FAQ's based on the queries received at the various sessions of

Quest Assist - ICSI

(Updated as on 11.05.2017)

INCORPORATION OF COMPANY

Q. 1 In case of a Foreign Company, where the place of business is in India, who can be appointed as authorised representative?

Ans: Pursuant to provision of Section 380 of the Companies Act, 2013, one or more persons resident in India can be authorized to accept on behalf of the company service of process and any notices or other documents required to be served on the company. Such person can be authorized either through board resolution or power of attorney by the foreign company.

Q. 2 How the subscriber sheet should be signed in case of foreign subscribers?

Ans: In case of a foreign subscriber signing outside India, the MOA subscriber sheet needs to be physically signed and appostiled/consolised at the place of signing in accordance with Rule 13 of the Companies (Incorporation) Rules, 2014. The complete MOA and AOA along with the subscriber sheet should be attached with the e-form INC-32 (SPICe).

Q. 3 How to file INC-32 (SPICe) in case of Foreign Subscriber and Foreign Body Corporate?

Ans: Foreign subscribers having a valid DIN, DSC and a valid business visa can file INC-32 (SPICe) with INC-33 (eMoA) and INC-34 (eAoA) as linked forms.

However, in case of foreign subscribers without a valid business visa, form INC-32 shall be filed with physical copies of apostillised MoA and AoA.

In respect of Foreign Body Corporate, pdf attachments of apostillised MOA and AOA shall be attached with SPICe (INC-32).

Q. 4 How to file Spice if only DIN available in case of Foreign Subscriber?

Ans: According to Rule 13 (5) of the Companies (Incorporation) Rules, 2014, in case of Foreign Subscriber, if both DIN and valid business visa are available, then Spice, e-MOA & e- AOA are sufficient. But if there is no valid business visa, then physical MOA and AOA will be required to be signed outside and duly Apostiled /Consolised as per the rule.

In case the Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

Q. 5 What is the meaning of the term "Entrenchment"?

Ans: The term 'Entrenchment' or 'Entrenched Article' is not defined in the Companies Act, 2013. Dictionary meaning of 'entrenched' is: 'established firmly so that it cannot be changed'. An entrenched clause or entrenchment clause of a basic law or constitution is a provision which makes certain amendments either more difficult or impossible.

Section 5(3) provides that the Articles may contain provisions for entrenchment to the effect that specified provisions of the Articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the cases of special resolution are met or complied with.

For example – The Company may specify some of its Articles as 'Entrenched' meaning thereby such entrenched articles can only be modified subject to some more restrictive procedures than only 'special resolution' for ex. Unanimous approval.

Q. 6 Spice (INC-32) is allowing limit of only 75 characters for writing proposed name of the company. Please guide as to how to proceed if the proposed name is of 78 characters.

Ans: Maximum limit for the Name column as per Spice is 75 characters and you cannot go beyond that. In case of more than 75 characters in the proposed name, you can file form INC-1 which allows up to 100 characters in name.

Q. 7 In Form INC- 22, a Company Secretary has to give Declaration that he has personally visited the Registered Office and verified that it is functioning for the business purposes of the company.

Can he delegate and authorise any other person on his behalf and take his affidavit for the same?

Ans: No, the visit shall be conducted by the Company Secretary himself/herself as this task cannot be delegated in terms of the Declaration stated in Form INC – 22 which is required to be given by the Company Secretary in his/her name only.

Q. 8 What is the procedure to get Refund in case Form INC-32 is rejected?

Ans: File "Form Refund" on MCA to get refund in case of rejection of INC – 32 (SPICe).

Q. 9 Whether interest in a sole proprietorship firm or a partnership firm or an LLP should be specified in the "Interest of Directors" by the Director of a Company? What should be specified in registration no. for

such firms?

Ans: Yes, each and every interest of a Director of any Company, being in a sole proprietorship firm or a partnership firm or an LLP should be specified in the 'Interest of Directors'. PAN for partnership firms and sole proprietorship firms shall be specified in respect of the registration no.

Q. 10 Is it necessary to attach any additional documents in addition to the documents as per list of attachments mentioned in SPICe Form 32 for incorporation of a company?

Ans: Yes, it is required to attach some additional documents in addition to the documents listed as attachment to SPICe Form 32 which is as below (these are indicative and not complete and conclusive, RoC may ask for some other additional documents):

(i) Consent from proposed directors in form DIR-2 along with ID and address proof;

(ii) Certified copy of MoA, AoA, COI and Board resolution in case the subscriber/promoter is a Company incorporated outside India(duly notarized and apostile, as per the rule);

(iii) Declaration from all the proposed directors holding valid DIN that the particulars in their respective DIN are same as of date and there is no change

Q. 11 In case registered office address is different from the address for correspondence shown in SPICe Form 32 at the time of incorporation and PAN has been issued on correspondence address, what will be the process for intimating the registered office address?

Ans: In case the registered address is different from the address for correspondence shown in SPICe Form 32, INC-22 alongwith necessary attachments is required to be filed within 30 days of incorporation, for intimating the registered office address. Also, necessary rectification in PAN data will be required for change in address by filing Form 49A with the Income tax authority.

