Payments [Section 327]

(1) In a winding up, subject to the provisions of section 326, there shall be paid in priority to all other debts,—

(a) all revenues, taxes, cesses and rates due from the company to the Central Government or a State Government or to a local authority at the relevant date, and having become due and payable within the twelve months immediately before that date;

(b) all wages or salary including wages payable for time or piece work and salary earned wholly or in part by way of commission of any employee in respect of services rendered to the company and due for a period not exceeding four months within the twelve months immediately before the relevant date, subject to the condition that the amount payable under this clause to any workman shall not exceed such amount as may be notified;

(c) all accrued holiday remuneration becoming payable to any employee, or in the case of his death, to any other person claiming under him, on the termination of his employment before, or by the winding up order, or, as the case may be, the dissolution of the company;

(d) unless the company is being wound up voluntarily merely for the purposes of reconstruction or amalgamation with another company, all amount due in respect of contributions payable during the period of twelve months immediately before the relevant date by the company as the employer of persons under the Employees' State Insurance Act, 1948 or any other law for the time being in force;

(e) unless the company has, at the commencement of winding up, under such a contract with any insurer as is mentioned in section 14 of the Workmen's Compensation Act, 1923, rights capable of being transferred to and vested in the workmen, all amount due in respect of any compensation or liability for compensation under the said Act in respect of the death or disablement of any employee of the company:

Provided that where any compensation under the said Act is a weekly payment, the amount payable under this clause shall be taken to be the amount of the lump sum for which such weekly payment could, if redeemable, be redeemed, if the employer has made an application under that Act;

(f) all sums due to any employee from the provident fund, the pension fund, the gratuity fund or any other fund for the welfare of the employees, maintained by the company; and

(g) the expenses of any investigation held in pursuance of sections 213 and 216, in so far as they are payable by the company.

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(2) Payment in case of employee: Where any payment has been made to any employee of a company on account of -

- wages or salary, or
- accrued holiday remuneration, himself or,
- in the case of his death, to any other person claiming through him,
- out of money advanced by some person for that purpose, the person by whom the money was advanced

shall, in a winding up, have a right of priority in respect of the money so advanced and paid-up to the amount by which the sum in respect of which the employee or other person in his right would have been entitled to priority in the winding up has been reduced by reason of the payment having been made.

(3) Payments of debts: The debts enumerated in this section shall—

(a) **rank equally among themselves and be paid in full**, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment to general creditors are insufficient to meet them, have **priority over the claims of holders of debentures** under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

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(4) Discharged from payment of debts: Subject to the retention of such sums as may be necessary for the costs and expenses of the winding up, the debts under this section shall be discharged forthwith so far as the assets are sufficient to meet them, and in the case of the debts to which priority is given under clause (d) of sub-section (1), formal proof thereof shall not be required except in so far as may be otherwise prescribed.

(5) Debts to which priority is given, shall be a first charge on the goods: In the event of a landlord or other person distraining or having distrained on any goods or effects of the company within three months immediately before the date of a winding up order, the debts to which priority is given under this section shall be a first charge on the goods or effects so distrained on or the proceeds of the sale thereof:

Provided that, in respect of any money paid under any such charge, the landlord or other person shall have the same rights of priority as the person to whom the payment is made.

(6) Remuneration of holiday/ of absence from work: Any remuneration in respect of a period of holiday or of absence from work on medical grounds through sickness or other good cause shall be deemed to be wages in respect of services rendered to the company during that period.

(7) Non-applicability of sections 326 & 327: Sections 326 and 327 shall not be applicable in the event of liquidation under the Insolvency and Bankruptcy Code, 2016.

Explanation—For the purposes of this section,—

(a) the expression "**accrued holiday remuneration**" includes, in relation to any person,-

- all sums which, by virtue either of his contract of employment or of any enactment including any order made or direction given thereunder,
- are payable on account of the remuneration which would, in the ordinary course, have become payable to him in respect of a period of holiday, had his employment with the company continued until he became entitled to be allowed the holiday;

(b) the expression **"employee"** does not include a workman; and

(c) the expression **"relevant date"** means in the case of a company being wound up by the Tribunal-

- the date of appointment or first appointment of a provisional liquidator, or
- if no such appointment was made, the date of the winding up order,

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unless, in either case, the company had commenced to be wound up voluntarily before that date under the Insolvency and Bankruptcy Code, 2016;

38. Fraudulent Preference [Section 328]

(1) When any transaction may be treated as fraudulent preference: Where a company has given preference to a person who is-

- one of the creditors of the company, or
- a surety or guarantor for any of the debts or other liabilities of the company,

and the company does anything or suffers anything done which has the effect of putting that person into a position which, in the event of the company going into liquidation, will be better than the position he would have been in if that thing had not been done prior to six months of making winding up application, -

the Tribunal, if satisfied that, such transaction is a fraudulent preference may order as it may think fit for restoring the position to what it would have been if the company had not given that preference.

(2) Order of tribunal: If the Tribunal is satisfied that there is a-

- preference transfer of property, movable or immovable, or
- any delivery of goods,
- payment,
- execution made, taken or done by or against a company within six months before making winding up application,

the Tribunal may order as it may think fit and may declare such transaction invalid and restore the position.

39. Transfers Not in Good Faith to be Void [Section 329]

Any transfer of property, movable or immovable, or any delivery of goods, made by a company, not being –

- a transfer or delivery made in the ordinary course of its business, or
- in favour of a purchaser or encumbrancer in good faith and for valuable consideration,

if made within a period of one year before the presentation of a petition for winding up by the Tribunal under this Act.

Such transfer shall be void against the Company Liquidator.

40. Certain Transfers to be Void [Section 330]

Any transfer or assignment by a company of all its properties or assets to trustees for the

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benefit of all its creditors shall be void.

41. Liabilities and Rights of Certain Persons Fraudulently Preferred [Section 331]

(1) Determination of rights and liabilities of fraudulently preferred persons: Where a company is being wound up and anything made, taken or done after the commencement of this Act is invalid under section 328 as a fraudulent preference of a person interested in property mortgaged or charged to secure the company's debt, then, without prejudice to any rights or liabilities arising, apart from this provision, the person preferred shall be subject to the same liabilities, and shall have the same rights, as if he had undertaken to be personally liable as a surety for the debt,-

- to the extent of the mortgage or charge on the property, or
- the value of his interest,

whichever is less.

(2) Value of interest shall be determined as at the date if the transaction constituting the fraudulent preference: The value of the interest of the person preferred under sub-section (1) shall be determined as at the date of the transaction constituting the fraudulent preference, as if the interest were free of all encumbrances other than those to which the mortgage or charge for the debt of the company was then subject.

(3) Application to tribunal to make payment: On an application made to the Tribunal with respect to any payment on the ground that the payment was a fraudulent preference of a surety or guarantor, the Tribunal shall have jurisdiction to determine any questions with respect to the payment arising between the person to whom the payment was made and the surety or guarantor and to grant relief in respect thereof, notwithstanding that it is not necessary so to do for the purposes of the winding up, and for that purpose, may give leave to bring in the surety or guarantor as a third party as in the case of a suit for the recovery of the sum paid.

(4) The provisions of sub-section (3) shall apply *mutatis mutandis* in relation to transactions other than payment of money.

42. Effect of Floating Charge [Section 332]

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,

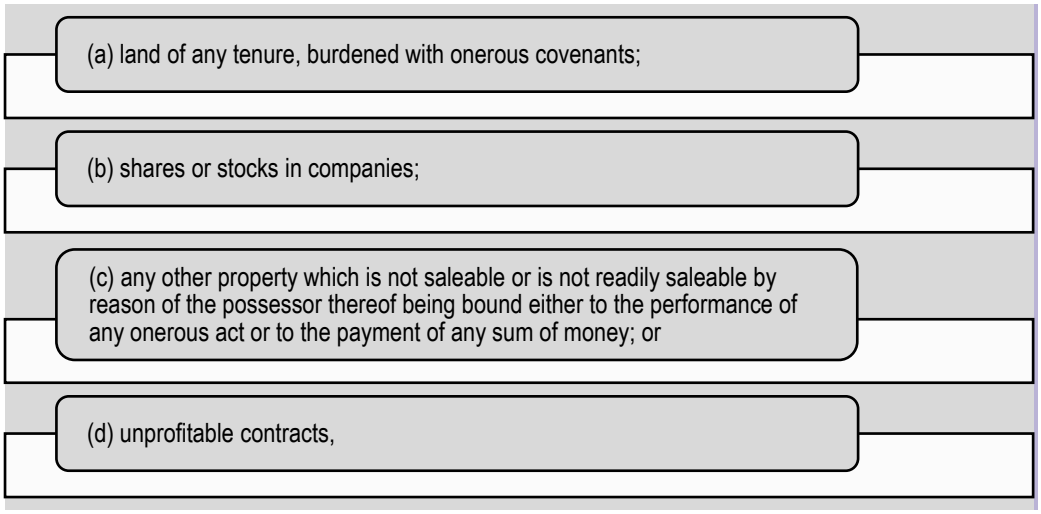
shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid, except for the amount of any cash paid to the company at the time of, or subsequent to the creation of, and in consideration for, the charge, together with interest on

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that amount at the rate of five per cent. per annum or such other rate as may be notified by the Central Government in this behalf.

43. Disclaimer of Onerous Property [Section 333]

(1) Disclaim of property by company liquidator: Where any part of the property of a company which is being wound up consists of—



the Company Liquidator may, notwithstanding that he has endeavoured to sell or has taken possession of the property or exercised any act of ownership in relation thereto or done anything in pursuance of the contract, with the leave of the Tribunal and subject to the provisions of this section, -

by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Tribunal, disclaim the property.

Where the Company Liquidator had not become aware of the existence of any such property within one month from the commencement of the winding up, the power of disclaiming the property may be exercised at any time within twelve months after he has become aware thereof or such extended period as may be allowed by the Tribunal.

(2) Determination of rights, interest and liabilities in respect of the property disclaimed: The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interest and liabilities of the company in or in respect of the property disclaimed, but shall not, except so far as is necessary for the purpose of releasing the company and the property of the company from liability, affect the rights, interest or liabilities of any other person.

(3) Notices to be given to the interested persons: The Tribunal, before or on granting

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leave to disclaim, may require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such other order in the matter as the Tribunal considers just and proper.

(4) Application made in writing to disclaim/ not to disclaim: The Company Liquidator shall not be entitled to disclaim any property in any case where an application in writing has been made to him by any person interested in the property requiring him to decide whether he will or will not disclaim and the Company Liquidator has not, within a period of twenty-eight days after the receipt of the application or such extended period as may be allowed by the Tribunal, give notice to the applicant that he intends to apply to the Tribunal for leave to disclaim, and in case the property is under a contract, if the Company Liquidator after such an application as aforesaid does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(5) Application of person who is entitled to benefit of a contract made with a company: The Tribunal may, on the application of any person who is, as against the Company Liquidator, entitled to the benefit or subject to the burden of a contract made with the company, make an order-

- rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or
- otherwise as the Tribunal considers just and proper, and
- any damages payable under the order to any such person may be proved by him as a debt in the winding up.

(6) Order of tribunal after hearing interested person on an application: The Tribunal may, on an application by any person who either claims any interest in any disclaimed property or is under any liability not discharged under this Act in respect of any disclaimed property, and after hearing any such persons as it thinks fit, make an order for the –

- vesting of the property in, or
- the delivery of the property to,
- any person entitled thereto or to whom it may seem just that the property should be delivered by way of compensation for such liability as aforesaid,
- or a trustee for him, and

on such terms as the Tribunal considers just and proper, and on any such vesting order being made, the property comprised therein shall vest accordingly in the person named therein in that behalf without any conveyance or assignment for the purpose:

Where the property disclaimed is of a **leasehold nature**-

the Tribunal shall not make a vesting order in favour of any person claiming under the company, whether as under-lessee or as mortgagee or holder of a charge by way of

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demise, except upon the terms of making that person—

(a) subject to the same liabilities and obligations as those to which the company was subject under the lease in respect of the property at the commencement of the winding up; or

(b) if the Tribunal thinks fit, subject only to the same liabilities and obligations as if the lease had been assigned to that person at that date,

and in either event as if the lease had comprised only the property comprised in the vesting order, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in, and security upon the property, and,

If there is no person claiming under the company who is willing to accept an order upon such terms, the Tribunal shall have power to vest the estate and interest of the company in the property in any person liable, either personally or in a representative character, and either alone or jointly with the company, to perform the covenants of the lessee in the lease, free and discharged from all estates, encumbrances and interests created therein by the company.

(7) Affected person shall be deemed creditor of company: Any person affected by the operation of a disclaimer under this section shall be deemed to be a creditor of the company to the amount of the compensation or damages payable in respect of such effect, and may accordingly prove the amount as a debt in the winding up.

44. Transfers, etc., After Commencement of Winding Up to be Void [Section 334]

In the case of a winding up by the Tribunal, any disposition of the property including actionable claims, of the company and any transfer of shares in the company or alteration in the status of its members, made after the commencement of the winding up shall, unless the Tribunal otherwise orders, be void.

45. Certain Attachments, Executions, etc., in Winding Up by Tribunal to be Void [Section 335]

(1) Where any company is being wound up by the Tribunal,—

(a) **any attachment**, **distress or execution** put in force, without leave of the Tribunal a**gainst the estate or effects of the company**, after the commencement of the winding up; or

(b) **any sale held**, without leave of the Tribunal of **any of the properties or effects of the company**, after such commencement,

-shall be void.

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(2) Not applicable to proceedings for the recovery of any tax/dues: Nothing in this section shall apply to any proceedings for the recovery of any tax or impost or any dues payable to the Government.

46. Offences by Officers of Companies in Liquidation [Section 336]

Offences committed by Officers of Companies

- No disclosure of assets
- No deliver of property
- No deliver of books and papers
- No deliver of informations
- Material omissions
- Prevents the production of any book or paper
- Displays fictitious losses or expenses
- False representation

(1) If any person, who is or has been an officer of a company which, at the time of the commission of the alleged offence, is being wound up, by the Tribunal under this Act or which is subsequently ordered to be wound up by the Tribunal under this Act—

(a) **No disclosure of assets:** does not, to the best of his knowledge and belief, fully and truly disclose to the Company Liquidator all the property, movable and immovable, of the company, and how and to whom and for what consideration and when the company disposed of any part thereof, except such part as has been disposed of in the ordinary course of the business of the company;

(b) **No deliver of property** : does not deliver up to the Company Liquidator, or as he directs, all such part of the movable and immovable property of the company as is in his custody or under his control and which he is required by law to deliver up;

(c) **No deliver of books and papers:** does not deliver up to the Company Liquidator, or as he directs, all such books and papers of the company as are in his custody or under his control and which he is required by law to deliver up;

(d) **No deliver of informations**: within the twelve months immediately before the commencement of the winding up or at any time thereafter,—

(i) **conceals any part of the property** of the company to the value of one thousand rupees or more, or conceals any debt due to or from the company;

(ii) **fraudulently removes any part of the property** of the company to the value of one thousand rupees or more;

(iii) **conceals, destroys, mutilates or falsifies**, or is privy to the concealment, destruction, mutilation or falsification of, **any book or paper** affecting or relating to, the property or affairs of the company;

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(iv) **makes, or is privy to the making of, any false entry** in any book or paper affecting or relating to, the property or affairs of the company;

(v) **fraudulently parts with, alters or makes any omission in**, or is privy to the fraudulent parting with, altering or making of any omission in, **any book or paper** affecting or relating to the property or affairs of the company;

(vi) by any **false representation or other fraud, obtains on credit**, for or on behalf of the company, any property which the company does not subsequently pay for;

(vii) under the **false pretence that the company is carrying on its business, obtains on credit**, for or on behalf of the company, any property which the company does not subsequently pay for; or

(viii) **pawns, pledges or disposes of any property of the company which has been obtained on credit and has not been paid** for, unless such pawning, pledging or disposing of the property is in the ordinary course of business of the company;

(e) **Material omissions:** makes any material omission in any statement relating to the affairs of the company;

(f) knowing or believing that a false debt has been proved by any person under the winding up, fails for a period of one month to inform the Company Liquidator thereof;

(g) **Prevents the production of any book or paper**: after the commencement of the winding up, prevents the production of any book or paper affecting or relating to the property or affairs of the company;

(h) **Displays fictitious losses or expenses:** after the commencement of the winding up or at any meeting of the creditors of the company within the twelve months next before the commencement of the winding up, attempts to account for any part of the property of the company by fictitious losses or expenses; or

(i) **False representation**: is guilty of any false representation or fraud for the purpose of obtaining the consent of the creditors of the company or any of them, to an agreement with reference to the affairs of the company or to the winding up,

-he shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees:

It shall be a good defence if the accused proves that he had no intent to defraud or to conceal the true state of affairs of the company or to defeat the law.

(2) **Person who takes in pawn or pledge or otherwise receives the property, knowing it**

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to be pawned, pledged, or disposed of in circumstances under sub-clause (viii) of clause (d) of sub-section (1) -Where any person pawns, pledges or disposes of any property in circumstances which amount to an offence under sub-clause (viii) of clause (d) of sub-section (1), every person who takes in pawn or pledge or otherwise receives the property, knowing it to be pawned, pledged, or disposed of in such circumstances as aforesaid, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to five years and with fine which shall not be less than three lakh rupees but which may extend to five lakh rupees.

Explanation -For the purposes of this section, the expression "**officer"** includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

47. Penalty for Frauds by Officers [Section 337]

If any person, being at the time of the commission of the alleged offence an officer of a company which is subsequently ordered to be wound up by the Tribunal under this Act—

(a) has, **by false pretences or by means of any other fraud**, **induced any person to give credit** to the company;

(b) **with intent to defraud creditors of the company or any other person**, **has made or caused to be made any gift or transfer of, or charge on**, or has caused or connived at the levying of any execution against, the property of the company; or

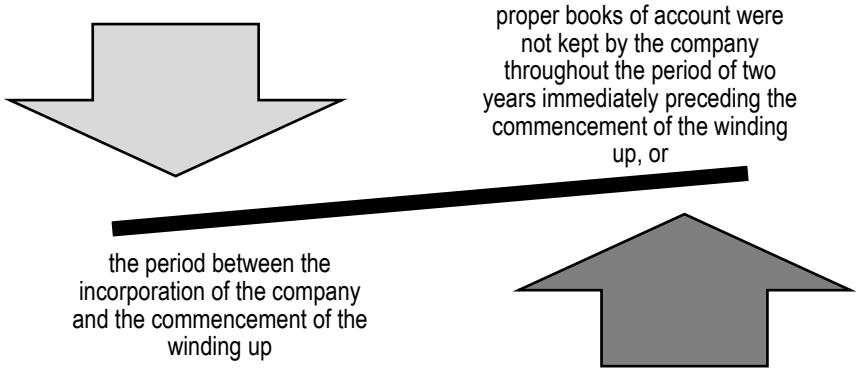
(c) **with intent to defraud creditors of the company, has concealed or removed any part of the property** of the company since the date of any unsatisfied judgment or order for payment of money obtained against the company or within two months before that date,

-he shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

48. Liability Where Proper Accounts not Kept [Section 338]

(1) Where a company is being wound up, if it is shown that-

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whichever is shorter, every officer of the company who is in default shall, unless he shows that he acted honestly and that in the circumstances in which the business of the company was carried on, the default was excusable, be punishable with imprisonment for a term which shall not be less than one year but which may extend to three years and with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

(2) It shall be deemed that proper books of account have not been kept in the case of any company,—

(a) if such books of account as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing entries made from day-to-day in sufficient detail of all cash received and all cash paid, have not been kept; and

(b) where the business of the company has involved dealings in goods, statements of the annual stock takings and, except in the case of goods sold by way of ordinary retail trade, of all goods sold and purchased, showing the goods and the buyers and the sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified, have not been kept.

49. Liability for Fraudulent Conduct of Business [Section 339]

(1) Tribunal to declare the liability of the persons: 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

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- the Company Liquidator or
- any creditor or contributory of the company,

may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of the company or 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 under this sub-section, the Official Liquidator or the Company Liquidator, as the case may be, may himself give evidence or call witnesses.

(2) Tribunal to give further directions to give effect to the declaration: Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and, in particular,—

(a) make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf, or any person claiming as assignee from or through the person liable or any person acting on his behalf;

(b) make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.

(3) Liable for fraud: Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be liable for action under section 447.

(4) Over riding effect of this section: This section shall apply, notwithstanding that the person concerned may be punishable under any other law for the time being in force in respect of the matters on the ground of which the declaration is to be made.

Explanation.—For the purposes of this section,—

(a) the expression **"assignee"** includes any person to whom or in whose favour, by the directions of the person liable, the debt, obligation, mortgage or charge was created, issued or transferred or the interest was created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made;

(b) the expression "**officer"** includes any person in accordance with whose directions or instructions the directors of the company have been accustomed to act.

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50. Power of Tribunal to Assess Damages against Delinquent Directors, etc. [Section 340]

It appears that any person who has taken part in the promotion or formation of the company, or any person, who is or has been a director, manager, Company Liquidator or officer of the company

has misapplied, or retained, or become liable or accountable for, any money or property of the company; or

has been guilty of any misfeasance or breach of trust in relation to the company,

Application can be made by

- Official Liquidator
- Company Liquidator
- Any creditor
- Contributory

Tribunal may

inquire into the conduct of the person, director, manager, Company Liquidator or officer aforesaid

- order him to repay or restore the money or property or any part thereof respectively, with interest at such rate as the Tribunal considers just and proper,
- or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Tribunal considers just and proper.

Time Period for making Application (Whichever is Longer)

- 5 years from the date of the winding up order
- 5 years from first appointment of the company liquidator
- 5 years from misapplication, retainer, misfeasance or breach of trust.

This section shall apply, notwithstanding that the matter is one for which the person concerned may be criminally liable.

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51. Liability under Sections 339 and 340 to Extend to Partners or Directors in Firms or Companies [Section 341]

Where a declaration under section 339 or an order under section 340 is made in respect of a firm or body corporate, the Tribunal shall also have power to make a declaration under section 339, or pass an order under section 340, as the case may be, in respect of any person who was at the relevant time a partner in that firm or a director of that body corporate.

52. Prosecution of Delinquent Officers and Members of Company [Section 342]

(1) Tribunal to direct the liquidator to prosecute the offender: If it appears to the Tribunal in the course of a winding up by the Tribunal, that any person, who is or has been -

- an officer, or
- any member, of the company

has been guilty of any offence in relation to the company, the Tribunal may, either-

- on the application of any person interested in the winding up, or
- suo motu,

-direct the liquidator to prosecute the offender or to refer the matter to the Registrar.

(2) To give assistance in prosecution: When any prosecution is instituted under this section, it shall be the duty of the liquidator and of every person, who is or has been an officer and agent of the company to give all assistance in connection with the prosecution which he is reasonably able to give.

Explanation—For the purposes of this sub-section, the expression **"agent",** in relation to a company, shall include any banker or legal adviser of the company and any person employed by the company as auditor.

(3) In case of failure: If a person fails or neglects to give assistance , he shall be liable to pay fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

53. Company Liquidator to Exercise Certain Powers Subject to Sanction [Section 343]

(1) Order passed by the Company Liquidator with the sanction of the tribunal: The Company Liquidator may, with the sanction of the Tribunal, when the company is being wound up by the Tribunal,—

(i) **pay any class of creditors** in full;

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(ii) **make any compromise or arrangement with creditors or persons** claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, against the company, or whereby the company may be rendered liable; or

(iii) **compromise any call or liability to call, debt, and liability** capable of resulting in a debt, and any claim, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or alleged to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or liabilities or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof.

(2) Central Government to make rules to regulate powers of the Company Liquidator: In the case of a winding up by the Tribunal, the Central Government may make rules to provide that the Company Liquidator may, under such circumstances, if any, and subject to such conditions, restrictions and limitations, if any, as may be prescribed, exercise any of the powers referred to in sub clause (ii) or sub-clause (iii) of clause (b) of sub-section (1) without the sanction of the Tribunal.

(3) Right to apply to the tribunal on the exercise of powers of the Company Liquidator: Any creditor or contributory may apply in the manner prescribed to the Tribunal with respect to any exercise or proposed exercise of powers by the Company Liquidator under this section, and the Tribunal shall after giving a reasonable opportunity to such applicant and the Company Liquidator, pass such orders as it may think fit.

54. Statement that Company is in Liquidation [Section 344]

(1) Statement of wound up: Where a company is being wound up, whether by

- the Tribunal or
- voluntarily,

- every invoice, order for goods or business letter issued-

- by or on behalf of the company or
- a Company Liquidator of the company, or
- a receiver or
- manager of the property of the company,

- being a document on or in which the name of the company appears, shall contain a statement that the company is being wound up.

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(2) If a company contravenes the above provisions, the company, and every officer of the company, the Company Liquidator and any receiver or manager, who wilfully authorises or permits the non-compliance, shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees.

55. Books and Papers of Company to be Evidence [Section 345]

Books and Papers shall be prima facie evidence of truth: Where a company is being wound up, all books and papers of the company and of the Company Liquidator shall, as between the contributories of the company, be prima facie evidence of the truth of all matters purporting to be recorded therein.

56. Inspection of Books and Papers by Creditors and Contributories [Section 346]

(1) Inspection of Books and Papers: At any time after the making of an order for the winding up of a company by the Tribunal, any creditor or contributory of the company may inspect the books and papers of the company only in accordance with, and subject to such rules as may be prescribed.

(2) No effect on the rights of the following persons: Nothing contained in sub-section (1) shall exclude or restrict any rights conferred by any law for the time being in force—

(a) on the Central Government or a State Government;

(b) on any authority or officer thereof; or

(c) on any person acting under the authority of any such Government or of any such authority or officer.

57. Disposal of Books and Papers of Company [Section 347]

(1) Disposal of books and papers: When the affairs of a company have been completely wound up and it is about to be dissolved, the books and papers of such company and those of the Company Liquidator may be disposed of in such manner as the Tribunal directs.

(2) Transfer of responsibility: After the expiry of five years from the dissolution of the company, no responsibility shall devolve-

- on the company,
- the Company Liquidator, or
- any person

to whom the custody of the books and papers has been entrusted, by reason of any book

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or paper not being forthcoming to any person claiming to be interested therein.

(3) The Central Government may, by rules,—

(a) **prevent for such period** as it thinks proper **the destruction of the books and papers** of a company which has been wound up and of its Company Liquidator; and

(b) **enable any creditor or contributory of the company to make representations** to the Central Government in respect of the matters specified in clause (a) and **to appeal to the Tribunal** from any order which may be made by the Central Government in the matter.

(4) **If any person acts in contravention** of any rule framed or an order made under sub-section (3), he shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees, or with both.

58. Information as to Pending Liquidations [Section 348]

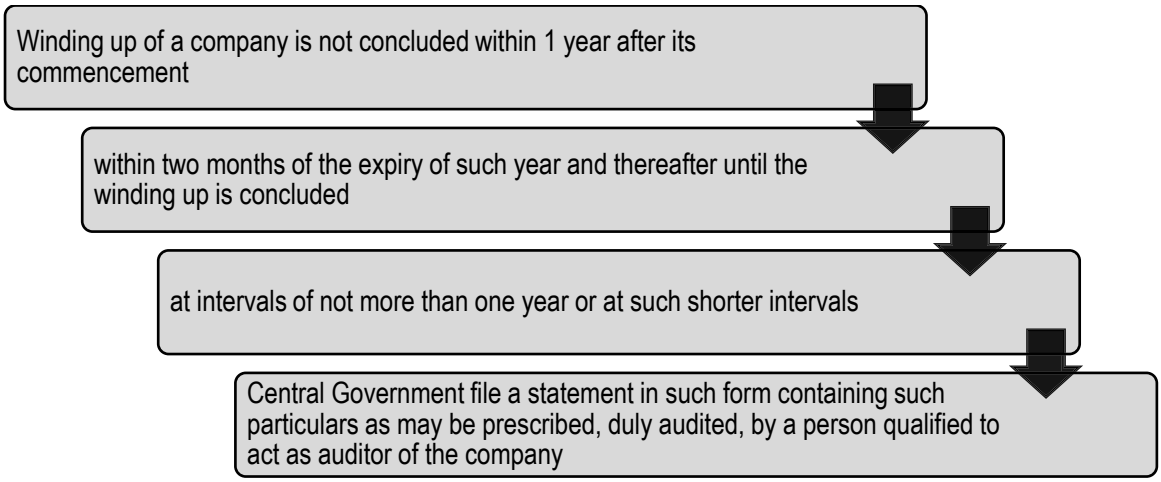
(1) **Conclusion of winding up process from its commencement:** If the winding up of a company is not concluded **within one year** after its commencement, the Company Liquidator shall (unless he is exempted from so doing), either-

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, if any, as may be prescribed,

file a statement in such form containing such particulars as may be prescribed,

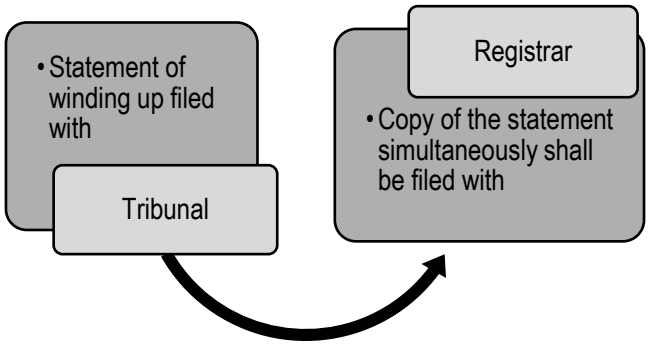
duly audited, by a person qualified to act as auditor of the company, with respect to the proceedings in, and position of, the liquidation, with the Tribunal:

No such audit as is referred to in this sub-section shall be necessary where the provisions of section 294 apply;

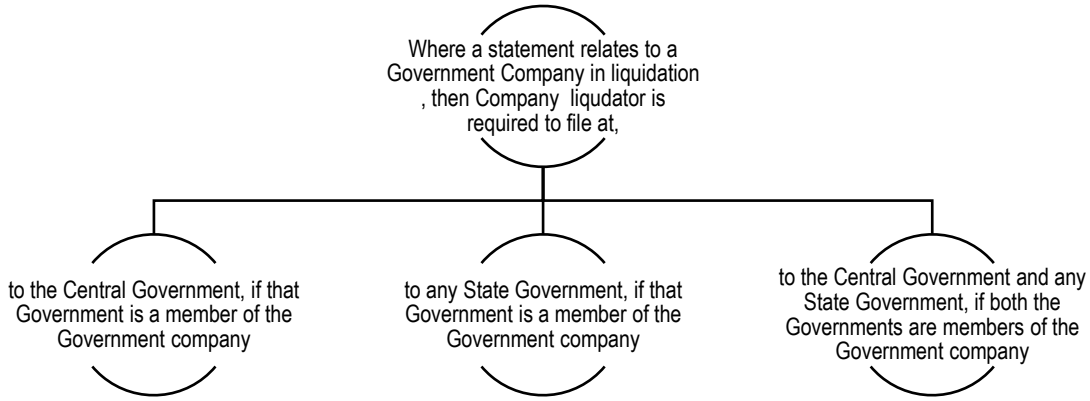


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(2) Copy of statement to be filed with the registrar: When the statement is filed with the Tribunal under clause (a) of sub-section (1), a copy shall simultaneously be filed with the Registrar and shall be kept by him along with the other records of the company.



(3) Where the company in liquidation is a Government Company:



(4) Person entitled to inspect the statement, etc.: Any person stating himself in writing to be a creditor or contributory of the company shall be entitled, by himself or by his agent, at all reasonable times, on payment of the prescribed fee, to inspect the statement referred to in sub-section (1), and to receive a copy thereof or an extract therefrom.

(5) Fraudulently representing himself creditor or contributory: Any person fraudulently stating himself to be a creditor or contributory shall be deemed to be guilty of an offence under section 182 of the Indian Penal Code, and shall, on the application of the Company Liquidator, be punishable accordingly.

(6) Contravention of provisions by Company Liquidator: If a Company Liquidator contravenes the provisions of this section, the Company Liquidator shall be punishable with fine which may extend to five thousand rupees for every day during which the failure continues.

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(7) In case of wilful default: If a Company Liquidator makes wilful default in causing the statement referred to in sub-section (1) audited by a person who is not qualified to act as an auditor of the company, the Company Liquidator shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one lakh rupees, or with both.

59. Official Liquidator to Make Payments into Public Account of India [Section 349]

Every Official Liquidator shall, in such manner and at such times as may be prescribed, pay the monies received by him as Official Liquidator of any company, into the public account of India in the Reserve Bank of India.

60. Company Liquidator to Deposit Monies into Scheduled Bank [Section 350]

(1) Deposit of monies in a scheduled bank: Every Company Liquidator of a company shall, in such manner and at such times as may be prescribed, deposit the monies received by him in his capacity as such in a scheduled bank to the credit of a special bank account opened by him in that behalf.

If the Tribunal considers that it is advantageous for the creditors or contributories or the company, it may permit the account to be opened in such other bank specified by it.

(2) Retention of amount after the prescribed period: If any Company Liquidator at any time retains for more than **ten days** a sum exceeding five thousand rupees or such other amount as the Tribunal may, on the application of the Company Liquidator, authorise him to retain, then, unless he explains the retention to the satisfaction of the Tribunal, he shall—

(a) **pay interest on the amount so retained in excess**, at the rate of twelve per cent. per annum and also pay such penalty as may be determined by the Tribunal;

(b) **be liable to pay any expenses occasioned** by reason of his default; and

(c) **also be liable to have all or such part of his remuneration**, as the Tribunal may consider just and proper, disallowed, or may also be removed from his office.

61. Liquidator Not to Deposit Monies into Private Banking Account [Section 351]

Neither the Official Liquidator nor the Company Liquidator of a company shall deposit any monies received by him in his capacity as such into any private banking account.

62. Company Liquidation Dividend and Undistributed Assets Account [Section 352]

(1) Money in the hands of the liquidator: Where any company is being wound up and the

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liquidator has in his hands or under his control any money representing—

(a) **dividends payable to any creditor** but which had remained unpaid for six months after the date on which they were declared; or

(b) **assets refundable to any contributory** which have remained undistributed for six months after the date on which they become refundable, the liquidator shall forthwith deposit the said money into a separate special account to be known as the Company Liquidation Dividend and Undistributed Assets Account maintained in a scheduled bank.

(2) Transfer of money into the Company Liquidation Dividend and Undistributed Assets Account: The liquidator shall, on the dissolution of the company, pay into the Company Liquidation Dividend and Undistributed Assets Account any money representing unpaid dividends or undistributed assets in his hands at the date of dissolution.

(3) Furnishing of statement all sums to registrar: The liquidator shall, when making any payment referred to in sub-sections (1) and (2), furnish to the Registrar, a statement in the prescribed form, setting forth, in respect of all sums included in such payment, the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(4) Receivable of receipt of money payment from scheduled bank: The liquidator shall be entitled to a receipt from the scheduled bank for any money paid to it, and such receipt shall be an effectual discharge of the Company Liquidator in respect thereof.

(5) In case of voluntary winding up of company: Where a company is being wound up voluntarily, the Company Liquidator shall, when filing a statement as per section 348,

- indicate the sum of money which is payable, during the six months preceding the date on which the said statement is prepared, and shall, within fourteen days of the date of filing the said statement-
- pay that sum into the Company Liquidation Dividend and Undistributed Assets Account.

(6) Application to registrar by the entitled person to any money paid: Any person claiming to be entitled to any money paid into the Company Liquidation Dividend and Undistributed Assets Account, whether paid in pursuance of this section or under the provisions of any previous company law

- may apply to the Registrar for payment thereof, and
- the Registrar, if satisfied that the person claiming is entitled, may make the payment to that person of the sum due.

