THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

SUPPLEMENT EXECUTIVE PROGRAMME

(NEW SYLLABUS)

for

June, 2022 Examination

Company Law

MODULE 1

PAPER 2

Index

Students appearing in Examination shall note the following:

Students are also required to update themselves with all the relevant Notifications, Circulars, Clarifications, etc. issued by the SEBI, RBI & Central Government on or before six months prior to the date of the examination.

The students are advised to acquaint themselves with the monthly and Regulatory updates published by the Institute. The Institute has revamped the study material in light of regulatory changes, inclusion of practical aspects viz. case laws, examples, self-test questions, highlighting key concepts and other structural changes. Accordingly, the students are advised to refer the latest study material uploaded on the website of the Institute along with these supplements.

Lesson 1- Introduction to Company Law

1) Important Committees recommending changes to the Companies Act

1952 Bhabha Committee

The Government of India appointed a Committee of twelve members representing various interests under the chairmanship of Shri C.H. Bhabha, to go into the entire question of the revision of the Companies Act, 1913

1957 Sastri Committee

The Government of India appointed a Committee of six members under the chairmanship of Shri A.V. Visvanatha Sastri to overcome such practical difficulties in its working as may have been encountered since it came into force, to remove such drafting defects and obscurities as may have interfered with the working of the Companies Act, to ensure the better fulfilment of the purposes underlying the Act and to consider what changes in the form or structure of the Act, if any.

1978 Sachar Committee

This Committee was constituted by Government under the Chairmanship of Shri Rajindar Sachar to consider and report on what changes are necessary in the Companies Act, 1956, with particular reference to the modifications which are required to be made in the form and structure of the Companies Act, 1956, so, as to simplify them and to make them more effective, wherever necessary.

1997 Chandrate Committee

Chandrate Committee was formed under the chairmanship of Dr.K.R.Chandratre.The main objective of the Group was to re-write the Companies Act,1956 to facilitate a healthy growth of the Indian corporate sector under a liberalised, fast changing and highly competitive environment

2000 Eradi Commitee

Vaish Committeer Chairmanship of Shri Justice V. Balakrishna Eradi has constituted a Committee consisting of experts to examine the existing law relating to winding up proceedings of companies in order to remodel it in line with the latest developments and innovations in the corporate law and governance.

2002 Joshi Committee

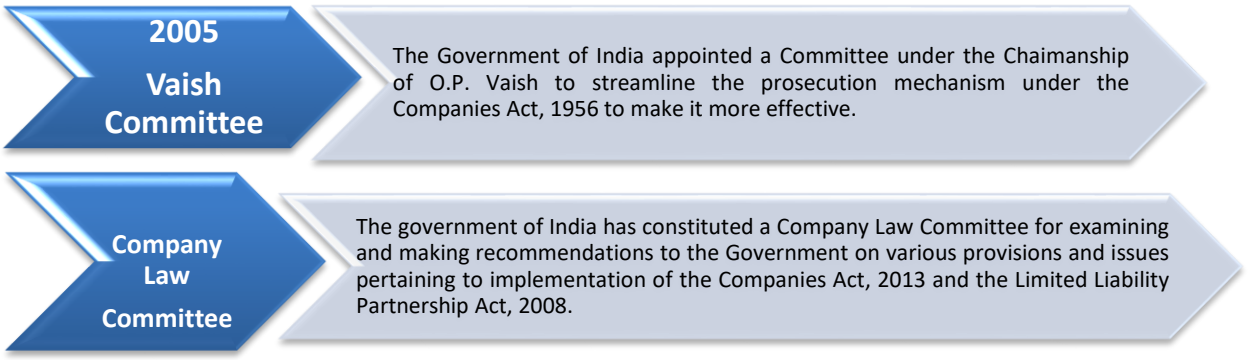
The Committee was constituted under the Chairmanship of Shri R.D. Joshi to examine the remanants of the companies Bill, 1997.