Q. 12 In some cases the ROC rejects the proposed name citing the reasons that it's common name/similar name etc. etc.

Ans: Before filing INC 1 or SPICe Form 32, always go through Rule 8 of the Companies (Incorporation) Rules, 2014, check the key words of proposed name at MCA web portal as well as at the web portal of Intellectual Property India – trademarks to rule out the existence of similar name.

Also, it is suggested that in case the proposed name looks general, then one may add name of promoter or any mix match of its initials before such general word. For ex. The proposed name is 'King Private Limited', instead of this, if we propose 'PKM King Private Limited' then the name may get approved as the proposed name is now specific and not general word.

Q. 13 Whether subscription money can be received in cash by newly incorporated company?

Ans: There is no prohibition/restriction under the Companies Act, 2013 for receiving the subscription money in cash (i.e. not through account payee cheque or other banking channel). However, the Company and/or subscriber(s) has(ve) to comply with the provisions of the Income Tax Act with regard to cash transaction.

Q. 14 How to get the name of the Company modified/changed prior to incorporation whose name is already reserved by approval of Form INC-1?

Ans: Once the name has been reserved by approval of e-Form INC 1, there is no procedure to get it modified/changed prior to its incorporation. In such a case either wait till the period to get it expired and apply afresh or write a request letter to the Registrar of Companies for surrender of the reserved name and apply afresh for new name.

Q. 15 Can a Company be incorporated under two or more categories of industry code?

Ans: No, at the time of incorporation or change in object clause, only one appropriate industry code is permissible to be mentioned in the respective e-form.

ALTERATION OF MOA & AOA

Q. 16. MOA and AOA drafted according to the Companies Act, 1956. Is it mandatory to alter MOA & AOA as per the Companies Act, 2013? Is it mandatory to file MGT 14 if we change it as per 2013 Act?

Ans: Sub-section (6) of Section 5 provides that the articles of a company shall be in respective forms specified in Tables F, G, H, I and J in Schedule I as may be applicable to such company.

Sub-section (9) of section 5 provides that nothing in this section shall apply to the articles of a company registered under any previous law unless amended under the Act.

It is advisable that whenever a company amends its articles, it should ensure that subsequent to the amendment, the AOA is as per the format specified under the Companies Act, 2013.

Since certain provisions of Companies Act, 2013 require specific clauses in the Articles to carry out such operations for e.g. for issuance of bonus shares, it is advisable that the Articles should be altered in line with the new requirements as various provisions themselves require specific clauses to be incorporated in the

Articles.

It is mandatory to pass a special resolution and file MGT 14 if you alter MOA and/or AOA as per the Companies Act, 2013.

Q. 17. We have not adopted new AOA as per the Companies Act, 2013 and there is no power in our AOA for dematerialisation of equity shares. Should we amend our AOA or adopt new AOA as per 2013 Act?

Ans: Adopt new AOA as per the Companies Act, 2013 and add the new clause related to dematerialisation of shares. The registrar may refuse the form MGT-14 and will enforce you to adopt new AOA if you try to amend your existing AOA by adding dematerialisation clause.

Q. 18 INC-33 (eMOA) does not have Other Object like earlier provided in the Act, can we incorporate other objects in e-MOA?

Ans: As per Section 4 (1) (c), the memorandum of a company shall state the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The Companies Act, 2013 does not provide for 'Other Objects'.

Q. 19 Do we need to attach physical MOA & AOA with MGT – 14 if a company incorporated through SPICe Form INC- 32, 33 and 34 wants to alter MOA & AOA? Do we need to file amended SPICe Form INC - 33 and 34 in case of alteration?

Ans: The Companies Act, 2013 has provided the format of MOA (table A to E of Schedule I) and AOA (table F to J of Schedule I) and the SPICe form INC- 33 and INC - 34 have also adopted the said format of respective table as applicable to the Company.

Accordingly, for alteration of MOA and/or AOA, scanned copy of amended MOA and/or AOA will be required to be attached with the e-Form MGT - 14 and not the altered SPICe Form INC - 33 and /or 34.

Q. 20 Is it possible to enter an additional Article in INC – 34 (eAOA) in addition to model Articles?

Ans: INC-34 (eAOA) has the facility for adding, modifying, and deleting Articles.

Q. 21 Difficulty in attaching DSC, it takes too much time when attaching with the new forms and showing Error.

Ans: Many a times the error in DSC registration occurs, when the details of members as per the records of the Institute do not match with PAN details.

Accordingly, ensure that the details of members must match with PAN details and updated records are submitted to MCA by the Institute.

Further, try changing the PDF setting. MCA has prescribed settings for reduction of the Size of PDF Documents which is available on the MCA – Forms & Downloads.

Q. 22 How to reduce the size of e-Form?

Ans: Always scan the documents in black and white mode. Prior to filling up e-Form, visit MCA website, select Company Forms under MCA services and view procedure given under "Useful instructions to optimize the PDF file size while affixing the Digital Signature Certificate (DSC)."

Q. 23 Can we change Main Objects of the Company without changing the name of the Company?

Ans: Yes, Main Objects of the Company can be changed without changing name of the Company after complying with the provisions of Section 13 of the Companies Act, 2013.

Q. 24 Can Subscriber List be altered?

Ans: Subscriber Sheet is a life time document of a Company, thus Subscriber List shall never be altered for a Company.

Q. 25 Company already registered with a certain name enters into new set of activities of business which are not in consonance with the name of the Company. Can a Company continue with such activities of business?