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Period of settlement of claim: Provided that the Registrar shall settle the claim of such person within a period of sixty days from the date of receipt of such claim, failing which the Registrar shall make a report to the Regional Director giving reasons of such failure.

(7) Unclaimed money in Company Liquidation Dividend and Undistributed Assets Account: Any money paid into the Company Liquidation Dividend and Undistributed Assets Account in pursuance of this section, which remains unclaimed thereafter -

- for a period of fifteen years,
- shall be transferred to the general revenue account of the Central Government,
- but a claim to any money so transferred may be preferred under sub-section (6) and shall be dealt with as if such transfer had not been made and the order, if any, for payment on the claim will be treated as an order for refund of revenue.

(8) In contravention: Any liquidator retaining any money which should have been paid by him into the Company Liquidation Dividend and Undistributed Assets Account under this section shall—

(a) **pay interest on the amount so retained at the rate of twelve per cent per annum** and also pay such penalty as may be determined by the Registrar:

Provided that the Central Government may in any proper case remit either in part or in whole the amount of interest which the liquidator is required to pay under this clause;

(b) **be liable to pay any expenses** occasioned by reason of his default; and

(c) **where the winding up is by the Tribunal**, also be liable to have all or such part of his remuneration, as the Tribunal may consider just and proper, to be disallowed, and to be removed from his office by the Tribunal.

63. Liquidator to Make Returns, etc. [Section 353]

(1) Company liquidator makes default in filing, delivering of documents etc.: If any Company Liquidator who has made any default-

- in filing, delivering or making any return, account or other document, or
- in giving any notice which he is by law required to file, deliver, make or give, fails to make good the default
- within fourteen days after the service on him of a notice requiring him to do so,

the Tribunal may, on an application made to it by any-

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- contributory or creditor of the company or
- by the Registrar,

make an order directing the Company Liquidator to make good the default within such time as may be specified in the order.

(2) Cost to be bear by company liquidator: Any order under sub-section (1) may provide that all costs of, and incidental to, the application shall be borne by the Company Liquidator.

(3) This section is not effecting on the other enactment imposing penalty on company liquidator: Nothing in this section shall prejudice the operation of any enactment imposing penalties on a Company Liquidator in respect of any such default as aforesaid.

64. Meetings to Ascertain Wishes of Creditors or Contributories [Section 354]

(1) Ascertain the wishes: 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 Tribunal may direct; and

(c) **appoint a person to act as chairman** of any such meeting, and

(d) **to report the result** thereof to the Tribunal.

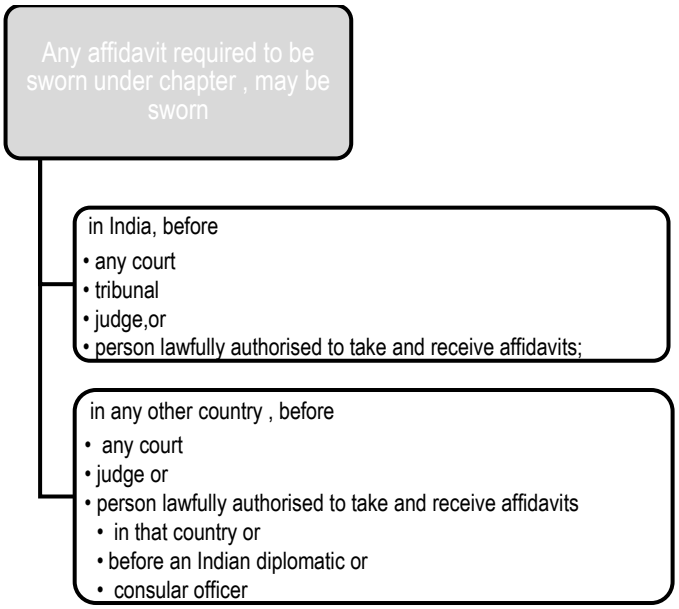
(2) While ascertaining the wishes of creditors, regard shall be had to the value of each debt of the creditor.

(3) While ascertaining the wishes of contributories, regard shall be had to the number of votes which may be cast by each contributory.

65. Court, Tribunal or Person, etc., before whom Affidavit may be Sworn [Section 355]

(1) Affidavit:

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(2) Judicial notice of the affidavit and other related documents: All tribunals, judges, Justices, commissioners and persons acting judicially in India shall take judicial notice of the seal, stamp or signature, as the case may be, of any such court, tribunal, judge, person, diplomatic or consular officer, attached, appended or subscribed to any such affidavit or to any other document to be used for the purposes of this Chapter.

66. Powers of Tribunal to Declare Dissolution of Company Void [Section 356]

(1) Power of tribunal to declare dissolution to be void: Where a company has been dissolved, the Tribunal may -

- at any time within two years of the date of the dissolution,
- on application by the Company Liquidator of the company or
- by any other person who appears to the Tribunal to be interested,

-make an order, upon such terms as the Tribunal thinks fit, declaring the dissolution to be void, and thereupon such proceedings may be taken as if the company had not been dissolved.

(2) Failure in fling of a certified copy of order of tribunal with registrar: It shall be the duty of the Company Liquidator or the person on whose application the order was made, within thirty days after the making of the order or such further time as the Tribunal may allow, to file a certified copy of the order with the Registrar who shall register the same, and if the Company Liquidator or the person fails so to do, the Company Liquidator or the

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person shall be punishable with fine which may extend to ten thousand rupees for every day during which the default continues.

67. Commencement of Winding Up by Tribunal [Section 357]

The winding up of a company by the Tribunal under this Act shall be deemed to commence at the time of the presentation of the petition for the winding up.

68. Exclusion of Certain Time in Computing Period of Limitation [Section 358]

Notwithstanding anything in the Limitation Act, 1963, or in any other law for the time being in force, in computing the period of limitation specified for any suit or application in the name and on behalf of a company which is being wound up by the Tribunal, the period from the date of commencement of the winding up of the company to a period of one year immediately following the date of the winding up order shall be excluded.

Part IV- Official Liquidator

69. Appointment of Official Liquidator [Section 359]

(1) For the purposes of this Act, so far as it relates to the winding up of companies by the Tribunal, the Central Government may appoint as many-

- Official Liquidators, Joint, Deputy or Assistant Official Liquidators as it may consider necessary to discharge the functions of the Official Liquidator.

(2) The liquidators so appointed, shall be whole-time officers of the Central Government.

(3) The salary and other allowances of the Official Liquidator, Joint Official Liquidator, Deputy Official Liquidator and Assistant Official Liquidator shall be paid by the Central Government.

70. Powers and Functions of Official Liquidator [Section 360]

(1) Such powers as prescribed by the Central Government: The Official Liquidator shall exercise such powers and perform such duties as the Central Government may prescribe.

(2) Others powers: Without prejudice to the provisions of sub-section (1), the Official Liquidator may—

(a) exercise all or any of the powers as may be exercised by a Company Liquidator under the provisions of this Act; and

(b) Conduct inquiries or investigations, if directed by the Tribunal or the Central Government, in respect of matters arising out of winding up proceedings.

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71. Summary Procedure for Liquidation [Section 361]

(1) Central Government may order for summary procedure: Where the company to be wound up under this Chapter, —

(i) has assets of book value not exceeding one crore rupees; and

(ii) belongs to such class or classes of companies as may be prescribed, the Central Government may order it to be wound up by summary procedure provided under this Part.

(2) Appointment of official liquidator: Where an order under sub-section (1) is made, the Central Government shall appoint the Official Liquidator as the liquidator of the company.

(3) Duties of official liquidator: The Official Liquidator shall forthwith take into his custody or control all assets, effects and actionable claims to which the company is or appears to be entitled.

(4) Submission of report to Central Government: The Official Liquidator shall, within thirty days of his appointment, submit a report to the Central Government in such manner and form, as may be prescribed, including a report whether in his opinion, any fraud has been committed in promotion, formation or management of the affairs of the company or not.

(5) Central Government may direct for investigation: On receipt of the report, if the Central Government is satisfied that any fraud has been committed by the promoters, directors or any other officer of the company, it may direct further investigation into the affairs of the company and that a report shall be submitted within such time as may be specified.

(6) Order of Central Government for the winding up: After considering the investigation report under sub-section (5), the Central Government may order that winding up may be proceeded under Part I of this Chapter or under the provision of this Part.

72. Sale of Assets and Recovery of Debts Due to Company [Section 362]

(1) Disposal of assets: The Official Liquidator shall expeditiously dispose of all the assets whether movable or immovable within sixty days of his appointment.

(2) Serving of notice to deposit payable amount: The Official Liquidator shall serve a notice within thirty days of his appointment calling upon the debtors of the company or the contributories, as the case may be, to deposit within thirty days with him the amount payable to the company.

(3) Order passed by Central Government: Where any debtor does not deposit the amount under sub-section (2), the Central Government may, on an application made to it by the Official Liquidator, pass such orders as it thinks fit.

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(4) Deposition of recovered amount: The amount recovered under this section by the Official Liquidator shall be deposited in accordance with the provisions of section 349.

73. Settlement of Claims of Creditors by Official Liquidator [Section 363]

(1) The Official Liquidator within thirty days of his appointment shall call upon the creditors of the company to prove their claims in such manner as may be prescribed, within thirty days of the receipt of such call.

(2) The Official Liquidator shall prepare a list of claims of creditors in such manner as may be prescribed and each creditor shall be communicated of the claims accepted or rejected along with reasons to be recorded in writing.

74. Appeal by Creditor [Section 364]

(1) Appeal against the decision of official liquidator before central government: Any creditor aggrieved by the decision of the Official Liquidator under section 363 may file an appeal before the Central Government within thirty days of such decision.

(2) Central government either dismiss or modify the decision: The Central Government may after calling the report from the Official Liquidator either dismiss the appeal or modify the decision of the Official Liquidator.

(3) Payment to the accepted claims: The Official Liquidator shall make payment to the creditors whose claims have been accepted.

(4) Referring of matter to tribunal: The Central Government may, at any stage during settlement of claims, if considers necessary, refer the matter to the Tribunal for necessary orders.

75. Order of Dissolution of Company [Section 365]

(1) Submission of final report of wound up: The Official Liquidator shall, if he is satisfied that the company is finally wound up, submit a final report to—

Sl.no.	Concerned authority	Condition
(i)	Central Government	in case no reference was made to the Tribunal under sub-section (4) of section 364;
(ii)	in any other case	the Central Government and the Tribunal

(2) Order of dissolution: The Central Government, or as the case may be, the Tribunal on receipt of such report shall order that the company be dissolved.

(3) Consequences of order: Where an order is made, the Registrar shall strike off the name of the company from the register of companies and publish a notification to this effect.

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11
Producer Companies

1. Introduction

(a) Background of the law relating to producer companies: The co-operative movement in India is considered as the backbone of the Indian economy. The movement was able to make rapid strides in the rural economy, uplifting the standard of living of the rural masses, which enabled them to sell their produce under an organised structure and form of organisation. The co-operative businesses in India are a time tested and successful form of organisation which enabled wider participation of the member constituting it and today there are many co-operative businesses, which are, not only state oriented but have become multi-state and national co-operatives. With the on set of reforms in the Indian economy, a need was felt that such of those producer co-operatives should be able to corporatise themselves into company form of organisation.

In the back drop of corporatisation of businesses, the Central Government incorporated provisions to facilitate the formation of co-operative businesses as companies and to make it possible to convert existing co-operative business into companies. The option of conversion is purely voluntarily.

Thus, the Companies Act, 1956 contains Sections 581A to 581ZT relating to formation of producer companies, their administration and management, conversion of existing co-operative businesses into producer companies and matters connected therewith.

Note: In this chapter, wherever the word 'Act' is used, it refers to the Companies Act, 1956.

Part IXA of the Companies Act, 1956 deals with Producer companies. It consists of 12 chapters.

The twelve chapters dealing with the respective matters as shown below:	
Chapter-I	Definitions
Chapter-II	Incorporations of producer companies and other matters
Chapter-III	Management of producer company
Chapter-IV	General Meetings
Chapter-V	Share Capital and Member Rights
Chapter-VI	Finance, Accounts and Audit

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Chapter-VII	Loans to Member and Investments
Chapter-VIII	Penalties
Chapter-IX	Amalgamation, Merger or Division
Chapter-X	Resolution of Disputes
Chapter-XI	Miscellaneous Provisions
Chapter-XII	Re-Conversion of producer company into Inter-State Co-operative Societies

(b) Over-riding effect: The provisions of Part-IXA shall override other laws. According to section 581 ZQ, the provisions of this part shall have effect notwithstanding anything inconsistent therewith contained in this Act or any other law for the time being in force or any instrument having effect by virtue of any such law; but the provisions of any such Act or law or instrument in so far as the same are not varied by, or are inconsistent with, the provisions of this part shall apply to the producer company.

2. Application of Provisions relating to Private Companies

All the limitations, restrictions and provisions of this Act, other than those specified in this part, applicable to a private company, shall, as far as may be, apply to a producer company, as if it is a private limited company under this Act in so far as they are not in conflict with the provisions of this Part. [Section 581ZR]

Although, the status of a producer company shall be that of a private company, strictly speaking, it cannot be construed as a private company in terms of section 3(1)(iii)[1] of the Companies Act, 1956 which defines a private company. In terms of restriction on the transfer of shares, a producer company shall be restricted as provided in sections 581ZD(ii) and (iv). A producer company cannot make any invitation to the public for subscription of any shares or debentures of the company or accept any invitation of deposits.

3. Power to Modify Act in its Application to Producer Companies [Section 581ZT]

(1) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act (other than those contained in this Part) specified in the said notification:

(a) shall not apply to the producer companies or any class or category thereof; or

(b) shall apply to the producer companies or any class or category thereof with such exception or adaptation as may be specified in the notification.

[1]Section 2(68) of the Companies Act, 2013.

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(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

4. Definitions

Section 581A summarises the following definitions:

(a) **"active member"** means a member who fulfils the quantum and period of patronage of the producer company as may be required by the articles;

(b) **"Chief Executive"** means an individual appointed as such under sub-section (1) of section 581W;

(c) **"limited return"** means the maximum dividend as may be specified by the articles;

(d) **"Member"** means a person or Producer institution (whether incorporated or not) admitted as a member of a producer company and who retains the qualifications necessary for continuance as such;

(e) **"inter-State co-operative society"** means a Multi-State co-operative society as defined in clause (p) of Section 3 of the Multi-State Co-operative Societies Act, 2002 (39 of 2002) and includes any co-operative society registered under any other law for the time being in force, which has, subsequent to its formation, extended any of its objects to more than one State by enlisting the participation of persons or by extending any of its activities outside the State, whether directly or indirectly or through an institution of which it is a constituent;

(f) **"mutual assistance principles"** means the principles set out in sub-section (2) of section 581G;

(g) **"officer"** includes any director or Chief Executive or Secretary or any person in accordance with whose directions or instructions part or whole of the business of the producer company is carried on;

(h) **"patronage"** means the use of services offered by the producer company to its member by participation in its business activities;

(i) **"patronage bonus"** means payments made by a producer company out of its surplus income to the member in proportion to their respective patronage;

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(j) **"primary produce"** means—

(i) produce of farmers, arising from agriculture (including animal husbandry, horticulture, floriculture, pisciculture, viticulture, forestry, forest products, re-vegetation, bee raising and farming plantation products), or from any other primary activity or service which promotes the interest of the farmers or consumers; or

(ii) produce of persons engaged in handloom, handicraft and other cottage industries;

(iii) any product resulting from any of the above activities, including by-products of such products;

(iv) any product resulting from an ancillary activity that would assist or promote any of the aforesaid activities or anything ancillary thereto;

(v) any activity which is intended to increase the production of anything referred to in sub-clauses (i) to (iv) or improve the quality thereof;

(k) **"producer"** means any person engaged in any activity connected with or relatable to any primary produce;

(l) **"Producer company"** means a body corporate having objects or activities specified in section 581B and registered as producer company under this Act;

(m) **"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.

(n) **"withheld price"** means part of the price due and payable for goods supplied by any member to the producer company; and as withheld by the producer company for payment on a subsequent date.

5. Objects of a Producer Company

Producer company means a body corporate having objects or activities specified in Section 581B and registered as a producer company under the Companies Act, 1956.

Every producer company should deal basically with the produce of its active member for carrying out any of its objects. The objects of the producer company, as per section 581B, may be relating to all or any of the following matters, namely:

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

Provided that the producer company may at its option carry on any of the activities specified in this clause either by itself or through other institution;

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

(iii) manufacture, sale or supply of machinery, equipment or consumables mainly to its members;

(iv) providing education on the mutual assistance principles to its members and others;

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

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

(vii) insurance of producers or their primary produce;

(viii) promoting techniques of mutuality and mutual assistance;

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

(x) any other activity, ancillary or incidental to any of the activities referred to in clauses (i) to (ix) or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner;

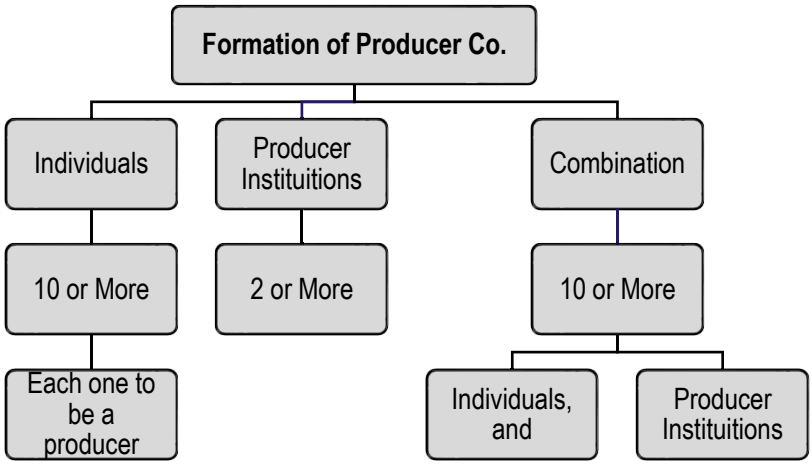
(xi) financing of procurement, processing, marketing or other activities specified in clauses (i) to (x) which include extending of credit facilities or any other financial services to its members.

6. Formation of a Producer Company and its Registration

The formalities relating to registration of a producer company are similar as applicable for all companies. However, for registration of a producer company, the requirements of Part-IXA should also be complied with. [Section 581C].

1. A producer company can be formed by any 10 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 and provisions of this Act in respect of registration, may form Producer Company under this Act.

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Example: A group of 8 individuals together with a producer institution approached the Registrar for incorporation of a producer company under Section 581 of the Companies Act, 1956. Can the Registrar go ahead with the registration and incorporation? Discuss.

Answer: In the problem given here, a group of 8 individuals together with a producer company approached the registrar for incorporation of a producer company. Since the requirements "combination of ten or more individuals and producer institutions" of this provision has not been complied with in respect of registration, so registrar cannot proceed with the registration and incorporation of the company.

2. If the Registrar of Companies is satisfied that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, he shall, within 30 days of the receipt of the documents required for registration, register the memorandum, the articles and other documents, if any, and issue a certificate of incorporation under this Act.

30 days

3. After incorporation, producer company so formed shall have the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed as company limited by shares.

Co. limited by shares

4. It also becomes a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limit to the number of members thereof, and the producer company shall not, under any circumstance, whatsoever, become or be deemed to become a public limited company under this Act.

Pvt Ltd. Co.

5. The producer company may reimburse to its promoters all other direct costs associated

Reimbursement to promoters

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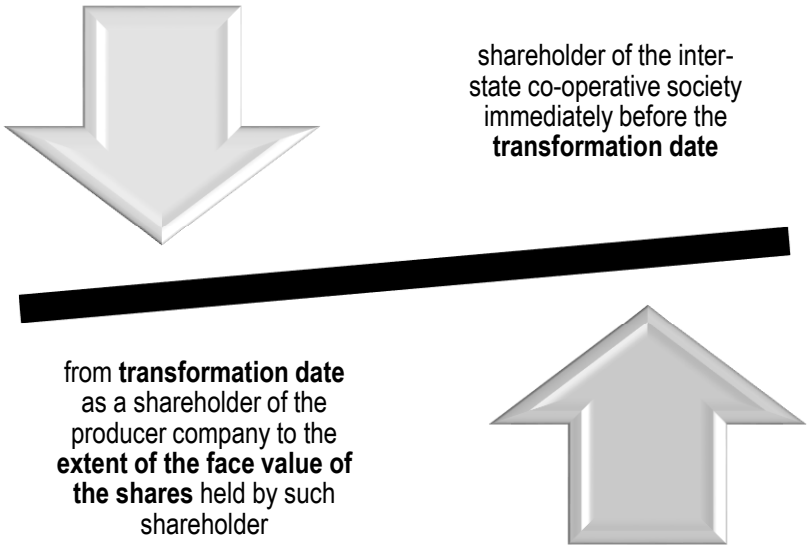
with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the members.

Registration of Producer Co.
• Within 30 days of the receipt of the documents required for registration • issue a certificate of incorporation
After incorporation
• Producer Co. shall have the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed as company limited by shares.
Body Corporate
• Private Limited Co. • Not a Public Co.
Reimbursement to promoters
• all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles • Such payment shall be subject to the approval at first general meeting of the members.

7. Effect of incorporation of producer company (Section 581K)

Every shareholder of the inter-state co-operative society immediately before the date of registration of producer company (hereafter referred to as the transformation date) shall be deemed to be registered on and from that date as a shareholder of the producer company to the extent of the face value of the shares held by such shareholder.

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8. Membership and voting rights of members (Section 581D)

1. A person, who has any business interest which is not in conflict with business of the producer company, shall become a member. On the other hand, a member, who acquires any business interest which is in conflict with the business of the producer company, shall cease to be a member and be removed as a member in accordance with articles of the producer company.

2. The articles of any producer company may provide for the conditions, subject to which a member may continue to retain his membership, and the manner in which voting rights shall be exercised by the members.

   These voting's rights are:

   (i) In a case where the members consist 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.

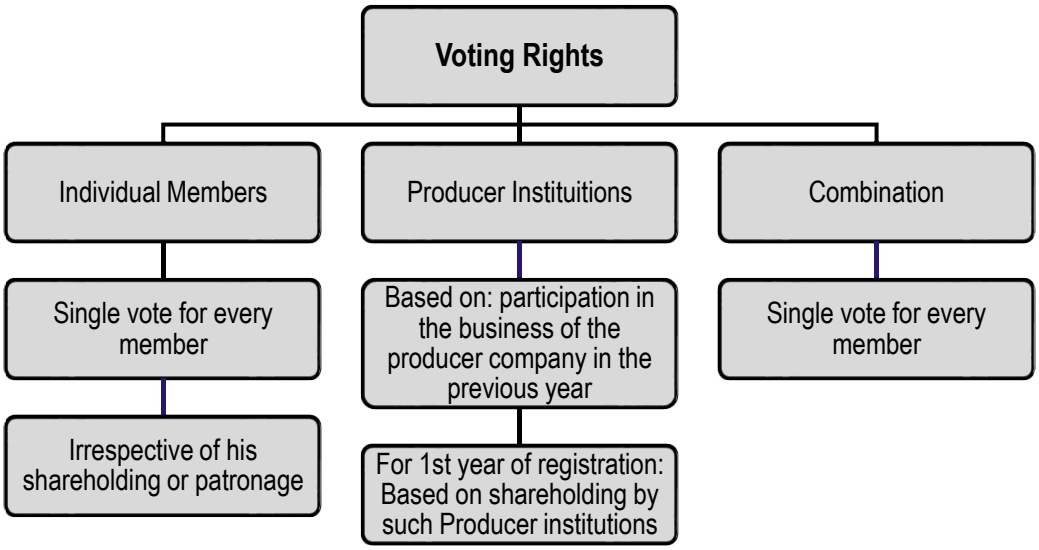
   (ii) In a case where the member consists of producer institutions only, the voting rights of such Producer institutions shall be determined on the basis of their participation in the business of the producer company in the previous year, as may be specified by articles.

   Provided that during the first year of registration of a producer company, the voting rights shall be determined on the basis of the shareholding by such Producer institutions.

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(iii) In a case where the members consist of individuals and producer institutions, the voting rights shall be computed on the basis of a single vote for every member.

3. However, a producer company may, if so authorised by its articles, restrict the voting rights to active members, in any special or general meeting.



9. Benefits to member [Section 581E]

The member of the producer company may get benefited in the following ways:

1. Every member of producer company, subject to provisions made in the articles, 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.

2. Every member shall, on the share capital contributed, receive only a limited return. However, every such member may be allotted bonus shares in accordance with the provisions contained in ection 581ZJ.

3. The surplus if any, remaining after making provision for payment of limited return and reserves referred to in section 581ZI, may also be disbursed as patronage bonus, amongst the members, in proportion to their participation in the business of the producer company, either in cash or by way of allotment of equity shares, or both, as may be decided by the members at the general meeting.

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10. Memorandum of Producer Company [Section 581F]

The memorandum of association of every producer company should contain the following:

(a) the name of the company with *"producer company Limited"* as the last words of the name of such Company;

(b) the State in which the registered office of the producer company is to situate;

(c) the main objects of the producer company shall be one or more of the objects specified in section 581B;

(d) the names and addresses of the persons who have subscribed to the memorandum;

(e) the amount of share capital with which the producer company is to be registered and division thereof into shares of a fixed amount;

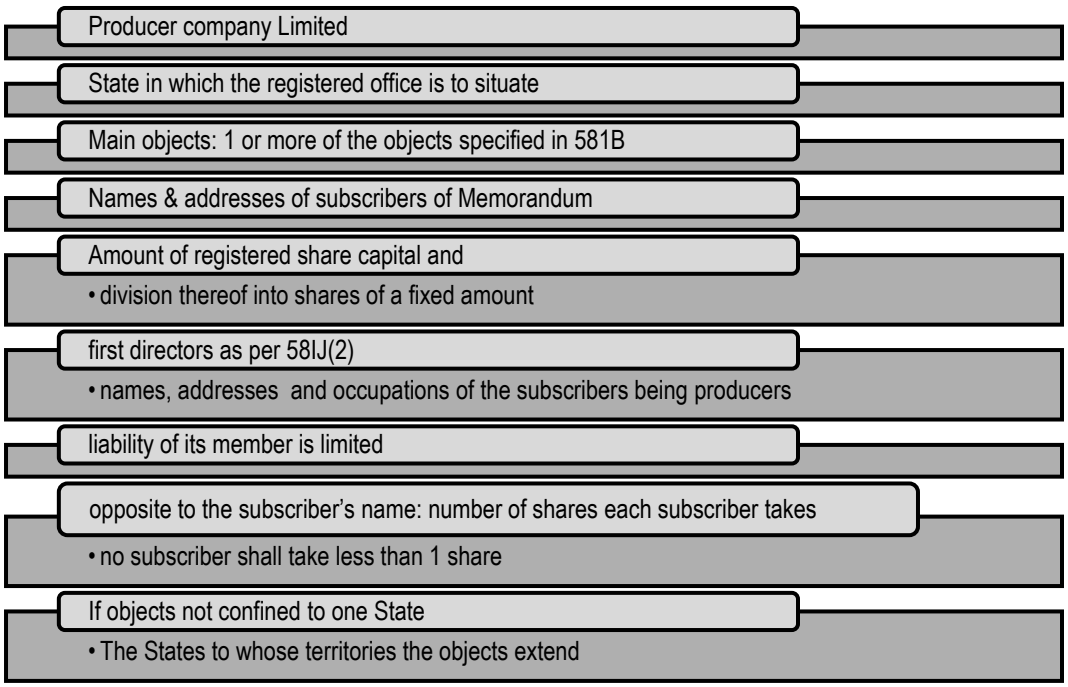
(f) the names, addresses and occupations of the subscribers being producers, who shall act as the first directors in accordance with sub-section (2) of section 58IJ.

(g) that the liability of its member is limited;

(h) opposite to the subscriber's name the number of shares each subscriber takes:

Provided that no subscriber shall take less than one share;

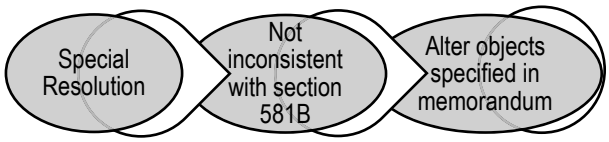
(i) in case the objects of the producer company are not confined to one State, the States to whose territories the objects extend.



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11. Amendment of memorandum [Section 581H]

A producer company shall not alter the conditions contained in its memorandum except in the cases, by the mode and to the extent for which express provision is made in this Act. However, a producer company may, by special resolution, not inconsistent with section 581B, alter its objects specified in its memorandum.



A copy of the amended memorandum, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of resolution.

In case of transfer of the registered office of a producer company from the jurisdiction of one Registrar to another, certified copies of the special resolution certified by two directors shall be filed with both the Registrars within thirty days, and each Registrar shall record the same, and thereupon the Registrar from whose jurisdiction the office is transferred, shall forthwith forward to the other Registrar all documents relating to the producer company.

The alteration of the provisions of memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Company Law Board on petition.

12. Articles of Association [Section 581G]

Registration of Articles

There shall be presented, for registration to the Registrar of the State to which the registered office of the Producer Company is, stated by the memorandum of association, to be situate -

(a) memorandum of the Producer Company;

(b) its articles duly signed by the subscribers to the Memorandum

Provisions contained in the Articles

The articles should contain the following provisions, namely:

(a) the qualifications for member, the conditions for continuance or cancellation of member and the terms, conditions and procedure for transfer of shares;

(b) the manner of ascertaining the patronage and voting right based on patronage;

(c) subject to the provisions contained in sub-section (1) of section 581N, the manner of constitution of the Board, its powers and duties, the minimum and maximum number of

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directors, manner of election and appointment of directors and retirement by rotation, qualifications for being elected or continuance as such and the terms of office of the said directors, their powers and duties, conditions for election or co-option of directors, method of removal of directors and the filling up of vacancies on the Board, and the manner and the terms of appointment of the Chief Executive;

(d) the election of the Chairman, term of office of directors and the Chairman, manner of voting at the general or special meetings of members, procedure for voting, by directors at meetings of the Board, powers of the Chairman and the circumstances under which the Chairman may exercise a casting vote.

(e) the circumstances under which, and the manner in which, the withheld price is to be determined and distributed;

(f) the manner of disbursement of patronage bonus in cash or by issue of equity shares, or both;

(g) the contribution to be shared and related matters referred to in sub-section (2) of section 581ZI;

(h) the matters relating to issue of bonus shares out of general reserves as set out in section 581ZJ;

(i) the basis and manner of allotment of equity shares of the producer company in lieu of the whole or part of the sale proceeds of produce or products supplied by the members;

(j) the amount of reserves, sources from which funds may be raised, limitation on raising of funds, restriction on the use of such funds and the extent of debt that may be contracted and the conditions thereof;

(k) the credit, loans or advances which may be granted to a member and the conditions for the grant of the same;

(l) the right of any member to obtain information relating to general business of the company;

(m) the basis and manner of distribution and disposal of funds available after meeting liabilities in the event of dissolution or liquidation of the producer company;

(n) theauthorisation for division, amalgamation, merger, creation of subsidiaries and the entering into joint ventures and other matters connected therewith;

(o) laying of the memorandum and articles of the producer company before a special general meeting to be held within ninety days of its registration;

(p) any other provision, which the member may, by special resolution recommend to be included in articles.

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Mutual Assistance Principles in the Articles

The articles should also contain the following *mutual assistance principles*, namely:

(a) the membership shall be voluntary and available, to all eligible persons who, can participate or avail of the facilities or services of the producer company, and are willing to accept the duties of member;

(b) each member shall save as otherwise provided in this Part, have only a single vote irrespective of the share holding;

(c) the producer company shall be administered by a Board consisting of persons elected or appointed as directors in the manner consistent with the provisions of this Part and the Board shall be accountable to the members;

(d) save as provided in this Part, there shall be limited return on share capital;

(e) the surplus arising out of the operations of the producer company shall be distributed in an equitable manner by—

  (i) providing for the development of the business of the producer company;

  (ii) providing for common facilities; and

  (iii) distributing amongst the members, as may be admissible in proportion to their respective participation in the business;

(f) provision shall be made for the education of member, employees and others, on the principles of mutuality and techniques of mutual assistance;

(g) the producer company shall actively co-operate with other producer companies (and other organisations following similar principles) at local, national or international level so as to best serve the interest of their members and the communities it purports to serve.

13. Amendment of articles [Section 581-I]

Any amendment of the articles should be proposed by not less than two-third of the elected directors or by not less than one-third of the members of the producer company, and adopted by the members by a special resolution.

Amendment proposed by:	Atleast 2/3rd of the elected directors OR Atleast 1/3rd of the members of the producer company
Adopted by: Members by Special Resolution	

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A copy of the amended articles together with the copy of the special resolution, both duly certified by two directors, should be filed with the Registrar within thirty days from the date of its adoption.

14. Inter-State Co-operative Societies

I. Conversion of Inter-State Co-operative Societies to become producer companies [Section 581J]

1. Any inter-State co-operative society having objects for multiplicity for states may make an application to the Registrar for registration as producer company.
2. Such application shall be accompanied by—
   (a) a copy of the special resolution, of not less than two-third of total members of inter-State co-operative society, for its incorporation as a producer company,
   (b) a statement showing—
      (i) names and addresses or the occupation of the directors and Chief Executive, if any, by whatever name called, of such co-operative; and
      (ii) list of members of such inter-State co-operative society;
   (c) a statement indicating that the inter-State co-operative society is engaged in any one or more of the objects specified in section 581B;
   (d) a declaration by two or more directors of the inter-State co-operative society certifying that particulars given in clauses (a) to (c) are correct.
3. The word "Producer Company Limited" should form part of its name to show its identity.
4. On compliance with the requirements of the Act, the Registrar shall, within a period of thirty days of the receipt of application, certify under his hand that the inter-State co-operative society applying for registration is registered and thereby incorporated as a producer company.
5. A co-operative society formed by producers, by federation or union of co-operative societies of producers or co-operatives of producers, registered under any law for the time being in force which has extended its objects outside the State, either directly or through a union or federation of co-operatives of which it is a constituent, as the case may be, and any federation or union of such co-operatives, which has so extended any of its objects or activities outside the State, shall be eligible to make an application as above to obtain registration as a producer company under this Part.
6. The Inter-State Co-operative Society upon its registration, under this section transformed into a producer company, and thereafter shall be governed by the provisions of this Part to the exclusion of the law by which it was earlier governed, save in so far as anything

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done or omitted to be done before its registration as a producer company, and notwithstanding anything contained in any other law for the time being in force, no person shall have any claim against the co-operative institution or the company by reason of such conversion or transformation.

7. Upon registration as a producer company, the Registrar of Companies who registers the company is required to intimate the Registrar with whom the erstwhile inter-State co-operative society was earlier registered for appropriate deletion of the society from its register.

II. Vesting of undertaking in producer company [Section 581L]

1. All properties and assets, of, or belonging to, the inter-State co-operative society as on the transformation date, shall vest in the producer company.

2. All the rights, debts, liabilities, interests, privileges and obligations of the inter-State co-operative society as on the transformation date shall stand transferred to, and be the rights, debts, liabilities, interests, privileges and obligations of, the producer company.

3. Without prejudice to the provisions contained in sub-section (2), all debts, liabilities and obligations incurred, all contracts entered into and all matters and things engaged to be done by, with or for, the society as on the transformation date for or in connection with their purposes, shall be deemed to have been incurred, entered into, or engaged to be done by, with or for, the producer company.