2003 Naresh Chandra Committee

This Committee was constituted by Government under the Chairmanship of Shri. Naresh Chandra, to Regulate Private Companies and Partnerships.

2005 Irani Committee

The Irani Committee was constituted under the chairmanship of Dr. J J Irani, Director, Tata Sons, with the task of advising the Government on the proposed revisions to the Companies Act, 1956.



2) **Origin of Company Law**

The Bubble Act of 1720

The concept of corporate form was brought in for the first time in United Kingdom wherein the body corporate could be brought into existence either by a Royal Charter or by a Special Act of Parliament. Both these methods were very expensive and dilatory. Consequently, to meet the growing commercial needs of the nation, large unincorporated partnerships came into existence, trading, however, in corporate form. The memberships of each such concern being very large, the management of business was left to a few trustees resulting into separation of ownership from management. Rules of law were not being developed by that time which gave a chance to fraudulent promoters to exploit the public money. As a result, many spurious companies were created which were formed only to disappear resulting in loss to the investing public.

The English parliament, therefore, passed an Act known as the Bubbles Act of 1720, which, instead of prohibiting the formation of fraudulent companies, made the very business of companies illegal.

Bubble Act is an English statute passed on 9, June 1720 to prevent corporate fraud. It forbade all joint-stock companies not authorized by royal charter. One of the reasons for the act was to prevent other companies from competing with the South Sea Company for investors' capital. The Act was repealed in 1825.

3) How to read and understand a Section?

The Companies Act, 2013 is to be read with relevant Rules, Schedules under Companies Act, Circulars/ Clarifications issued by Ministry of Corporate Affairs.

For example Section 135 (Relating to Corporate Social Responsibility) is to be read with the Companies (Corporate Social Responsibility Policy) Rules 2014, Schedule VII (Activities relating to Corporate Social Responsibility) and circulars/clarifications issued by Ministry of Corporate Affairs on Section 135 & Rules made thereunder.

Reading provisions of Companies Act, 2013 with delegated legislations

For example when you read sections relating to issue of capital you should read the sections with Companies (Share Capital and Debentures) Rules, Companies (Prospectus and Allotment of Securities) Rules. Besides, other legislative aspects including the provisions of SEBI Act, SEBI (ICDR) Regulations, SEBI (LODR) Regulations, provisions of Depositories Act for dematerialization provisions and even the provisions of FEMA when the shares are issued to non-residents, wherever applicable, are required to be read in collusion.

Breaking sections into parts and preparing notes for each section

Company law is so wide that it cannot be easily remembered after only one reading. Students may make notes for each topic about sections, the genesis, amendments notified, reasons for amendments along with delegated legislation. They may also make notes on exemptions provided,

exceptions and the reasons behind such exemptions/ exceptions. This will help in understanding the background of the provisions, the spirit of law and would help in remembering the provisions also. The exemptions provided for certain class of companies under Section 462 of Companies Act are provided in the e-book at MCA portal under respective sections.

Students may break the sections at relevant places and giving emphasis on critical words and read for getting more clarity.

For examples Section 2(6) deals with the Definition of "Associate Company" which may be read with the following breaks.

"associate company", in relation to another company……/,

means a company in which that other company has a significant influence……./,

but which is not a subsidiary company of the company having such influence and ……/.

includes a joint venture company.

Explanation.—For the purpose of this clause,—

(a) the expression "significant influence" means control of at least twenty percent of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

Thus the definition can be read by breaking at the places as indicated above, by understanding the terms 'joint venture company', 'significant influence' and the definition of subsidiary as mentioned in section 2(87).

Interpretations of some standard words and Phrases used in Statutes

*"**Proviso**"- A clause, as in a document or statute, that begins with the words "Provided that" is called 'proviso'. The term 'proviso' is defined as a clause making some condition or stipulation; a clause in a statute, deed, or other legal document introducing a qualification or condition to some other provision, frequently the one immediately preceding the proviso itself.*

It is well settled that "the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the preceding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it."

also must be complied with.