Ans: In case new set of activities of business are as per the approved objects of MOA, the Company can continue with the same name.

Q. 26 Can a trust or society or an LLP become a subscriber of a Company?

Ans: Yes, a trust or society or an LLP can become a subscriber of a Company.

ISSUE AND ALLOTMENT OF SECURITIES

Q. 27 How to file Balance Sheet if Subscription Money is not received?

Ans: Subscription money to be paid is the liability of the Subscriber thus if subscription money is not received by the Company then the Balance Sheet shall show the same amount of such capital not received as "Recoverable from

Subscriber" on the "Assets" side.

Q. 28 If a Company has been incorporated but the Subscribers have not paid subscription money, whether it is necessary to issue share certificates within two months as per the provisions in Companies Act, 2013?

Ans: As per Section 56 (4) (a) the Companies Act, 2013, a Company shall issue Share Certificates to the subscribers of Memorandum within 2 months from the date of Incorporation. But it is to be ensured that Share subscription money is received before issuing share certificates.

Therefore, share certificates should be issued only after the receipt of money.

Q. 29 Do we need to maintain a complete record of Private Placement Offer in Form PAS – 5 in case of preferential offer to existing members only?

Ans: Proviso to Rule 13(1) of the Companies (Share Capital and Debentures) Rules, 2014 provides that in case of any preferential offer made by a company to one or more existing members only, the provisions of sub-rule (1) and proviso to sub-rule (3) of Rule 14 of Companies (Prospectus and Allotment of Securities) Rules, 2014 shall not apply.

Accordingly, there is no requirement of making open offer in Form PAS – 4 and filing thereof with the Registrar of Companies in such cases.

However, complete record of private placement offer is required to be maintained in Form PAS – 5 as the same has not been exempted.

REGISTRATION OF CHARGES AND CONDONATION

Q. 30 What are the forms to be filed for condonation of delay by the Central Government?

Ans: In case the due date of filing of form for creation/modification/satisfaction has expired, then it is advised to first file Form CHG-1 for creation or modification of charge or Form CHG-4 for satisfaction of charge, as the case may be. Then, file Form CHG-8 for condonation of delay in registration/modification/satisfaction of charge to Central Government (power delegated to Regional Director) and Form INC-28 for filing the certified true copy of the order passed by RD to the Registrar of Companies as per the provisions of Chapter VI of the Companies Act, 2013.

Q. 31 What is the fee for filing e-form CHG-8?

Ans: Please refer Rule 12 of the Companies (Registration of Offices and Fees) Rules, 2014 for the filing fee of e-form CHG-8. Further, the same has also been mentioned in the Instruction kit of the e-Form CHG-8.

Q. 32 What are the attachments required with Form CHG -1?

Ans: The attachments required to be filed with Form CHG – 1 are as follows:-

- Instrument(s) of creation or modification of charge is a mandatory attachment in all cases.
- Instrument(s) evidencing…….which is already subject to charge ……such acquisitions. This attachment is mandatory in case if there is any acquisition of property which is already subjected to charge.
- Particulars of all joint charge holders. It is mandatory if number of charge holder is more than one.

The Instrument of creation or modification of charge is required to be attached with Form CHG-1. The word 'Instrument' is not defined in the Companies Act, 2013.

Further as per the Indian Stamp Act, 1899, "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or record. It may include Hypothecation Deed and any other agreement received from the bank by which security interest is created.

Q. 33 Is it necessary to file Form CHG-8 for condonation of delay if there is a delay in filing CHG-4 due to late receipt of NOC from the Bank?

Ans: Yes, It is necessary to file CHG-8 for condonation of delay if there is a delay in filing CHG-4 due to late receipt of NOC from the Bank.

Q. 34 Whether physical submission of petition to the CG (power is delegated to RD) is required in case of condonation of delay in filing the particulars of charge, modification or satisfaction of charge?

Ans: No, the physical submission of petition to the CG (power is delegated to RD) is not require in case of condonation of delay in filing the particulars of charge, modification or satisfaction of charge.
Further, it is suggested to submit the application petition to RD for the speedy disposal of case and ease of processing.

APPOINTMENT AND QUALIFICATIONS OF DIRECTORS

Q 35. If the director has already filed DIR – 11 post his resignation, then what shall be the consequences on the company for the non-filing of DIR - 12 within the stipulated time?

Ans. Filing of Form DIR - 11 & Form DIR - 12 are separate responsibilities, Form DIR - 12 is the responsibility of the Company whereas the Form DIR – 11 is onus on the part of the Director of the company.

As per Rule 15 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the Company shall within 30 days from the date of receipt of notice of resignation from a director, intimate such resignation to the Registrar in Form DIR-12. Further, DIR - 12 can be filed with ROC until 300 days with additional fees as prescribed. However, after 300 days if the company wishes to file Form DIR -12 with the ROC then it shall first get the delay condoned by filing form CG -1 with the MCA.

Q 36. Whether Non - Executive Director of a Private Limited Company can also render services as a consultant (If having expertise in a particular field) to the same company and a company in some other Group? Which companies are required to appoint independent directors?

Ans. A Non-Executive Director of a Private Limited Company is eligible to act as a consultant of the private company in which he is a director. However, any such appointment shall be done in compliance of section 184, 188 of Companies Act, 2013 and Rules framed thereunder. Subject to Articles of Association of the Company, he can also be appointed as consultant of any other company.