4. All sums of money due to the inter-State co-operative society immediately before the transformation date, shall be deemed to be due to the producer company.

5. Every organisation, which was being managed immediately before the transformation date by the inter-State co-operative society shall be managed by the producer company for such part, to such extent and in such manner as the circumstances may require.

6. Every organisation which was getting financial, managerial or technical assistance from the inter-state co-operative society, immediately before the transformation date, may continue to be given financial, managerial or technical assistance, as the case may be, by the producer company, for such part, to such extent and in such manner as that company may deem fit.

7. The amount representing the capital of the erstwhile inter-State co-operative society shall form part of the capital of the producer company.

8. Any reference to the inter-State co-operative society in any law other than this Act or in any contract or other instrument, shall be deemed to be reference to the producer company.

9. If, on the transformation date, there is pending any suit, arbitration, appeal or other legal

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proceeding of whatever nature by or against the inter-State co-operative society, the same shall not abate, be discontinued or be in any way prejudicially affected by reason of the incorporation of the producer company under section 581C or transformation of the inter-State co-operative society as a producer company under section 581J, as the case may be, but the suit, arbitration, appeal or other proceeding, may be continued, prosecuted and enforced by or against the producer company in the same manner and to the same extent as it would have, or may have been continued, prosecuted and enforced by or against the inter-State co-operative society as if the provisions contained in this Part had not come into force.

III. Concession, etc. to be deemed to have been granted to producer company [Section 581M]

With effect from the transformation date, all fiscal and other concessions, licences, benefits, privileges and exemptions granted to the inter-state co-operative society in connection with the affairs and business of the inter-State co-operative society under any law for the time being in force shall be deemed to have been granted to the producer company.

IV. Provisions in respect of officers and other employees of Inter-State Co-operative Society [Section 581N]

1. All the directors in the inter-State co-operative society before the incorporation of the producer company shall continue in office for a part of one year from the transformation date and in accordance with the provisions of this Act.
2. Every officer or other employee of the inter-State co-operative society (except a director of the Board, Chairman or Managing Director) serving in its employment immediately before the transformation date shall, in so far as such officer or other employee is employed in connection with the inter-State co-operative society which has vested in the producer company by virtue of this Act, become, as from the transformation date, an officer or, as the case may be, other employee of the producer company and shall hold his office or service therein by the same tenure, at the same remuneration, upon the same terms and conditions, with the same obligations and with the same rights and privileges as to leave, leave travel concession, welfare scheme, medical benefit scheme, insurance, provident fund, other funds, retirement, voluntary retirement, gratuity and other benefits as he would have held under the erstwhile inter-State co-operative society if its undertaking had not vested in the producer company and shall continue to do so as an officer or, as the case may be, other employee of the producer company.
3. Where an officer or other employee of the inter-State co-operative society opts not to be in employment or service of the producer company, such officer or other employee shall be deemed to have resigned.
4. Notwithstanding anything contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force, the transfer of the services of any officer or other

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employee of the inter-State co-operative society to the producer company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

5. The officers and other employees who have retired before the transformation date from the service of the inter-State co-operative society and are entitled to any benefits, rights or privileges, shall be entitled to receive the same benefits, rights or privileges from the producer company.

6. The trusts of the provident fund or the gratuity fund of the inter-State co-operative society and any other bodies created for the welfare of officers or employees shall continue to discharge functions in the producer company as was being done hitherto in the inter-State co-operative society and any tax exemption granted to the provident fund or the gratuity fund would continue to be applied to the producer company.

7. Notwithstanding anything contained in this Act or in any other law for the time being in force or in the regulations of the inter-State co-operative society, no director of the Board, Chairman, managing director or any other person entitled to manage the whole or substantial part of the business and affairs of the inter-State co-operative society. The co-operative society shall be entitled to any compensation against the inter-State co-operative society or the producer company for the loss of office or for the premature termination of any contract of management entered into by him with the inter-State co-operative society.

15. Management

I. Number of directors

Every producer company shall have at least 5 directors and not more than 15 directors. (Section 581O). The proviso to the section states that in the case of the Inter-State Co-operative Society incorporated as a producer company, such company may have more than 15 directors for a period of one year from the date of its incorporation as a producer company.

Example: An Inter-state co-operative society was incorporated on 1st May 2017 as a Producer company under the provisions of the Companies Act, 1956. Advise the company whether it can have 18 Directors on its Board after incorporation.

Answer: In the instant case, the Inter-State Co-operative Society was incorporated as a producer company on 1st May, 2017. Thus, it can appoint 18 directors on its Board for a period of one year after incorporation.

II. Appointment of Directors [Section 581P]

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1. The members who sign the memorandum and the articles are designated as first directors and shall govern the affairs of the company until the directors are appointed at the Annual General Meeting.
2. The Election of Directors shall be conducted within 90 days from the date of registration of the producer company.
3. In the case of Inter-State Co-operative Society the election shall be held within a period of 365 days.
4. The period of office of a director shall be not less than one year and not exceeding 5 years as may be specified in the articles.
5. The directors retiring by rotation in accordance with the articles shall be eligible for re-appointment as a director.
6. Normally, the directors of the Board shall be elected or appointed by the members in the Annual General Meeting.
7. **Co-opted or expert directors or additional director**

   The Board may also co-opt one or more expert directors or an additional director. Such directors cannot exceed 1/5th of the total number of directors. The expert directors shall not have the right to vote in the election of chairman but shall be eligible to be elected as chairman if it is provided by the articles. The maximum period for which expert director or additional director holds office shall not exceed such period as may be prescribed in the articles.

III. Vacation of office by directors [Section 581Q]

The office of the director of a producer company shall become vacant if—

(a) he is convicted by a court of any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months;

(b) the Producer Company, in which he is a director, has made a default in repayment of any advances or loans taken from any company or institution or any other person and such default continues for ninety days;

(c) he has made a default in repayment of any advances or loans taken from the producer company in which he is a director;

(d) the producer company, in which he is a director—

   (i) has not filed the annual accounts and annual return for any continuous three financial years commencing on or after the 1st day of April, 2002; or

   (ii) has failed to, repay its deposit or withheld price or patronage bonus or interest thereon on due date, or pay dividend and such failure continues for one year or more;

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(e) default is made in holding election for the office of director, in the producer company in which he is a director, in accordance with the provisions of this Act and articles;

(f) the annual general meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason.

The above provisions may also apply to the director of a Producer institution, which is a member of a producer company.

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

(i) Jubin a Director of Xtra Ltd., a producer company has made a default in payment of loan taken from a company and default continues for 60 days.

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

Answer

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

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

IV. Powers and functions of Board [Section 581R]

The Board of directors of a producer company shall exercise, subject to articles, all such powers and to do all such acts and things, as the company is authorised so to do. These powers may include all or any of the following matters, namely:

(i) determination of the dividend payable;

(ii) determination of the quantum of withheld price and recommend patronage to be approved at general meeting;

(iii) admission of new member;

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(iv) pursue and formulate the organisational policy, objectives, establish specific long-term and annual objectives, and approve corporate strategies and financial plans;

(v) appointment of a Chief Executive and such other officers of the producer company, as may be specified in the articles;

(vi) exercise superintendence, direction and control over Chief Executive and other officers appointed by it;

(vii) cause proper books of account to be maintained; prepare annual accounts to be placed before the annual general meeting with the auditor's report and the replies on qualifications, if any, made by the auditors;

(viii) acquisition or disposal of property of the producer company in its ordinary course of business;

(ix) investment of the funds of the producer company in the ordinary course of its business;

(x) sanction any loan or advance, in connection with the business activities of the producer company to any member, not being a director or his relative;

(xi) take such other measures or do such other acts as may be required in the discharge of its functions or exercise of its powers.

All the above powers may be exercised by the Board, through a resolution passed at its meeting on behalf of the producer company. However, a director or a group of directors, who do not constitute the Board, shall not exercise any of the powers exercisable by it.

V. Liability of directors [Section 581T]

1. When the directors vote for a resolution, or approve by any other means, anything done in contravention of the provisions of this Act or any other law for the time being in force or articles, they shall be jointly and severally liable to make good any loss or damage suffered by the producer company.

2. The producer company is having the right to recover from its director—

   (i) where such director has made any profit as a result of the contravention of law or articles, an amount equal to the profit so made;

   (ii) where the producer company incurred a loss or damage as a result of the contravention of law or articles, an amount equal to that loss or damage.

3. The liability imposed under this section shall be in addition to and not in derogation of a liability imposed on a director under this Act or any other law for the time being in force.

VI. Committee of directors [Section 581U]

1. The Board may constitute such number of committees as it may deem fit for the purpose of assisting the Board in the efficient discharge of its functions. However, the Board shall

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not delegate any of its powers or assign the powers of the Chief Executive, to any committee.

2. A committee may, with the approval of the Board, co-opt such number of persons as it deems fit as member of the committee. However, the Chief Executive appointed under Section 581W or a director of the producer company shall be a member of such committee.

3. Every such committee shall function under the general superintendence, direction and control of the Board, for such duration, and in such manner as the Board may direct.

   The fee and allowances to be paid to the members of the committee shall be such as may be determined by the Board.

4. The minutes of each meeting of the committee shall be placed before the Board at its next meeting.

VII. Meetings of Board and quorum [Section 581V]

1. A meeting of the Board shall be held not less than once in every 3 months and at least four such meetings shall be held in every year.

2. Notice of every meeting of the Board of directors 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.

3. The Chief Executive shall give notice as aforesaid not less than seven days prior to the date of the meeting of the Board and if he fails to do so, he shall be punishable with fine which may extend to one thousand rupees. However, a meeting of the Board may be called at shorter notice and the reasons thereof shall be recorded in writing by the Board.

4. The quorum for a meeting of the Board shall be one-third of the total strength of directors, subject to a minimum of three.

5. Subject to provisions in the articles, directors including the co-opted director, may be paid such fees and allowances for attendance at the meetings of the Board, as may be decided by the member in the general meeting.

VIII. Chief Executive and his functions [Section 581W]

1. Every producer company shall have a full time Chief Executive to be appointed by the Board from amongst persons other than member.

2. The Chief Executive shall be ex officio director of the Board and such director shall not retire by rotation.

3. Save as otherwise provided in articles, the qualifications, experience and the terms and conditions of service of the Chief Executive shall be such as may be determined by the Board.

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4. The Chief Executive shall be entrusted with substantial powers of management as the Board may determine.

5. The Chief Executive shall manage the affairs of the producer company under the general superintendence, direction and control of the Board and be accountable for the performance of the producer company. Without prejudice to the above the Chief Executive may exercise the powers and discharge the functions, namely:

   (a) doing administrative acts of a routine nature including managing the day-to-day affairs of the producer company;

   (b) operating bank accounts or authorise any person, subject to the general or special approval of the Board in this behalf, to operate the bank account.

   (c) making arrangements for safe custody of cash and other assets of the Producer Company;

   (d) signing such documents as may be authorised by the Board, for and on behalf of the company;

   (e) maintaining paper books of account; preparing annual accounts and audit thereof; placing the audited accounts before the Board and in the annual general meeting of the member;

   (f) furnishing members with periodic information to appraise them of the operation and functions of the producer company;

   (g) making appointments to posts in accordance with the powers delegated to him by the Board;

   (h) assisting the Board in the formulation of goals, objectives, strategies, plans and policies;

   (i) advising the Board with respect to legal and regulatory matters concerning the proposed and on going activities and taking necessary action in respect thereof;

   (j) exercising the powers as may be necessary in the ordinary course of business;

   (k) discharging such other functions, and exercising such other powers, as may be delegated by the Board.

IX. Secretary of a producer company [Section 581X]

1. Every producer company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall have a whole-time secretary, who possesses membership of the Institute of Company Secretaries of India constituted under the Company Secretaries Act, 1980.

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2. If a producer company fails to comply with this, the company and every officer of the company who is in default, shall be punishable with fine which may extend to five hundred rupees for every day during which the default continues.

3. In any proceedings against a person in respect of an offence, under this section, it shall be a defence to prove that all reasonable efforts to comply with the provisions of section were taken or that the financial position of the company was such that it was beyond its capacity to engage a whole-time secretary.

16. General Meetings

I. Matters to be transacted at general meeting [Section 581S]

The Board of directors of a producer company shall exercise the following powers on behalf of the company, and it shall do so only by means of resolutions passed at the annual general meeting of its members, namely:

(a) approval of budget and adoption of annual accounts of the producer company;

(b) approval of patronage bonus;

(c) issue of bonus shares;

(d) declaration of limited return and decision on the distribution of patronage;

(e) specify the conditions and limits of loans that may be given by the Board to any director; and

(f) approval of any transaction of the nature as is to be reserved in the articles for approval by the members.

II. Quorum [Section 581Y]

Unless the articles require a larger number, one-fourth of the total membership shall constitute the quorum at a general meeting.

III. Voting Rights [Section 581Z]

Save as otherwise provided in sub sections (1) and (3) of section 581D, every member shall have one vote and in the case of equality of votes, the Chairman or the person presiding shall have a casting vote except in the case of election of the Chairman.

IV. Annual general meetings [Section 581ZA]

1. Every producer company shall hold, annual general meeting in each year and the time gap between one annual general meeting to another, should not be more than fifteen months.

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In this regard, the Registrar may, for any special reason, permit extension of the time for holding any annual general meeting (not being the first annual general meeting) by a part not exceeding three months.

2. A producer company shall hold its first annual general meeting within a period of ninety days from the date of its incorporation.

3. The member shall adopt the articles of the producer company and appoint directors of its Board in the annual general meeting.

4. The notice calling the annual general meeting shall be accompanied by the following documents, namely:

   (a) the agenda of the annual general meeting;

   (b) the minutes of the previous annual general meeting or the extra-ordinary general meeting;

   (c) the names of candidates for election, if any, to the office of director including a statement of qualifications in respect of each candidate;

   (d) the audited balance-sheet and profit and loss accounts of the producer company and its subsidiary, if any, together with a report of the Board of directors of such Company with respect to—

      (i) the state of affairs of the producer company;

      (ii) the amount proposed to be carried to reserve;

      (iii) the amount to be paid as limited return on share capital;

      (iv) the amount proposed to be disbursed as patronage bonus;

      (v) the material changes and commitments, if any, affecting the financial position of the producer company and its subsidiary, which have occurred in between the date of the annual accounts of the producer company to which the balance sheet relates and the date of the report of the Board;

      (vi) any other matter of importance relating to energy conservation, environmental protection, expenditure or earnings in foreign exchanges;

      (vii) any other matter which is required to be, or may be, specified by the Board;

   (e) the text of the draft resolution for appointment of auditors;

   (f) the text of any draft resolution proposing amendment to the memorandum or articles to be considered at the general meeting, along with the recommendations of the Board.

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5. The Board of Directors shall, on the requisition made in writing, duly signed and setting out the matters for the consideration, made by one-third of the members entitled to vote in any general meeting, proceed to call an extraordinary general meeting in accordance with the provisions contained in sections 169 to 186 of this Act.
6. Every annual general meeting should be called during business hours, on a day that is not a public holiday and shall be held at the registered office or at some other place within the city, town or village in which the registered office of the Company is situate.
7. A general meeting of the producer company shall be called by giving not less than fourteen days prior notice in writing.
8. The notice of the general meeting indicating the date, time and place of the meeting shall be sent to every member and auditor of the producer company.
9. Unless the articles of the producer company provide for a larger number, one-fourth of the total number of members of the producer company shall be the quorum for its annual general meeting.
10. The proceedings of every annual general meeting along with the Directors' Report, the audited balance-sheet and the profit and loss account shall be filed with the Registrar within sixty days of the date on which the annual general meeting is held, with an annual return along with the filing fees as applicable under the Act.
11. In the case where a producer company is formed by Producer institutions, such institutions shall be represented in the general body through the Chairman or the Chief Executive thereof who shall be competent to act on its behalf:

Provided that a Producer institution shall not be represented if such institution makes a default or failure referred to in clauses (d) to (f) of sub-section (1) of section 581Q.

Example: A producer company was incorporated on 1st September, 2015. At present the paid-up share capital of the company is ₹ 10 lakhs consisting of 1,00,000 equity shares of ₹ 10 each fully paid-up held by 200 individuals and 20 producers institutions. You are required to answer the following with reference to the provisions of the Companies Act, 1956:-

(i) What is the time limit for holding the First Annual General Meeting and the subsequent Annual General Meetings?

(ii) What is the Quorum for the Annual General Meeting?

Answer

(i) Annual General Meeting – The first annual general meeting of a producer company shall be held within 90 days of incorporation i.e. on or before 29th November, 2015 in this case.

In the case of subsequent AGMs gap between two AGMs must not be more than 15

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months. Registrar of Companies may extend the time for holding any AGM other than the first AGM by a period not exceeding 3 months for any special reason.

(ii) Quorum: Unless the articles of association of the producer company provide for a larger number, 1/4th of the total number of members of the producer company shall be the quorum for its annual general meeting. In this case the company has got 220 (200+20) members. Hence, the quorum is 55.

17. Share Capital and Member Rights

I. Share capital [Section 581ZB]

1. The share capital of a producer company shall consist of equity shares only.
2. The shares held by a member in a producer company, shall as far as may be, be in proportion to the patronage of that company.

II. Special user rights [Section 581ZC]

1. The producers, who are active member may, if so provided in the articles, have special rights and the producer company may issue appropriate instruments to them in respect of such special rights.
2. The instruments shall be issued after obtaining approval of the Board in that behalf, be transferable to any other active member of that producer company.

Here, special right means any right relating to supply of additional produce by the active member or any other right relating to his produce which may be conferred upon him by the Board.

III. Transferability of shares and attendant rights [Section 581ZD]

The provisions are as follows:

1. Save as otherwise provided in sub-sections (2) to (4), the shares of a member of a producer company shall not be transferable.
2. A member of a producer company may, after obtaining the previous approval of the Board, transfer the whole or part of his shares along with any special rights, to an active member at par value.
3. Every member shall within three months of his becoming a member of Producer Company, nominate, as specified in articles, a person to whom his shares in the producer company shall vest in the event of his death.
4. The nominee shall, on the death of the member, become entitled to all the rights in the shares of the producer company and the Board of that Company shall transfer the shares of the deceased member to his nominee:

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Provided that in a case where such nominee is not a producer, the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board.

5. Where the Board of a producer company is satisfied that—

   (a) any member has ceased to be a primary producer; or

   (b) any member has failed to retain his qualifications to be a member as specified in articles,

   the Board shall direct the surrender of shares together with special rights, if any, to the producer company at par value or such other value as may be determined by the Board:

Provided that the Board shall not direct such surrender of shares unless the member has been served with a written notice and given an opportunity of being heard.

18. Books of accounts [Section 581ZE]

1. Every producer company has to maintain books of account with respect to—

   (a) all sums of money received and expended by the producer company and the matters in respect of which the receipts and expenditure take place;

   (b) all sales and purchase of goods by the producer company;

   (c) the instruments of liability executed by or on behalf of the producer company;

   (d) the assets and liabilities of the producer company;

   (e) in case of a producer company engaged in production, processing and manufacturing, the particulars relating to utilisation of materials or labour or other items of costs.

2. The balance sheet and profit and loss account of the producer company shall be prepared, as far as may be, in accordance with the provisions contained in section 211 of the Companies Act, 1956.

19. Internal audit [Section 581ZF]

Every producer company shall have internal audit of its accounts carried out, at such interval and in such manner as may be specified in articles, by a chartered accountant as defined in clause (b) of sub-section (1) of Section 2 of the Institute of Chartered Accountants Act, 1949.

20. Duties of auditor under this Part [Section 581ZG]

Without prejudice to the provisions contained in section 227, the auditor shall report on the following additional matters relating to the producer company, namely:—

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(a) the amount of debts due along with particulars of bad debts if any;

(b) the verification of cash balance and securities;

(c) the details of assets and liabilities;

(d) all transactions which appear to be contrary to the provisions of this Part;

(e) the loans given by the producer company to the directors;

(f) the donations or subscriptions given by the producer company;

(g) any other matter as may be considered necessary by the auditor.

21. Donations or subscription by producer company [Section 581ZH]

A producer company may, by special resolution, make donation or subscription to any institution or individual for the purposes of—

(a) promoting the social and economic welfare of producer member or producers or general public; or

(b) promoting the mutual assistance principles:

Provided that the aggregate amount of all such donation and subscription in any financial year shall not exceed three per cent of the net profit of the producer company in the financial year immediately preceding the financial year in which the donation or subscription was made.

Further, no producer company shall make directly or indirectly to any political party or for any political purpose to any person any contribution or subscription or make available any facilities including personnel or material.

Example: A two year old Producer Company registered under Section 581C of the Companies Act, 1956 wants to donate some amount. As per the Profit & Loss account of the Producer Company for its last accounting year, net profit was ₹ 20.00 lacs. What amount it can donate?

Answer: Since the net profit of the Producer Company as per its last profit & loss account was ₹ 20.00 lacs, it can make a total donation of ` 60,000/- in this year being 3% thereof.

22. General and other reserves [Section 581ZI]

Every producer company shall maintain a general reserve in every financial year, in addition to any reserve maintained by it as may be specified in articles.

In a case where the producer company does not have sufficient funds in any financial year for transfer to maintain the reserves as may be specified in articles, the contribution to the reserve shall be shared amongst the member in proportion to their patronage in the business of that company in that year.

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23. Issue of bonus shares [Section 581ZJ]

Any producer company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalisation of amounts from general reserves referred to in Section 581ZI in proportion to the shares held by the member on the date of the issue of such shares.

24. Loan, etc., to member [Section 581ZK]

The Board may, subject to the provisions made in articles, provide financial assistance to the members of the producer company by way of—

(i) credit facility, to any member, in connection with the business of the Producer Company, for a period not exceeding six months;

(ii) loans and advances, against security specified in articles to any member, repayable within a period exceeding three months but not exceeding seven years from the date of disbursement of such loan or advances.

However, any loan or advance to any director or his relative shall be granted only after the approval by the members in general meeting.

Example: Anant Producer Company Limited was incorporated on 1st April, 2003. The company wants to grants a loan of ₹ 10,000 to Mr. Amit, a Director of the company repayable within a period of six months. The Board of directors of the company seeks your advice on the said proposal.

Answer: The directors must convene the general meeting and get the approval of the members before granting the proposed loan of ₹10,000 to Mr. Amit, a director of the company.

25. Investment in other companies, formation of subsidiaries, etc. [Section 581ZL]

The producer company has to follow the following provisions under this section.

1. The general reserves of any producer company shall be invested to secure the highest returns available from approved securities, fixed deposits, units, bonds issued by the Government or co-operative or scheduled bank or in such other mode as may be prescribed.
2. Any producer company may, for promotion of its objectives acquire the shares of another producer company.
3. Any producer company may subscribe to the share capital of, or enter into any agreement or other arrangement, whether by way of formation of its subsidiary company, joint venture or in any other manner with any body corporate, for the purpose of

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promoting the objects of the producer company by special resolution in this behalf.

4. Any producer company, either by itself or together with its subsidiaries, may invest, by way of subscription, purchase or otherwise, shares in any other company, other than a producer company, specified under sub-section (2), or subscription of capital under sub-section (3), for an amount not exceeding thirty per cent of the aggregate of its paid-up capital and free reserves:

   Provided that a producer company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits specified in this section.

5. All investments by a producer company may be made if such investment are consistent with the objects of the producer company.

6. The Board of a producer company may, with the previous approval of members by a special resolution, dispose of any of its investments referred to in sub-sections (3) and (4).

7. Every producer company shall maintain a register containing particulars of all the investments, showing the names of the companies in which shares have been acquired, number and value of shares; the date of acquisition; and the manner and price at which any of the shares have been subsequently disposed of.

8. The register referred to in sub-section (7) shall be kept at the registered office of the producer company and the same shall be open to inspection by any member who may take extracts there from.

Example: Dhanlaxmi India Sugar Producer Company Limited, having paid-up capital of ₹ 5 lakh and free reserves of ₹ 3 lakh, propose to make the investments of ₹ 3 lakh in the equity shares of Ganesh Marketing Limited.

State the restrictions, if any, in this regard and also the legal requirements to be complied with by the Company under the provisions of the Companies Act, 1956.

Answer:

Investment in other companies: As per section 581ZL of the Companies Act, 1956, any producer company, either by itself or together with its subsidiaries, may invest, by way of subscription, purchase or otherwise, shares in any other company other than a producer company for an amount not exceeding thirty per cent of the aggregate of its paid-up capital and free reserves. Further, the provision provides that a producer company may, by special resolution passed in its general meeting and with prior approval of the Central Government, invest in excess of the limits.

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Thus, according to the above provision, the Dhanlaxmi India Sugar Producer Company Limited cannot invest an amount exceeding thirty per cent of the aggregate of its paid-up capital and free reserves i.e. ₹ 2,40,000/-(i.e., 30% of 8,00,000) in Ganesh Marketing Limited. However, the company may invest in excess of the limits (more than 2,40,000) by special resolution passed in its general meeting and with prior approval of the Central Government.

26. Penalties

Penalty for contravention [Section 581ZM]

1. If any person, other than a producer company registered under this part, carries on business under any name which contains the words "producer company limited", he shall be punishable with fine which may extend to ten thousand rupees for every day during which such name has been used by him.
2. If a director or an officer of a producer company, who willfully fails to furnish any information relating to the affairs of the producer company required by a member or a person duly authorised in this behalf, he shall be liable to imprisonment for a term which may extend to six months and with fine equivalent to five per cent of the turnover of that company during preceding financial year.
3. If a director or officer of a producer company—
   (a) makes a default in handing over the custody of books of account and other documents or property in his custody to the producer company of which he is a director or officer; or
   (b) fails to convene annual general meeting or other general meetings,

   he shall be punishable with fine which may extend to one lakh rupees, and in the case of a continuing default or failure, with an additional fine which may extend to ten thousand rupees for every day during which such default or failure continues.

27. Amalgamation, Merger or Division [Section 581ZN]

Amalgamation, merger or division, etc., to form new producer companies

1. A producer company may, by a resolution passed at its general meeting,—
   (a) decide to transfer its assets and liabilities, in whole or in part, to any other producer company, which agrees to such transfer by a resolution passed at its general meeting, for any of the objects specified in section 581B;
   (b) divide itself into two or more new producer companies.

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2. Any two or more producer companies may, by a resolution passed at any general or special meetings of its members, decide to—

   (a) amalgamate and form a new producer company; or

   (b) merge one producer company (hereafter referred to as 'merging company') with another producer company (hereafter referred to as 'merged company').

3. Every resolution of a producer company under this section shall be passed at its general meeting by a majority of total Members with right of vote not less than two-thirds of its Members present and voting and such resolution shall contain all particulars of the transfer of assets and liabilities, or division, amalgamation, or merger, as the case may be.

4. Before passing a resolution under this section, the producer company shall give notice thereof in writing together with a copy of the proposed resolution to all the Members and creditors who may give their consent.

5. Notwithstanding anything contained in articles or in any contract to the contrary, any Member, or any creditor not consenting to the resolution shall, during the period of one month of the date of service of the notice on him, have the option,

   (a) in the case of any such Member, to transfer his shares with the approval of the Board to any active Member thereby ceasing to continue as a Member of that company; or

   (b) in the case of a creditor, to withdraw his deposit or loan or advance, as the case may be.

6. Any Member or creditor, who does not exercise his option within the period specified in sub-section (5), shall be deemed to have consented to the resolution.

7. A resolution passed by a producer company under this section shall not take effect until the expiry of one month or until the assent thereto of all the members and creditors has been obtained, whichever is earlier.

8. The resolution referred to in this section shall provide for—

   (a) the regulation of conduct of the producer company's affairs in the future;

   (b) the purchase of shares or interest of any members of the producer company by other members or by the producer company;

   (c) in the case of purchase of shares of one producer company by another producer company, the consequent reduction of its share capital;

   (d) termination, setting aside or modification of any agreement, howsoever arrived between the company on the one hand and the directors, secretaries and manager on the other hand, apart from such terms and conditions as may, in the opinion of the majority of shareholders, be just and equitable in the circumstances of the case;

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(e) termination, setting aside or modification of any agreement between the producer company and any person not referred to in clause (d):

Provided that no such agreement shall be terminated, set aside or modified except after giving due notice to the part concerned and also no such agreement shall be modified except after obtaining the consent of the party concerned;

(f) the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property, made or done by or against the producer company within three months before the date of passing of the resolution, which would if made or done against any individual, be deemed in his insolvency to be a fraudulent preference;

(g) the transfer to the merged company of the whole or any part of the undertaking property or liability of the producer company;

(h) the allotment or appropriation by the merged company of any shares, debentures, policies, or other like interests in the merged company;

(i) the continuation by or against the merged company of any legal proceedings pending by or against any producer company;

(j) the dissolution, without winding-up, of any producer company;

(k) the provision to be made for the members or creditors who make dissent;

(l) the taxes if any, to be paid by the producer company;

(m) such incidental, consequential and supplemental matters as are necessary to secure that the division, amalgamation or merger shall be fully and effectively carried out.

9. When a resolution passed by a producer company under this section takes effect, the resolution shall be a sufficient conveyance to vest the assets and liabilities in the transferee.

10. The producer company shall make arrangements for meeting in full or otherwise satisfying all claims of the members and the creditors who exercise the option, within the period specified in sub-section (4), not to continue as the member or creditor, as the case may be.

11. Where the whole of the assets and liabilities of a producer company are transferred to another producer company in accordance with the provisions of sub-section (9), or where there is merger under sub-section (2), the registration of the first mentioned Company or the merging company, as the case may be, shall stand cancelled and that Company shall be deemed to have been dissolved and shall cease to exist forthwith as a corporate body.

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12. Where two or more producer companies are amalgamated into a new producer company in accordance with the provisions of sub-section (2) and the producer company so formed is duly registered by the Registrar, the registration of each of the amalgamating companies shall stand cancelled forthwith on such registration and each of the Companies shall thereupon cease to exist as a corporate body.
13. Where a producer company divides itself into two or more producer companies in accordance with the provisions of clause (b) of sub-section (1) and the new producer companies are registered in accordance with the provisions of sub-section (8), the registration of the erstwhile producer company shall stand cancelled forthwith and that Company shall be deemed to have been dissolved and cease to exist as a corporate body.
14. The amalgamation, merger or division of companies under the foregoing sub-sections shall not in any manner whatsoever affect the pre-existing rights or obligations and any legal proceedings that might have been continued or commenced by or against any erstwhile company before the amalgamation, merger or division, may be continued or commenced by, or against, the concerned resulting company, or merged company, as the case may be.
15. The Registrar shall strike off the names of every producer company deemed to have been dissolved under sub-sections (11 to 14).
16. Any member or creditor or employee aggrieved by the transfer of assets, division, amalgamation or merger may, within thirty days of the passing of the resolution, prefer an appeal to the High Court.
17. The High Court shall, after giving a reasonable opportunity to the person concerned, pass such orders thereon as it may deem fit.
18. Where an appeal has been filed under sub-section (16), the transfer of assets, division, amalgamation or merger of the producer company shall be subject to the decision of the High Court.

28. Resolution of Disputes

I. Disputes [Section 581ZO]

1. Where any dispute relating to the formation, management or business of a producer company arises—
   (i) amongst members, former members or persons claiming to be members or nominees of deceased members; or
   (ii) between a member, former member or a person claiming to be a member, or nominee of deceased member and the producer company, its Board of directors,

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office-bearers, or liquidator, past or present; or

(iii) between the producer company or its Board, and any director, office-bearer or any former director, or the nominee, heir or legal representative of any deceased director of the producer company,

such dispute shall be settled by conciliation or by arbitration as provided under the Arbitration and Conciliation Act, 1996 as if the parties to the dispute have consented in writing for determination of such disputes by conciliation or by arbitration and the provisions of the said Act shall apply accordingly.

Explanation—For the purposes of this section, a dispute shall include—

(a) a claim for any debt or other amount due;

(b) a claim by surety against the principal debtor, where the producer company has recovered from the surety amount in respect of any debtor or other amount due to it from the principal debtor as a result of the default of the principal debtor whether such debt or amount due be admitted or not;

(c) a claim by producer company against a member for failure to supply produce as required of him;

(d) a claim by a member against the producer company for not taking goods supplied by him.

2. If any question arises whether the dispute relates to formation, management or business of the producer company, the question shall be referred to the arbitrator, whose decision thereon shall be final.

II. Striking off name of producer company [Section 581ZP]

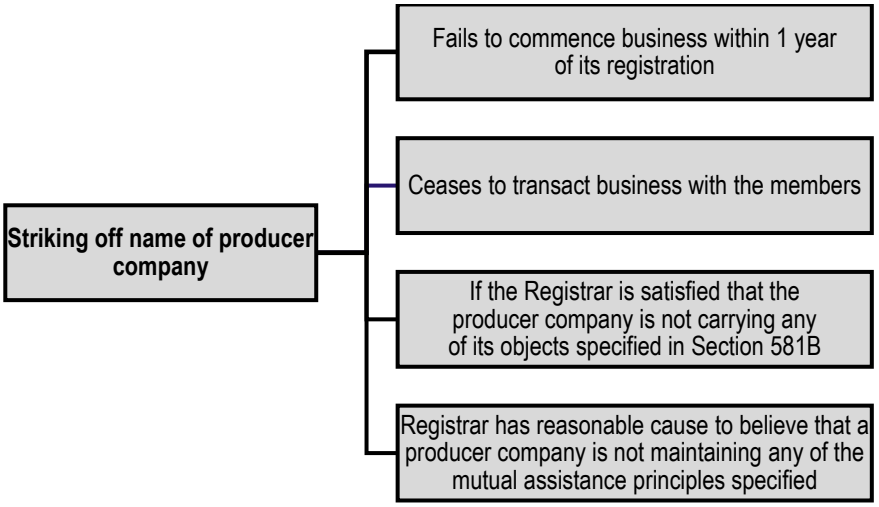
1. If a producer company fails to commence business within one year of its registration or ceases to transact business with the members or if the Registrar is satisfied, after making such inquiry as he thinks fit, that the producer company is not carrying any of its objects specified in Section 581B, he shall make an order striking off the name of the producer company, which shall thereupon cease to exist forthwith.

No such order cancelling the registration as aforesaid shall be passed until a notice to show cause has been given by the Registrar to the producer company with a copy to all its directors on the proposed action and reasonable opportunity to represent its case has been given.

2. Where the Registrar has reasonable cause to believe that a producer company is not maintaining any of the mutual assistance principles specified, he shall strike its name off the register in accordance with the provisions contained in Section 560 of this Act.

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3. Any member of a producer company, who is aggrieved by an order made under this section, may appeal to the Company Law Board NCLT within sixty days of the order. After disposing the appeal, if any, the order to striking off the name shall take effect.



29. Re-conversion of producer company to inter-state co-operative society [Section 581ZS]

The method is as follows:

(1) Application to the High Court: Any producer company, being an erstwhile inter-State co-operative society, formed and registered under this Part, may make an application—

(a) after passing a resolution in the general meeting by not less than two-third of its members present and voting; or

(b) on request by its creditors representing three-fourth value of its total creditors,

to the High Court for its re-conversion to the inter-State co-operative society.

(2) Holding of meeting: The High Court shall, on the application made under sub-section (1), direct holding meeting of its members or such creditors, as the case may be, to be conducted in such manner as it may direct.

(3) Majority in agreement with reconversion: If a majority in number representing three-fourths in value of the creditors, or members, as the case may be, present and voting in person at the meeting conducted in pursuance of the directions of the High Court under sub-section (2), agree for re-conversion, if sanctioned by the High Court, be binding on all the members and all the creditors, as the case may be, and also on the company which is being converted:

Provided that no order sanctioning re-conversion shall be made by the Court unless the

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Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the Court, by affidavit or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under sections 235 to 251, and the like.