"Notwithstanding anything contained"

Notwithstanding means, in spite of; without being opposed or prevented by; nevertheless; although, regardless of. A provision in a statute beginning with the words 'Notwithstanding anything contained' is called a 'non-obstante' provision and is generally used in a statute to give an overriding effect to a particular section or the statute as a whole. A non-obstante clause is used in a statutory drafting to create an exception to or override the provision which this phrase follows.

***"Subject to"-** The ordinary meaning of the phrase 'subject to' is being dependent upon; conditional upon; subordinate to; subservient to something else to happen or to be true; that on the condition of the provisions of the specified section being observed or complied with. It is used to express the intention that when while complying with one statutory provision, another provision relating to the subject matter also must be complied with.*

"Nothing contained in this section" shall apply

The phrase "Nothing in this section shall apply" or "Nothing contained in this section shall apply", isfrequently used in legislative drafting. Literally, it means anything contained in the preceding part of the section would not apply in the situation stated in the provision that begins with this phrase.

"Without prejudice to the provisions contained in this Act/any other Act"

The phrase 'without prejudice' means without dismissing, damaging, or otherwise affecting; without detriment; harm. So when one provision says 'without prejudice to any other provision', it means that no other provision is affected by that provision or that other provisions remain unaffected. This is a qualifying phrase used in statutory drafting in a provision to protect the operation of another provision which it refers to. In other words, both the provisions operate independently.

"That is to say"

This phrase explains or clarifies the preceding word, phrase or expression.

"For the purposes of this section/provision/definition"

It has limited applicability; it applesto only the relevantsection / provision/ definition but appliesto the whole of it.

*"**As the case may be"-** The phrase is used when in a provision two or more things are covered and the provision is applicable to both or all of them.*

*"**Shall**"-When used in a statute, the presumption is that its use is mandatory and not merely directory.*

*"**May**" is either permissive or directory*

4) Reforms brought under the Companies Act, 2013 for Ease of Doing Business

The enactment of the Companies Act, 2013 allowed India to have a modern legislation for growth and regulation of corporate sector in India. The Act was enacted in light of the changing economic and business environment both domestically and globally to facilitate business-friendly corporate regulations, improve corporate governance norms, enhances accountability on the part of corporates and auditors, raise levels of transparency and protect interests of investors, particularly small investors. The objective of the Companies Act, 2013 is to provide business friendly corporate regulation/ pro-business initiatives; e-Governance Initiatives; good corporate governance and CSR; enhanced disclosure norms; enhanced accountability of management; stricter enforcement of laws; audit accountability; Protection for minority shareholders; Investor protection and Shareholder activism; Robust framework for insolvency regulation; and Institutional structure. Initially, it seems that changes in the Companies Act, 2013 will brought out the significant changes in the manner of doing business in India. It becomes true, when the initial unrest of business community was taken to the Government and to address the practical difficulties faced by the business community upon notification of the various provisions of the Act and Rules made thereunder and the term "Ease of Doing Business" was popularised in India. On Ease of Doing Business front, the Government of India has enacted the series of amendments, relaxation, exemptions and simplification in the various Acts, Rules, Regulations etc. covering various business related issues and processes and also extends support to facilitate ease of doing business. In the series the

Companies Act, 2013 has also been amended to extend relief to the business entities governed under the Companies Act, 2013. The object and rationale for such amendments are discussed below:

The Companies (Amendment) Act, 2015

The Companies (Amendment) Act, 2015 addressed the initial practical difficulties experienced from implementation of the provisions of the Act and difficulties faced by the companies / stakeholders / Professionals in complying with some of the provisions of the Companies Act, 2013. The Companies (Amendment) Act, 2015 was enacted after it received the President's assent on 25th May 2015.