Appointment of independent Director is mandatory in listed companies and certain specified companies [refer rule 4 of Companies (Appointment and Qualification of Directors) Rules, 2014]. Private companies are exempted from appointing any independent directors.

Q 37. Can a resolution be passed and DIR-12 be filed in advance for the appointment of a director which will be effective from a future date?

Ans. Yes, a resolution may be passed for any appointment of director which is effective from any future date.

However, DIR-12 can only be filed within 30 days of the effective date of appointment. (i.e. the. Form DIR -12 cannot be filed in advance).

Q 38. Are the compliances required for appointment of an additional director same as that of appointment of a director.

Ans. Some of the compliances for appointment of an additional director and appointment of a director are same like Entry in Register of directors, filing of form DIR-12.

However, to appoint an additional director, the Board is empowered but a Director can only be appointed at general meeting. There is also a difference of term of officer of both additional director and a director.

Q 39. The present and permanent address of the director is same. How to change the present address?

Ans. File Form DIR - 6 to change the present address of the director. Duly attach proof of change as address proof with Form DIR -6. Such form is required to be filed within 30 days from the date of change.

Q 40. Is it required to file the financial statements before filing Form DIR – 10 i.e. application for removal of disqualification of directors?

Ans. Yes, you may need to make the default good by doing necessary filings before filing Form DIR – 10 i.e. application for removal of disqualification of directors.

Q 41. In case the director is being appointed by a listed company as an Additional Director as well as an Independent Director in the board meeting, can we mention designation as Additional Director in the Form DIR – 12, and as an Independent Director while intimating the stock exchange.

Ans. Yes, you may mention his designation as an Additional Director in the Form DIR – 12 and intimation to stock exchange can be given mentioning him as an Independent Director.

Q 42. If a director is disqualified u/s 164, does he vacate the office in the defaulting company only or in all other companies in which he is a director?

Ans. Section 167 (1) provides that any person who incurs any disqualification specified in section 164 shall be liable to vacate his office as a director. Thus his office shall become vacant. The plain reading of section 167 signifies that such person shall vacate his office in all companies.

Q 43. Is it compulsory to take DIR - 8 for every financial Year as it is not mentioned in the law?

Ans. Rule 14(1) of Companies (Appointment of Directors and Qualification) Rules, 2014 provides that Form DIR - 8 is required to be filed by a director at the time before his appointment or re-appointment. As a good practice, Form DIR -8 may be submitted before the commencement of a financial year.

Q 44. Is it mandatory to file Form MR - 1 - Return of appointment of Key Managerial Personnel for the appointment of Managing Director in case of a Private Company as appointment of MD is not mandatory for a Private Company?

Ans. MCA Exemption notification dated 5th June, 2015 exempts sub-sections (4) and (5) of section 196 for private companies. Accordingly, it is not mandatory to file Form MR - 1 for appointment of a Managing Director by any such company.

Q 45. In case of appointment of a director in a Private Company, there are three options - Independent, Promoter and Professional. If a person is not a promoter or professional, we only have the option to select Independent Director. Shall it be the right option?

Ans. In a private company, appointment of independent director is not mandatory and because of this reason such category cannot be selected while filing form DIR-12. Further, Professional means a person having expertise and specialized knowledge in the field in which the company operates.

Hence, in respect of a private company while filing Form DIR-12 if we don't have the correct option then we should opt for professional category instead of independent director.

Q 46. If a director is getting remuneration, he is an Executive director - Is this interpretation correct as proper definition of executive director is not mentioned in the Act?

Ans. As per Rule 2 (k) of the Companies (Specification of Definitions Details) Rules, 2014, Executive Director means, "A whole time director as defined in clause (94) of section 2 of the Act". Hence, if a person is appointed as a director of the company and he is also in employment of the company, he becomes the whole time director of the company and therefore, the executive director of the company.

Thus remuneration is not the only the criteria to determine whether the director is Executive director or not. A person may be an executive director without drawing any remuneration and may also draw remuneration in professional capacity though not holding any executive position.

Q 47. Whether rotation of director is applicable on whole time director as well?

Ans. The Companies Act, 2013 does not bar a whole time director to be appointed as a rotational director. Hence, a Whole Time Director can also be director liable to be retire by rotation.

Q 48. If someone wants to appoint a director in any private company, do we need to give a candidature with a prescribed fee of Rs. 1 Lac?

Ans. As per notification GSR 465 (E), dated 05.06.2015, section 160 shall not be applicable on a Private Company. Hence, a director may be appointed without complying with section 160 i.e. no candidature shall be proposed or any fee shall be deposited.

Q 49. Is there any Age limit for appointment of a Managing Director in a Public Company?

Ans. Part 1 of Schedule V of the Companies Act, 2013 says the minimum age for appointing a person as a Managing Director, Whole Time Director and Manager that he has completed the age of 21 years and has not attained the age of 70 years. However, after attaining the age of 70 years, company may by a Special resolution proceed with the appointment and no further approval by the Central Government will be required.

SEBI, PIT, TAKEOVER AND COMPANIES LISTED AT EXITING RSE'S

Q 50. A company is listed at NSE. Promoters are holding 70% shares and they want to further acquire 5% shares. Whether the Promoter has to prepare and submit Trading Plan in terms of the provisions of the SEBI (PIT) Regulations, 2015? Whether Open Offer get triggered?