(4) **Filing of certified copy with Registrar**: An order made by the Court shall have no effect until a certified copy of the order has been filed with the Registrar.

(5) **Copy of order to be annexed with every copy of Memorandum:** A copy of every such order shall be annexed to every copy of the Memorandum of the company issued after the certified copy of the order has been filed as aforesaid, or in the case of a company not having a Memorandum, to every copy so issued of the instrument constituting or defining the constitution of the company.

(6) **Default in filing of certified copy:** If default is made in complying with sub-section (4), the company, and every officer of the company who is in default, shall be punishable with fine which may extend to one hundred rupees, for each copy in respect of which default is made.

(7) **Stay on suit/proceeding until the disposal of application:** The Court may, at any time after an application has been made to it under this section, stay the commencement or continuation of any suit or proceeding against the company on such terms as the Court thinks fit, until the application is finally disposed of.

(8) **Filing of an application under the Co-operative Society Act etc. after being sanctioned re-conversion by the High-Court:** Every producer company which has been sanctioned re-conversion by the High Court, shall make an application, under the Multi-State Co-operative Societies Act, 2002or any other law for the time being in force for its registration as multi-State co-operative society or co-operative society, as the case may be, within six months of sanction by the High Court and file a report thereof to the High Court and the Registrar of companies and to the Registrar of the co-operative societies under which it has been registered as a multi-State Co-operative society or co-operative society, as the case may be.

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12

Companies Incorporated Outside India

1. Introduction

Foreign Company [Section 2(42)]: "Foreign company" means any company or body corporate incorporated outside India which-

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* **"electronic mode"** means carrying out electronically based, whether main server is installed in India or not, including, but not limited to -

(a) business to business and business to consumer transactions, data interchange and other digital supply transactions;

(b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;

(c) financial settlements, web based marketing, advisory and transactional services, database services and products, supply chain management;

(d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and

(e) all related data communication services,

whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

2. Application of Act to foreign companies [Section 379]

According to this section:

Where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by:

(i) one or more citizens of India; or

(ii) by one or more companies or bodies corporate incorporated in India; or

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(iii) by one or more citizens of India and one or more companies or bodies corporate incorporated in India,

whether singly or in the aggregate, such company shall comply with the provisions of Chapter XXII and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India as if it were a company incorporated in India.

Note: Chapter XXII referred to above deals with the legal provisions for companies incorporated outside India.

3. Documents, etc., to be delivered to Registrar by foreign companies [Section 380]

According to section 380 (1) of the Companies Act, 2013,

(i) Every foreign company shall, within 30 days of the establishment of its place of business in India, deliver to the Registrar for registration:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company. If the instrument is not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

In relation to the nature of particulars to be provided as above, the *Companies (Registration of Foreign Companies) Rules, 2014*, provide that the list of directors and secretary or equivalent (by whatever name called) of the foreign company shall contain the following particulars, for each of the persons included in such list, namely:

(1) personal name and surname in full;

(2) any former name or names and surname or surnames in full;

(3) father's name or mother's name and spouse's name;

(4) date of birth;

(5) residential address;

(6) nationality;

(7) if the present nationality is not the nationality of origin, his nationality of origin;

(8) passport Number, date of issue and country of issue; (if a person holds more than one passport then details of all passports to be given)

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(9) income-tax permanent account number (PAN), if applicable;

(10) occupation, if any;

(11) whether directorship in any other Indian company, (Director Identification Number (DIN), Name and Corporate Identity Number (CIN) of the company in case of holding directorship);

(12) other directorship or directorships held by him;

(13) Membership Number (for Secretary only); and

(14) e-mail ID.

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(h) any other information as may be prescribed.

(ii) According to the *Companies (Registration of Foreign Companies) Rules, 2014*, the above informations shall be filed with the Registrar within 30 days of the establishment of its place of business in India, in Form *FC-1* along with prescribed fees and documents required to be furnished as provided in section 380(1). The application shall also be supported with an attested copy of approval from the Reserve Bank of India under the Foreign Exchange Management Act or Regulations, and also from other regulators, if any, approval is required by such foreign company to establish a place of business in India or a declaration from the authorised representative of such foreign company that no such approval is required.

(iii) Office where documents to be delivered and fee for registration of documents:

1. According to the *Companies (Registration of Foreign Companies) Rules, 2014*, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

2. It shall be accompanied with the prescribed fees.

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3. If any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and from the date on which such notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, provided it has no other place of business in India.

(iv) Under section 380 (2) every foreign company existing at the commencement of the Companies Act 2013, which has not delivered to the Registrar the documents and particulars specified in section 592(1) of the Companies Act, 1956, it shall continue to be subject to the obligation to deliver those documents and particulars in accordance with the Companies Act, 1956.

(v) Section 380 (3) provides that where any alteration is made or occurs in the documents delivered to the Registrar under section 380, the foreign company shall, within 30 days of such alteration, deliver to the Registrar for registration, a return containing the particulars of the alteration in the prescribed form. The *Companies (Registration of Foreign Companies) Rules, 2014*, has prescribed that the return containing the particulars of the alteration shall be filed in form *FC-2* along with prescribed fees.

4. Accounts of foreign company [Section 381]

According to this section:

(i) Every foreign company shall, in every calendar year,—

(a) make out a balance sheet and profit and loss account in such form, containing such particulars and including or having attached or annexed thereto such documents as may be prescribed, and

(b) deliver a copy of those documents to the Registrar.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* every foreign company shall prepare financial statement of its Indian business operations in accordance with Schedule III or as near thereto as possible for each financial year including:

(1) documents that are required to be annexed should be in accordance with Chapter IX i.e. Accounts of Companies.

(2) The documents relating to copies of latest consolidated financial statements of the parent foreign company, as submitted by it to the prescribed authority in the country of its incorporation under the applicable laws there.

(ii) The Central Government is empowered to direct that, in the case of any foreign company or class of foreign companies, the requirements of clause (a) given above shall not apply, or shall apply subject to such exceptions and modifications as may be specified in notification in that behalf [Section 381(1)].

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(iii) If any of the specified documents are not in the English language, a certified translation thereof in the English language shall be annexed. [Section 381 (2)]

(iv) Every foreign company shall send to the Registrar along with the documents required to be delivered to him, a copy of a list in the prescribed form, of all places of business established by the company in India as at the date with reference to which the balance sheet referred to in section 381(1) is made.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* every foreign company shall file with the Registrar, along with the financial statement, in Form FC.3 with such fee as provided under *Companies (Registration Offices and Fees) Rules, 2014* a list of all the places of business established by the foreign company in India as on the date of balance sheet.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, if any foreign company ceases to have a place of business in India, it shall forthwith give notice of the fact to the Registrar, and as from the date on which notice is so given, the obligation of the company to deliver any document to the Registrar shall cease, if it does not have other place of business in India.

(v) According to the *Companies (Registration of Foreign Companies) Rules, 2014*,

(a) Further, every foreign company shall, along with the financial statement required to be filed with the Registrar, attach thereto the following documents; namely:-

(1) Statement of related party transaction

(2) Statement of repatriation of profits

(3) Statement of transfer of funds (including dividends, if any)

The above statements shall include such other particulars as are prescribed in the *Companies (Registration of Foreign Companies) Rules, 2014*.

(b) All these documents shall be delivered to the Registrar within a period of 6 months of the close of the financial year of the foreign company to which the documents relate.

(vi) **Audit of accounts of foreign company:** According to the *Companies (Registration of Foreign Companies) Rules, 2014,*

(a) Every foreign company shall get its accounts, pertaining to the Indian business operations prepared in accordance with section 381(1) and Rules thereunder, shall be audited by a practicing Chartered Accountant in India or a firm or limited liability partnership of practicing chartered accountants.

(b) The provisions of Chapter X i.e. Audit and Auditors and rules made there under, as far as applicable, shall apply, *mutatis mutandis*, to the foreign company.

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5. Display of name, etc., of foreign company [Section 382]

Every foreign company shall—

(a) conspicuously exhibit on the outside of every office or place where it carries on business in India, the name of the company and the country in which it is incorporated, in letters easily legible in English characters, and also in the characters of the language or one of the languages in general use in the locality in which the office or place is situate;

(b) cause the name of the company and of the country in which the company is incorporated, to be stated in legible English characters in all business letters, bill- heads and letter paper, and in all notices, and other official publications of the company; and

(c) if the liability of the members of the company is limited, cause notice of that fact—

(i) to be stated in every such prospectus issued and in all business letters, bill-heads, letter paper, notices, advertisements and other official publications of the company, in legible English characters; and

(ii) to be conspicuously exhibited on the outside of every office or place where it carries on business in India, in legible English characters and also in legible characters of the language or one of the languages in general use in the locality in which the office or place is situated.

6. Service on foreign company [Section 383]

Any process, notice, or other document required to be served on a foreign company shall be deemed to be sufficiently served, if addressed to any person whose name and address have been delivered to the Registrar under section 380 and left at, or sent by post to, the address which has been so delivered to the Registrar or by electronic mode.

7. Debentures, annual return, registration of charges, books of account and their inspection [Section 384]

(i) The provisions of section 71 (Issue of Debentures) shall apply *mutatis mutandis* to a foreign company.

(ii) The provisions of section 92 (Preparation and filing of Annual return) shall, subject to such exceptions, modifications and adaptations as may be made therein by rules made under this Act, apply to a foreign company as they apply to a company incorporated in India.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* every foreign company shall prepare and file an annual return in Form *FC-4* along with prescribed fees, within a period of 60 days from the last day of its financial year, to the Registrar containing the particulars as they stood on the close of the financial year.

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(iii) The provisions of section 128 (Books of account, etc., to be kept by company) shall apply to a foreign company to the extent of requiring it to keep at its principal place of business in India, the books of account referred to in that section, with respect to monies received and spent, sales and purchases made, and assets and liabilities, in the course of or in relation to its business in India.

(iv) The provisions of Chapter VI (Registration of Charges) shall apply *mutatis mutandis* to charges on properties which are created or acquired by any foreign company.

(v) The provisions of Chapter XIV (Inspection, inquiry and investigation) shall apply *mutatis mutandis* to the Indian business of a foreign company as they apply to a company incorporated in India.

8. Fee for registration of documents [Section 385]

There shall be paid to the Registrar for registering any document required by the provisions of this Chapter to be registered by him, such fee, as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014*, fee to be paid to the Registrar for registering any document relating to a foreign company shall be such as provided in the *Companies (Registration Offices and Fees) Rules, 2014*.

9. Interpretation [Section 386]

For the purposes of the foregoing provisions of this Chapter, the expression:

(a) "Certified" means certified in the prescribed manner to be a true copy or a correct translation;

(b) "Director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and

(c) "Place of business" includes a share transfer or registration office.

Example: Examine with reference to the provisions of the Companies Act, 2013 whether the following companies can be treated as foreign companies:

(i) A company incorporated outside India having a share registration office at Mumbai.

(ii) Indian citizens incorporated a company in Singapore for the purpose of carrying on business there.

Answer

Section 2(42) of the Companies Act, 2013 defines a "foreign company" as any company or body corporate incorporated outside India which:

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(a) Has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) Conducts any business activity in India in any other manner.

According section 386 of the Companies Act, 2013, for the puproses of Chapter XXII of the Companies Act, 2013 (Companies incorporated outside India), expression "Place of business" includes a share transfer or registration office.

Accordingly, to qualify as 'foreign company' a company must have the following features:

(a) it must be incorporated outside India; and

(b) it should have a place of business in India.

(c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and

(d) It must conduct a business activity of any nature in India.

(i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.

(ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore will not fall within the definition of a foreign company. Its incorporation by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must conduct a business activity in India.

10. Dating of prospectus and particulars to be contained therein [Section 387]

According to this section:

(i) Prospectus to be dated and signed [Section 387(1)]: No person shall issue, circulate or distribute in India any prospectus offering to subscribe for securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless the prospectus is dated and signed, and—

(a) contains particulars with respect to the following matters, namely:—

(1) the instrument constituting or defining the constitution of the company

(2) the enactments or provisions by or under which the incorporation of the company was effected;

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(3) address in India where the said instrument, enactments or provisions, or copies thereof, and if the same are not in the English language, a certified translation thereof in the English language can be inspected;

(4) the date on which and the country in which the company would be or was incorporated; and

(5) whether the company has established a place of business in India and, if so, the address of its principal office in India; and

(b) states the matters specified under section 26 (Matters to be stated in prospectus).

Provided that points (1), (2) and (3) of point (a) above shall not apply in the case of a prospectus issued more than 2 years after the date at which the company is entitled to commence business.

(ii) No waiver of compliance in prospectus [Section 387(2)]: Any condition requiring or binding an applicant for securities to waive compliance with any requirement imposed by virtue of section 387(1) or purporting to impute him with notice of any contract, documents or matter not specifically referred to in the prospectus, shall be void.

(iii) Form of application for securities to be issued along with prospectus [Section 387(3)]: No person shall issue to any person in India a form of application for securities of such a company or intended company as is mentioned in section 387(1), unless the form is issued with a prospectus which complies with the provisions of this Chapter (Chapter XXII) and such issue does not contravene the provisions of section 388:

Exception: If it is shown that the form of application was issued in connection with a *bona fide* invitation to a person to enter into an underwriting agreement with respect to securities.

(iv) Section 387(4) further provides that the provisions of section 387—

(a) shall not apply to the issue to existing members or debenture holders of a company of a prospectus or form of application relating to securities of the company, whether an applicant for securities will or will not have the right to renounce in favour of other persons; and

(b) except in so far as it requires a prospectus to be dated, to the issue of a prospectus relating to securities which are or are to be in all respects uniform with securities previously issued and for the time being dealt in or quoted on a recognised stock exchange,

but, subject as aforesaid, section 387 shall apply to a prospectus or form of application whether issued on or with reference to the formation of a company or subsequently.

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(v) Nothing in section 387 shall limit or diminish any liability which any person may incur under any law for the time being in force in India or under the Companies Act, 2013 apart from section 387.

11. Provisions as to expert's consent and allotment [Section 388]

According to this section:

(i) No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not been established, or when formed will or will not establish, a place of business in India,—

(a) if, where the prospectus includes a statement purporting to be made by an expert, he has not given, or has before delivery of the prospectus for registration withdrawn, his written consent to the issue of the prospectus with the statement included in the form and context in which it is included, or there does not appear in the prospectus a statement that he has given and has not withdrawn his consent as aforesaid; or

(b) if the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of sections 33 and 40, so far as applicable.

(ii) For the purposes of this section, a statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith.

12. Registration of prospectus [Section 389]

According to this section:

No person shall issue, circulate or distribute in India any prospectus offering for subscription in securities of a company incorporated or to be incorporated outside India, whether the company has or has not established, or when formed will or will not establish, a place of business in India, unless before the issue, circulation or distribution of the prospectus in India, a copy thereof certified by the chairperson of the company and two other directors of the company as having been approved by resolution of the managing body has been delivered for registration to the Registrar and the prospectus states on the face of it that a copy has been so delivered, and there is endorsed on or attached to the copy, any consent to the issue of the prospectus required by section 388 and such documents as may be prescribed.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* the following documents shall be annexed to the prospectus, namely:

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(a) any consent to the issue of the prospectus required from any person as an expert;

(b) a copy of contracts for appointment of managing director or manager and in case of a contract not reduced into writing, a memorandum giving full particulars thereof;

(c) a copy of any other material contracts, not entered in the ordinary course of business, but entered within preceding 2 years;

(d) a copy of underwriting agreement; and

(e) a copy of power of attorney, if prospectus is signed through duly authorized agent of directors.

13. Offer of Indian Depository Receipts [Section 390]

For the purposes of this section, and according to the *Companies (Registration of Foreign Companies) Rules, 2014,* Indian Depository Receipts (IDR) means any instrument in the form of a depository receipt created by a Domestic Depository in India and authorized by a company incorporated outside India making an issue of such depository receipts.

According to section 390, notwithstanding anything contained in any other law for the time being in force, the Central Government may make rules applicable for—

(i) the offer of Indian Depository Receipts (IDR);

(ii) the requirement of disclosures in prospectus or letter of offer issued in connection with IDR;

(iii) the manner in which the IDR shall be dealt with in a depository mode and by custodian and underwriters; and

(iv) the manner of sale, transfer or transmission of IDR,

by a company incorporated or to be incorporated outside India, whether the company has or has not established, or will or will not establish, any place of business in India.

According to the *Companies (Registration of Foreign Companies) Rules, 2014,* no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India.

The Rules relating to offer, disclosure requirements and manner of transfer, sale etc., related to IDR are contained in *Companies (Registration of Foreign Companies) Rules, 2014*.

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14. Application of sections 34 to 36 and Chapter XX [Section 391]

Section 391 of the Companies Act, 2013 provides for Application of sections 34 to 36 and Chapter XX. According to this section:

According to sub-section (1), the provisions of sections 34 to 36 (both inclusive) shall apply to—

(i) the issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;

(ii) the issue of IDR by a foreign company.

Section 34 deals with criminal liability for mis-statements in prospectus

Section 35 deals with Civil Liability for mis-statement in prospectus

Section 36 deals with punishment for fraudulently inducing persons to invest money

Sub-section (2) provides that the provisions of Chapter XX i.e. Winding up shall apply mutatis mutandis for closure of the place of business of a foreign company in India as if it were a company incorporated in India.

15. Punishment for contravention [Section 392]

Without prejudice to the provisions of section 391, if a foreign company contravenes the provisions of Chapter XXII of the Companies Act, 2013 (i.e. Chapter on Companies incorporated outside India), the foreign company shall be punishable with fine which shall not be less than ₹ 1,00,000 but which may extend to ₹ 3,00,000 and in the case of a continuing offence, with an additional fine which may extend to ₹ 50,000 for every day after the first during which the contravention continues and every officer of the foreign company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than ₹ 25,000 but which may extend to ₹ 5,00,000, or with both.

Thus, the punishment for contravention may be summed up as under:

1. Fine on defaulting foreign company in the range of 1 lac to 3 lac rupees.
2. In case of continuing default an additional fine on the foreign company to the tune of ₹ 50,000 per day after the first during which the contravention continues.
3. Punishment for every officer of the foreign company who is default shall be:
   (a) Imprisonment for a maximum term of 6 months, or
   (b) Imposition of a fine of a minimum amount of ₹ 25,000, or
   (c) Both - imprisonment and fine.

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16. Company's failure to comply with provisions of this Chapter not to affect validity of contracts, etc. [Section 393]

Any failure by a company to comply with the provisions of Chapter XXII of the Companies Act, 2013, shall not affect the validity of any contract, dealing or transaction entered into by the company or its liability to be sued in respect thereof. However, the company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction, until the company has complied with the provisions of the Companies Act, 2013, applicable to it.

RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 379.	Section 379 of the principal Act shall be renumbered as sub-section (*2*) thereof and before sub-section (*2*) as so renumbered, the following sub-section shall be inserted, namely:— "(*1*) Sections 380 to 386 (both inclusive) and sections 392 and 393 shall apply to all foreign companies: Provided that the Central Government may, by Order published in the Official Gazette, exempt any class of foreign companies, specified in the Order, from any of the provisions of sections 380 to 386 and sections 392 and 393 and a copy of every such Order shall, as soon as may be after it is made, be laid before both Houses of Parliament."	Notified till 30th April, 2018
Amendment of section 384.	In section 384 of the principal Act, in sub-section (*2*), after the word and figures "section 92", the words and figures "and section 135" shall be inserted.	Notified till 30th April, 2018
Amendment of section 391.	In section 391 of the principal Act, for sub-section (*2*), the following sub-section shall be substituted, namely:— "(*2*) Subject to the provisions of section 376, the provisions of Chapter XX shall apply *mutatis mutandis* for closure of the place of business of a foreign company in India as if it were a company incorporated in India in case such foreign company has raised monies through offer or issue of securities under this Chapter which have not been repaid or redeemed."	Notified till 30th April, 2018

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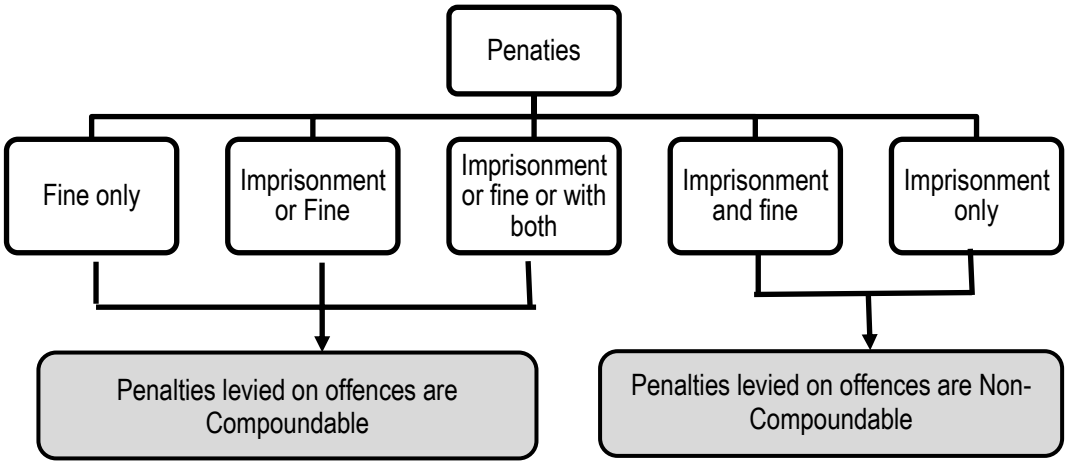
13
Offences and Penalties

1. Introduction

An offence is a commission of an act which is contrary to any law or forbidden by the law and is not confined to commission of crime only. Such commission of act against the law requires a particular punishment levied through the way of penalty.

Types of Penalties

There are five types of penalties that can be levied on the commission of the offences that have been contemplated under the Companies Act, 2013. They are as follows:



Compoundable offences are those offences where, the complainant (one who has filed the case) enters into a compromise, and agrees to have the charges dropped against the accused.

Non-Compoundable offences are those which are not compoundable because of grievous nature of offence.

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2. Jurisdiction of court for trial of offences

According to section 2(29) of the Companies Act, 2013, the term courts means –

Sl. No.	Types of courts	Jurisdiction
1.	High Court	**Having jurisdiction in relation to the place** at which the registered office of the company concerned is situate, except to the extent to which jurisdiction has been conferred on any district court or district courts subordinate to that High Court under sub-clause (ii);
2.	District Court	**In cases where the Central Government has, by notification, empowered any district court** to exercise all or any of the jurisdictions conferred upon the High Court, within the scope of its jurisdiction in respect of a company whose registered office is situate in the district;
3.	Session Court	**having jurisdiction to try any offence under this Act or under any previous company law**
4.	Special Court	The Central Government may, provide for speedy trial of offences punishable under this Act **with imprisonment of two years or more** by notification, establish or designate as many Special Courts as may be necessary. (Section 435)
5.	Any Metropolitan Magistrate or a Judicial Magistrate of the First Class	having **jurisdiction to try any offence under this Act or under any previous company law**

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3. Offences to be non-cognizable [Section 439]

This sections provides of the offences that are non-cognizable. According to this section:

Offence	Nature of offence
every offence under the Companies Act, 2013 except the offences referred to section 212(6)	shall be deemed to be non-cognizable within the meaning of the Cr.P.C
Court shall take cognizance of any offence under the Companies Act which is alleged to have been committed by any company or any officer thereof	Only on the written complaint of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf.
Cognizance of offences relating to issue and transfer of securities and non-payment of dividend	The court may take cognizance on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.
Non-application of section 439(2)	To a prosecution by a company of any of its officers
Where the complainant is the Registrar or a person authorised by the Central Government	The presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial
Non-application of section 439(2)	To any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX (Winding up) or in any other provision of this Act relating to winding up of companies The liquidator of a company shall not be deemed to be an officer of the company.

As per the Notification G.S.R. 463(E) dated 5th June 2015, in case of a government companies, court shall take cognizance of an offence under this Act which is alleged to have been committed by any company or any officer thereof on the complaint in writing of a person authorized by the Central Government in that behalf

4. Application of fines [Section 446]

According to this section, the court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the payment of a reward to the person on whose information the proceedings were instituted.

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RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 439.	In section 439 of the principal Act, in sub-section (*2*), after the words "a shareholder", the words "or a member" shall be inserted.	Not notified till 30th April, 2018
Insertion of new section 446A. Factors for determining level of punishment. Lesser penalties for One Person Companies or small companies.	After section 446 of the principal Act, the following sections shall be inserted, namely:— "446A. The court or the Special Court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:— (*a*) size of the company; (*b*) nature of business carried on by the company; (*c*) injury to public interest; (*d*) nature of the default; and (*e*) repetition of the default. 446B. Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub-section (*5*) of section 92, sub-section (*2*) of section 117 or sub-section (*3*) of section 137, such company and officer in default of such company shall be punishable with fine or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one-half of the fine or imprisonment or fine and imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections.".	Notified till 30th April, 2018

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14
E-Governance

1. MCA 21 Project

This is an innovative project and initiative of the Ministry of Corporate Affairs to enable e-filing. This project covers all the services provided by the Registrar of Companies (ROC) starting from the incorporation of a new company. The project would provide e-services including registration of new companies, filing of various returns and statutory documents under the Companies Act, 2013. The system would also enables filing and access for statutory documents like memorandum of association, articles of association, certificate of incorporation etc.

The project serves the interest of all the key stake holders and the public at large. Also professionals need no longer to visit the officers of ROC and are able to interact with the Ministry using MCA 21 portal from their offices or home. The services of the Ministry of Company Affairs with the introduction of MCA 21 will be e-form driven. Form filing will be done using freely downloadable software and it can be done offline. The prerequisite for using the MCA 21 portal will be P-4 computer with printer, windows 2000 / XP / Vista / 7, internet explorer 6.0 version, Adobe Acrobat Reader from version in 9.4 to version 7.5 and digital signature certificate.

To know better about how MCA 21 will function, one need to know about the set up of the Ministry of Corporate Affairs.

2. Set Up of MCA

MCA has a three tier organizational set-up:

- Headquarters at New Delhi
- Regional Directors (RD) at Mumbai, Kolkata, Chennai, Noida, Ahmedabad and Hyderabad
- Registrar of Companies (RoC) in States and Union Territories

MCA Headquarters handles cases that require approval of the Government of India (GoI) for citizen related functions. RD supervises the functioning of RoCs and handles the matters delegated by GoI while the RoC offices handle the bulk of citizen facing functions.

The Official Liquidators (OL) attached to various High Courts functioning in the country are also under the overall administrative control of the MCA. Its headquarters at Delhi also includes two Directors of Inspection and Investigation and Director of Research and Statistics.

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3. MCA 21 Program

Ministry of Corporate Affairs (MCA), Government of India (GoI) initiated MCA 21 program, for easy and secure access to MCA services in a manner that best suits the businesses and citizens.

The program goals have been set as follows keeping in mind stakeholders' needs:

- **Business** enabled to register a company and file statutory documents quickly and easily
- **Public** to get easy access to relevant records and effective grievances redressal
- **Professionals** to be able to offer efficient services to their client companies
- **Financial Institutions** to easily find charges registration and verification
- **Employees** to ensure proactive and effective compliance of relevant laws and corporate governance

MCA 21 has been envisioned to provide anytime and anywhere services to businesses. It is a pioneering program being the first mission mode e-governance project undertaken in the country. This program builds on the GoI vision to introduce a Service Oriented Approach in the design and delivery of Government services, establish a healthy business ecosystem and make the country globally competitive.

4. Program Scope

MCA 21 program provides for anytime anywhere electronic services with speed and certainty to all the stakeholders. It includes:

- Design and development of application system
- Setting up of IT infrastructure
- Setting up the Digital Signature/PKI delivery mechanisms and associated security requirements
- Setting up of Physical Front Offices (PFOs)
- Setting up of temporary Front Offices (FOs) for the peak periods to meet with the requirements and subsequent shutdown of temporary FOs at the end of such peak periods
- Migrating legacy data and digitization of paper documents to the new system
- Providing MCA services to all MCA 21 stakeholders in accordance with the Service Oriented Approach
- Providing user training at all levels and all offices (Front and Back Offices)

The MCA 21 is designed to automate processes related to the proactive enforcement and compliance of the legal requirements under the Companies Act, 2013. However, it does not include processes related to OL.

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5. Key Benefits

MCA 21 seeks to fulfill the requirements of the various stakeholders. The key benefits of MCA 21 project are:

- Expeditious incorporation of companies
- Simplified and ease of convenience in filing of Forms/ Returns
- Better compliance management
- Total transparency through e-Governance
- Customer centric approach
- Increased usage of professional certificate for ensuring authenticity and reliability of the Forms / Returns
- Building up a centralised database repository of corporate operating
- Enhanced service level fulfillment
- Inspection of public documents of companies anytime from anywhere
- Registration as well as verification of charges anytime from anywhere
- Timely redressal of investor grievances
- Availability of more time for MCA employees for monitoring and supervision

6. List of E-Forms

Mapping of e-forms prescribed under the Companies Act, 2013 with e-forms prescribed under Companies Act, 1956

S. No.	e-Form (Companies Act, 2013)	Corresponding e-Form (Companies Act, 1956)	Purpose of Form as per Companies Act, 2013
1	INC-1	1A	Application for reservation of name
2	INC-2	New form	Form for Incorporation and nomination (One Person Company)
3	INC-3	New form	Form for consent of nominee of One Person Company
4	INC-4	New form	Form for change in member/nominee of One Person Company
5	INC-5	New form	Form for intimation of exceeding threshold of One Person Company
6	INC-6	New form	Application for Conversion

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7	INC-7	1	Application for Incorporation of Company (Other than One Person Company)
8	INC-18	New form	Application to Regional Director for conversion of section 8 company into any other kind of company
9	INC-20	New form	Intimation to Registrar of revocation or surrender of license issued under section 8
10	INC-21	19	Declaration prior to the commencement of business
11	INC-22	18	Notice of situation or change of situation of registered office and verification
12	INC-23	1AD, 24AAA	Application to Regional director for approval to shift the registered office from one state to another state or from jurisdiction of one registrar to another within the state
13	INC-24	1B	Application for approval of Central Government for change of name
14	INC-27	1B, 62	Conversion of public company into private company or private company into public company
15	INC-28	21	Notice of order of the Court or other authority
16	PAS-3	2	Return of allotment
17	SH-7	5	Notice to Registrar for alteration of share capital
18	SH-8	New form	letter of offer
19	SH-11	4C	Return in respect of buy back of securities
20	CHG-1	8	Application for registration of creation, modification of charge (other than those related to debentures) including particulars of modification of charge by Asset Reconstruction Company in terms of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI)
21	CHG-4	17	Particulars for satisfaction of charge
22	CHG-6	15	Notice of appointment or cessation of receiver or manager
23	CHG-9	10	Application for registration of creation or

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			modification of charge for debentures or rectification of particulars filed in respect of creation or modification of charge for debentures
24	MGT-6	22B	Form of return to be filed with the Registrar
25	MGT-14	23	Filing of Resolutions and agreements to the Registrar under section 117
26	DIR-3	DIN1	Application for allotment of Director Identification Number
27	DIR-6	DIN4	Intimation of change in particulars of Director to be given to the Central Government
28	DIR-11	New form	Notice of resignation of a director to the Registrar
29	DIR-12	32, 32AD	Particulars of appointment of directors and the key managerial personnel and the changes amongst them
30	MR-1	25C	Return of appointment of managing director or whole time director or manager
31	MR-2	25A	Form of application to the Central Government for approval of appointment or reappointment and remuneration or increase in remuneration or waiver for excess or over payment to managing director or whole time director or manager and commission or remuneration to directors
32	URC-1	37, 39	Application by a company for registration under section 366
33	FC-1	44	Information to be filed by foreign company
34	FC-2	49, 52	Return of alteration in the documents filed for registration by foreign company
35	FC-3	52	List of all principal places of business in India established by foreign company
36	FC-4	PTII	Annual Return
37	GNL-1	61	Form for filing an application with Registrar of Companies
38	GNL-2	62	Form for submission of documents with Registrar of Companies
39	GNL-3	1AA	Particulars of person(s) or director(s) or

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			charged or specified for the purpose of section 2(60)
40	ADJ	New form	Memorandum of Appeal
41	MSC-1	New form	Application to ROC for obtaining the status of dormant company
42	MSC-3	New form	Return of dormant companies
43	MSC-4	New form	Application for seeking status of active company
44	RD-1	24A	Form for filing application to Regional Director
45	RD-2	24AAA	Form for filing petitions to Central Government (Regional Director)
46	CG-1	65	Form for filing application or documents with Central Government
47	-	66	Form for submission of compliance certificate with the Registrar
48	-	5INV	Statement of unclaimed and unpaid amounts
49	-	14LLP	Form for intimating to Registrar of Companies of conversion of the company into limited liability partnership (LLP).
50	-	20B	Form for filing annual return by a company having a share capital with the Registrar
51	-	21A	Particulars of annual return for the company not having share capital
52	-	23AC	Form for filing balance sheet and other documents with the Registrar
53	-	23ACA	Form for filing Profit and Loss account and other documents with the Registrar
54	-	23ACA-XBRL	Form for filing XBRL document in respect of Profit and Loss account and other documents with the Registrar
55	-	23AC-XBRL	Form for filing XBRL document in respect of balance sheet and other documents with the Registrar
56	-	23C	Form of application to the Central Government for appointment of cost auditor
57	-	23D	Form for Information by Cost Auditor to Central Government

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58	-	35A	Information to be furnished in relation to any offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company
59	-	A-XBRL	Form for filing XBRL document in respect of compliance report and other documents with the Central Government
60	-	FTE	Application for striking off the name of company under the Fast Track Exit (FTE) Mode
61	-	I-XBRL	Form for filing XBRL document in respect of cost audit report and other documents with the Central Government
62	-	Refund	Application for requesting refund of fees paid
63	-	Bank ACC	Application for simplifying bank account opening process as user shall not be required to submit any physical application form.
64	-	Investor Complaint Form	Form for filing complaint(s) against the company
65	-	67AD.	Clarification

In order to facilitate easy understanding of the e-forms being rolled out under the provisions of Companies Act, 2013 and Rules made thereunder, forms under the new Act are mandatorily numbered alpha-numeric. Initial of forms is to be started with alphabet of two or three letters based on the subject of the Chapter, followed by serial number of the form. This will define the nature of the forms and would be easy to recognise.

Following table is the summary of chapter wise nomenclature of forms provided by MCA:

Sl. no.	Chapter No	Particulars of chapter	Form no start with	remarks
01	II	Incorporation of Company and Matters Incidental thereto	INC	
02	III	Prospectus and Allotment of Securities	PAS	
03	IV	Share capital and Debentures	SH	
04	V	Acceptance of Deposit by Companies	DPT	
05	VI	Charges	CHG	
06	VII	Management and Administration	MGT	

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07	VIII	Declaration any Payment of Dividend	DIV	Alphabet followed by numeric number
08	IX	Accounts of Companies	AOC	
09	X	Audit and Auditors	ADT	
10	XI	Appointment and Qualifications of Directors	DIR	
11	XII	Meetings of Board and its Powers	MBP	
12	XIII	Appointment and Remuneration of Personnel	MR	
13	XXI	Companies Authorised to Register under this Act	URC	
14	XXII	Companies Incorporated Outside India	FC	
15	XXIV	Registration Offices and Fees	GNL	
16	XXVI	Nidhis	NDH	
17	XXVIII	Special Court	MAC	
18	XXIX	Memorandum of Appeal	ADJ	
19	XXIX	Miscellaneous	MSC	

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15

National Company Law Tribunal and Appellate Tribunal

1. Introduction



In the past there were number of quasi-judicial forums and tribunals to provide specialized judicial settlement in a wide range of business issues for dispensation of justice to companies.