Company Law Committee and The Companies (Amendment) Act, 2017

During the consideration of the Companies (Amendment) Act, 2015 in the Rajya Sabha, views were expressed that more amendments would be required; accordingly, the Government has constituted a Companies Law Committee on 4th June, 2015. The terms of references of the Committee are:

(i) to make recommendations to the Government on issues arising from the implementation of the Companies Act, 2013; and

(ii) to examine the recommendations received from the Bankruptcy Law Reforms Committee, the High Level Committee on CSR, the Law Commission and other agencies, while undertaking (i) above. The report of the CLC was submitted to the Government on the 1st February, 2016 and the Companies (Amendment) Bill, 2016 introduced in Lok Sabha on 16 March, 2016 is based on the recommendations of the Companies Law Committee after taking into account the comments received on the report. The amendments proposed, inter-alia, include changes in definitions to remove ambiguities; allowing greater flexibility in incorporating and running a company by simplifying Memorandum of Association and doing away with Central Government approvals, etc.; easing raising of capital, procedures; rationalizing penal provisions related to auditors, reconciling the competing objectives of improving corporate governance, incentivising individuals to take up positions of responsibility in boards and reducing compliance cost. The report have also recommended some changes to remove ambiguities in the CSR provisions based on the recommendations of the High Level Committee on CSR.

The Companies (Amendment) Bill 2016, was referred to the Standing Committee on Finance on 12th April 2016 for examination and report thereon. The Standing Committee on Finance Committee submitted it's report on 07, December, 2016, which was further placed before the Lok Sabha on 27th July, 2017 and Passed in Rajya Sabha on 19th December, 2017.

The Companies (Amendment) Act, 2017

The subsequent amendments in Companies Act, 2013 was made through the Companies (Amendment) Act, 2017 which was expected to ensure better corporate governance and improve the ease of doing business by simplify procedures, making compliance easier and taking stringent action against defaulting companies, strengthen corporate governance standards, achieve better harmonization with other statutes and address difficulties in implementation of the Companies Act, 2013.

Committee on review of Offences under the Companies Act, 2013 & the Companies (Ordinance), 2018

In order to review the framework dealing with offences under the Companies Act, 2013 and related matters and to make recommendations to promote better corporate compliance, the Government of

India has constituted a Committee on review of Offences under Companies Act, 2013 in July, 2018 and the said Committee, submitted its report in August, 2018.

The Committee recommended that the existing rigour of the law should continue for serious offences, whereas the lapses that are essentially technical or procedural in nature may be shifted to in-house adjudication process. The Committee observed that this would serve the twin purposes of promoting of ease of doing business and better corporate compliance. It would also reduce the number of prosecutions filed in the Special Courts which would in turn facilitate speedier disposal of serious offences and the offenders shall be penalised.

The liability under section 447 which deals with corporate fraud would continue to apply wherever fraud is noticed. The Committee also recommend suitable amendments for significant reduction in compounding cases before the Tribunal, declaration of commencement of business, maintenance of a registered office, protection of depositors registration and management of charge declaration of significant beneficial ownership and independence of independent director.

After the submission of the Report, the immediate relief were expected by the Corporate and Stake holders, However, at that time the parliament was not in session, to provides the immediate relief, the Ordinance in need to be issued by the Government of India, accordingly the Companies (Amendment) Ordinance, 2018 was promulgated by the President on the 2nd day of November, 2018.

In order to give continued effect to the Companies (Amendment) Ordinance, 2018, the President promulgated the Companies (Amendment) Ordinance, 2019 and the Companies (Amendment) Second Ordinance, 2019 on the 12th day of January, 2019 and the 21st day of February, 2019 respectively. With the constitution of new assembly, The Companies (Amendment) Bill, 2019 was introduced in Lok Sabha on July 25, 2019, to replace the Companies (Amendment) Second Ordinance, 2019 with certain other amendments which are considered necessary to ensure more accountability and better enforcement to strengthen the corporate governance norms and compliance management in corporate sector. The Companies (Amendment) Bill, 2019 passed in Lok Sabha on 26th July, 2019 and on 30th July, 2019 in the Rajya Sabha.

