

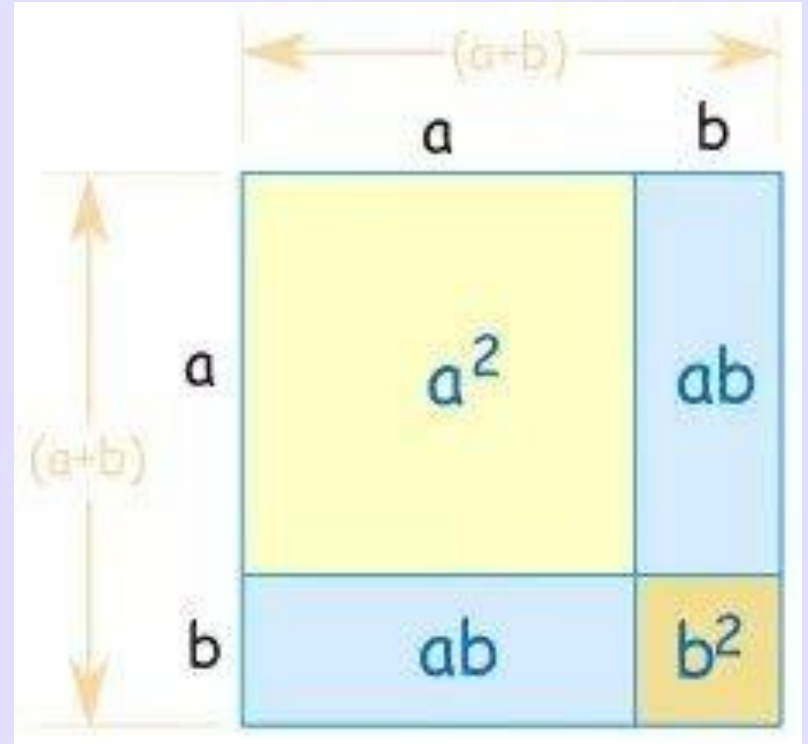
# *DRAFTING OF OPINIONS*



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# Prologue

- ▶ “Law must be certain” – A principle based on the doctrine of precedent
- ▶ Article 141 of the Constitution states that “The law declared by the Supreme Court shall be binding on all courts within the territory of India”



# What is an opinion?

▶ An opinion is an expression of view on any given issue/ subject by an expert – to enable the seeker to take an informed decision:

- To be specific
- Logical
- Reasoned
- Supported by defined principles of law and not based on what others are doing



# Who is an expert?

- ▶ Sec. 2(38) of CA 2013 – “expert” includes an engineer, a valuer, a CA, a CS, a CA and any other person who has power or authority to issue a certificate in pursuance of any law for the time being in force.
- ▶ S.45 of IE Act 1872 – A person specially skilled are called ‘experts’ (limited to foreign law, science or art or identifying handwriting/ finger impressions)



# When do you require an opinion?

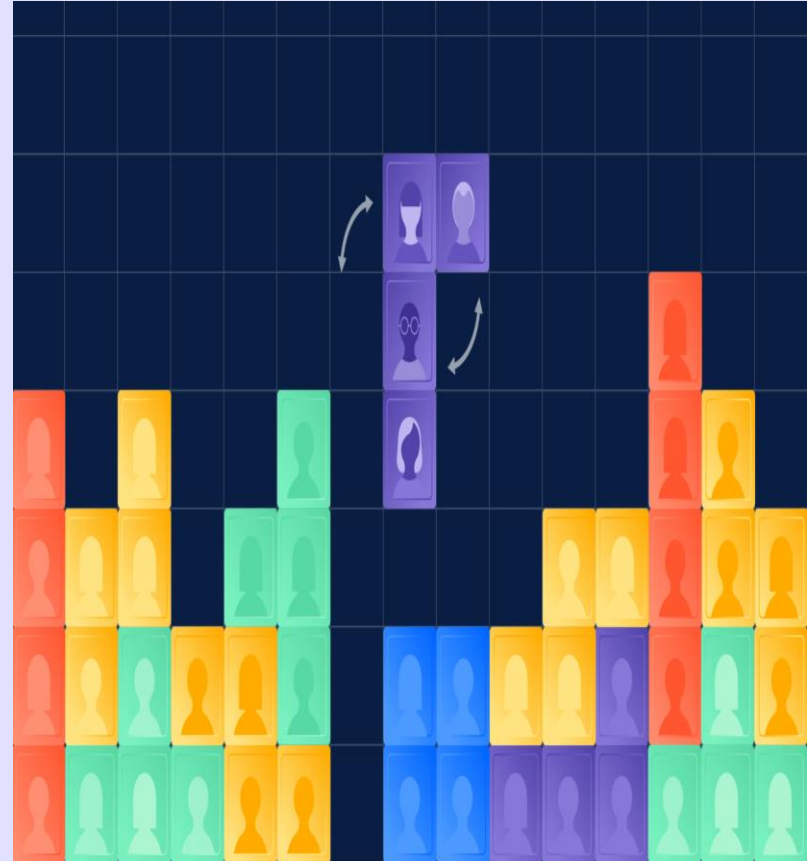
- ▶ In a transaction
- ▶ In a litigation matter
- ▶ In drafting an agreement
- ▶ In day-to-day compliance
- ▶ For a specific issue/ general advisory