The Companies Act, 2013 provides for the constitution of National Company Law Tribunal (NCLT) & National Company Law Tribunal and Appellate Tribunal (NCLAT). NCLT is set up to bring all lawsuits pertaining to companies under one body. It has replaced the Company Law Board (CLB), the Board for Industrial and Financial Reconstruction (BIFR) and the Appellate Authority for Industrial and Financial Reconstruction and will have judicial and technical members. Initially, NCLT will have eleven branches, four at New Delhi (including the Principal Bench) and one each at Ahemdabad, Allahabad, Bengaluru, Chandigarh, Chennai, Guwahati, Hyderabad, Kolkata and Mumbai.

Vide Ministry of Corporate Affairs Notification S.O.1936 (E) dated 1st June 2016 read with section 434(1) (a) of the Companies Act, 2013 , the Central Government hereby appoints the 1st day of June, 2016, on which all matters or proceedings or cases pending before the Board of Company Law Administration (Company Law Board) shall stand transferred to the National Company Law Tribunal and it shall dispose of such matters or proceedings or cases in accordance with the provisions of the Companies Act, 2013 or the Companies Act, 1956.

The provisions dealing with the various parts of NCLT and NCLAT are covered under the Chapter XXVII of the Companies Act, 2013.

NCLT AND NCLAT



NCLT is a quasi- judicial body that adjudicats matters pertaining to companies in India. Any person aggrevied by the decision of NCLT may prefer an appeal to NCLAT. NCLT and NCLAT has provided a single window for settlement of all disputes relating to companies. Further, the provisions of the Insolvency and Bankruptcy Code, 2016 have already been incorporated in the Companies Act, thereby providing a complete harmony in working of NCLT in line with the Insolvency and Bankruptcy Code, 2016.Thus, NCLT and NCLAT is providing a one stop solution to almost all the disputes of the companies under the Companies Act, 2013.

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2. Definitions [Section 407]

Section 407 of the Companies Act, 2013 provides the definitions of chairperson, judicial members, member, president and technical member. The section defines the following key members constituting the NCLT & NCLAT-

Members		Definitions
Chairperson	Means	the Chairperson of the Appellate Tribunal
Judicial Member		a member of the Tribunal or the Appellate Tribunal appointed as such and includes the President or the Chairperson, as the case may be.
Member		a member, whether Judicial or Technical of the Tribunal or the Appellate Tribunal and includes the President or the Chairperson, as the case may be.
President		the President of the Tribunal
Technical Member		a member of the Tribunal or the Appellate Tribunal appointed as such

3. Constitution of National Company Law Tribunal [Section 408]

According to section 408 of the Companies Act, 2013, the Central Government shall, by notification[1], constitute with effect from such date as may be specified therein, a Tribunal to be known as the National Company Law Tribunal consisting of a President and such number of (Judicial and Technical) members, as the Central Government may deem necessary, to be appointed by notification, to exercise and discharge such powers and functions as conferred on it by or under this Act or any other law for the time being in force.

4. Qualification of President and Members of Tribunal [Section 409]

Section 409 of the Companies Act, 2013, deals with qualifications of the President and members of Tribunal.



(i) **Qualification for the President**: He shall be a person who is or has been a Judge of a High Court for five years.

[1] The Ministry of Corporate Affairs Vide notification S.O.1932 (E) dated 1st June 2016, hereby constitutes the NCLT to exercise and discharge the powers and functions as are or may be conferred on it by or under the said Act with effect from 1st June 2016.

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(ii) Qualification for the Judicial member: A person shall not be qualified for appointment as a Judicial Member unless he is or has been—

(1) a judge of a High Court; or

(2) a District Judge for at least five years; or

(3) an advocate of a court for at least ten years.

For the purposes of clause (3) above, in computing the period for which a person has been an advocate of a court, there shall be included any period during which the person has held judicial office or the office of a member of a tribunal or any post, under the Union or a State, requiring special knowledge of law after he become an advocate.

(iii) Qualification for Technical member: A person shall not be qualified for appointment as a Technical Member unless he—

(1) has been a member of the Indian Corporate Law Service or Indian Legal Service for at least fifteen years out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service; or

(2) is or has been in practice as a chartered accountant, or a cost accountant , or as a company secretary for at least fifteen years

(3) is a person of proven ability, integrity and standing having special knowledge and experience, of not less than fifteen years, in industrial finance, management or administration, reconstruction, investment, accountancy, labour matters or such other disciplines which are related to the management of the affairs including reconstruction, rehabilitation and winding up of companies,

(4) is or has been a presiding officer of a Labour Court, Tribunal or National Tribunal constituted under the Industrial Disputes Act, 1947 for at least five years.

5. Constitution of Appellate Tribunal [Section 410]

National Company Law Appellate Tribunal (NCLAT) has been constituted for hearing appeals against the orders of the NCLT.

As per section 410 of the Companies Act, 2013,

(i) the Central Government shall, by notification constitute with effect from such date as may be specified therein, an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of judicial and technical members, not exceeding 11, as the Central Government may deem fit.

(ii) NCLAT when constituted will be for hearing appeals against the orders of the Tribunal.

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6. Qualifications of Chairperson and members of Appellate Tribunal [Section 411]

Section 411 of the Companies Act, 2013 prescribes the qualifications of the chairperson and the members of the Appellate Tribunal.

(i) Qualification of Chairperson: The chairperson shall be a person who is or has been a Judge of the Supreme Court or the Chief Justice of a High Court.

(ii) Qualification of members:

(1) **Judicial Member:** A Judicial Member shall be a person who is or has been a Judge of a High Court or is a Judicial Member of the Tribunal for 5 years.

(2) **Technical Member:** A Technical Member shall be a person of proven ability, integrity and standing having special knowledge and experience, of not less than 25 years in various specified disciplines related to the management, conduct of affairs, revival, rehabilitation and winding up of companies.

7. Selection of Members of Tribunal and Appellate Tribunal [Section 412]

(i) The President of the Tribunal and the chairperson and Judicial Members of the Appellate Tribunal shall be appointed after consultation with the Chief Justice of India.

(ii) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee.

(iii) Selection Committee

(a) Constitution of selection Committee: The selection committee shall consist of—

(1) Chief Justice of India or his nominee—Chairperson;

(2) a senior Judge of the Supreme Court or a Chief Justice of High Court — Member;

(3) Secretary in the Ministry of Corporate Affairs—Member;

(4) Secretary in the Ministry of Law and Justice—Member; and

(5) Secretary in the Department of Financial Services in the Ministry of Finance—Member.

The Secretary, Ministry of Corporate Affairs shall be the Convener of the Selection Committee.

(b) Functioning of the Selection Committee: The Selection Committee shall drtermine its procedure for recommending persons for the appointment of the members of the Tribunal and the technical members of the Appellate Tribunal.

(c) No appointment of members shall be invalid: No appointment of the Members of the Tribunal or the Appellate Tribunal shall be invalid merely by reason of any vacancy or any defect in the constitution of the Selection Committee.

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8. Term of office of President, Chairperson and other Members [Section 413]

The section provides the term for the holding of office for the members constituting Tribunal and Appellate Tribunal along with the age bar on the holding of the same.

(i) **Term of holding office in the case of Tribunal:** The President and every other Member of the Tribunal shall hold office for a term of 5 years from the date on which he enters upon his office and shall be eligible for re appointment for another term of 5 years. [Section 413 (1)].

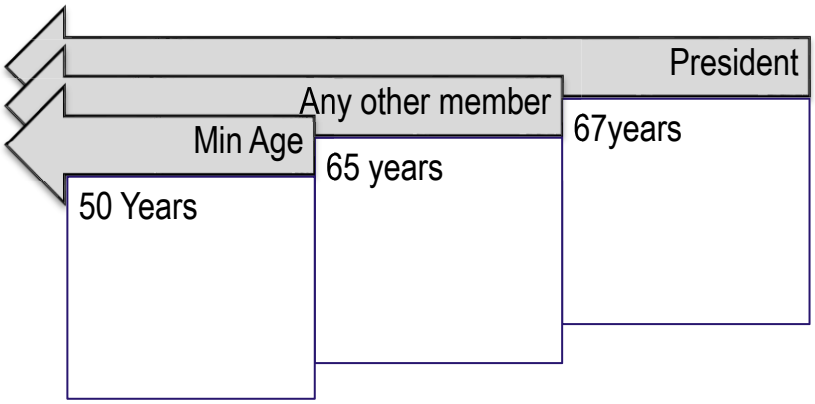
(ii) **Age bar on holding of office**: Under section 413 (2), a Member of the Tribunal shall hold office as such until he attains,—

(a) in the case of the President, the age of 67 years;

(b) in the case of any other Member, the age of 65 years.

Provided that a person who has not completed 50 years of age shall not be eligible for appointment as Member.

Provided further that the Member may retain his lien with his parent cadre or Ministry or Department, while holding office for a period not exceeding one year.



(iii) **Term of holding office in the case of Appellate Tribunal:** The chairperson or a Member of the Appellate Tribunal shall hold office for a term of 5 years from the date on which he enters upon his office, and shall be eligible for re-appointment for another term of 5 years. [Section 413(3)]

(iv) **Restriction on holding of office:** Under section 413(4), a member of the Appellate Tribunal shall hold office as such until he attains,—

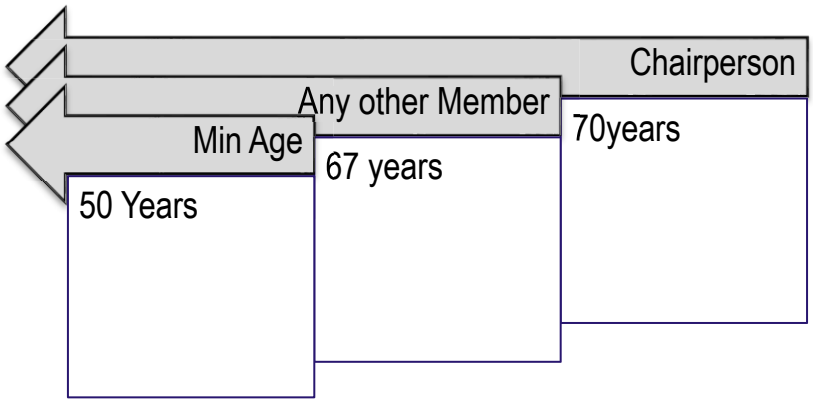
(a) in the case of the Chairperson, the age of 70 years;

(b) in the case of any other Member, the age of 67 years.

Provided that a person who has not completed 50 years of age shall not be eligible for appointment as Member.

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Provided further that a member may retain his lien with his parent cadre or Ministry or Department, while holding office for a period not exceeding one year.



9. Salary, allowances and other terms and conditions of service of Members [Section 414]

The salary, allowances and other terms and conditions of service of the Members of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

Provided that, neither the salary and allowances nor the other terms and conditions of service of the Members shall be varied to their disadvantage after their appointment.

10. Acting President and Chairperson of Tribunal or Appellate Tribunal [Section 415]

(1) In the event of the occurrence of any vacancy in the office of the President or the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the President or the Chairperson, as the case may be, until the date on which a new President or Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

(2) When the President or the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the President or the Chairperson, as the case may be, until the date on which the President or the Chairperson resumes his duties.

11. Resignation of Members [Section 416]

The President, the Chairperson or any Member may, by notice in writing under his hand addressed to the Central Government, resign from his office.

Provided that the President, the Chairperson, or the Member shall continue to hold office until the expiry of 3 months from the date of receipt of such notice by the Central Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earliest.

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12. Removal of members [Section 417]

(1) **Grounds for removal:** The Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who—

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b)to (e)without giving him a reasonable opportunity of being heard.

(2) **Reasonable opportunity of being heard:** Without prejudice to the provisions of sub-section (1), the President, the Chairperson or the Member shall not be removed from his office except by an order made by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by a Judge of the Supreme Court nominated by the Chief Justice of India on a reference made to him by the Central Government in which such President, the Chairperson or Member had been informed of the charges against him and given a reasonable opportunity of being heard.

(3) **Suspension by Central Government in concurrence with CJI:** The Central Government may, with the concurrence of the Chief Justice of India (CJI), suspend from office, the President, the Chairperson or Member in respect of whom reference has been made to the Judge of the Supreme Court under sub-section (2) until the Central Government has passed orders on receipt of the report of the Judge of the Supreme Court on such reference.

(4) **Central Government to make regulation for inquiry procedure:** The Central Government shall, after consultation with the Supreme Court, make rules to regulate the procedure for the inquiry on the ground of proved misbehaviour or incapacity referred to in sub-section (2).

13. Staff of Tribunal and Appellate Tribunal [Section 418]

(1) **Providing of staff to discharge the function:** The Central Government shall, in consultation with the Tribunal and the Appellate Tribunal, provide the Tribunal and the Appellate Tribunal, as the case may be, with such officers and other employees as may be necessary for the exercise of the powers and discharge of the functions of the Tribunal and the Appellate Tribunal.

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(2) **Supervision of the President on the discharge of function:** The officers and other employees of the Tribunal and the Appellate Tribunal shall discharge their functions under the general superintendence and control of the President, or as the case may be, the Chairperson, or any other Member to whom powers for exercising such superintendence and control are delegated by him.

(3) **Terms of services to be regulated by respective rules:** The salaries and allowances and other conditions of service of the officers and other employees of the Tribunal and the Appellate Tribunal shall be such as may be prescribed.

14. Benches of Tribunal [Section 419]

(1) **Number of benches:** There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(2) **Presiding of the Principal Bench:** The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(3) **Power exercisable by benches:** The powers of the Tribunal shall be exercisable by Benches consisting of 2 Members out of whom one shall be a Judicial Member and the other shall be a Technical Member:

Provided that it shall be competent for the Members of the Tribunal authorised in this behalf to function as a Bench consisting of a single Judicial Member and exercise the powers of the Tribunal in respect of such class of cases or such matters pertaining to such class of cases, as the President may, by general or special order, specify:

Provided further that if at any stage of the hearing of any such case or matter, it appears to the Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the President, or, as the case may be, referred to him for transfer, to such Bench as the President may deem fit.

(4) **Constitution of special benches:** The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016.

(5) **Decision where members differ in opinion:** If the Members of a Bench differ in opinion on any point or points, it shall be decided according to the majority, if there is a majority, but if the Members are equally divided, they shall state the point or points on which they differ, and the case shall be referred by the President for hearing on such point or points by one or more of the other Members of the Tribunal and such point or points shall be decided according to the opinion of the majority of Members who have heard the case, including those who first heard it.

15. Order of Tribunal [Section 420]

(1) **Reasonable opportunity of being heard:** The Tribunal may, after giving the parties to

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any proceeding before it, a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.

(2) **Amendment in order:** The Tribunal may, at any time within 2 years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties:

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(3) **Send the copy of order to parties concerned:** The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

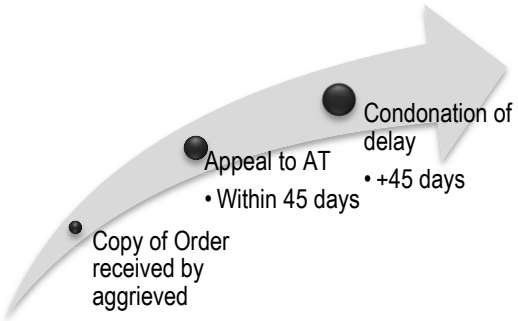
16. Appeal from Orders of Tribunal [Section 421]

(1) **Appeal to AT:** Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal (AT).

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

(3) **Period for filing of appeal:** Every appeal under sub-section (1) (i.e. appael to AT against order of Tribunal) shall be filed within a period of 45 days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding 45, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.



(4) **Pass order after giving of reasonable opportunity of being heard:** On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

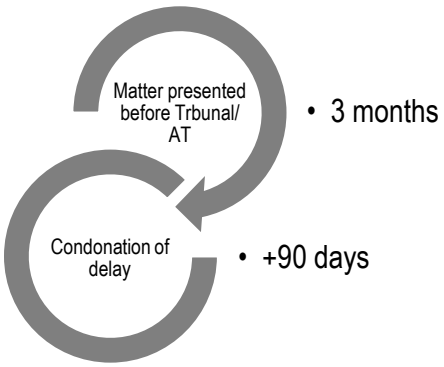
(5) **Copy of order to tribunal and parties to appeal:** The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

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17. Expeditious Disposal by Tribunal and Appellate Tribunal [Section 422]

(1) **Speedy disposal:** Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within 3 months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

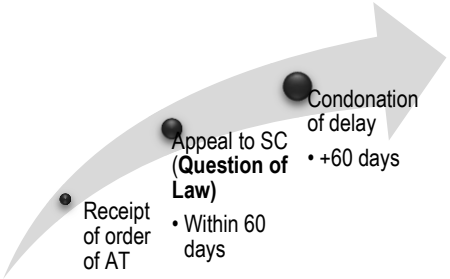
(2) **Reasons to be recorded for delay:** Where any application or petition or appeal is not disposed of within the period specified in sub-section (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary.



18. Appeal to Supreme Court [Section 423]

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within 60 days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

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 60 days.



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19. Procedure before Tribunal and Appellate Tribunal [Section 424]

(1) **Tribunal regulate their own procedure based on natural justice:** The Tribunal and the Appellate Tribunal shall not, while disposing of any proceeding before it or, as the case may be, an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principals of natural justice, and, subject to the other provisions of this Act or the Insolvency and Bankruptcy Code, 2016 and of any rules made there under, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

(2) **Vested with same power as that of a civil court:** The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office;

(e) issuing commissions for the examination of witnesses or documents;

(f) dismissing a representation for default or deciding it *ex parte*;

(g) setting aside any order of dismissal of any representation for default or any order passed by it ex parte; and

(h) any other matter which may be prescribed.

(3) **Nature of decree and its execution:** Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Tribunal or the Appellate Tribunal to send for execution of its orders to the court within the local limits of whose jurisdiction,—

(a) in the case of an order against a company, the registered office of the company is situate; or

(b) in the case of an order against any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

(4) **Nature of proceedings:** All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

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20. Power to punish for contempt [Section 425]

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—

(a) the reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and

(b) the reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.

21. Delegation of Powers [Section 426]

The Tribunal or the Appellate Tribunal may, by general or special order, direct, subject to such conditions, if any, as may be specified in the order, any of its officers or employees or any other person authorised by it to inquire into any matter connected with any proceeding or, as the case may be, appeal before it and to report to it in such manner as may be specified in the order.

22. President, Members, Officers, etc., to be Public Servants [Section 427]

The President, Members, officers and other employees of the Tribunal and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

23. Protection of Action Taken in Good Faith [Section 428]

No suit, prosecution or other legal proceeding shall lie against the Tribunal, the President, Member, officer or other employee, or against the Appellate Tribunal, the Chairperson, Member, officer or other employees thereof or liquidator or any other person authorised by the Tribunal or the Appellate Tribunal for the discharge of any function under this Act in respect of any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

24. Power to Seek Assistance of Chief Metropolitan Magistrate [Section 429]

According to section 429,

(1) The Tribunal may, in any proceedings for winding up of a company under this Act or in any proceedings under the Insolvency and Bankruptcy Code, 2016, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such company under this Act or of corporate persons under the said Code, are situated or found, to take possession thereof, and the Chief Metropolitan Magistrate,

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Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him,—

(a) take possession of such property, books of account or other documents; and

(b) cause the same to be entrusted to the Tribunal or other persons authorised by it.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector may take or cause to be taken such steps and use or cause to be used such force as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector done in pursuance of this section shall be called in question in any court or before any authority on any ground whatsoever.

25. Civil court not to have jurisdiction [Section 430]

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

26. Vacancy in Tribunal or Appellate Tribunal Not to Invalidate Acts or Proceedings [Section 431]

No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case may be.

27. Right to Legal Representation [Section 432]

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

28. Limitation [Section 433]

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

29. Transfer of Certain Pending Proceedings. [Section 434]

(1) On such date as may be notified by the Central Government in this behalf,—

(a) all matters, proceedings or cases pending before the Board of Company Law Administration (herein in this section referred to as the Company Law Board)

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constituted under sub-section (1) of section 10E of the Companies Act, 1956, immediately before such date shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act;

(b) any person aggrieved by any decision or order of the Company Law Board made before such date may file an appeal to the High Court within 60 days from the date of communication of the decision or order of the Company Law Board to him on any question of law arising out of such order:

Provided that the High Court may if it is satisfied that the appellant was prevented by sufficient cause from filing an appeal within the said period, allow it to be filedwithin a further period not exceeding 60 days; and

(c) all proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer:

Provided that only such proceedings relating to the winding up of companies shall be transferred to the Tribunal that are at a stage as may be prescribed by theCentral Government.

Provided also that only such proceedings relating to cases other than winding-up, for which orders for allowing or otherwise of the proceedings are not reserved by the High Courts shall be transferred to the Tribunal:

Provided further that –

(i) all proceedings under the Companies Act, 1956 other than the cases relating to winding up of companies that are reserved for orders for allowing or otherwise such proceedings; or

(ii) the proceedings relating to winding up of companies which have not been transferred from the High Courts;

shall be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959.

(2) The Central Government may make rules consistent with the provisions of this Act to ensure timely transfer of all matters, proceedings or cases pending before the Company Law Board or the courts, to the Tribunal under this section.

RELEVANT AMENDMENTS

1. Enforcement of the Companies (Removal of Difficulties) Orders, 2017 Vide Order S.O. 2042(E) dated 29th June , 2017

In the Companies Act, 2013, in section 434, in sub-section (1), in clause (c),-

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(a) in the third proviso, for "Provided further that-", the following shall be substituted, namely:- "Provided also that-";

(b) after the third proviso, the following proviso shall be inserted, namely:-

"Provided also that proceedings relating to cases of voluntary winding up of a company where notice of the resolution by advertisement has been given under sub-section (1) of section 485 of the Companies Act, 1956 but the company has not been dissolved before the 1st April, 2017 shall continue to be dealt with in accordance with provisions of the Companies Act, 1956 and the Companies (Court) Rules, 1959."

2. **Amendments through the Companies (Amendment) Act, 2017**

Relevant sections	Amendment	Status
Amendment of section 409	In section 409 of the principal Act, in sub-section (*3*),— (*i*) in clause (*a*), for the words "out of which at least three years shall be in the pay scale of Joint Secretary to the Government of India or equivalent or above in that service", the words "and has been holding the rank of Secretary or Additional Secretary to the Government of India" shall be substituted; (*ii*) for clause (*e*), the following clause shall be substituted, namely:— "(*e*) is a person of proven ability, integrity and standing having special knowledge and professional experience of not less than fifteen years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.".	Notified till 30th April, 2018
Amendment of section 410	In section 410 of the principal Act, for the words "orders of the Tribunal", the words "orders of the Tribunal or of the National Financial Reporting Authority" shall be substituted.	Not notified till 30th April, 2018
Amendment of section 411.	In section 411 of the principal Act, for sub-section (*3*), the following sub-section shall be substituted, namely:—	Notified till 30th April, 2018

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	"(*3*) A technical member shall be a person of proven ability, integrity and standing having special knowledge and professional experience of not less than twenty-five years in industrial finance, industrial management, industrial reconstruction, investment and accountancy.".	
Amendment of section 412	In section 412 of the principal Act, for sub-section (*2*), the following sub-sections shall be substituted, namely:— "(*2*) The Members of the Tribunal and the Technical Members of the Appellate Tribunal shall be appointed on the recommendation of a Selection Committee consisting of— (*a*) Chief Justice of India or his nominee—Chairperson; (*b*) a senior Judge of the Supreme Court or Chief Justice of High Court—Member; (*c*) Secretary in the Ministry of Corporate Affairs—Member; and (*d*) Secretary in the Ministry of Law and Justice—Member. (*2A*) Where in a meeting of the Selection Committee, there is equality of votes on any matter, the Chairperson shall have a casting vote.".	Notified till 30th April, 2018

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16
Special Courts

1. Introduction

Chapter XXVIII of the Companies Act, 2013 deals with the concept of Special Courts. This concept has assumed greater importance especially in the recent times as this will help in speedy trial of all offences under the Act. Hence, this will definitely facilitate in good corporate governance and stricter implementation of the Law. Due to this, the stakeholders will be benefited at large. With intent to punish the guilty, the Legislature has bring in, the Special Courts in the Companies Act, 2013. The Act focuses on establishment and the jurisdiction of the Special Court. The Companies Act, 2013 overrides the related provisions of the Cr.PC.

2. Establishment of Special Court [Section 435]

Section 435 of the Companies Act deals with the establishment of the Special Court. The provisions state the number of special court that may be established with the required number of judges for the working.

(1) Establishment of number of special court: The Central Government may by notification-

- for the purpose of providing speedy trial of offences
- punishable under this Act
- with imprisonment of two years or more,

establish or designate as many Special Courts as may be necessary.

Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

Types of court	Nature of trial of offences
Special Courts	Offences punishable under this Act with imprisonment of two years or more
A Metropolitan Magistrate or a Judicial Magistrate of the First Class	All other offences under this Act or under any previous company law.

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(2) Appointment of judge: A Special Court shall consist of a single judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) Eligibility: A person shall not be qualified for appointment as a judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge.

3. Offences Triable by Special Courts [Section 436]

(1) Powers of special courts with respect to trail of offences: Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

Powers of the special courts	Provisions
Offences triable by the special court	All offences specified under section 435(1) shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed.
In case of more than one Special Courts	Where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;
Where a person accused of, or suspected of the commission of, an offence under this Act	Such person is forwarded to a Magistrate under section 167 of the Code of Criminal Procedure, 1973. (i) such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate, (ii) and seven days in the whole where such Magistrate is an Executive Magistrate: Provided that where such Magistrate considers that the detention of such person(upon or before the expiry of the period of detention) is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

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Vested with same power as provided under the Cr. P.C	the Special Court may exercise the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 in relation to an accused person who has been forwarded to him under that section;
Cognizance of offence by special court	A Special Court may, upon perusal of the police report or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) Special Court to try an offence other than an offence under this Act: When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 be charged at the same trial.

(3) Summary Trial: Notwithstanding anything contained in the Code of Criminal Procedure, 1973,

Power of special court on summary trail of an offence	Nature of summary trial
The Special Court may, if it thinks fit, try in a summary way any offence under this Act	Which is punishable with imprisonment for a term not exceeding three years
In the case of conviction in a summary trial	no sentence of imprisonment for a term exceeding one year shall be passed
When at the commencement of, or in the course of, a summary trial, it appears to the Special Court that – • the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed, or • that it is, for any other reason, undesirable to try the case summarily	the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

4. Appeal and Revision [Section 437]

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The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX which deals with appeals, Reference and Revision of the Code of Criminal Procedure, 1973 on a High Court-

As if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

5. Application of Code to Proceedings before Special Court [Section 438]

Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure, 1973 shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

6. Offences to be non-cognizable [Section 439]

This sections provides of the offences that are non-cognizable. According to this section:

Offence	Nature of offence
every offence under the Companies Act, 2013 except the offences referred to section 212(6)	shall be deemed to be non-cognizable within the meaning of the Cr.P.C
Court shall take cognizance of any offence under the Companies Act which is alleged to have been committed by any company or any officer thereof	Only on the written complaint of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf.
Cognizance of offences relating to issue and transfer of securities and non-payment of dividend	The court may take cognizance on a complaint in writing, by a person authorised by the Securities and Exchange Board of India.
Non-application of section 439(2)	To a prosecution by a company of any of its officers
Where the complainant is the Registrar or a person authorised by the Central Government	The presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial
Non-application of section 439(2)	To any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX (Winding up) or in any other provision of this Act relating

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	to winding up of companies The liquidator of a company shall not be deemed to be an officer of the company.

As per the Notification G.S.R. 463(E) dated 5th June 2015, in case of a government companies, court shall take cognizance of an offence under this Act which is alleged to have been committed by any company or any officer thereof on the complaint in writing of a person authorized by the Central Government in that behalf

7. Transitional provisions [Section 440]

According to the section, any offence committed under this Act, which is triable by a Special Court shall, until a Special Court is established, be tried by a Court of Session exercising jurisdiction over the area, notwithstanding anything contained in the Code of Criminal Procedure, 1973:

Provided that nothing contained in this section shall affect the powers of the High Court under section 407 of the Code to transfer any case or class of cases taken cognizance by a Court of Session under this section.

8. Compounding of certain offences [Section 441]

Section 441 deals with the process of compounding of certain offences.

(1) Who may compound the offence: Notwithstanding anything contained in the Code of Criminal Procedure, 1973, any offence punishable under this Act (whether committed by a company or any officer thereof) with fine only, may, either before or after the institution of any prosecution, be compounded by—

(a) the Tribunal; or

(b) where the maximum amount of fine which may be imposed for such offence does not exceed five lakh rupees, by the-

- Regional Director or
- any officer authorised by the Central Government,

on payment or credit, by the company or, as the case may be, the officer, to the Central Government of such sum as that Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, may specify:

Limit of fine: Provided that the sum so specified shall not, in any case, exceed the maximum amount of the fine which may be imposed for the offence so compounded:

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Provided further that in specifying the sum required to be paid or credited for the compounding of an offence under this sub-section, the sum, if any, paid by way of additional fee under sub-section (2) of section 403 shall be taken into account:

No compounding of an offence on initiation/pending of an investigation: Provided also that any offence covered under this sub-section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.

(2) Restriction: Nothing in sub-section (1) shall apply to an offence committed by a company or its officer within a period of three years from the date on which a similar offence committed by it or him was compounded under this section.

Explanation.—For the purposes of this section,—

(a) any second or subsequent offence committed after the expiry of a period of three years from the date on which the offence was previously compounded, shall be deemed to be a first offence;

(b) "Regional Director" means a person appointed by the Central Government as a Regional Director for the purposes of this Act.

(3) Filing of application to Registrar:

(a) **Application to be made to the Registrar:** Every application for the compounding of an offence shall be made to the Registrar who shall forward the same, together with his comments thereon, to the Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be.

(b) **Intimation of compounding of offence:** Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the company to the Registrar within seven days from the date on which the offence is so compounded.

(c) **No prosecution shall be instituted:** Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.

(d) **Compounding of any offence to be bought to the notice of the court:** Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.

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(4) Central Government to authorise for dealing with a proposal for compounding of offence: The Tribunal or the Regional Director or any officer authorised by the Central Government, as the case may be, while dealing with a proposal for the compounding of an offence for a default in compliance with any provision of this Act which requires a company or its officer to file or register with, or deliver or send to, the Registrar any return, account or other document, may direct, by an order, if it or he thinks fit to do so, any officer or other employee of the company to file or register with, or on payment of the fee, and the additional fee, required to be paid under section 403, such return, account or other document within such time as may be specified in the order.

(5) In case of failure in compliance: Any officer or other employee of the company who fails to comply with any order made by the Tribunal or the Regional Director or any officer authorised by the Central Government under sub-section (4) shall be punishable with imprisonment for a term which may extend to six months, or with fine not exceeding one lakh rupees, or with both.

(6) Offences which can be compounded: Notwithstanding anything contained in the Code of Criminal Procedure, 1973,—

(a) any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences;

(b) any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

(7) Restriction: No offence specified in this section shall be compounded except under and in accordance with the provisions of this section.

9. Mediation and Conciliation Panel [Section 442]

(1) Maintenance of panel of experts: The Central Government shall maintain a panel of experts to be called as the Mediation and Conciliation Panel.

Composition: It shall be consisting of such number of experts having such qualifications as may be prescribed for mediation between the parties during the pendency of any proceedings before-

- the Central Government or
- the Tribunal or
- the Appellate Tribunal under this Act.

(2) Referring of matters by any parties to the proceedings to Mediation and Conciliation Panel: Any of the parties to the proceedings may, at any time during the

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proceedings before the Central Government or the Tribunal or the Appellate Tribunal, apply to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, in such form along with such fees as may be prescribed, for referring the matter pertaining to such proceedings to the Mediation and Conciliation Panel and the Central Government or Tribunal or the Appellate Tribunal, as the case may be, shall appoint one or more experts from the panel referred to in sub-section (1).

(3) ***Suo moto*** **referring of matters to Mediation and Conciliation Panel:** The Central Government or the Tribunal or the Appellate Tribunal before which any proceeding is pending may, suo moto, refer any matter pertaining to such proceeding to such number of experts from the Mediation and Conciliation Panel as the Central Government or the Tribunal or the Appellate Tribunal, as the case may be, deems fit.

(4) Fees and other conditions of experts: The fee and other terms and conditions of experts of the Mediation and Conciliation Panel shall be such as may be prescribed.

(5) Procedure and disposal of matter: The Mediation and Conciliation Panel shall follow such procedure as may be in Rule 11 of the Special Courts (Companies Mediation and Conciliation) Rules, 2016, and dispose of the matter referred to it within a period of three months from the date of such reference and forward its recommendations to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

(6) Objection to the recommendation of the Mediation and Conciliation Panel: Any party aggrieved by the recommendation of the Mediation and Conciliation Panel may file objections to the Central Government or the Tribunal or the Appellate Tribunal, as the case may be.

10. Power of Central Government to Appoint Company Prosecutors [Section 443]

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may appoint-

- generally, or
- for any case, or
- in any case, or
- for any specified class of cases in any local area,
- one or more persons, as company prosecutors for the conduct of prosecutions arising out of this Act.

The persons so appointed as company prosecutors shall have all the powers and privileges conferred by the Code on Public Prosecutors appointed under section 24 of the Code.

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11. Appeal against Acquittal [Section 444]

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the Central Government may, in any case arising under this Act, direct any-

- company prosecutor or
- authorise any other person either by name or by virtue of his office,
- to present an appeal from an order of acquittal passed by any court, other than a High Court, and an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate court.

12. Compensation for Accusation without Reasonable Cause [Section 445]

The provisions of section 250 of the Code of Criminal Procedure, 1973 shall apply *mutatis mutandis* to compensation for accusation without reasonable cause before the Special Court or the Court of Session.

13. Application of fines [Section 446]

According to this section, the court imposing any fine under this Act may direct that the whole or any part thereof shall be applied in or towards payment of the costs of the proceedings, or in or towards the payment of a reward to the person on whose information the proceedings were instituted.

RELEVANT AMENDMENTS

Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of section 435. Establishment of Special Courts	For section 435 of the principal Act, the following shall be substituted, namely:— 435. (*1*) The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary. (*2*) A Special Court shall consist of— (*a*) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and (*b*) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences,	Not notified till 30th April, 2018

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	who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.".	
Amendment of section 438.	In section 438 of the principal Act, for the words "deemed to be a Court of Session", the words "deemed to be a Court of Session or the court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be," shall be substituted.	Not notified till 30th April, 2018
Amendment of section 439.	In section 439 of the principal Act, in sub-section (*2*), after the words "a shareholder", the words "or a member" shall be inserted.	Not notified till 30th April, 2018
Amendment of section 440.	In section 440 of the principal Act, for the words "Court of Session", at both the places, the words "Court of Session or the Court of Metropolitan Magistrate or a Judicial Magistrate of the First Class, as the case may be" shall be substituted.	Not notified till 30th April, 2018
Amendment of section 441.	In section 441 of the principal Act, in sub-section (*1*), for the words "with fine only", the words "not being an offence punishable with imprisonment only, or punishable with imprisonment and also with fine" shall be substituted.	Notified till 30th April, 2018
Insertion of new section 446A. Factors for determining level of punishment. Lesser penalties for One Person Companies or small companies.	After section 446 of the principal Act, the following sections shall be inserted, namely:— "446A. The court or the Special Court, while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:— (*a*) size of the company; (*b*) nature of business carried on by the company; (*c*) injury to public interest; (*d*) nature of the default; and (*e*) repetition of the default. 446B. Notwithstanding anything contained in this Act, if a One Person Company or a small company fails to comply with the provisions of sub-section (*5*) of section 92, sub-section (*2*) of section 117 or sub-section (*3*) of section 137, such company and officer in default of such company shall be punishable with fine or imprisonment or fine and imprisonment, as the case may be, which shall not be more than one-half of the fine or imprisonment or fine and	Notified till 30th April, 2018

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	imprisonment, as the case may be, of the minimum or maximum fine or imprisonment or fine and imprisonment, as the case may be, specified in such sections.".	