Ans. Submission of Trading Plan [as mentioned under Regulation 5 of SEBI (PIT) Regulations, 2015] is an option not an obligation.

As per Reg. 3(2) of the SEBI (SAST) Regulations, 2011, no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer.

So, in the aforesaid case, open offer shall not be triggered.

Q 51. A listed company had adopted a code as per the SEBI (Prohibition of Insider Trading) Regulations, 1992. Whether it is required to adopt a new policy as per the new SEBI (PIT) Regulations, 2015?

Ans. SEBI (PIT) Regulations, 2015 was notified on 15th January, 2015 and came into force on 120th day from the date of notification. As per sub-regulation (1) of Regulation 12 of SEBI (PIT) Regulations, 2015, The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 are being repealed. Further, as per Reg. 8(1) of the SEBI (PIT) Regulations, 2015, the board of directors of every listed company has to formulate and publish on its

official website, a code of practices and procedures for fair disclosure of unpublished price sensitive information that it would follow in order to adhere to each of the principles set out in Schedule A to these regulations, without diluting the provisions of these regulations in any manner.

Accordingly, a listed company had to adopt new code of practices and procedures for fair disclosure of unpublished price sensitive information, as prescribed under Reg. 8(1) of SEBI (PIT) Regulations, 2015.

Q 52. Whether it is required by a listed company to inform the stock exchange about the closure of trading window?

Ans. The provisions of SEBI (PIT) Regulations, 2015 [or erstwhile SEBI (PIT) Regulations, 1992] does not specifically provide the requirement for intimating the stock exchange about closure of trading window. However, NSE vide NSE/CML/2013/15 dated December 18, 2013 and BSE vide DCS/COMP/ 14 /2013-14 dated 3rd February, 2014 has advised listed company to inform the exchange about the closure of trading window.

These circulars of NSE/ BSE were issued with reference to the requirements under the erstwhile SEBI (PIT) Regulations, 1992, however, as per sub-regulation (3) of Regulation 12 of SEBI (PIT) Regulations, 2015, after the repeal of Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992, any reference in any other regulations made, guidelines or circulars issued thereunder by the Board shall be deemed to be a reference to the corresponding provisions of SEBI (PIT) Regulations, 2015.

Thus, a listed company should continue to intimate the stock exchange about the closure of trading window, even under the new SEBI (PIT) Regulations, 2015.

Q 53. While some of the provisions of the SEBI (PIT) Regulations, 2015 are applicable only on the Designated Persons; whether the disclosure requirement under Reg. 7(2) is applicable in case of all employees of the listed Company?

Ans. As per Regulation 7(2)(a) of the SEBI (PIT) Regulations, 2015, every promoter, employee and director of every company shall disclose to the company the number of such securities acquired or disposed of within two trading days of such transaction if the value of the securities traded, whether in one transaction or a series of transactions over any calendar quarter, aggregates to a traded value in excess of ten lakh rupees or such other value as may be specified.

So, as per the aforesaid provisions, the disclosure requirements under reg. 7(2)(a) is applicable in case of each employee.

Q 54. A disclosure was made to the stock exchange under Regulation 10(5) of SEBI (SAST) Regulations, 2011, regarding proposed inter-se transfer among promoters. However, now the promoters do not intent to enter into the transaction. Whether, this withdrawal of the decision is required to be notified to the stock exchange?

Ans. Yes; the withdrawal of the decision for proposed inter-se transfer of shares among promoters, should also be disseminated to the stock exchange.

Q 55. A Company (Exclusively Listed Company i.e. ELC) was listed on the regional stock exchange (RSE) and after de-recognition/ exit of such stock exchange now the Company has been shifted to the dissemination board (DB) of BSE. What are the obligations for a Company (including its promoters) as per the relevant SEBI Circular dealing companies which was exclusively listed on RSEs?

Ans. As per the SEBI Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/110 dated 10th October, 2016, an ELC on the DB would be required to exercise one of the two options as mentioned below:

(i) Raising capital for listing on Nationwide Stock Exchanges:

In order to facilitate listing on nationwide stock exchanges, the ELCs on the DB are allowed to raise capital for meeting the listing requirements through preferential allotment route in terms of the provisions under the Issue of Capital and Disclosure Requirements Regulations, 2009 (ICDR).

However ELCs are required to meet other eligibility norms of respective nationwide stock exchange, to get listed.

(ii) Promoter(s) of the ELC to provide exit to all investors.

The ELC and its promoter(s) may also choose to provide exit to the investors.

Promoters of ELCs, which fail to list on the nationwide stock exchanges under the aforesaid mechanism shall also provide exit to its investors as per aforesaid SEBI Circular.

The last date for the ELCs to provide to the BSE/ NSE the plan of action to comply with the aforesaid requirement is 30th June, 2017.

Please refer the circular for more details.

Q 56. A company is listed on the Calcutta Stock Exchange Limited (CSE). Whether the provisions relating to providing exit to the public shareholders as per the SEBI Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/110 10th October, 2016, is applicable to such company?