# Structure of an opinion

- ▶ Facts
- ▶ Queries/ Issues
- ▶ Applicable Law
- ▶ Analysis of Applicable Law
- ▶ Conclusion/ Executive Summary



# Structure (contd..)

- ▶ Facts:
  - Test of Relevancy
  - Test of Sufficiency
- ▶ Queries/ Issues:
  - Frame the issues clearly





# Structure (contd..)

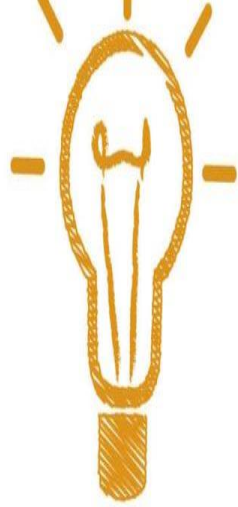
- ▶ Applicable law:
  - Committee Reports
  - Other jurisdictions
  - Dictionary meanings
  - Provisions of law
  - Judicial precedents
  - Circulars/ Notifications
- ▶ Analysis of the Applicable Law
- ▶ Conclusion/ Executive Summary (need not give any remedy always)



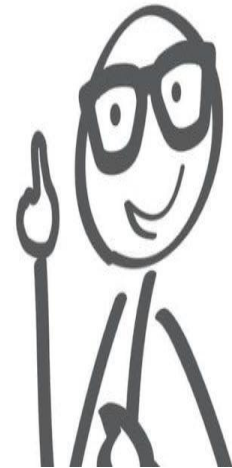
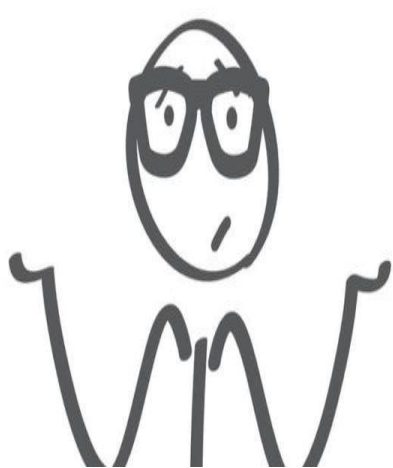
# Structure (contd..)

- ▶ Assumptions:
  - Cannot be of essential facts
  - Reasonable
- ▶ Disclaimer:
  - Based on the information provided
  - Based on the law as on the date of the opinion





# Some issues for discussions



# Issue No. 1: CSR

- ▶ Circular of the MCA (Dt. 12-1-2016)– Excess amount spent on CSR activities cannot be forward and adjusted in the subsequent years
- ▶ Merger of profit making company into a loss making company – can the amount spent by profit making company towards CSR, after the accounts are re-casted from the appointed date, be carried forward?



# Issue No. 2: Deposit Rules

- ▶ Exclusions from deposits:
  - Advances from customers beyond 365 days
  - Amounts received in accordance with FEMA
- ▶ Maxim: Generalia Specialibus Non-derogant:
- ▶ Rule of harmonious construction: An interpretation which avoids inconsistency or repugnancy between the various sections or parts of the statute should be adopted