The Companies (Amendment) Act, 2019

The Companies (Amendment) Act, 2019 received the President assent on 31st July, 2019 and replaced the Companies (Amendment) Second Ordinance, 2019. It provided certain additional amendments, inter-alia, for the Ease of Doing Business, including:

i. Amendment in clause (41) of section 2 of the Companies Act, 2013 so as to empower the Central Government to allow certain companies to have a different financial year instead of as determined by the Tribunal;

ii. Amendment in sixteen sections of the Act so as to modify the punishment as provided in the said sections from fine to monetary penalties to lessen the burden upon the Special Courts;

iii. Amendment in section 135 of the Act so as to bring clarity to –

(a) carry forward the unspent corporate social responsibility amount, to a special account to be spent within three financial years and transfer thereafter to the Fund specified in Schedule VII, in case of an ongoing project; and

(b) transfer the unspent amount to the Fund specified under Schedule VII, in other cases;

iv. Amendment in section 441 of the Act so as to enhance the jurisdiction of the Regional Director for compounding the offences.

The Companies (Amendment) Act, 2020

In view of constant effort of Government of India to facilitate ease of doing business in India to the corporates, a Company Law Committee (CLC) consisting of representatives from Ministry of

Corporate Affairs, industry chambers, professional institutes and legal fraternity was constituted on the September 18, 2019 headed by Mr. Injeti Srinivas (Secretary of MCA), to give recommendations to decriminalize some more provisions of the Companies Act, 2013 and facilitate ease of living related changes.

Company Law Committee submitted its report on November 14, 2019. On the basis of this report, the Finance Ministry has proposed some major amendments in the Companies Act, 2013 under the Companies Amendment Bill, 2020 which was introduced in Lok Sabha on March 17, 2020. Later it was passed by the Lok Sabha on September 19, 2020 and by the Rajya Sabha on September 22, 2020. Finally on September 28, 2020, the Companies (Amendment) Act, 2020 received the assent of Hon'ble President of India.

Based on the recommendations of the CLC and internal review by the Government, the government has amended various provisions of the Act to decriminalise minor procedural or technical lapses under the provisions of the said Act, into civil wrong; and considering the overall pendency of the courts, a principle based approach was adopted to further remove criminality in case of defaults, which can be determined objectively and which otherwise lack any element of fraud or do not involve larger public interest. In addition, the Government also proposes to provide greater ease of living to corporates through certain other amendments to the Companies Act, 2013.

5) Agencies under MCA-21

The Ministry of Corporate Affairs (MCA) is primarily concerned with administration of the Companies Act 2013, the Limited Liability Partnership Act, 2008 & other allied Acts and rules & regulations framed there-under mainly for regulating the functioning of the corporate sector in accordance with law.

Besides, it exercises supervision over the three professional bodies, namely, Institute of Chartered Accountants of India (ICAI), Institute of Company Secretaries of India (ICSI) and the Institute of Cost Accountants of India which are constituted under three separate Acts of the Parliament for proper and orderly growth of the professions concerned.

The Ministry also has the responsibility of carrying out the functions of the Central Government relating to administration of Partnership Act, 1932, the Companies (Donations to National Funds) Act, 1951 and Societies Registration Act, 1980 etc.

Registrar of Companies (ROC) as defined under Section 2 (75) of the Companies Act, 2013 means a Registrar, an Additional Registrar, a Joint Registrar, a Deputy Registrar or an Assistant Registrar, having the duty of registering companies and discharging various functions under this Act.

Registrars of Companies (ROC) appointed in the various States and Union Territories are vested with the primary duty of registering companies and LLPs floated in the respective states and the Union Territories and ensuring that such companies and LLPs comply with statutory requirements under the Act. These offices function as registry of records, relating to the companies registered with them, which are available for inspection by members of public on payment of the prescribed fee. The Central Government exercises administrative control over these offices through the respective Regional Directors.