Ans. No, the Calcutta Stock Exchange Limited has yet not been de-recognized/ exited and the companies listed at CSE are not shifted to the Dissemination Board of BSE/ NSE. SEBI Circular No. SEBI/HO/MRD/DSA/CIR/P/2016/110 dated 10th October, 2016 are applicable only on company shifted to Dissemination Board of NSE/ BSE.

Q 57. Whether a listed company is required to submit the information to the stock exchange regarding loss of share certificate as well as issue of duplicate share certificate?

Ans. In terms of the provisions of Regulation 39(3) of SEBI (LODR) Regulations, 2015, a listed entity has to submit information regarding loss of share certificates and issue of the duplicate certificates, to the stock exchange within two days of its getting information. Accordingly at both instances, i.e., (i) on receipt of the information relating to loss of share certificate and also (ii) upon issue of duplicate share certificate; the listed company should inform the stock exchange.

Q 58. Whether the disclosure under Regulation 29(2) of the SEBI (SAST) Regulations, 2011 is required to be made for change in shareholding of more than 2% from the last disclosure made under Reg. 29(1) or Reg. 29(2) or for change in shareholding of more than 2% from the date of closure of last financial year?

Ans. As per regulation 29(2) of the SEBI (SAST) Regulations, 2011; any person, who together with persons acting in concert with him, holds shares or voting rights entitling them to five per cent or more of the shares or voting rights in a target company, shall disclose the number of shares or voting rights held and change in shareholding or voting rights, **if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under sub-regulation (2) and such change exceeds two per cent of total shareholding or voting rights in the target company.**

So for the purpose of applicability of Reg. 29 (2) of the SEBI (SAST) Regulations, 2011; the difference between the shareholding in the immediate last disclosure made under Reg. 29(1)/ 29(2) and the present shareholding needs to be checked. In case this difference is more than 2%; the disclosure under Reg. 29(2) gets attracted.

Q 59. Whether the provisions of Regulation 3(2) of the SEBI (SAST) Regulations, 2011 (provisions relating to creeping acquisition) gets attracted 'individual shareholder-wise or along with the persons acting in concert with such shareholder'?

Ans. As per Reg. 3(2) of the SEBI (SAST) Regulations, 2011, no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer.

However, Reg. 3(3) of the SEBI (SAST) Regulations, 2011 clarifies that acquisition of shares by any person, such that the **individual shareholding** of such person acquiring shares exceeds the stipulated thresholds mentioned under Reg. 3(1) or 3(2), shall also be attracting the obligation to make an open offer for acquiring shares of the target company, irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.

For example, in case the overall promoter group shareholding increased from 60% to 64% and within that shareholding of an individual shareholders is increased from 6% to 13%; open offer shall not be triggered; as the shareholding of such individual shareholder has crossed the ceiling of 25%. However, in a situation, when an individual shareholder's shareholding is increased from 26% to 32%, then the open offer shall get triggered.

Q 60. As per Regulation 32 of SEBI (LODR) Regulations, 2015, a company is required to submit to the stock exchange, a statement indicating deviation or variation in the use of proceeds from the objects of Public/ Right/ Preferential Issue. Whether this statement is required to be submitted even after the issue proceeds has been fully utilised? Whether, this statement is required to be submitted, if there is no deviation/ variation in use of issue proceeds?

Ans. As per Regulation 32(1) of the SEBI (LODR) Regulations, 2015 (1), a listed entity shall submit to the stock exchange the following statement(s) on a quarterly basis for public issue, rights issue, preferential issue etc.:

(a) indicating deviations, **if any,** in the use of proceeds from the objects stated in the offer document or explanatory statement to the notice for the general meeting, as applicable;

(b) indicating category wise variation (capital expenditure, sales and marketing, working capital etc.) between projected utilisation of funds made by it in its offer

document or explanatory statement to the notice for the general meeting, as applicable and the actual utilisation of funds.

Reg. 32(2) clarifies that statement(s) specified in sub-regulation (1), shall be continued to be given till such time the issue proceeds have been **fully utilised or the purpose for which these proceeds were raised has been achieved.**

Accordingly, the disclosure is required to be provided till the time the issue proceeds has been fully utilised.

The provision of clause (a) of Reg. 32(1) indicates that, the statement of deviation(s) or variation(s) should be provided, if there is some deviation otherwise not required.

Q 61. Whether each Insider has to prepare and submit Trading Plan in terms of the provisions of the SEBI (PIT) Regulations, 2015?

Ans. An insider shall be entitled to formulate a trading plan and present it to the compliance officer for approval and public disclosure pursuant to which trades may be carried out on his behalf in accordance with such plan.

This provision intends to give an option to persons who may be perpetually in possession of unpublished price sensitive information and enabling them to trade in securities in a compliant manner. This provision would enable the formulation of a trading plan by an insider to enable him to plan for trades to be executed in future. By doing so, the possession of unpublished price sensitive information when a trade under a trading plan is actually executed would not prohibit the execution of such trades that he had pre-decided even before the unpublished price sensitive information came into being.

So, submission of Trading Plan is an option not an obligation.

Q 62. What is the penalty for violation under Regulation 7 of the SEBI (Prohibition of Insider Trading) Regulations, 2015?