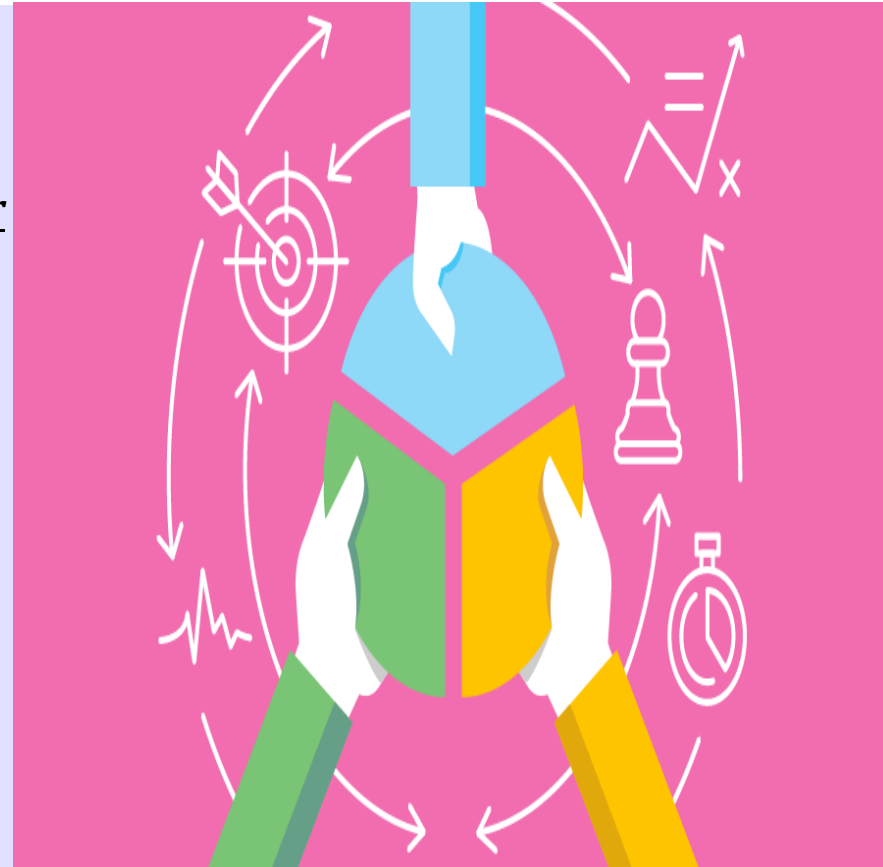
# Issue No. 3: Who is 'any other person'

- ▶ S. 94(3) of CA states that registers/ returns can be inspected by a member, debenture holder, other security holder or beneficial owner or any other person.
- ▶ Rule of Ejusdem Generis – of the same kind/ nature. A rule of interpretation that where a class of things is followed by general wording that is not itself expansive, the wording is usually restricted to things of the same type as the listed items.
- ▶ **Anil Kumar v Futura Commercials Pvt. Ltd. [2017] 201 Comp Cas 12 (NCLT)**



# Issue No. 4: Who is 'other stakeholders'

- ▶ S. 31 of IBC states that the approved resolution plan shall be binding on the corporate debtors and its employees, members, creditors, guarantors and other stakeholders involved in the resolution plan.
- ▶ How far does rule of Ejusdem Generis apply?
- ▶ Whether this can bind government authorities?
- ▶ Scheme of mergers are stampable





# Issue No. 5: What is appropriate forum/ remedy

▶ What is appropriate forum/ remedy for collection of dues

- Civil Courts;
- Arbitration;
- MSME Facilitation Council;
- NCLT;
- Criminal Courts (IPC - Cheating, Criminal Breach of Trust, Negotiable Instrument Act, 1881)





# Issue No. 6: Oppression & Mismanagement

- ▶ Right to apply for O&M for companies limited by shares – 100 members or  $1/10^{\text{th}}$  of total no. of members, whichever is less (or) members holding  $1/10^{\text{th}}$  of the issued share capital. Joint members shall be counted as one.
- ▶ Who should be counted: Joint member – first/ second, Trustee, Karta of HUF?



# Issue No. 7: Amendment of AoA

- ▶ Whether the transaction documents like SHA, should be mandatorily incorporated in the AoA?
- ▶ Section 58 (2) states that public company's shares are freely transferable. Proviso: *provided that any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.*
- ▶ Does clauses like – restriction on transfer of shares, drag along and tag along need to be inserted in AoA?



*Articles of Association*

## Issue No. 8: Continuing default

- ▶ What is a continuing offence? S. 188 (5) in case of violation company shall be punishable with fine which shall not be less Rs. 25,000/- but which may extend to Rs. 5,00,000/-
- ▶ Can provision be made towards the penalty?



## ▶ Withdrawal of Opinion





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exceeding expectations  
since 1985

**Thank You**