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17
Miscellaneous Provisions

1. Introduction

Ministry of Corporate Affairs vide Notifications dated 7th of December & 26th of December, 2016 notified various sections of the Companies Act, 2013. Besides, with the enforcement of the Insolvency and Bankruptcy Code, 2016, many consequential changes have also bring in the Companies Act, 2013.

This chapter contains Chapter XVIII: Removal of names of companies from the register of companies, Chapter XXI- Part I: Companies authorized to register under this Act, Part II: Winding up of unregistered companies, Chapter XXIII: Government companies, Chapter XXIV: Registration offices and fees, Chapter XXV: Companies to furnish information or statistics, chapter XXVI: Nidhis and chapter XXIX: Miscellaneous.

2. Removal of Names of Companies from the Register of Companies

Provision related to removal of names of companies from the register of companies is covered in Chapter XVIII of the Companies Act, 2013. This chapter comprises of five sections being covered from Section 248 to 252.

Important aspect of this chapter are as follows:

(i) Registrar has *suomoto* powers to remove the name of companies after compliance with desired requirements as prescribed in this chapter.

(ii) Company has a right to apply for the striking off its name from the register of companies on the grounds specified in this chapter.

(iii) With the publish of notice in the official gazette related to striking of name, the respective company shall stand dissolved.

(iv) This chapter also ensures that the liabilities and obligations of the company are met and even after the striking name of the company, assets are made available for meeting the liabilities of the company.

(v) Chapter prescribes the conditions on making of an application under section 248 which entitles a company to apply for its removal from the registrar of companies. This restriction have been devised to protect the public interest.

(vi) Chapter also enumerates effect of company on being notified as dissolved. Such type of company cease to operate and certificate of incorporation is deemed to be cancelled from the date on which notice was issued. However, for the purpose of realising the

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amount due to the company and for payment or discharge of its liabilities/obligations, company continued in existence.

(vii) This chapter also discusses on the issue where the company fraudulently apply for the striking off its name to evade the liabilities or to deceive its creditors or any persons.

(viii) Provision has been incorporated with respect to filing of appeal to tribunal by any aggrieved person.

[I] Power of Registrar to Remove Name of Company from Register of Companies [Section 248]

(1) **Power of registrar:** Where the Registrar has reasonable cause to believe that—

(a) a company has failed to commence its business within one year of its incorporation, or;

(b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455,

-he shall send a notice to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents, if any, within a period of thirty days from the date of the notice.

(2) Filing of application to registrar by company for removal of name: A company may, after extinguishing all its liabilities, by-

- a special resolution, or
- consent of seventy-five per cent. members in terms of paid-up share capital,

-file an application in the prescribed manner to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified in sub-section (1) and the Registrar shall, on receipt of such application, cause a public notice to be issued in the prescribed manner:

Approval of the regulatory body, in case of a company regulated under a special Act: Provided that in the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application.

(3) **Exemption to section 8 companies:** Nothing in sub-section (2) shall apply to a company registered under section 8.

(4) **Publishing of notice for general public:** A notice issued under sub-section (1) or sub-section (2) shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

(5) **Strike off of names from register of companies**: At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the

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Official Gazette, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

(6) **Provisions for realisation of amount:** The Registrar, before passing an order under sub-section (5), shall satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time and, if necessary, obtain necessary undertakings from the managing director, director or other persons in charge of the management of the company:

Provided that notwithstanding the undertakings referred to in this sub-section, the assets of the company shall be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

(7) **Persistence of the liability**: The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under sub-section (5), shall continue and may be enforced as if the company had not been dissolved.

(8) **Not affecting on the power of tribunal:** Nothing in this section shall affect the power of the Tribunal to wind up a company the name of which has been struck off from the register of companies.

[II] Restrictions on making application under section 248 in certain situations [Section 249]

(1) An application under section 248 on behalf of a company shall not be made if, at any time in the previous three months, the company—

(a) has changed its name or shifted its registered office from one State to another;

(b) has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;

(c) has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;

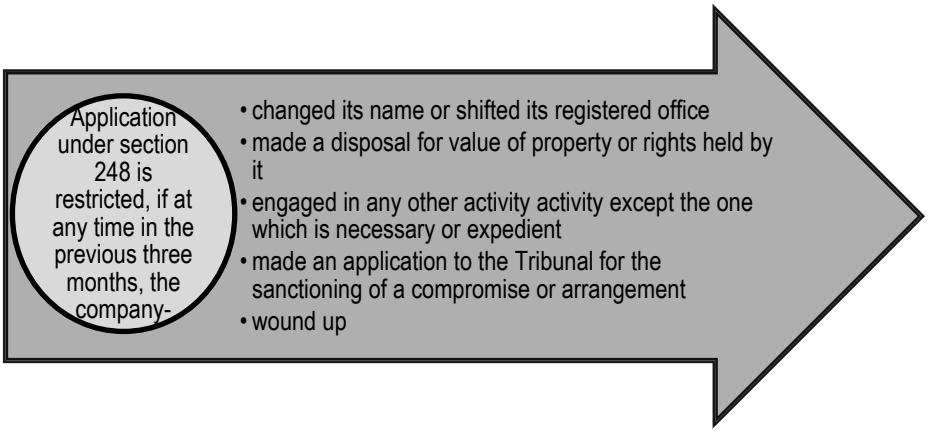
(d) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded; or

(e) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

(2) **Violation of above conditions on filing of application:** If a company files an application in violation of restriction as given in sub-section (1) as given above, it shall be punishable with fine which may extend to one lakh rupees.

(3) **Rights of registrar on non-compliance of conditions by the company:** An application filed under sub-section (2) of section 248 shall be withdrawn by the company or rejected by the Registrar as soon as conditions under sub-section (1) are brought to his notice.

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[III] Effect of Company Notified as Dissolved [Section 250]

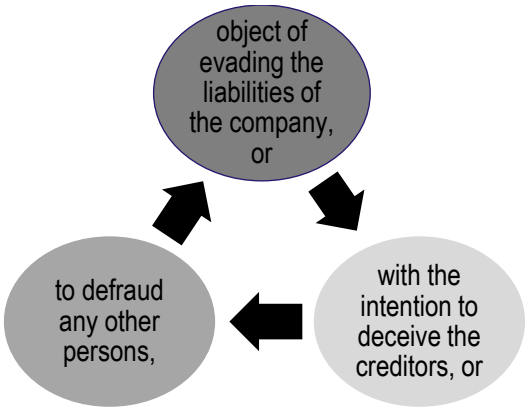
Where a company stands dissolved under section 248, it shall on and from the date mentioned in the notice –

- cease to operate as a company, and
- the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date.,

For the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company, this sub-section shall not effect. The company shall be continued in existence.

[IV] Fraudulent Application for Removal of Name [Section 251]

(1) **Intention of filing application:** Where it is found that an application by a company has been made with the-



-the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved—

(a) be **jointly and severally liable** to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and

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(b) be **punishable for fraud** in the manner as provided in section 447.

(2) **Recommendation for prosecution:** The Registrar may also recommend prosecution of the persons responsible for the filing of an application.

[V] Appeal to Tribunal [Section 252]

(1) **Aggrieved person to file an appeal against the order of registrar:** Any person aggrieved by an order of the Registrar, notifying a company as dissolved under section 248, may file an appeal to the Tribunal within a period of three years from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies:



Reasonable opportunity of representations given to registrar: Before passing any order under this section, the Tribunal shall give a reasonable opportunity of making representations and of being heard to

- the Registrar,
- the company and
- all the persons concerned.

Restoration of name of company: If the Registrar is satisfied, that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors, which requires restoration in the register of companies, he may within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company.

(2) **Order of tribunal to be filed with register:** A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

(3) **Order of tribunal as it may deem just:** If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by

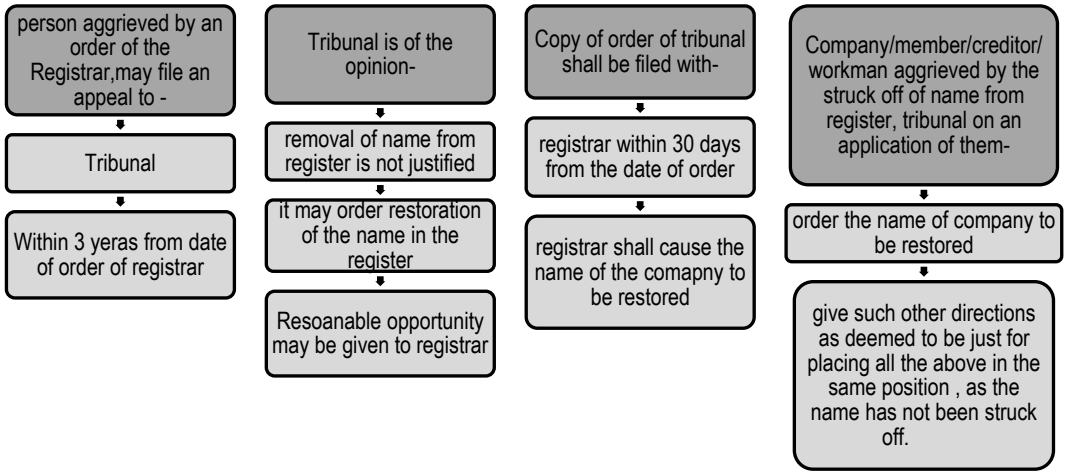
- the company,
- member,
- creditor or

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- workman

before the expiry of twenty years from the publication in the Official Gazette of the notice under sub-section (5) of section 248 may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies,

- order the name of the company to be restored to the register of companies,
- and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.



3. Companies authorised to register under this act

Provision related to the Companies which are authorized to registered under this Act is given in Chapter XXI of the Companies Act, 2013.

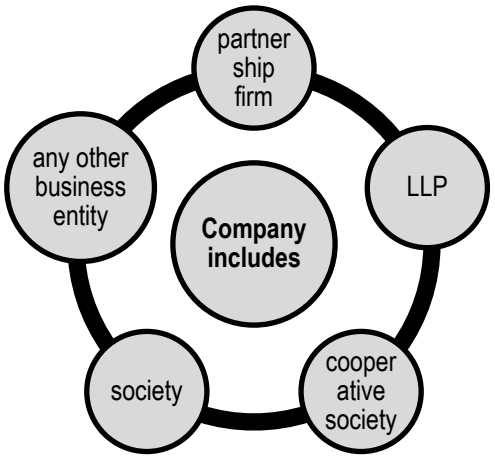
This chapter is divided into two parts. Part I deals with the companies authorised to register under this Act. It contains 9 sections. Whereas Part II deals with the winding up of unregistered companies. It comprises of 4 sections. This chapter covers sections from 366-378 of the Companies Act, 2013.

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Part I — Companies Authorised to Register Under this Act

[I] Companies capable of being registered [Section 366]

(1) **Meaning of company:** For the purposes of this Part, the word **"company"** includes the following entities which applies for registration under this Part.-



(2) **Registration of companies:** With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of seven or more members, may at any time register under this Act -

- as an unlimited company, or
- as a company limited by shares, or
- as a company limited by guarantee,

in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company's being wound up:

Provided that—

(i) **Company registered under the previous company law:** a company registered under the Indian Companies Act, 1882 or under the Indian Companies Act, 1913 or the Companies Act, 1956, shall not register in pursuance of this section;

(ii) **Limited liability of member**: a company having the liability of its members limited by any Act of Parliament other than this Act or by any other law for the time being in force, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(iii) **Company can be registered as a company limited by shares only:** a company shall be registered in pursuance of this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares, also of

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fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons;

(iv) **Companies can be registered with the assent of the majority:** a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose;

(v) **Company to register as a limited company requires majority to assent:** where a company not having the liability of its members limited by any Act of Parliament or any other law for the time being in force is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;

(vi) **Company is about to register as a company limited by guarantee , assent to be accompanies by resolution:** where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(3) **Computation of majority:** In computing any majority required for the purposes of sub-section (1), when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the Company.

[II] Certificate of registration of existing companies [Section 367]

On compliance with the requirements of this Chapter with respect to registration, and on payment of such fees, if any, as are payable under section 403,-

- the Registrar shall certify under his hand that the company applying for registration is incorporated as a company under this Act, and
- in the case of a limited company that it is limited and thereupon the company shall be so incorporated.

[III] Vesting of property on registration [Section 368]

All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall,

- on such registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein.

[IV] Saving of existing liabilities [Section 369]

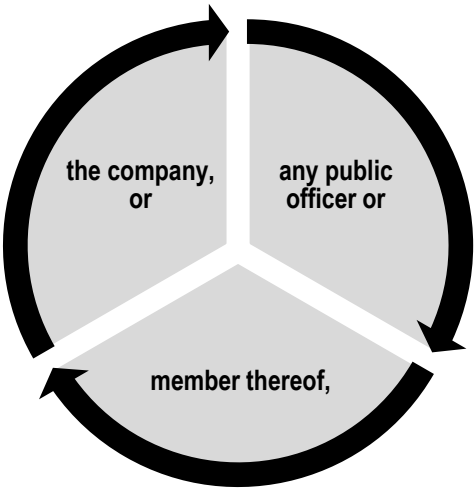
The registration of a company in pursuance of this Part shall not affect its rights or liabilities in

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respect of any debt or obligation incurred, or any contract entered into, by, to, with, or on behalf of, the company before registration.

[V] Continuation of pending legal proceedings [Section 370, except the Proviso]

All suits and other legal proceedings taken by or against-



which are pending at the time of the registration of a company in pursuance of this Part, may be continued in the same manner as if the registration had not taken place.

Provided that execution shall not issue against the property or persons of any individual member of the company on any decree or order obtained in any such suit or proceeding; but, in the event of the property of the company being insufficient to satisfy the decree or order, an order may be obtained for winding up the company in accordance with the provisions of this Act or of the Insolvency and Bankruptcy Code, 2016.

[VI] Effect of registration under this Part [Section 371]

(1) When a company is registered in pursuance of this Part, sub-sections (2) to (7) shall apply.

(2) All provisions contained in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company, including, in the case of a company registered as a company limited by guarantee, the resolution declaring the amount of the guarantee, shall be deemed to be conditions and regulations of the company, in the same manner and with the same incidents as if so much thereof as would, if the company had been formed under this Act, have been required to be inserted in the memorandum, were contained in a registered memorandum, and the residue thereof were contained in registered articles.

(3) **Application of the provisions of this Act:** All the provisions of this Act shall apply to the-

- company and the members,

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- contributories and creditors thereof,

in the same manner in all respects as if it had been formed under this Act, subject as follows:—

(a) **table F in Schedule I shall not apply** unless and except in so far as it is adopted by special resolution;

(b) **the provisions of this Act relating to the numbering of shares shall not apply** to any company whose shares are not numbered;

(c) **in the event of the company being wound up, every person shall be a contributory**, in respect of the debts and liabilities of the company contracted before registration, who is liable to pay or contribute to the payment of any debt or liability of the company contracted before registration, or to pay or contribute to the payment of any sum for the adjustment of the rights of the members among themselves in respect of any such debt or liability, or to pay or contribute to the payment of the costs, charges and expenses of winding up the company, so far as relates to such debts or liabilities as aforesaid;

(d) **in the event of the company being wound up, every contributory shall be liable to contribute to the assets of the company**, in the course of the winding up, all sums due from him in respect of any such liability as aforesaid; and in the event of the death or insolvency of any contributory, the provisions of this Act with respect to the legal representatives of deceased contributories, or with respect to the assignees of insolvent contributories, as the case may be, shall apply.

(4) **Application of the provisions of this Act:** The provisions of this Act with respect to—

(a) the registration of an unlimited company as a limited company;

(b) the powers of an unlimited company on registration as a limited company, to increase the nominal amount of its share capital and to provide that a portion of its share capital shall not be capable of being called-up except in the event of winding up;

(c) the power of a limited company to determine that a portion of its share capital shall not be capable of being called-up except in the event of winding up,

shall apply, notwithstanding anything in any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company.

(5) **No alteration of any provisions contained in the instrument:** Nothing in this section shall authorise the company to alter any such provisions contained in any instrument constituting or regulating the company as would, if the company had originally been formed under this Act, have been required to be contained in the memorandum and are not authorised to be altered by this Act.

(6) **Powers of altering the constitution or regulations as vested in the company:** None of the provisions of this Act (apart from those of section 242) shall derogate from any power of altering its constitution or regulations which may be vested in the company, by

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virtue of any Act of Parliament or any other law for the time being in force, or other instrument constituting or regulating the company.

(7) In this section, the expression **"instrument**" includes deed of settlement, deed of partnership, or limited liability Partnership.

[VII] Power of Court to Stay or Restrain Proceedings [Section 372]

The provisions of this Act or of the Insolvency and Bankruptcy Code, 2016, as the case may be with respect to staying and restraining suits and other legal proceedings against a company at any time after the presentation of a petition for winding up and before the making of a winding up order, shall, in the case of a company registered in pursuance of this Part, where the application to stay or restrain is by a creditor, extend to suits and other legal proceedings against any contributory of the company.

[VIII] Suits Stayed on Winding Up Order [Section 373]

Where an order has been made for winding up, or a provisional liquidator has been appointed for, a company registered in pursuance of this Part,

- no suit or other legal proceeding shall be proceeded with or commenced against the company or any contributory of the company in respect of any debt of the company, except by leave of the Tribunal and except on such terms as the Tribunal may impose.

[IX] Obligation of Companies registering under this Part [Section 374]

Every company which is seeking registration under this Part shall,—

(a) **Consent given by secured creditors to company's registration:** ensure that secured creditors of the company, prior to its registration under this Part, have either consented to or have given their no objection to company's registration under this Part;

(b) **Publication of notice of registration:** publish in a newspaper, advertisement one in English and one in vernacular language in such form as may be prescribed giving notice about registration under this Part, seeking objections and address them suitably;

(c) **Affidavit of the submission of necessary documents:** file an affidavit, duly notarised, from all the members or partners to provide that in the event of registration under this Part, necessary documents or papers shall be submitted to the registering or other authority with which the company was earlier registered, for its dissolution as partnership firm, limited liability partnership, cooperative society, society or any other business entity, as the case may be.

(d) **comply with such other conditions** as may be prescribed.

Part II—Winding Up of Unregistered Companies

[I] Winding Up of Unregistered Companies [Section 375]

(1) **Application of provisions of winding up on unregistered companies:** Subject to the provisions of this Part, any unregistered company may be wound up under this Act, in such manner as may be prescribed, and all the provisions of this Act, with respect to

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winding up shall apply to an unregistered company, with the exceptions and additions mentioned in sub-sections (2) to (4).

(2) **No voluntary winding up of unregistered companies:** No unregistered company shall be wound up under this Act voluntarily.

(3) **Circumstances of winding up of unregistered companies:** An unregistered company may be wound up under the following circumstances, namely:—

(a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;

(b) if the company is unable to pay its debts;

(c) if the Tribunal is of opinion that it is just and equitable that the company should be wound up.

(4) **When unregistered company is unable to pay debts:** An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—

(a) **if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding one lakh rupees then due**, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Tribunal may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

(b) **if any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due,** from the company, or from him in his character as a member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Tribunal may approve or direct, the company has not, within ten days after service of the notice,—

(i) paid, secured or compounded for the debt or demand;

(ii) procured the suit or other legal proceeding to be stayed; or

(iii) indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;

(c) **if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor against the company, or any member** thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part;

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(d) **if it is otherwise proved to the satisfaction of the Tribunal that the company is unable to pay its debts**.

Explanation.—For the purposes of this Part, the expression "**unregistered company**"—

(a) shall not include—

(i) a railway company incorporated under any Act of Parliament or other Indian law or any Act of Parliament of the United Kingdom;

(ii) a company registered under this Act; or

(iii) a company registered under any previous companies law and not being a company the registered office whereof was in Burma, Aden, Pakistan immediately before the separation of that country from India; and

(b) save as aforesaid, shall include any partnership firm, limited liability partnership or society or co-operative society, association or company consisting of more than seven members at the time when the petition for winding up the partnership firm, limited liability partnership or society or co-operative society, association or company, as the case may be, is presented before the Tribunal.

[II] Power to Wind Up Foreign Companies, Although Dissolved [Section 376]

Where a **body corporate incorporated outside India which has been carrying on business in India, ceases to carry on business in India**, it may be wound up as an unregistered company under this Part, notwithstanding that the body corporate has been dissolved or otherwise ceased to exist as such under or by virtue of the laws of the country under which it was incorporated.

[III] Provisions of Chapter Cumulative [Section 377]

(1) **The provisions of this Part, with respect to unregistered companies shall be in addition to and not in derogation of**, any provisions hereinbefore in this Act contained with respect to the winding up of companies by the Tribunal.

(2) **The Tribunal or Official Liquidator may exercise any powers or do any act in the case of unregistered companies** which might be exercised or done by the Tribunal or Official Liquidator in winding up of companies formed and registered under this Act:

Provided that an unregistered company shall not, except in the event of its being wound up, be deemed to be a company under this Act, and then only to the extent provided by this Part.

[IV] Saving and Construction of Enactments Conferring Power to Wind Up Partnership Firm, Association or Company, etc., in Certain Cases [Section 378]

Nothing in this Part, shall affect the operation of any enactment which provides for any partnership firm, limited liability partnership or society or co-operative society, association or company being wound up, or being wound up as a company or as an unregistered company, under the Companies Act, 1956, or any Act repealed by that Act.

Provided that references in any such enactment to any provision contained in the Companies

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Act, 1956 or in any Act repealed by that Act shall be read as references to the corresponding provision, if any, contained in this Act.

4. Government companies

[I] Annual reports on Government companies [Section 394]

As per section 2(45) of the Companies Act, 2013, "Government Company" means any company in which not less than 51% 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 company of such a Government company.

Section 394 of the Companies Act, 2013 provides for Annual reports on Government companies.

It provides for Annual reports on Government companies in the cases where the central government and the state Government is a member of the Government Company. According to this section:

(1) **Where the Central Government is a member of a Government company,** the Central Government shall cause an annual report on the working and affairs of that company to be—

   (a) prepared within three months of its annual general meeting before which the comments given by the Comptroller and Auditor-General of India and the audit report are placed under the proviso to sub-section (6) of section 143; and

   (b) as soon as may be after such preparation, laid before both Houses of Parliament together with a copy of the audit report and comments upon or supplement to the audit report, made by the Comptroller and Auditor-General of India.

(2) **Where in addition to the Central Government, any State Government is also a member of a Government company**, that State Government shall cause a copy of the annual report prepared under sub-section (1) to be laid before the House or both Houses of the State Legislature together with a copy of the audit report and the comments upon or supplement to the audit report referred above.

Example:

(i) Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited.

(ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company.

Examine with reference to the provisions of the Companies Act, 2013 whether MN Limited and PQ Limited can be considered as Government Company.

Answer

According to section 2(45) of the Companies Act, 2013, "Government company" means any

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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 company of such a Government company.

(i) The Central Government and Government of Maharashtra together hold 40% of the paid-up share capital of MN Limited. A government company also holds 20% of the paid-up share capital in MN Limited.

In this case, MN Limited is not a Government company because the holding of the Central Government and Government of Maharashtra is 40% which is less than the 51% prescribed under the definition of Government Company. The holding of the government company in MN Limited of 20% cannot be taken into account while counting the prescribed limit of 51%.

(ii) PQ Limited is a subsidiary but not a wholly owned subsidiary of a government company

In this case, PQ Limited is a government company as the definition of Government Company clearly specifies that a Government Company includes a company which is a subsidiary company of a Government company. Whether the subsidiary should be a wholly owned subsidiary or not is not clearly mentioned under the definition of the Government company under section 2(45).

[II] Annual reports where one or more State Governments are members of companies [Section 395]

Section 395 of the Companies Act, 2013 seeks to provide that one or more state governments who is a member of a company where no Central government is a member shall prepare annual reports on the working and affairs of the company. According to this section:

(1) **Where the Central Government is not a member of a Government company**, every State Government which is a member of that company, or where only one State Government is a member of the company, that State Government shall cause an annual report on the working and affairs of the company to be—

(a) Prepared within the time specified in sub-section (1) of section 394; and

(b) as soon as may be after such preparation, laid before the House or both Houses of the State Legislature together with a copy of the audit report and comments upon or supplement to the audit report referred to in sub-section (1) of that section.

(2) **Application of the provisions to the Government Company in liquidation:** The provisions of this section and section 394 shall, so far as may be, apply to a Government company in liquidation as they apply to any other Government company.

5. Registration Offices & Fees

[I] Registration offices [Section 396]

Section 396 of the Companies Act, 2013 provides for Registration offices. According to this section:

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(i) **Establishment of offices:** For the purposes of exercising such powers and discharging such functions as are conferred on the Central Government by or under this Act or under the rules made thereunder and for the purposes of registration of companies under this Act, the Central Government shall, by notification, establish such number of offices at such places as it thinks fit, specifying their jurisdiction.

Rule 4 of the *Companies (Registration Offices and Fees) Rules, 2014*shall apply in relation to Registration offices:

(a) The Central Government shall establish such number of offices at such places as it thinks fit, specifying their jurisdiction for the purpose of exercising such powers and discharge of such functions as are conferred on the Central Government by or under this Act or under the rules made there under and for the purposes of registration of companies under the Act.

(b) The office of the Registrar shall observe such normal working hours as may be approved by the Central Government and shall be open for the transaction of business with the public on all days except Saturday, Sunday and public holidays during working hours between 10.30 a.m. and 3.30 p.m.

(c) The offices other than the office of the Registrar shall observe such normal working hours as may be approved by the Central Government.

(ii) (a) **Appointment of officers**: The Central Government may appoint such Registrars, Additional, Joint, Deputy and Assistant Registrars as it considers necessary for the registration of companies and discharge of various functions under this Act.

(b) **Powers and duties of officers:** The powers and duties that may be exercisable by such officers shall be such as may be prescribed.

According to Rule 5 of *the Companies (Registration Offices and Fees) Rules, 2014,* the following powers and duties have been prescribed:

(1) The Registrars shall exercise such powers and discharge such duties as are conferred on them by the Act or the rules made there under or delegated to them by the Central Government, wherever the power or duty has been conferred upon the Central Government by the Act or the rules made there under.

(2) Whenever according to the Act, any function or duty is to be discharged by the Registrar, it shall, until the Central Government otherwise directs, be done by the Registrar, or in his absence, by such person as the Central Government may for the time being authorize.

However, in the event of the Central Government altering the constitution of the existing registry offices or any of them, any such function or duty shall be discharged by such officer and at such place, with reference to the local situation of the registered offices of the companies concerned, as the Central Government may appoint.

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(iii) **Terms & conditions of Salaries payable to officers:** The terms and conditions of service, including the salaries payable to persons appointed, shall be such as may be prescribed.

(iv) **Seal for authentication:** The Central Government may direct a seal or seals to be prepared for the authentication of documents required for, or connected with, the registration of companies.

According to Rule 6 of *the Companies (Registration Offices and Fees) Rules, 2014*, the Registrar shall have a seal and such seal shall bear the words "Registrar of Companies, _____ (Place and State)".

[II] Admissibility of certain documents as evidence [Section 397]

Section 397 of the Companies Act, 2013 provides for admissibility of certain documents as evidence. According to this section:

Notwithstanding anything contained in any other law for the time being in force, any document reproducing or derived from returns and documents filed by a company with the Registrar on paper or in electronic form or stored on any electronic data storage device or computer readable media by the Registrar, and authenticated by the Registrar or any other officer empowered by the Central Government in such manner as may be prescribed, shall be deemed to be a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder without further proof or production of the original as evidence of any contents of the original or of any fact stated therein of which direct evidence is admissible.

[III] Provisions relating to filing of applications, documents, inspection, etc., in electronic form [Section 398]

Section 398 of the Companies Act, 2013 provides for Provisions relating to filing of applications, documents, inspection, etc., in electronic form. According to this section:

(i) Notwithstanding anything to the contrary contained in this Act, and without prejudice to the provisions contained in section 6 of the Information Technology Act, 2000, the Central Government may make rules so as to require from such date as may be prescribed in the rules that—

(a) such applications, balance sheet, prospectus, return, declaration, memorandum, articles, particulars of charges, or any other particulars or document as may be required to be filed or delivered under this Act or the rules made thereunder, shall be filed in the electronic form and authenticated in such manner as may be prescribed;

(b) such document, notice, any communication or intimation, as may be required to be served or delivered under this Act, in the electronic form and authenticated in such manner as may be prescribed;

(c) such applications, balance sheet, prospectus, return, register, memorandum, articles, particulars of charges, or any other particulars or document and return filed under this Act or rules made thereunder shall be maintained by the Registrar in the

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electronic form and registered or authenticated, as the case may be, in such manner as may be prescribed;

(d) such inspection of the memorandum, articles, register, index, balance sheet, return or any other particulars or document maintained in the electronic form, as is otherwise available for inspection under this Act or the rules made thereunder, may be made by any person through the electronic form in such manner as may be prescribed;

For details, refer *the Companies (Registration Offices and Fees) Rules, 2014, Rule 8: Authentication of documents.*

(e) such fees, charges or other sums payable under this Act or the rules made thereunder shall be paid through the electronic form and in such manner as may be prescribed; and

According to *the Companies (Registration Offices and Fees) Rules, 2014,* the fees, charges or other sums payable for filing any application, form, return or any other document in pursuance of the Act or any rule made thereunder shall be paid by means of credit card; or internet banking; or remittance at the counter of the authorised banks or any other mode as approved by the Central Government.

(f) the Registrar shall register change of registered office, alteration of memorandum or articles, prospectus, issue certificate of incorporation, register such document, issue such certificate, record the notice, receive such communication as may be required to be registered or issued or recorded or received, as the case may be, under this Act or the rules made thereunder or perform duties or discharge functions or exercise powers under this Act or the rules made thereunder or do any act which is by this Act directed to be performed or discharged or exercised or done by the Registrar in the electronic form in such manner as may be prescribed.

Explanation—It is clarified that the rules made under this section shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor.

(ii) The Central Government may, by notification, frame a scheme to carry out the provisions of section 398(1) through the electronic form.

For details, refer *the Companies (Registration Offices and Fees) Rules, 2014.*

[IV] Inspection, production and evidence of documents kept by Registrar [Section 399]

Section 399 of the Companies Act, 2013 provides for Inspection, production and evidence of documents kept by Registrar. According to this section:

(i) Save as otherwise provided elsewhere in this Act, any person may—

(a) inspect by electronic means any documents kept by the Registrar in accordance with the rules made, being documents filed or registered by him in pursuance of this Act, or making a record of any fact required or authorised to be recorded or

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registered in pursuance of this Act, on payment for each inspection of such fees as may be prescribed;

(b) require a certificate of the incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment in advance of such fees as may be prescribed.

(ii) The rights conferred as mentioned above shall be exercisable—

(a) **in relation to documents delivered to the Registrar with a prospectus in pursuance of section 26** (Matters to be stated in the prospectus), only during the 14 days beginning with the date of publication of the prospectus; and at other times, only with the permission of the Central Government; and

(b) **in relation to documents so delivered in pursuance of clause (b) of subsection (1) of section 388** (Provisions as to expert's consent and allotment), only during the 14 days beginning with the date of the prospectus; and at other times, only with the permission of the Central Government.

(iii) According to section 399(2) of the Companies Act, 2013, no process for compelling the production of any document kept by the Registrar shall issue from any court or the Tribunal except with the leave of that court or the Tribunal and any such process, if issued, shall bear thereon a statement that it is issued with the leave of the court or the Tribunal.

(iv) A copy of, or extract from, any document kept and registered at any of the offices for the registration of companies under this Act, certified to be a true copy by the Registrar (whose official position it shall not be necessary to prove), shall, in all legal proceedings, be admissible in evidence as of equal validity with the original document.

According to Rule 14 of *the Companies (Registration Offices and Fees) Rules, 2014,* the inspection of the documents maintained in the electronic registry so set up in pursuance of rule 9 of the Companies (Registration Offices and Fees) and which are otherwise available for inspection under the Act or rules made thereunder, shall be made by any person in electronic form.

Inspection of documents- Rule 15 of the *Companies (Registration Offices and Fees) Rules, 2014*, provides that any person may-

(a) inspect any document kept by the Registrar, being documents filed or registered by him in pursuance of this Act or the Companies Act, 1956 (1 of 1956) or making a record of any fact required or authorised to be recorded or registered in pursuance of this Act, on payment for each inspection of fee.

(b) require a certificate of incorporation of any company, or a copy or extract of any other document or any part of any other document to be certified by the Registrar, on payment of fee.

Provided that no person shall be entitled under section 399 to inspect or obtain copies of resolutions passed in pursuance of section 179(3) as referred to in clause (g) of sub-section (3) of section 117 of the Act.

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[V] Electronic form to be exclusive, alternative or in addition to physical form [Section 400]

Section 400 of the Companies Act, 2013 provides for Electronic form to be exclusive, alternative or in addition to physical form. According to this section:

The Central Government may also provide in the rules made under section 398 and section 399 that the electronic form for the purposes specified in these sections shall be exclusive, or in the alternative or in addition to the physical form, therefor.

[VI] Provision of value added services through electronic form [Section 401]

Section 401 of the Companies Act, 2013 provides that the Central Government may provide such value added services through the electronic form and levy such fee thereon as may be prescribed under Rule 12 of the *Companies (Registration Offices and Fees) Rules, 2014.*

[VII] Application of provisions of Information Technology Act, 2000 [Section 402]

Section 402 of the Companies Act, 2013 provides that all the provisions of the Information Technology Act, 2000 relating to the electronic records, including the manner and format in which the electronic records shall be filed, in so far as they are not inconsistent with this Act, shall apply in relation to the records in electronic form specified under section 398.

[VIII] Fee for filing, etc. [Section 403][1]

According to this section any documents may be filed with the registrar with the specified fees in the following conditions:

(i) **Submission within time**: Any document, required to be submitted, filed, registered or recorded, or any fact or information required or authorised to be registered under this Act, shall be submitted, filed, registered or recorded within the time specified in the relevant provision on payment of such fee as may be prescribed.

(ii) **Submission after the time specified in relevant provision:** Any document, fact or information may be submitted, filed, registered or recorded, after the time specified in relevant provision for such submission, filing, registering or recording, within a period of 270 days from the date by which it should have been submitted, filed, registered or recorded, as the case may be, on payment of such additional fee as may be prescribed as per the rule 12 and 13 of *the Companies (Registration Offices and Fees) Rules, 2014.*

(iii) **Submission after the expiration of above 270 days also**: Any such document, fact or information may, without prejudice to any other legal action or liability under the Act, be also submitted, filed, registered or recorded, after the first time specified in the expiration of above mentioned 270 days, on payment of fee and additional fee specified under this section.