Ans. Provisions relation to penalty for defaults made under the SEBI (PIT) Regulations, 2015 has not been mentioned in the said Regulation. Pursuant to clause (b) Section 15A of the SEBI Act, 1992; If any person, who is required under this Act or any rules or regulations made thereunderto file any return or furnish any information, books or other documents within the time specified therefore in the regulations, fails to file return or furnish the same within the time specified therefore in the regulations, he shall be liable to a penalty, which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.

Q 63. If a listed company is inviting Fixed Deposit from public and some of the related parties also propose to subscribe/ invest in such deposit. Whether it will be treated as Related Party Transaction under SEBI (LODR) 2015?

Ans. Regulation 2(1)(zb) of the SEBI (LODR) Regulations, 2015, has defined the term Related Party in the following manner:

"related party" means a related party as defined under sub-section (76) of section 2 of the Companies Act, 2013 or under the applicable accounting standards.

Regulation 2(1)(zc) of the SEBI (LODR) Regulations, 2015, has defined the term Related Party Transaction in the following manner:

"related party transaction" means a transfer of resources, services or obligations between a listed entity and a related party, regardless of whether a price is charged and a "transaction" with a related party shall be construed to include a single transaction or a group of transactions in a contract.

As per Regulation 23(6) of the SEBI (LODR) Regulations, 2015, the provisions of Regulation 23 shall be applicable to all prospective transactions.

However, as per Regulation 23(5) of the SEBI (LODR) Regulations, 2015, the provisions of sub-regulations (2), (3) and (4) of Regulation 23 shall not be applicable in the following cases:

(a) transactions entered into between two government companies;

(b) 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.

Subject to above, the proposed transaction in question may be treated as a related party transaction and requisite compliance may be made.

CONVENING AND HOLDING OF GENERAL MEETINGS

Q 64. Can a private limited company hold a general meeting by giving notice of less than 21 days if the articles of the private company so provides?

Ans. As per sub-section (1) of section 101 of Companies Act, 2013, a company can call a general meeting by giving notice of twenty one clear working days notice either in writing or through electronic mode. But as per Notification No.

GSR 464(E) dated 5-6-2015, in case of private companies, Section 101 shall apply unless otherwise specified in respective sections or the articles of association of the company provide otherwise. Thus, a private limited company can hold a general meeting by giving notice of less than 21 days if the articles of the private company so provides.

Q 65.-An illiterate person wants to become a subscriber, how can he sign as a subscriber to the Memorandum of Association?

Ans. As per Rule 13(2) of the Companies (Incorporation) Rules 2014, where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him.

Further as per Rule 13(3), such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the Memorandum and Articles of Association.

Q 66. A director is not attending the board meetings of the company, thus the company wants him to vacate the office. As a company secretary what action should be taken?

Ans. In terms of Section 167(1)(b) of Companies Act, 2013, the office of a director shall become vacant in case he absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board.

The Company Secretary should check that the proper process as mentioned in section 173 of the Companies Act, 2013 has been followed in sending the board meeting notices. The Company Secretary should keep the attendance records/minutes of the board meeting wherein such director's absence is recorded.

For the purpose of counting of Board Meetings held in the preceding twelve months, the counting should commence from the date of the first Board Meeting held immediately after the Meeting which the Director concerned last attended.

The requirement of SS-1 with respect to vacation of office is only for attendance of a Director in the Board Meeting and not for the manner of attending the Board Meeting. Therefore, Board Meeting attended by a Director, whether physically or through Electronic Mode, shall be sufficient attendance.

A Board Resolution need not be passed to show that office of Director has been vacated by a particular Director. Vacation of office is automatic as soon as a Director is found to have incurred disability as contemplated by clause (g) of sub– section (1) of Section 283 of the Companies Act, 1956 (corresponding to

clause (b) of sub–section (1) of Section 167 of the Companies Act, 2013) [Bharat Bhushan v. H.B. Portfolio Leasing Ltd. (1992) 74 Comp. Cas. 20].

As a matter of good governance, due intimation of such vacation should be sent to such Director forthwith and the Board may take note of such vacation at its next Meeting.

Q 67. Can a company, providing facility of e-voting, pass a resolution in the general meeting with show of hands?

Ans. As per sub-section (1) of section 107 of Companies Act, 2013, unless the voting is carried out electronically at any general meeting, a resolution shall be decided on show of hands. Therefore, show of hands is not allowed in case of e-voting,

Q 68. Whether a government company exempted from holding an annual general meeting?

Ans. As per sub-section (1) of section 96 of the Companies Act, 2013, every company other than a One Person Company shall hold an annual general meeting. Thus, a government company is not exempt and shall hold an annual general meeting.

Q 69. Whether remuneration to a managing director can be given without passing special resolution by a company?

Ans. Yes, in case of a private company, terms of remuneration to a managing director, pursuant to Section 196(4) of Companies Act, 2013, need not be approved in a general meeting and can be given without passing of special resolution as per Exemption Notification No. SGSR 464(E) dated 5-6-2015.

Q 70. Whether minutes of meetings of extra-ordinary general meetings should be given serial no.? Can an extra-ordinary general meeting be conducted anywhere inside or outside India?

Ans. Yes, as per the Secretarial Standard 2, serial no. shall be given to each extra-ordinary general meeting held by the company after the secretarial standards came into force from 1st July, 2015.

Annual General Meetings shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated, whereas other General Meetings may be held at any place within India.

Explanation to Rule 18 of the Companies (Management and Administration) Rules, 2014, prescribes that the Extra-Ordinary General Meeting should be held at a place within India. Thus, an Extra-Ordinary General Meeting should be held only in India though not necessarily within the city, town or village in which the Registered Office of the company is situated.

However, Clause 27 of the Companies (Amendment) Bill, 2016 seeks to amend sub-section (1) of section 100 of the Companies Act, 2013 to allow the wholly owned subsidiary of company incorporated outside India to hold its extra ordinary general meeting outside India. As per Clause 27, in section 100 of the principal Act, in sub-section (*1*), the following proviso shall be inserted, namely:—

"Provided that an extraordinary general meeting of the company, other than of the wholly owned subsidiary of a company incorporated outside India, shall be held at a place within India."

Q 71. If two directors are the only two shareholders of a private company and one of them dies? Whether the remaining alive director cum shareholder has the right to appoint another director, as this may not fulfil the criteria of quorum of a meeting?

Ans. As per the provisions of section 174(2) of the Companies Act, 2013, in case the number of directors 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. Thus, the remaining alive director can act as a quorum and pass resolution for appointment of another director.

Q 72. Shareholder group, holding 26% voting rights, wants to appoint two directors. Whether such shareholders have the right to participate and vote on such a resolution to be passed on the extra-ordinary general meetings, called by such shareholders?

Ans. Yes, they can participate and vote on such resolution. Further, proviso to Section 188(1) is not applicable on appointment of directors.

Q 73. How to conduct an AGM in case of a company having 2 directors who are also the shareholders and both the directors are outside India?

Ans. Annual General Meetings shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated, whereas other General Meetings may be held at any place within India. Thus, the AGM cannot be held outside India.

POWERS OF BOARD (SECTION 179 AND 188)

Q 74. Holding company wants to give guarantee on behalf of its wholly owned subsidiary, can the company do so?

Ans. Yes, as per clause (c) to first proviso of sub-section (1) of section 185 of Companies Act, 2013, a holding company can a give corporate guarantee or provide security in respect of any loan made to its wholly owned subsidiary company provided that the loans are utilised by the subsidiary company for its principal business activities.

Q 75. Disclosure of Interest of Directors is filed in Form MBP-1, whether concern/interest is required to be disclosed in respect of shares held in any company? Can interested director of a private company participate in such meeting where he is interested?

Ans. As per sub-section (1) of the section 184 of Companies Act, 2013, read with Rule 9(1) of the Companies (Meetings of Board and its Powers) Rules, 2014, every director shall at the first meeting of the Board in which he participates as a director and thereafter at the first meeting of the Board in every financial year or whenever there is any change in the disclosures already made, then at the first Board meeting held after such change, disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, by giving a notice in writing in Form MBP-1.

As per clause (a) of sub-section (2) of section 184 of Companies Act, 2013, 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 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 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, in case of a private company, director holding any amount of shares will have to provide disclosure of such holding, with the exception that the interested director may participate in such meeting after disclosure of his interest as per the exemption notification dated 5th June, 2015.

Thus, from the above we can conclude that disclosure in respect of shares of any amount shall be given in Form MBP-1 and in case of a contract or arrangement the director holding more than of two percent shareholding is required to give such disclosure. Further, a director of a private company only can participate in such meeting where he is interested after the disclosure of his interest.

Q 76. Can interested director be counted as quorum?

Ans. No provision in the Companies Act, 2013 specifies whether interested director can be considered as quorum or not for the meeting. However, as per Para 3.2 of Secretarial Standard-1, a director shall not be reckoned for Quorum in respect of an item in which he is interested and he shall not be present, whether physically or through Electronic Mode, during discussions and voting on such item.

Thus, the directed cannot be counted as quorum.

Q 77. Whether it is necessary to pass Board Resolution if a transaction is transacted at arm's length basis with a related party?

Ans. Board Resolution is not required to be passed but as a good corporate practice a note should be taken for the transaction occurring at arm's length basis with a related party transaction.

Q 78. Whether selling of shares to related party included in Section 188 as definition of 'goods' includes 'shares' as per Sale of Goods Act, 1930?

Ans. If the business of the Company is buying and selling of shares and such other securities then selling of shares and such other securities are covered under clause (a) of sub-section (1) of section 188 of Companies Act, 2013. Otherwise sale of shares in the normal course of business is not included under Section 188 as related party transactions.

Q 79. Whether power to borrow money under Section 179 can be delegated? Can it be delegated on an unlimited basis?

Ans. Yes, power to borrow money under clause (d) of sub-section (3) of section 179 of Companies Act, 2013, can be delegated, by means of a board resolution, to any committee of directors or managing director or manager or any other principal officer as per first proviso to sub-section (3) of section 179 of Companies Act, 2013. The company, in the board resolution, specifies the limit of the amount to be borrowed on behalf of the company by the authorised person or committee, as and when the need arises, and also specifies the time limit for which the person or committee is authorised and his/its scope of operations. Thus, the authority cannot be delegated on an unlimited basis.

Q 80. Whether remuneration and unsecured loans to the directors covered under related party transactions as per section 188?

Ans. Remuneration and unsecured loans to directors are not covered under the related party transactions as per section 188 of Companies Act, 2013. There are specific sections for remuneration to directors (Section 197 of the Act) and unsecured loans to directors (Section 185 of the Act).

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