[1] In case of Nidhis, section 403 shall apply, with the modification that the filing fees in respect of every return of allotment made under sub-section 9 of section 42 shall be calculated at the rate of one rupee for every one hundred rupees or parts thereof on the face value of the shares included in the return but shall not exceed the amount of normal filing fee payable.

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(iv) **Penalty or punishment on submission after the expiration of above 270 days also**: Where a company fails or commits any default to submit, file, register or record any document, fact or information within 270 days from the date by which it should have been submitted, filed, registered or recorded, as the case may be under sub-section (1) before the expiry of the period specified in the first proviso to that sub-section with additional fee, the company and the officers of the company who are in default, shall, without prejudice to the liability for payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default.

[IX] Fees, etc., to be credited into public account [Section 404]

Section 404 provided that all fees, charges and other sums received by any Registrar, Additional, Joint, Deputy or Assistant Registrar or any other officer of the Central Government in pursuance of any provision of this Act shall be paid into the public account of India in the Reserve Bank of India.

6. Companies to Furnish Information or Statistics

Power of Central Government to direct companies to furnish information or statistics [Section 405]

Section 405 of the Companies Act, 2013 provides for Power of Central Government to direct companies to furnish information or statistics. According to this section:

(i) The Central Government may, by order, require companies generally, or any class of companies, or any company, to furnish such information or statistics with regard to their or its constitution or working, and within such time, as may be specified in the order.

(ii) Every above order shall be published in the Official Gazette and may be addressed to companies generally or to any class of companies, in such manner, as the Central Government may think fit.

(iii) The date of such publication shall be deemed to be the date on which requirement for information or statistics is made on such companies or class of companies, as the case may be.

(iv) For the purpose of satisfying itself that any information or statistics furnished by a company or companies in pursuance of any above order is correct and complete, the Central Government may by order require such company or companies to produce such records or documents in its possession or allow inspection thereof by such officer or furnish such further information as that Government may consider necessary.

(v) If any company fails to comply with an order made above or knowingly furnishes any information or statistics which is incorrect or incomplete in any material respect, the company shall be punishable with fine which may extend to twenty-five thousand rupees and every officer of the company who is in default, shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to three lakh rupees, or with both.

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(vi) Where a foreign company carries on business in India, all references to a company in this section shall be deemed to include references to the foreign company in relation, and only in relation, to such business.

7. Nidhis

Power to modify Act in its application to Nidhis (Section 406 of the Companies Act, 2013)

Section 406 of the Companies Act, provides Power to the Central Government to modify Act in its application to *Nidhis.* According to this section:

(i) **Definition:** Here, "Nidhi" means a company which has been incorporated as a Nidhi with the object of:

(a) cultivating the habit of thrift and savings amongst its members,

(b) receiving deposits from, and lending to, its members only, for their mutual benefit, and

(c) which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

(ii) The Central Government may, by notification, direct that any of the provisions of this Act shall not apply, or shall apply with such exceptions, modifications and adaptations as may be specified in that notification, to any Nidhi or Nidhis of any class or description as may be specified in that notification.

(iii) A copy of every notification proposed to be issued under point (ii), shall be laid in draft before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

The *Nidhi Rules, 2014,* shall apply in relation to the following:

(i) **Application:** These rules shall apply to-

(a) every company which had been declared as a Nidhi or Mutual Benefit Society under sub - section (1) of Section 620A of the Companies Act, 1956,

(b) every company functioning on the lines of a Nidhi company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a Nidhi or Mutual Benefit Society under sub- Section (1) of Section 620A of the Companies Act, 1956; and

(c) every company incorporated as a Nidhi pursuant to the provisions of Section 406 of the Act.

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(ii) **Incorporation and incidental matters.—**

(a) A Nidhi to be incorporated under the Act shall be a public company and shall have a minimum paid up equity share capital of 5 lakh rupees.

(b) On and after the commencement of the Act, no Nidhi shall issue preference shares.

(c) If preference shares had been issued by a Nidhi before the commencement of this Act, such preference shares shall be redeemed in accordance with the terms of issue of such shares.

(d) Except as provided under the proviso to sub-rule (e) to rule 6, no Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.

Exception as provided under the proviso to sub-rule (e) to rule 6: Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.

(e) Every Company incorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

(iii) **General restrictions or prohibitions**

No Nidhi shall—

(a) carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate;

(b) issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;

(c) open any current account with its members;

(d) acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi;

Explanation.—For the purposes of this sub-rule, "control" shall have the same meaning assigned to it in section 2(27) of the Act;

(e) carry on any business other than the business of borrowing or lending in its own name:

However Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.

(f) accept deposits from or lend to any person, other than its members;

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(g) pledge any of the assets lodged by its members as security;

(h) take deposits from or lend money to any body corporate;

(i) enter into any partnership arrangement in its borrowing or lending activities;

(j) issue or cause to be issued any advertisement in any form for soliciting deposit:

However private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words "for private circulation to members only" shall not be considered to be an advertisement for soliciting deposits.

(k) pay any brokerage or incentive for mobilising deposits from members or for deployment of funds or for granting loans.

(iv) **Membership—**

(a) A Nidhi shall not admit a body corporate or trust as a member.

(b) Except as otherwise permitted under the rules, every Nidhi shall ensure that its membership is not reduced to less than 200 members at any time.

(c) A minor shall not be admitted as a member of Nidhi:

However, deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

(v) **Rules relating to Directors—**

(a) The Director shall be a member of Nidhi.

(b) The Director of a *Nidhi* shall hold office for a term up to 10 consecutive years on the Board of *Nidhi*.

(c) The Director shall be eligible for re-appointment only after the expiration of 2 years of ceasing to be a Director.

(d) Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure.

(e) The person to be appointed as a Director shall comply with the requirements of sub-section (4) of Section 152 of the Act and shall not have been disqualified from appointment as provided in section 164 of the Act.

(vi) **Dividend-** A Nidhi shall not declare dividend exceeding 25% or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:—

(a) an equal amount is transferred to General Reserve;

(b) there has been no default in repayment of matured deposits and interest; and

(c) it has complied with all the rules as applicable to Nidhis.

(vii) **Auditor—**

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(a) No Nidhi shall appoint or re-appoint an individual as auditor for more than one term of 5 consecutive years.

(b) No Nidhi shall appoint or re-appoint an audit firm as auditor for more than 2 terms of 5 consecutive years:

Provided that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of 2 years from the completion of his or its term:

Explanation: For the purposes of this proviso:

(1) in case of an auditor (whether an individual or audit firm), the period for which he or it has been holding office as auditor prior to the commencement of these rules shall be taken into account in calculating the period of 5 consecutive years or 10 consecutive years, as the case may be;

(2) appointment includes re-appointment.

(viii) **Auditor's certificate—**The Auditor of the company shall furnish a certificate every year to the effect that the company has complied with all the provisions contained in the rules and such certificate shall be annexed to the audit report and in case of non-compliance, he shall specifically state the rules which have not been complied with.

(ix) **Penalty for non-compliance—**If a company to which *the Nidhi Rules, 2014* applies contravenes any of the provisions of the prescribed rules, the company and every officer of the company who is in default shall be punishable with fine which may extend to 5,000 rupees, and where the contravention is a continuing one, with a further fine which may extend to 500 rupees for every day after the first during which the contravention continues.

8. Miscellaneous Provisions

[I] Punishment for fraud [Section 447]



Section 447 of the Companies Act, 2013 provides for Punishment for fraud. According to this section:

(i) Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud.

(ii) Where the fraud in question involves public interest, the term of imprisonment shall not be less than 3 years.

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Explanation.— For the purposes of this section—

(a) "fraud" in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;

(b) "wrongful gain" means the gain by unlawful means of property to which the person gaining is not legally entitled;

(c) "wrongful loss" means the loss by unlawful means of property to which the person losing is legally entitled.

[II] Penalty for false statements [Section 448]

According to section 448 of the Companies Act, 2013, save as otherwise provided in this Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made thereunder, any person makes a statement,—

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

Example

Mr. Z, a director of Southern Highway Tolls Private Limited, is duly authorized by the Board of directors to prepare and file returns, report or other documents to the Registrar of Companies on behalf of the company. Though he filed all the required documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar. State the penal provision under the Companies Act, 2013?

Answer

According to section 448 of the Companies Act, 2013, save as otherwise provided in this Act, if in any return, report, certificate, financial/statement, prospectus, statement or other document required by, or for, the purposes of any of the provisions of this Act or the rules made there under, any person makes a statement,

(a) which is false in any material particulars, knowing it to be false; or

(b) which omits any material fact, knowing it to be material,

he shall be liable under section 447.

In the present case, Mr. Z, a director of Southern Highway Tools Private Limited filed returns,

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report or other documents to Registrar in time, however, subsequently it was found that the filed documents were false and inaccurate in respect to material particulars (knowing it to be false) submitted to the Registrar.

Hence, Mr. Z shall be liable under section 447 for false statements.

Penal Provisions: As per Section 447, any person who is found to be guilty under this section shall be punishable with imprisonment for a term which shall not be less than 6 months but which may extend to 10 years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to 3 times the amount involved in the fraud, provided that, where the fraud involves public interest, the term of imprisonment shall not be less than 3 years.

Hence Mr. Z a director of Southern Highway Tools Private Limited shall be punishable with imprisonment and fine prescribed as aforesaid.

[III] Penalty for false evidence [Section 449]

According to section 449 of the Companies Act, 2013, save as otherwise provided in this Act, if any person intentionally gives false evidence—

(a) upon any examination on oath or solemn affirmation, authorised under this Act; or

(b) in any affidavit, deposition or solemn affirmation, in or about the winding up of any company under this Act, or otherwise in or about any matter arising under this Act,

he shall be punishable with imprisonment for a term which shall not be less than 3 years but which may extend to 7 years and with fine which may extend to 10 lakh rupees.

[IV] Punishment where no specific penalty or punishment is provided [Section 450]

(i) **Applicability of section 450**: The penalty under this section applies only in those cases where penalty or punishment is not provided elsewhere in this Act.

(ii) **Penalty under this section**: The company and every officer of the company who is in default or such other person:

  (a) shall be punishable with fine which may extend to 10,000 rupees, and

  (b) Where the contravention is continuing one, with a further fine which may extend to 1,000 rupees for every day after the first during which the contravention continues.

(iii) **List of contraventions**: If a company or any officer of a company or any other person contravenes:

  (a) any of the provisions of this Act; or

  (b) the rules made thereunder; or

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(c) any condition, limitation or restriction subject to which any approval, sanction, consent, confirmation, recognition, direction or exemption in relation to any matter has been accorded, given or granted.

[V] Punishment in case of repeated default [Section 451]

As per the section, if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and where the same offence is committed for the second or subsequent occasions within a period of 3 years, then, that company and every officer thereof who is in default shall be punishable with twice the amount of fine for such offence in addition to any imprisonment provided for that offence.

[VI] Penalty for wrongful withholding of property [Section 452]

Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to this section:

(i) If any officer or employee of a company—

(a) wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorised by this Act,

he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(ii) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Example:

An officer of a company was allotted one room for two years in a guest house owned by the Company at some other city where he used to stay while on tour. It came to notice of the company that he had not vacated the said room after the expiry of two years and is holding the unauthorized possession of that room and has been permitting to stay outsiders in the said room, at a rent of ₹ 500 per day. The record shows that he had permitted the outsider for 45 days and collected ₹ 22,500 and retained the said amount with him. As per the letter of allotment, there was no such clause which can be invoked against him for making any recovery on account of such wrongful occupation. The Manager of the company seeks your advice as to whether the recovery can be made from him under any of the provisions of his employment or Companies Act.

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Answer

Penalty for wrongful withholding of property: Section 452 of the Companies Act, 2013 provides for Penalty for wrongful withholding of property. According to the section:

(i) If any officer or employee of a company -

(a) Wrongfully obtains possession of any property, including cash of the company; or

(b) having any such property including cash in his possession, wrongfully withholds it or knowingly applies it for the purposes other than those expressed or directed in the articles and authorized by this Act, he shall, on the complaint of the company or of any member or creditor or contributory thereof, be punishable with fine which shall not be less than 1 lakh rupees but which may extend to 5 lakh rupees.

(ii) The Court trying an offence may also order such officer or employee to deliver up or refund, within a time to be fixed by it, any such property or cash wrongfully obtained or wrongfully withheld or knowingly misapplied, the benefits that have been derived from such property or cash or in default, to undergo imprisonment for a term which may extend to 2 years.

Hence as per the provisions of the Companies Act, 2013 and not giving any emphasis on the terms of employment, the manager of the company can recover possession of the room and the cash wrongfully obtained and the benefits that have been derived from such property or cash.

[VII] Punishment for improper use of "Limited" or "Private Limited" [Section 453]

Section 453 of the Companies Act, 2013 provides for Punishment for improper use of "Limited" or "Private Limited". According to this section:

If any person or persons trade or carry on business under any name or title, of which the word "Limited" or the words "Private Limited" or any contraction or imitation thereof is or are the last word or words, that person or each of those persons shall, unless duly incorporated with limited liability, or unless duly incorporated as a private company with limited liability, as the case may be, punishable with fine which shall not be less than 500 rupees but may extend to 2,000 rupees for every day for which that name or title has been used.

[VIII] Adjudication of penalties [Section 454]

(1) The Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of this Act in the manner as provided in Rule 3 of *the Companies(Adjudication of Penalties) Rules, 2014.*

Manner of adjudication of Penalties

(i) **Appointment of Adjudicating officers**: The Central Government may appoint any of its officers, not below the rank of Registrar, as adjudicating officers for adjudging penalty under the provisions of the Act.

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(ii) **Issue of written notice by an adjudicating officer:** Before adjudging penalty, the adjudicating officer shall issue a written notice-

- to the company and
- to every officer of the company who is in default,

to show cause, within such period as may be specified in the notice (not being less than fifteen days and more than forty five days from the date of service thereon), why the inquiry should not be held against him:

Provided that every notice issued under this sub-rule, shall clearly indicate the nature of non-compliance or default under the Act alleged to have been committed or made by such company and officer in default, as the case may be:

Provided further that the adjudicating officer may, for reasons to be recorded in writing, extend the period referred to above by a further period not exceeding fifteen days, if the company or officer (as applicable) satisfies the said officer that it has sufficient cause for not responding to the notice within the stipulated period.

(iii) **Adjudicating officer can held inquiry:** If, after considering the cause, if any, shown by such company or officer, the adjudicating officer is of the opinion that an inquiry should be held, he shall issue a notice fixing a date for the appearance of such company, through its authorised representative, or officer of such company whether personally or through his authorised representative

(iv) **Passing of an order by the adjudicating officer:** On the date fixed for hearing and after giving a reasonable opportunity of being heard to the person(s) concerned, the adjudicating officer may, subject to reasons to be recorded in writing, pass any order as he thinks fit including an order for adjournment of the hearing to a future date.

(v) Every order passed shall be dated and signed by the adjudicating officer.

(vi) **Forwarding of copy of an order:** The adjudicating officer shall send a copy of the order passed by it to the concerned company or officer who is in default and to the Central Government.

(vii) **Powers of Adjudicating Authority:** While holding an inquiry, the adjudicating officer shall have the following powers, namely:-

(a) to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case;

(b) to order for evidence or to produce any document, which in the opinion of the adjudicating officer, may be useful for or relevant to the subject matter of the inquiry.

(viii) **Failure to be present before the adjudicating authority:** If any person fails, neglects or refuses to appear before the adjudicating officer, the adjudicating officer may proceed with the inquiry in the absence of such person after recording the reasons for doing so.

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(ix) **Consideration to following factors while levying penalty:** While adjudging quantum of penalty, the adjudicating officer shall have due regard to the following factors, namely:-

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors or creditors as a result of the default;

(c) the repetitive nature of the default.

(x) **Sum to be credited to the Consolidation Fund of India:** All sums realised by way of penalties under the Act shall be credited to the Consolidated Fund of India.

(2) The Central Government shall while appointing adjudicating officers, specify their jurisdiction in the order under sub-section (1).

(3) The adjudicating officer may, by an order impose the penalty on the company and the officer who is in default stating any non-compliance or default under the relevant provision of the Act.

(4) The adjudicating officer shall, before imposing any penalty, give a reasonable opportunity of being heard to such company and the officer who is in default.

(5) Any person aggrieved by an order made by the adjudicating may prefer an appeal to the Regional Director having jurisdiction in the matter.

(6) Every appeal shall be filed within sixty days from the date on which the copy of the order made by the adjudicating officer is received by the aggrieved person and shall be in such form, manner and be accompanied by such fees In Rule 4 of *the Companies(Adjudication of Penalties) Rules, 2014.*

(7) The Regional Director may, after giving the parties to the appeal an opportunity of being heard, pass such order as he thinks fit, confirming, modifying or setting aside the order appealed against.

(8) (i) Where company does not pay the penalty imposed by the adjudicating officer or the Regional Director within a period of ninety days from the date of the receipt of the copy of the order, the company shall be punishable with fine which shall not be less than twenty five thousand rupees but which may extend to five lakh rupees.

(ii) Where an officer of a company who is in default does not pay the penalty within a period of ninety days from the date of the receipt of the copy of the order, such officer shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, or with both.

[IX] Dormant company [Section 455]

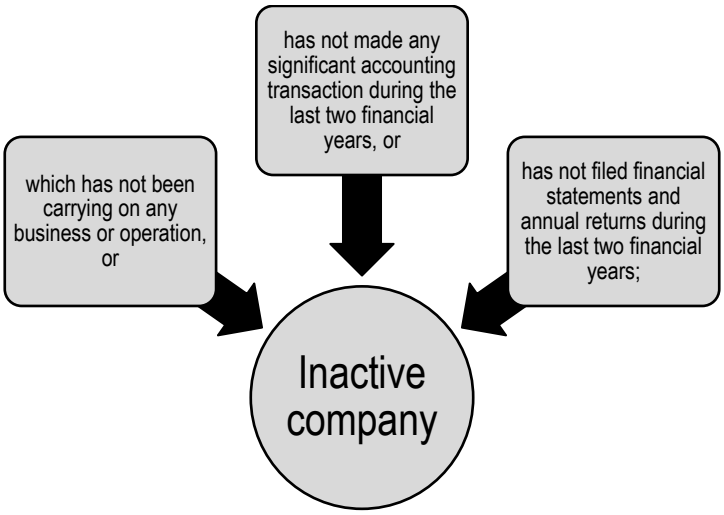
A new section 455 of the Companies Act, 2013 provides for Dormant Company. According to this section:

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(i) **Status as a dormant company**: Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

Explanation.—For the purposes of this section,—

(a) "*inactive company*" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;



(b) "*significant accounting transaction*" means any transaction other than—

(1) payment of fees by a company to the Registrar;

(2) payments made by it to fulfill the requirements of this Act or any other law;

(3) allotment of shares to fulfill the requirements of this Act; and

(4) payments for maintenance of its office and records.

According to the Rule 3 of the *Companies (Miscellaneous) Rules, 2014,* a company may make an application in Form *MSC-1* along with such fee as provided in the *Companies (Registration Offices and Fees) Rules, 2014* to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of section 455 after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).

A company shall be eligible to apply under this rule only, if-

(a) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

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(b) no prosecution has been initiated and pending against the company under any law;

(c) the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;

(d) the company is not having any outstanding loan, whether secured or unsecured:

However if there is any outstanding unsecured loan, the company may apply under this rule after obtaining concurrence of the lender and enclosing the same with Form *MSC-1*;

(e) there is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form *MSC-1*;

(f) the company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.;

(g) the company has not defaulted in the payment of workmen's dues;

(h) the securities of the company are not listed on any stock exchange within or outside India.

(ii) **Certificate of status of dormant company:** The Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.

According to the Rule 4 of the *Companies (Miscellaneous) Rules, 2014,* the Registrar shall, after considering the application filed in Form *MSC-1*, issue a certificate in Form *MSC-2* allowing the status of a Dormant Company to the applicant.

(iii) **Register of dormant company**: The Registrar shall maintain a register of dormant companies in such form as may be prescribed.

According to the Rule 5 of the *Companies (Miscellaneous) Rules, 2014,* the Register maintained under the portal maintained by the Ministry of Corporate Affairs on its web-site www.mca.gov.in or any other website notified by the Central Government, shall be the register for dormant companies.

(iv) **Consequences of non filing of annual returns or financial statements:** In case of a company which has not filed financial statements or annual returns for 2 financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

According to the Rule 7 of the *Companies (Miscellaneous) Rules, 2014,* a dormant company shall file a "Return of Dormant Company" annually, *inter alia*, indicating financial position duly audited by a chartered accountant in practice in Form *MSC-3* along with such annual fee as provided in the *Companies (Registration Offices and Fees) Rules, 2014* within a period of 30 days from the end of each financial year.

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The company shall also continue to file the return or returns of allotment and change in directors in the manner and within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company.

(v) **Directors of dormant company**: A dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed.

According to Rule 6 of the *Companies (Miscellaneous) Rules, 2014,* a dormant company shall have a minimum number of 3 directors in case of a public company, 2 directors in case of a private company and 1 director in case of a One Person Company.

Rotation of auditors: According to Rule 6 the *Companies (Miscellaneous) Rules, 2014,* the provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.

Application for seeking status of an active company: According to the Rule 8 of the *Companies (Miscellaneous) Rules, 2014,*

(a) An application for obtaining the status of an active company shall be made in Form *MSC-4* along with fees as provided in the *Companies (Registration Offices and Fees) Rules, 2014* and shall be accompanied by a return in Form *MSC-3* in respect of the financial year in which the application for obtaining the status of an active company is being filed:

However, the Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive 5 years.

(b) The Registrar shall, after considering the application filed for obtaining the status of an active company, issue a certificate in Form *MSC-5* allowing the status of an active company to the applicant.

(c) Where a dormant company does or omits to do any act mentioned in the Grounds of application in Form *MSC-1* submitted to Registrar for obtaining the status of dormant company, affecting its status of dormant company, the directors shall within 7 days from such event, file an application for obtaining the status of an active company.

(d) Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company.

(vi) **Striking off the name by the Registrar:** The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section.

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[X] Protection of action taken in good faith [Section 456]

According to the section no suit, prosecution or other legal proceeding shall lie against the Government or any officer of the Government or any other person in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder, or in respect of the publication by or under the authority of the Government or such officer, of any report, paper or proceedings.

[XI] Non-disclosure of information in certain cases [Section 457]

Section 457 says that-

Notwithstanding anything contained in any other law for the time being in force, the Registrar, any officer of the Government or any other person shall not be compelled to disclose to any court, Tribunal or other authority, the source from where he got any information which—

(a) has led the Central Government to order an investigation under section 210; or

(b) is or has been material or relevant in connection with such investigation.

[XII] Delegation by Central Government of its powers and functions [Section 458]

Section 458 of the Companies Act, 2013 provides for delegation of its powers and functions by Central Government. According to this section:

(i) The Central Government may, by notification, and subject to such conditions, limitations and restrictions as may be specified therein, delegate any of its powers or functions under this Act other than the power to make rules to such authority or officer as may be specified in the notification.

However, the powers to enforce the provisions contained in section 194 and section 195 relating to forward dealing and insider trading shall be delegated to SEBI for listed companies or the companies which intend to get their securities listed.

In such case, any officer authorised by the SEBI shall have the power to file a complaint in the court of competent jurisdiction.

(ii) A copy of every notification issued under point (i) shall, as soon as may be after it is issued, be laid before each House of Parliament.

[XIII] Powers of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications [Section 459]

Section 459 of the Companies Act, 2013 provides for Powers of Central Government or Tribunal to accord approval, etc., subject to conditions and to prescribe fees on applications. According to this section:

(i) Where the Central Government or the Tribunal is required or authorised by any provision of this Act—

(a) to accord approval, sanction, consent, confirmation or recognition to, or in relation to, any matter; or

(b) to give any direction in relation to any matter; or

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(c) to grant any exemption in relation to any matter,

then, the Central Government or the Tribunal may in the absence of anything to the contrary contained in that provision or any other provision of this Act, accord, give or grant such approval, sanction, consent, confirmation, recognition, direction or exemption, subject to such conditions, limitations or restrictions as it may think fit to impose and may, in the case of a contravention of any such condition, limitation or restriction, rescind or withdraw such approval, sanction, consent, confirmation, recognition, direction or exemption.

(ii) Every application which may be, or is required to be, made to the Central Government or the Tribunal under any provision of this Act—

(a) in respect of any approval, sanction, consent, confirmation or recognition to be accorded by that Government or the Tribunal to, or in relation to, any matter; or

(b) in respect of any direction or exemption to be given or granted by that Government or the Tribunal in relation to any matter; or

(c) in respect of any other matter,

shall be accompanied by the prescribed fees which have been specified in the Rule 9 of the *Companies (Registration Offices and Fees) Rules, 2014* .

(iii) Different fees may be prescribed in Rule 12 of the *Companies (Registration Offices and Fees) Rules, 2014* for applications in respect of different matters or in case of applications by different classes of companies.

[XIV] Condonation of delays in certain cases [Section 460]

Notwithstanding anything contained in this Act,—

(a) where any application required to be made to the Central Government under any provision of this Act in respect of any matter is not made within the time specified therein, that Government may, for reasons to be recorded in writing, condone the delay; and

(b) where any document required to be filed with the Registrar under any provision of this Act is not filed within the time specified therein, the Central Government may, for reasons to be recorded in writing, condone the delay.

[XV] Annual report by Central Government [Section 461]

Section 461 says that the Central Government shall cause a general annual report on the working and administration of this Act to be prepared and laid before each House of Parliament within one year of the close of the year to which the report relates.

[XVI] Power to exempt class or classes of companies from provisions of this Act [Section 462]

Section 462 of the Companies Act, 2013 provides for Power to exempt class or classes of companies from provisions of this Act. According to this section:

(i) The Central Government may in the public interest, by notification direct that any of the provisions of this Act,—

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(a) shall not apply to such class or classes of companies; or

(b) shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification.

(ii) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

(iii) In reckoning any such period of thirty days as is referred to in point (ii), no account shall be taken of any period during which the House referred to as above, is prorogued or adjourned for more than four consecutive days.

(iv) The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament.

[XVII] Power of court to grant relief in certain cases [Section 463]

Section 463 of the Companies Act, 2013 provides for power of court to grant relief in certain cases. According to this section:

(i) If it appears to the court hearing the case that an officer of a company is or may be liable in respect of the negligence, default, breach of duty, misfeasance or breach of trust but he has acted honestly and reasonably, he ought fairly to be excused having regard to all the circumstances of the case, including those connected with his appointment, the court may relieve him, either wholly or partly, from his liability on such term, as it may think fit.

(ii) In a criminal proceeding, the court shall have no power to grant relief from any civil liability which may attach to an officer in respect of such negligence, default, breach of duty, misfeasance or breach of trust.

(iii) Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a court before which a proceedings against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought.

(iv) No court shall grant any relief to any officer unless it has, by notice served in the manner specified by it, required the Registrar and such other person, if any, as it thinks necessary, to show cause why such relief should not be granted.

[XVIII] Prohibition of association or partnership of persons exceeding certain number [Section 464]

Section 464 of the Companies Act, 2013 provides for Prohibition of association or partnership of persons exceeding certain number. According to this section:

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(i) Maximum number of persons: According to section 464(1) of the Companies Act, 2013, no association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force.

However, the number of persons which may be prescribed shall not exceed one hundred.

Rule 10 of the *Companies (Miscellaneous) Rules, 2014,* provides that no association or partnership shall be formed, consisting of more than 50 persons for the purpose of carrying on any business that has for its objects the acquisition of gain by the association or partnership or by individual members thereof, unless it is registered as a company under the Act or is formed under any other law for the time being in force.

Thus, the above provision can be read as under:

No association or partnership consisting of more than 50 persons (as provided under the Rules) shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force.

Further, the Act has put a cap of maximum 100 persons. Thus, the number of persons as provided in the Rule 10 cannot exceed the maximum cap of 100 persons.

(ii) Exceptions: The above provision is not applicable to-

(a) a Hindu undivided family carrying on any business; or

(b) an association or partnership, if it is formed by professionals who are governed by special Acts.

(iii) Penalty: Every member of an association or partnership carrying on business in contravention of section 464(1) shall be punishable with fine which may extend to 1 lakh rupees and shall also be personally liable for all liabilities incurred in such business.

[XIX] Dissolution of Company Law Board and Consequential Provisions [Section 466]

(i) **Dissolution of CLB:** Notwithstanding anything contained in section 465, the Board of Company Law Administration constituted under the Companies Act, 1956 (hereafter in this section referred to as the Company Law Board) shall stand dissolved on the constitution of the Tribunal and the Appellate Tribunal.

(ii) Appointment of Chairman, Vice Chairman and members of CLB in Tribunal: It is also provided that until the Tribunal and the Appellate Tribunal is constituted, the Chairman, Vice-Chairman and Members of the Company Law Board immediately before the constitution of the Tribunal and the Appellate Tribunal, who fulfil the qualifications and requirements provided under this Act regarding appointment as President or Chairperson or Member of the Tribunal or the Appellate Tribunal, shall function as President, Chairperson or Member of the Tribunal or the Appellate Tribunal.

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(iii) Officer or other employee of CLB on deputation basis: Every officer or other employee, who had been appointed on deputation basis to the Company Law Board, shall, on such dissolution,—

(i) become officer or employee of the Tribunal or the Appellate Tribunal, if he fulfils the qualifications and requirements under this Act; and

(ii) stand reverted to his parent cadre, Ministry or Department, in any other case

(iv) Rights of employees of CLB on regular basis: Every officer and the other employee of the Company Law Board, employed on regular basis by that Board, shall become, on and from such dissolution the officer and other employee, respectively, of the Tribunal or the Appellate Tribunal with the same rights and privileges as to pension, gratuity and other like benefits as would have been admissible to him if he had continued to serve that Board and shall continue to do so unless and until his employment in the Tribunal or the Appellate Tribunal is duly terminated or until his remuneration, terms and conditions of employment are duly altered by the Tribunal or the Appellate Tribunal, as the case may be.

(v) No compensation: Notwithstanding anything contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force, any officer or other employee who becomes an officer or other employee of the Tribunal or the Appellate Tribunal under the preceding proviso shall not be entitled to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

(vi) Transfer of employee's funds from CLB To Tribunal: Where the Company Law Board has established a provident fund, superannuation fund, welfare fund or other fund for the benefit of the officers and other employees employed in that Board, the monies relatable to the officers and other employees who have become officers or employees of the Tribunal or the Appellate Tribunal shall, out of the monies standing to the credit of such provident fund, superannuation fund, welfare fund or other fund, stand transferred to, and vest in, the Tribunal or the Appellate Tribunal, as the case may be, and such monies which stand so transferred shall be dealt with by the Tribunal or the Appellate Tribunal in such manner as may be prescribed.

(vii) Vacation of office by officers of CLB not covering above: The persons holding the offices of Chairman, Vice-Chairman and Members, and officers and other employees of the Company Law Board immediately before the constitution of the Tribunal and the Appellate Tribunal who are not covered under proviso to sub-section (1) shall vacate their respective offices on such constitution and no such Chairman, Vice Chairman and Members and officers or other employees shall be entitled to claim any compensation for the premature termination of the term of his office or of any contract of service, if any.

[XX] Power of Central Government to amend Schedules [Section 467]

Section 467 of the Companies Act, 2013 provides for Power of Central Government to amend Schedules. According to this section:

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(i) The Central Government may, by notification, alter any of the regulations, rules, Tables, forms and other provisions contained in any of the Schedules to this Act.

(ii) Any alteration notified as above shall have effect as if enacted in this Act and shall come into force on the date of the notification, unless the notification otherwise directs.

(iii) No such alteration in Table F of Schedule I shall apply to any company registered before the date of such alteration.

(iv) Every alteration made by the Central Government shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the alteration, or both Houses agree that the alteration should not be made, the alteration shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done in pursuance of that alteration.

[XXI] Power of Central Government to make rules relating to winding up [Section 468]

Section 468 provides for Power of Central Government to make rules relating to winding up. According to this section:

(i) The Central Government shall, make rules consistent with the Code of Civil Procedure, 1908 providing for all matters relating to the winding up of companies, which by this Act, are to be prescribed, and may make rules providing for all such matters, as may be prescribed.

(ii) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) as to the mode of proceedings to be held for winding up of a company by the Tribunal under this Act;

(b) for the holding of meetings of creditors and members in connection with proceedings under section 230;

(c) for giving effect to the provisions of this Act as to the reduction of the capital;

(d) generally for all applications to be made to the Tribunal under the provisions of this Act;

(e) the holding and conducting of meetings to ascertain the wishes of creditors and contributories;

(f) the settling of lists of contributories and the rectifying of the register of members where required, and collecting and applying the assets;

(g) the payment, delivery, conveyance, surrender or transfer of money, property, books or papers to the liquidator;

(h) the making of calls; and

(i) the fixing of a time within which debts and claims shall be proved.

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(iii) All rules made by the Supreme Court on the matters referred to in this section as it stood immediately before the commencement of this Act and in force at such commencement, shall continue to be in force, till such time the rules are made by the Central Government and any reference to the High Court in relation to winding up of a company in such rules shall be construed as a reference to the Tribunal.

[XXII] Power of Central Government to make rules [Section 469]

Section 469 of the Companies Act, 2013 provides for Power of Central Government to make rules. According to this section:

(i) The Central Government may, by notification, make rules for carrying out the provisions of this Act.

(ii) The Central Government may make rules for all or any of the matters which by this Act are required to be, or may be, prescribed or in respect of which provision is to be or may be made by rules.

(iii) Any rule made as above may provide that a contravention thereof shall be punishable with fine which may extend to five thousand rupees and where the contravention is a continuing one, with a further fine which may extend to five hundred rupees for every day after the first during which such contravention continues.

(iv) Every rule made under this section and every regulation made by Securities and Exchange Board under this Act, shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

[XXIII] Power to remove difficulties [Section 470]

According to this section:

(i) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order published in the Official Gazette, make such provisions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for removing the difficulty.

(ii) No such order shall be made after the expiry of a period of 5 years from the date of commencement of section 1 of this Act.

(iii) Every order made under this section shall, as soon as may be after it is made, be laid before each House of Parliament.

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RELEVANT AMENDMENTS

1. Notification of Section 247 vide Notification S.O. 3393(E) dated 18th October 2017

The Central Government hereby appoints the 18th October, 2017 as the date on which the provisions of section 247 of the said Act shall come into force.

Section 247: Valuation by Registered Valuers.

(1) Where a valuation is required to be made in respect of any property, stocks, shares, debentures, securities or goodwill or any other assets (herein referred to as the assets) or net worth of a company or its liabilities under the provision of this Act, it shall be valued by 2[a person having such qualifications and experience and registered as a valuer in such manner, on such terms and conditions as may be prescribed] and appointed by the audit committee or in its absence by the Board of Directors of that company.

(2) The valuer appointed under sub-section (1) shall,—

(a) make an impartial, true and fair valuation of any assets which may be required to be valued;

(b) exercise due diligence while performing the functions as valuer;

(c) make the valuation in accordance with such rules as may be prescribed; and

(d) not undertake valuation of any assets in which he has a direct or indirect interest or becomes so interested at any time 3[during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him.]

(3) If a valuer contravenes the provisions of this section or the rules made thereunder, the valuer shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

However if the valuer has contravened such provisions with the intention to defraud the company or its members, he shall be punishable with imprisonment for a term which may extend to one year and with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees.

(4) Where a valuer has been convicted under sub-section (3), he shall be liable to—

(i) refund the remuneration received by him to the company; and

(ii) pay for damages to the company or to any other person for loss arising out of incorrect or misleading statements of particulars made in his report.

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[2] Substituted by the Companies (Removal of Difficulties) Second Order 2017

[3] Amended through the Companies (Amendment) Act, 2017 on 9th February, 2018

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2. Notification of the Companies (Registered Valuers and Valuation) Rules, 2017 vide Notification G.S.R 1316(E) dated 18th October, 2017

In exercise of the powers conferred by section 247, the Central Government hereby enforced the Companies (Registered Valuers and Valuation) Rules, 2017.

COMPANIES (REGISTERED VALUERS AND VALUATION) RULES, 2017

2. Definitions

(1) In these rules, unless the context otherwise requires **-**

"authority" means an authority specified by the Central Government under section 458 of the Companies Act, 2013 to perform the functions under these rules;

"asset class" means a distinct group of assets, such as land and building, machinery and equipment, displaying similar characteristics, that can be classified and requires separate set of valuers for valuation;

"certificate of recognition" means the certificate of recognition granted to a registered valuers organisation under sub-rule (5) of rule 13 and the term "recognition" shall be construed accordingly;

"certificate of registration" means the certificate of registration granted to a valuer under sub-rule (6) of rule 6 and the term "registration" shall be construed accordingly;

"registered valuers organisation" means a registered valuers organization recognised under sub-rule (5) of rule 13;

"valuer" means a person registered with the authority in accordance with these rules and the term "registered valuer" shall be construed accordingly.

3. Eligibility for registered valuers

(1) A person shall be eligible to be a registered valuer if he-

(*a*) Is a valuer member of a registered valuers organisation;

Explanation.- For the purposes of this clause, "a valuer member" is a member of a registered valuers organisation who possesses the requisite educational qualifications and experience for being registered as a valuer;

(*b*) Is recommended by the registered valuers organisation of which he is a valuer member for registration as a valuer;

(*c*) Has passed the valuation examination under rule 5 within three years preceding the date of making an application for registration under rule 6;

(*d*) Possesses the qualifications and experience as specified in rule 4;

(*e*) Is not a minor;

(f) Has not been declared to be of unsound mind;

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(*g*) Is not an undischarged bankrupt, or has not applied to be adjudicated as a bankrupt;

(*h*) Is a person resident in India;

Explanation.- For the purposes of these rules 'person resident in India' shall have the same meaning as defined in clause (*v*) of section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999) as far as it is applicable to an individual;

(*i*) Has not been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of the sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

(*j*) Has not been levied a penalty under section 271J of Income-tax Act, 1961 (43 of 1961) and time limit for filing appeal before Commissioner of Income-tax (Appeals) or Income-tax Appellate Tribunal, as the case may be has expired, or such penalty has been confirmed by Income-tax Appellate Tribunal, and five years have not elapsed after levy of such penalty; and

(*k*) Is a fit and proper person:

Explanation.- For determining whether an individual is a fit and proper person under these rules, the authority may take account of any relevant consideration, including but not limited to the following criteria-

(*i*) Integrity, reputation and character,

(*ii*) Absence of convictions and restraint orders, and

(*iii*) Competence and financial solvency.

(2) No partnership entity or company shall be eligible to be a registered valuer if-

(*a*) It has been set up for objects other than for rendering professional or financial services, including valuation services and that in the case of a company, it is not a subsidiary, joint venture or associate of another company or body corporate;

(*b*) It is undergoing an insolvency resolution or is an undischarged bankrupt;

(*c*) All the partners or directors, as the case may be, are not ineligible under clauses (c), (d), (e), (g), (h), (i), (j) and (k) of sub-rule (1);

(*d*) Three or all the partners or directors, whichever is lower, of the partnership entity or company, as the case may be, are not registered valuers; or

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(*e*) None of its partners or directors, as the case may be, is a registered valuer for the asset class, for the valuation of which it seeks to be a registered valuer.

4. Qualifications and experience

An individual shall have the following qualifications and experience to be eligible for registration under rule 3, namely:-

(*a*) post-graduate degree or post-graduate diploma, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least three years of experience in the specified discipline thereafter; or

(*b*) a Bachelor's degree or equivalent, in the specified discipline, from a University or Institute established, recognised or incorporated by law in India and at least five years of experience in the specified discipline thereafter; or

(*c*) membership of a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession with at least three years' experience after such membership and having qualification mentioned at clause (a) or (b).

Explanation-I- For the purposes of this clause the 'specified discipline' shall mean the specific discipline which is relevant for valuation of an asset class for which the registration as a valuer or recognition as a registered valuers organisation is sought under these rules.

Explanation-II.- Qualifying education and experience and examination or training for various asset classes, is given in an indicative manner in **Annexure-IV** of these rules.

6. Application for certificate of registration

(1) An individual eligible for registration as a registered valuer under rule 3 may make an application to the authority in Form-A of Annexure-II along with a non-refundable application fee of five thousand rupees in favour of the authority.

(2) A partnership entity or company eligible for registration as a registered valuer under rule 3 may make an application to the authority in Form-B of Annexure-II along with a non-refundable application fee of ten thousand rupees in favour of the authority.

(3) The authority shall examine the application, and may grant twenty one days to the applicant to remove the deficiencies, if any, in the application.

(4) The authority may require the applicant to submit additional documents or clarification within twenty- one days.

(5) The authority may require the applicant to appear, within twenty one days, before the authority in person, or through its authorised representative for explanation or clarifications required for processing the application.

(6) If the authority is satisfied, after such scrutiny, inspection or inquiry as it deems necessary, that the applicant is eligible under these rules, it may grant a certificate

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of registration to the applicant to carry on the activities of a registered valuer for the relevant asset class or classes in Form-C of the Annexure-II within sixty days of receipt of the application, excluding the time given by the authority for presenting additional documents, information or clarification, or appearing in person, as the case may be.

(7) If, after considering an application made under this rule, the authority is of the prima facie opinion that the registration ought not be granted, it shall communicate the reasons for forming such an opinion within forty-five days of receipt of the application, excluding the time given by it for removing the deficiencies, presenting additional documents or clarifications, or appearing in person, as the case may be.

(8) The applicant shall submit an explanation as to why his/its application should be accepted within fifteen days of the receipt of the communication under sub- rule (7), to enable the authority to form a final opinion.

(9) After considering the explanation, if any, given by the applicant under sub-rule (8), the authority shall either -

(a) accept the application and grant the certificate of registration; or

(b) reject the application by an order, giving reasons thereof.

(10) The authority shall communicate its decision to the applicant within thirty days of receipt of explanation.

7. Conditions of Registration

The registration granted under rule 6 shall be subject to the conditions that the valuer shall -

(*a*) at all times possess the eligibility and qualification and experience criteria as specified under rule 3 and rule 4;

(*b*) at all times comply with the provisions of the Act, these rules and the Bye-laws or internal regulations, as the case may be, of the respective registered valuers organisation;

(*c*) in his capacity as a registered valuer, not conduct valuation of the assets or class(es) of assets other than for which he/it has been registered by the authority;

(*d*) take prior permission of the authority for shifting his/ its membership from one registered valuers organisation to another;

(*e*) take adequate steps for redressal of grievances;

(*f*) maintain records of each assignment undertaken by him for at least three years from the completion of such assignment;

(*g*) comply with the Code of Conduct of the registered valuers organisation of which he is a member;

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(*h*) in case a partnership entity or company is the registered valuer, allow only the partner or director who is a registered valuer for the asset class(es) that is being valued to sign and act on behalf of it;

(*i*) in case a partnership entity or company is the registered valuer, it shall disclose to the company concerned, the extent of capital employed or contributed in the partnership entity or the company by the partner or director, as the case may be, who would sign and act in respect of relevant valuation assignment for the company;

(*j*) in case a partnership entity is the registered valuer, be liable jointly and severally along with the partner who signs and acts in respect of a valuation assignment on behalf of the partnership entity;

(*k*) in case a company is the registered valuer, be liable alongwith director who signs and acts in respect of a valuation assignment on behalf of the company;

(*l*) in case a partnership entity or company is the registered valuer, immediately inform the authority on the removal of a partner or director, as the case may be, who is a registered valuer along with detailed reasons for such removal; and

(*m*) comply with such other conditions as may be imposed by the authority.

8. Conduct of Valuation

(1) The registered valuer shall, while conducting a valuation, comply with the valuation standards as notified or modified under rule 18:

Provided that until the valuation standards are notified or modified by the Central Government, a valuer shall make valuations as per-

(*a*) internationally accepted valuation standards;

(*b*) valuation standards adopted by any registered valuers organisation.

(2) The registered valuer may obtain inputs for his valuation report or get a separate valuation for an asset class conducted from another registered valuer, in which case he shall fully disclose the details of the inputs and the particulars etc. of the other registered valuer in his report and the liabilities against the resultant valuation, irrespective of the nature of inputs or valuation by the other registered valuer, shall remain of the first mentioned registered valuer.

(3) The valuer shall, in his report, state the following:-

(*a*) background information of the asset being valued;

(*b*) purpose of valuation and appointing authority;

(*c*) identity of the valuer and any other experts involved in the valuation;

(*d*) disclosure of valuer interest or conflict, if any;

(*e*) date of appointment, valuation date and date of report;

(*f*) inspections and/or investigations undertaken;

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(*g*) nature and sources of the information used or relied upon;

(*h*) procedures adopted in carrying out the valuation and valuation standards followed;

(*i*) restrictions on use of the report, if any;

(*j*) major factors that were taken into account during the valuation;

(*k*) conclusion; and

(*l*) caveats, limitations and disclaimers to the extent they explain or elucidate the limitations faced by valuer, which shall not be for the purpose of limiting his responsibility for the valuation report.

9. Temporary surrender

(1) A registered valuer may temporarily surrender his registration certificate in accordance with the bye-laws or regulations, as the case may be, of the registered valuers organisation and on such surrender, the valuer shall inform the authority for taking such information on record.

(2) A registered valuers organisation shall inform the authority if any valuer member has temporarily surrendered his/its membership or revived his/ its membership after temporary surrender, not later than seven days from approval of the application for temporary surrender or revival, as the case may be.

(3) Every registered valuers organisation shall place, on its website, in a searchable format, the names and other details of its valuers members who have surrendered or revived their memberships.

10. Functions of a Valuer

A valuer shall conduct valuation required under the Act as per these rules and he may conduct valuation as per these rules if required under any other law or by any other regulatory authority.

12. Eligibility for registered valuers organisations

(1) An organisation that meets requirements under sub-rule (2) may be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes if -

(*i*) it has been registered under section 25 of the Companies Act, 1956 (1 of 1956) or section 8 of the Companies Act, 2013 (18 of 2013) with the sole object of dealing with matters relating to regulation of valuers of an asset class or asset classes and has in its bye laws the requirements specified in **Annexure-III**;

(*ii*) a professional institute established by an Act of Parliament enacted for the purpose of regulation of a profession;

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Provided that, subject to sub-rule (3), the following organisations may also be recognised as a registered valuers organisation for valuation of a specific asset class or asset classes, namely:-

(*a*) an organisation registered as a society under the Societies Registration Act, 1860 (21 of 1860) or any relevant state law, or;

(*b*) an organisation set up as a trust governed by the Indian Trust Act, 1882 (2 of 1882).

(2) The organisation referred to in sub-rule (1) shall be recognised if it –

(*a*) conducts educational courses in valuation, in accordance with the syllabus determined by the authority, under rule 5, for individuals who may be its valuers members, and delivered in class room or through distance education modules and which includes practical training;

(*b*) grants membership or certificate of practice to individuals, who possess the qualifications and experience as specified in rule 4, in respect of valuation of asset class for which it is recognised as a registered valuers organisation ;

(*c*) conducts training for the individual members before a certificate of practice is issued to them;

(*d*) lays down and enforces a code of conduct for valuers who are its members, which includes all the provisions specified in **Annexure-I**;

(*e*) provides for continuing education of individuals who are its members;

(*f*) monitors and reviews the functioning, including quality of service, of valuers who are its members; and

(*g*) has a mechanism to address grievances and conduct disciplinary proceedings against valuers who are its members.

(3) A registered valuers organisation, being an entity under proviso to sub-rule (1), shall convert into or register itself as a company under section 8 of the Companies Act, 2013, and include in its bye laws the requirements specified in **Annexure-III,** within one year from the date of commencement of these rules.

14. Conditions of Recognition

The recognition granted under rule 13 shall be subject to the conditions that the registered valuers organisation shall-

(*a*) at all times continue to satisfy the eligibility requirements specified under rule 12;

(*b*) maintain a register of members who are registered valuers, which shall be publicly available;

(*c*) admits only individuals who possess the educational qualifications and experience requirements, in accordance with rule 4 and as specified in its recognition certificate, as members;

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(*d*) make such reports to the authority as may be required by it;

(*e*) comply with any directions, including with regard to course to be conducted by valuation organisation under clause (*a*) of sub-rule (2) of rule 12, issued by the authority;

(*f*) be converted or registered as company under section 8 of the Act, with governance structure and bye laws specified in **Annexure-III**, within a period of one year from the date of commencement of these rules if it is an organisation referred to in proviso to sub-rule (1) of rule 12;

(*g*) shall have the governance structure and incorporate in its bye laws the requirements specified in **Annexure-III** within one year of commencement of these rules if it is an organisation referred to in clause (i) of sub-rule (1) of rule 12 and existing on the date of commencement of these rules;

(*h*) display on its website, the status and specified details of every registered valuer being its valuer members including action under rule 17 being taken against him; and

(*i*) comply with such other conditions as may be specified by authority.

15. Cancellation or suspension of certificate of registration or recognition

The authority may cancel or suspend the registration of a valuer or recognition of a registered valuers organisation for violation of the provisions of the Act, any other law allowing him to perform valuation, these rules or any condition of registration or recognition, as the case may be in the manner specified in rule 17.

16. Complaint against a registered valuer or registered valuers organisation

A complaint may be filed against a registered valuer or registered valuers organisation before the authority in person or by post or courier along with a non-refundable fees of rupees one thousand in favour of the authority and the authority shall examine the complaint and take such necessary action as it deems fit:

Provided that in case of a complaint against a registered valuer, who is a partner of a partnership entity or director of a company, the authority may refer the complaint to the relevant registered valuers organisation and such organisation shall handle the complaint in accordance with its bye laws.

18. Valuation Standards

The Central Government shall notify and may modify (from time to time) the valuation standards on the recommendations of the Committee set up under rule 19.

20. Punishment for contravention

Without prejudice to any other liabilities where a person contravenes any of the provision of these rules he shall be punishable in accordance with sub-section (3) of section 469 of the Act.

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21. Punishment for false statement

If in any report, certificate or other document required by, or for, the purposes of any of the provisions of the Act or the rules made thereunder or these rules, any person makes a statement,—

(*a*) which is false in any material particulars, knowing it to be false; or

(*b*) which omits any material fact, knowing it to be material, he shall be liable under section 448 of the Act.

3. Enforcement of the Companies (Registered Valuers and Valuation) Amendment Rules, 2018 vide Notification No. G.S.R. 155 (E) dated 9th February, 2018

In exercise of the powers conferred by section 247 read with section 469 of the Companies Act, 2013, the Central Government makes the **Companies (Registered Valuers and Valuation) Amendment Rules, 2018** to amend the Companies (Registered Valuers and Valuation) Rules, 2017, namely:-

In the Companies (Registered Valuers and Valuation) Rules, 2017, in rule 11, for the figures, letters and word "31st March, 2018", occurring at both the places, the figures, letters and word "30th September, 2018" shall be substituted.

4. Amendments through the Companies (Amendment) Act, 2017

Relevant sections	Amendment	Status
Amendment of Section 247	In section 247 of the principal Act, in sub-section (*2*), in clause (*d*), for the words "during or after the valuation of assets", the words "during a period of three years prior to his appointment as valuer or three years after the valuation of assets was conducted by him" shall be substituted.	Notified till 30th April, 2018
Amendment of section 366.	In section 366 of the principal Act, in sub-section (*2*),— (*i*) for the words "seven or more members", the words "two or more members" shall be substituted; (*ii*) in the proviso, after clause (*vi*), the following clause shall be inserted, namely:— "(*vii*) a company with less than seven members shall register as a private company."	Notified till 30th April, 2018
Amendment of section 374.	In section 374 of the principal Act, after clause (*d*), the following proviso shall be inserted, namely:— "Provided that upon registration as a company under this Part a limited liability partnership incorporated under the Limited Liability Partnership Act, 2008 shall be deemed to have been dissolved under that Act	Notified till 30th April, 2018

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	without any further act or deed.".	
Amendment of section 403.	In section 403 of the principal Act,— (*i*) in sub-section (*1*), for the first and second provisos, the following provisos shall be substituted, namely:— "Provided that where any document, fact or information required to be submitted, filed, registered or recorded, as the case may be, under section 92 or 137 is not submited, filed, registered or recorded, as the case may be, within the period provided in those sections, without prejudice to any other legal action or liability under this Act, it may be submitted, filed, registered or recorded, as the case may be, after expiry of the period so provided in those sections, on payment of such additional fee as may be prescribed, which shall not be less than one hundred rupees per day and different amounts may be prescribed for different classes of companies: Provided further that where the document, fact or information, as the case may be, in cases other than referred to in the first proviso, is not submitted, filed, registered or recorded, as the case may be, within the period provided in the relevant section, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded as the case may be, on payment of such additional fee as may be prescribed and different fees may be prescribed for different classes of companies: Provided also that where there is default on two or more occasions in submitting, filing, registering or recording of the document, fact or information, it may, without prejudice to any other legal action or liability under this Act, be submitted, filed, registered or recorded, as the case may be, on payment of a higher additional fee, as may be prescribed and which shall not be lesser than twice the additional fee provided under the first or the second proviso as applicable."; (*ii*) for sub-section (*2*), the following sub-section shall be	Not notified till 30th April, 2018

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	substituted, namely:— "(*2*) Where a company fails or commits any default to submit, file, register or record any document, fact or information under sub-section (*1*) before the expiry of the period specified in the relevant section, the company and the officers of the company who are in default, shall, without prejudice to the liability for the payment of fee and additional fee, be liable for the penalty or punishment provided under this Act for such failure or default."	
Substitution of new section for section 406. Provision relating to *Nidhis* and its application, etc.	For section 406 of the principal Act, the following section shall be substituted, namely:— '406. (*1*) In this section, "*Nidhi*" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a *Nidhi* or Mutual Benefit Society, as the case may be. (*2*) The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification— (*a*) shall not apply to any *Nidhi* or Mutual Benefit Society; or (*b*) shall apply to any *Nidhi* or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification. (*3*) A copy of every notification proposed to be issued under sub-section (*2*), shall be laid in draft before each House of Parliament, while it is in session, for a total period of thirty days, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses. (*4*) In reckoning any such period of thirty days as is referred to in sub-section (*3*), no account shall be taken of any period during which the House referred to in sub-section (*3*) is prorogued or adjourned for more than four consecutive days. (*5*) The copies of every notification issued under this	Not notified till 30th April, 2018

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	section shall, as soon as may be after it has been issued, be laid before each House of Parliament.'	
Amendment of section 447.	In section 447 of the principal Act,— (*i*) after the words "guilty of fraud", the words "involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower" shall be inserted; (ii) after the proviso, the following proviso shall be inserted, namely:— "Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.".	Notified till 30th April, 2018
Amendment of section 458	In section 458 of the principal Act, in sub-section (*1*), the proviso shall be omitted.	Notified till 30th April, 2018

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Corporate Secretarial Practice – Drafting of Resolutions, Minutes, Notices and Reports

1. Introduction

The Companies Act, 2013 mandates holding of at least one Annual General Meeting and minimum 4 Board meetings in a year. When any of these business meetings are to be held, it will necessarily consist of 4 major components:

(i) Notice of the meeting

(ii) Agenda for the meeting

(iii) Resolutions at the meeting

(iv) Minutes of the meeting

The law also recognizes the importance of these documents and has laid various rules for drafting, laying and preserving the above documents. Hence, it becomes imperative to properly draft these documents, which may even be used in future as reference.

2. General Hints on Drafting Reports

Reports are too numerous to be governed by precise rules. However, a few general hints for drafting them are given below:

(a) Collection of material or data being the foundation on which the report stands; the writer must collect them by referring to office records, interviewing people, visiting different places, etc., as may be necessary.

(b) The material collected as aforesaid has to be arranged in a logical sequence so that the report, when made out, may read like a narrative.

(c) The report should have a leading and a preface explaining its purpose and nature.

(d) Its language has to be simple, clear and unequivocal short sentences are to be preferred to long ones. It should be drafted in an impersonal manner, making use of 'third person'.

(e) If the report is likely to be lengthy, it should be divided into parts and appropriate sub-heading should be used. The report must then contain a summary also. Many people adopt the practice of giving the gist in one page and the matter in detail later in the

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report.

(f) Where the directors are not technical persons, technical phraseology should be eschewed, yielding place to plain and simple phraseology, the idea being to make the report, as far as practicable, easily understandable by those for whom it is meant.

(g) The conclusions put forward should be founded on the material or data collected; also these should be unbiased in character.

3. Notice of Board meeting



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

Further, a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting.

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

As per section 173(4) of the Companies Act, 2013, every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of ₹ 25,000.

Specimen notice

Board Meeting

Section 173(3) of the Companies Act, 2013: 'Notice' convening a Board Meeting

Paper Wood Limited

Palkaji,
Bombay-400 012.

Dated..... 20....

To

Mr. XYZ,
Nagpur-440 012.

Dear Sir,

Notice is hereby given that a meeting of the Board of Director which will be held at the registered office of the company at Palkaji, Bombay- 400 012 on..... the.....

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20…… at……..a.m./p.m.

You are requested to make it convenient to attend the meeting.

A copy of the agenda of the businesses which are likely to be transacted at the meeting is enclosed for your perusal.

Yours faithfully

For PAPER WOOD LIMITED

Secretary
(Each director should be individually addressed with a copy of agenda of the meeting)

4. Agenda



The various items of business to be transacted constitute the agenda, literally "things to be done" is called the meeting. Though it is common practice to send to directors or members an agenda or a list of items of business proposed to be transacted at the meeting, the Act does not lay down any such requirement. The current practice is, to lay down the agenda preferably in the form of proposed resolutions. It is usually prepared by the secretary but issued however, after it has been approved by the managing director or an executive of an equal rank.

Preparation of agenda: The preparation of agenda requires considerable care. An ideal agenda is the one which is so worded that only by altering a few words of an item to convert it into past tense, it would form the minutes. It may be, and is often drawn up on loose sheets of foolscap Paper. However, it is also preferable to write in bond book specially kept for that purpose. The order in which various items appear in the agenda is generally the order in which the business is to be transacted at the meeting. As it is customary to discuss routine matters first such items as relate to it come first in the agenda. They are followed by important items which, it is expected would provoke discussion among members. At the end, the item which require only to be noted by the members are listed. Such an order generally has the merit of dividing equitably the time of the meeting among various items according to their importance. It must be added, however, that the chairman has the discretion to take up item for consideration by the meeting in the order he considers convenient for the disposal of the business. The various items listed on the agenda are numbered serially for convenience of recording minute and for future reference.

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AGENDA for the Board Meeting (Summary Form)

Agenda for Board Meeting to be held at……. on..…… day, of …… 20……. at……. [a.m.]

…….. Ltd.

1. The Chairman to announce that the quorum for the meeting is present.
2. The Chairman to address the meeting, and to move that, with the permission of the members present, the notice of the meeting and the Directors' Report be taken as read, and to call on the Secretary to read the Auditors' Report.
3. The Chairman to make a statement commenting upon the working of the company.
4. The Chairman to propose:

   "Resolved that the audited Balance Sheet as at…….. 20…… at the Profit and Loss Account for the year ending…….. 20……. together with the Directors' Report and Auditors' Report thereon, be and the same are hereby received and adopted".

   Mr…….. to second.

   The Chairman to invite members to put questions regarding working of the company under review. After the members have spoken and their queries answered, put motion to meeting and declare result.
5. Mr……. a Director to propose:

   "Resolved that pursuant to the recommendation of the directors, dividend at the rate of Rupees……. per share on the equity share capital of the company for the year ended…… 20…… be and is hereby declare out of the current profits [or out of the accumulated profits] of the company and that the same be paid, after deduction of income-tax at source, to those shareholder whose names appear on the company's register of members on…… 20…… and that divided warrants be posted within 30 days hereof only to those shareholders who are entitled to receive payment".

   Mr……. to second.

   Put motion to meeting and declare result.
6. Mr……. a Director to propose:

   "Resolved that Mr……. who retires by rotation and is eligible for re-appointment, be and is hereby re-appointment as a Director of the Company".

   Mr……. to second.

   Put motion to meeting and declare result.
7. The Chairman to declare the meeting closed.

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5. Resolutions



A meeting is an important instrument in the corporate decision-making process. The business at a meeting is preceded by a notice containing the agenda. The resolution is the event that takes place in the meeting.

Dictionary meaning of the word 'resolution', is 'a formal proposal put before a public assembly or the formal determination of such proposal on any matter'. Derived from this meaning, a resolution is a formal agreement as to adoption of proposal put before an assembly of persons or meeting. In the context of company management, it is either a Board meeting or a General meeting of the members. The passing of a resolution should be construed as the manner in which a meeting formally acts expressing the intent and purpose of the meeting and if it is a meeting of members, it means the will of the company, and if it is a meeting of the Board of directors, it means the exposition of the intent of the executive action initiated or to be initiated subject to the limiting and regulatory force of the different statute.

Hints on drafting of resolution

While framing resolution, it is to be ensured that:

(i) They should be expressed clearly and in precise terms, and not vaguely, whether they embody the decisions of the directors or are those passed at general meeting.

(ii) All identification of instruments, persons, etc., referred to in the resolution are properly made.

(iii) If the resolution is being passed in pursuance to the provisions of the Act, it refers to relevant section or sections.

(iv) If the resolution is such as requires the approval of the Central Government/ National Company Law Tribunal or confirmation of the Court, it states that effect.

(v) If the resolution is to be effective immediately, it is drawn to show that effect.

(vi) The resolution is confined to one subject matter.

Wherever possible, lengthy resolutions should be divided into paragraphs and arranged in their logical order having regard to the subject matter of the resolution.

Members' resolution

Resolutions that may be passed by a company are of two kinds:

(i) Ordinary resolution and

(ii) Special resolutions

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Specimen General Meeting Resolutions- Ordinary

Sections 149, 150 and 152 of the Companies Act, 2013- Appointment of Independent Director – Ordinary Resolution

"RESOLVED that pursuant to the provisions of Sections 149, 150, 152 and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force) read with Schedule IV to the Companies Act, 2013, Mr. ----- (holding DIN -------), Director of the Company who retires by rotation at the Annual General Meeting and in respect of whom the Company has received a notice in writing from a member proposing his candidature for the office of Director, be and is hereby appointed as an Independent Director of the Company to hold office for five consecutive years for a term up to ---, 20---."

Specimen General Meeting Resolutions- Special

Section 232 of the Companies Act, 2013: Approval of scheme of arrangement between company and class of shareholders – Special resolution

"*Resolved* that, subject to sanction by the Tribunal at……., a scheme of arrangement in terms of the draft laid before this meeting and for the purpose of identification signed by the Chairman thereof, or with such alteration or modification thereof as may be directed by the said Tribunal, between the company and the holders of the promoters shares and the holders of the equity shares for the purpose of eliminating existing…….. promoters shares of ₹……. each by converting them into…….. equity shares of ₹……. be and is hereby approved."

Section 180 of the Companies Act, 2013: Power of Board of directors to borrow money– Special resolution

"RESOLVED that pursuant to Section 180(1)(c) and any other applicable provisions of the Companies Act, 2013 and the rules made thereunder (including any statutory modification(s) or re-enactment thereof for the time being in force), the consent of the Company be and is hereby accorded to the Board of Directors to borrow moneys in excess of the aggregate of the paid up share capital and free reserves of the Company, provided that the total amount borrowed and outstanding at any point of time, apart from temporary loans obtained/to be obtained from the Company's Bankers in the ordinary course of business, shall not be in excess of ₹ ___Crores (Rupees ____ crores) over and above the aggregate of the paid up share capital and free reserves of the Company."

Directors' Resolutions

Resolutions passed in a Board meeting.

As a general rule, the directors act/ exercise their powers by resolutions passed at Board meetings. These resolutions may be resolution requiring:

(a) Adoption by majority: The articles usually provide for a simple majority of votes to secure adoption of directors' resolution.

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(b) *Unanimous adoption:* The resolution must be passed unanimously where the Act requires as such. For example: Third Proviso to section 203(3) of the Companies Act, 2013

(c) *Resolution by circulation*

1. The Act allows the Board of directors to pass resolution by Circulation also. A resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation if:

   (i) The resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,

   (ii) The resolution should be sent at their addresses registered with the company in India,

   (iii) It can be sent by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and

   The Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.

   (iv) It has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

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

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

Note: Please refer section 175 of the Companies Act, 2013, for detail discussion on 'Passing of Resolution by Circulation'.

Specimen Board Resolution passed in the Meeting

Section 202 of the Companies Act, 2013: Compensation for loss of office – Board Resolution

"*WHEREAS* Mr. NBS was employed for a period of three years as the Managing Director of the company from…….. 20….. and Whereas the company wanted to dispense with the services of the said Managing Director, and WHEREAS the company has duly served notice to the said Managing Director in terms of clause…… of the agreement between the company and the said Mr. NBS governing his terms and condition as the Managing Director of the company, it is hereby resolved that an amount of ₹……., be paid to Mr. NBS as compensation for the loss of his office as the Managing Director of the company."

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Specimen Board Resolution – Passed by Circulation

……..Ltd.

To

Mr……., Director

……

……

(Address in India only).

Dear Sir,

The following resolution, which is intended to be passed as a resolution by circulation as provided in Section 175 of the Companies Act, 2013, is circulated herewith as per the provisions of the said section.

If only you are *Not Interested* in the resolution, you may please indicate by appending your signature in the space provided beneath the resolution appearing herein below as a separate perforated slip if you are in favour or against the said resolution. The perforated slip may please be returned if and when signed within……. days of this letter.

However, it need not be returned if you are interested in the resolution.

Yours faithfully,

(Secretary)

……..Ltd.

Resolution by circulation passed by the directors as per circulation effected…… 20…..

Resolved that……

[Set out the resolution intended to passed]

*For/Against

Signature

*Strike off whichever is inapplicable.

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6. Minutes



The minute in a literal sense means a note to preserve the memory of anything. The minutes of a meeting are a written record of the business transacted; decisions and resolutions arrived at the meeting. Section 118 of the Companies Act, 2013 imposes a statutory obligation on every company to cause minutes of all proceedings of general meetings, board meetings and other meeting and resolution passed by postal ballot. Section 119 of the Companies Act, 2013 provides for inspection of minutes-books of general meeting. The statutory requirements relating to keeping of the minutes of meeting are:

(1) Preparation of the minutes of the proceedings of meetings: Every company shall cause minutes of the proceedings of every general meeting of any class of shareholders or creditors, and every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board, to be prepared and signed in such manner as may be prescribed and kept within thirty days of the conclusion of every such meeting concerned, or passing of resolution by postal ballot in books kept for that purpose with their pages consecutively numbered.

(2) Contain fair and correct summary: The minutes of each meeting shall contain a fair and correct summary of the proceedings thereat.

(3) Appointments to be included in the minutes: All appointments made at any of the meetings aforesaid shall be included in the minutes of the meeting.

(4) Other details: In the case of a meeting of the Board of Directors or of a committee of the Board, the minutes shall also contain—

(a) the names of the directors present at the meeting; and

(b) in the case of each resolution passed at the meeting, the names of the directors, if any, dissenting from, or not concurring with the resolution.

(5) Exemptions to matters from inclusion in the minutes: There shall not be included in the minutes, any matter which, in the opinion of the Chairman of the meeting,—

(a) is or could reasonably be regarded as defamatory of any person; or

(b) is irrelevant or immaterial to the proceedings; or

(c) is detrimental to the interests of the company.

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(6) Absolute discretion of chairman: The Chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes on the grounds specified in point (5) above.

(7) Considered as evidence of the proceedings: The minutes kept in accordance with the provisions of this section shall be evidence of the proceedings recorded therein.

(8) Minutes signifies the validity of the procedure: Where the minutes have been kept in accordance with this section then, until the contrary is proved, the meeting shall be deemed to have been duly called and held, and all proceedings thereat to have duly taken place, and the resolutions passed by postal ballot to have been duly passed and in particular, all appointments of directors, key managerial personnel, auditors or company secretary in practice, shall be deemed to be valid.

(9) Matter contained in the minutes shall be circulated: No document purporting to be a report of the proceedings of any general meeting of a company shall be circulated or advertised at the expense of the company, unless it includes the matters required by this section to be contained in the minutes of the proceedings of such meeting.

(10) Adherence of secretarial standards by company: Every company shall observe secretarial standards with respect to general and Board meetings specified by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980, and approved as such by the Central Government.

(11) Default in compliance: If any default is made in complying with the provisions of this section in respect of any meeting, the company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees.

(12) Tampering with the minutes: If a person is found guilty of tampering with the minutes of the proceedings of meeting, he shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Drafting of minutes: The minutes may be drafted in a tabular form or they may be drafted in the form of a series of paragraphs, numbered consecutively and with relevant headings. However, all minutes whether of general meetings, or board meetings, should contain the following particulars:

Particulars of the Meeting

(1) Name of the meeting.

(2) Place, date and time of meeting.

(3) How the meeting was constituted.

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Constitution of the Meeting - Present

(a) name of person in the Chair.

(b) names of directors and Secretary.

(c) names of persons in attendance……. Solicitor,…….auditor (in a board meeting).

(d) together with number of members (in general meeting).

Contents of minutes

(4) Serial number of the minute.

(5) Brief subject heading or index of each minute.

(6) Full terms of resolutions adopted.

(7) All statistical figures, amounts, dates, rate of interest, Nos. of Shares, etc.

(8) Specific business upon which decisions were taken.

(9) All appointments of officers, salaries, etc.

(10) Financial and contractual transactions considered by the meeting.

(11) In the case of special resolution number of votes for and against.

(12) Objections and protests raised by members together with the Chairman's rulings when members insist on their recording in the minutes, e.g., Mr. A objected to the proposed motion on the ground that it was *ultra vires*, the Chairman ruled that the motion was in order.

(13) Names of directors dissenting or not concurring with any resolution passed at a Board Meeting.

(14) Reference about interested directors abstaining from voting is necessary.

(15) The Chairman's signature and date of verification of minutes as correct.

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Specimen Minutes

Minutes of…….. meeting of the Board of Directors of ABC Limited held on…….. the…….. 2017, at New Delhi

Present:

1. …….. Chairman
2. …….. Director
3. …….. Director

In attendance Secretary

Item No. 1: Leave of absence:

Leave of absence was granted to Saravashri…….. directors.

Item No. 2: Confirmation of minutes of the…….. Board meeting:

The minutes of the…….. meeting of the Board of Directors held on…….. were considered and confirmed.

Item No. 3: Appointment of Managing Director:

The Board noted the appointment of Shri…….. director of the company as the Managing Director of the company. In this connection, the following resolutions were passed:

"*Resolved* that Shri…….. who fulfils the conditions specified in Parts I and II of Schedule V to the Companies Act, 2013, be and is here by appointed as the Managing Director of the company for a period of five years effective from…….. and that he may be paid remuneration by way of salary, commission and perquisites in accordance with Part II of Schedule V to the Act.

Resolved further that the Secretary of the company be and is hereby directed to file the necessary returns with the Registrar of Companies and to all acts and things as may be necessary in this connection."

Item No. 4: Next Board Meeting:

The next meeting of the Board will be held on…….. the…….. 20…… at the registered office of the company. The meeting ended with a vote of thanks to the chair.

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