Regional Director (RD) is in-charge of the respective region, each region comprising a number of States and Union Territories. They supervise the working of the offices of the Registrars of Companies and the Official Liquidators working in their regions. They also maintain liaison with the respective State Governments and the Central Government in matters relating to the administration of the Companies Act and LLP Act. Certain powers of the Central Government under the Act have been delegated to the Regional Directors. They have also been declared as heads

of Department.

Official Liquidators (OL) means an Official Liquidator appointed under sub-section (1) of section 359 of the Companies Act, 2013.

As per Section 359 (1) of the Companies Act, 2013, 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.

The liquidators appointed shall be whole-time officers of the Central Government. 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.

Serious Fraud Investigation Office (SFIO)- The Government in the backdrop of major failure of non-banking financial institutions, phenomenon of vanishing companies, plantation companies and the recent stock market scam had decided to set up Serious Fraud Investigation Office (SFIO), a multi-disciplinary organization to investigate corporate frauds. The Organization has been established and it has started functioning since 1st October, 2003.

The SFIO is expected to be a multi-disciplinary organisation consisting of experts in the field of accountancy, forensic auditing, law, information technology, investigation, company law, capital market and taxation for detecting and prosecuting or recommending for prosecution white collar crimes/frauds.

The National Financial Reporting Authority (NFRA) was constituted on 01st October, 2018 by the Government of India under Sub Section (1) of section 132 of the Companies Act, 2013.

As per Sub Section (2) of Section 132 of the Companies Act, 2013, the duties of the NFRA are to:

• Recommend accounting and auditing policies and standards to be adopted by companies for approval by the Central Government;

• Monitor and enforce compliance with accounting standards and auditing standards;

• Oversee the quality of service of the professions associated with ensuring compliance with such standards and suggest measures for improvement in the quality of service;

• Perform such other functions and duties as may be necessary or incidental to the aforesaid functions and duties.

Sub Rule (1) of Rule 4 of the NFRA Rules, 2018 , provides that the Authority shall protect the public interest and the interests of investors, creditors and others associated with the companies or bodies corporate governed under Rule 3 by establishing high quality standards of accounting and auditing and exercising effective oversight of accounting functions performed by the companies and bodies corporate and auditing functions performed by auditors.

National Company Law Tribunal/National Company Law Appellate Tribunal (NCLT/NCLAT) - The setting up of the NCLT and NCLAT are part of the efforts to move to a regime of faster resolution of corporate disputes, thus improving the ease of doing business in India. The Ministry of Company Affairs (MCA) on 1st June, 2016 notified the Constitution of National Company Law Tribunal (NCLT) & The National Company Law Appellate Tribunal (NCLAT) in exercise of powers conferred under section 408 and 410 of the Companies Act, 2013.

The constitution of NCLT & NCLAT was a step towards improving and easing all the judicial matters relating to the Company law under one roof.

6) Interpretation of Definitions of the Companies Act, 2013

A definition is a statement of the meaning as of a word or phrase. Usually, every statute has a definitions sections (also called 'interpretation clause') which provides definitions of various words

and phrases used in the statute (e.g. Section 2 of the Companies Act, 2013).

Definition:

• To Define: The Act of making something definite, distinct or clear.

• Definition: An exact statement or description of the nature, scope, or meaning of something (Oxford dictionary)

• In relation to a Statute: Definitions given in a statute are those of certain words or expressions used elsewhere in the Statute.

• Object of using Definitions: - To avoid frequent repetitions - To aid interpretation of words for that specific statute

Types of Definitions

- Restrictive Definitions - Use of the word "mean"
- Extensive Definitions - Use of the word "include"

When in a definition the word "**mean**" is used, it means word is restricted to the scope indicated in the definition section. It means definition is hard and fast definition and no other meaning can be assigned to the expression than is put down in definition.

The word "**include**" gives a wider meaning to the words or phrases in the statute. The legislature does not intend to restrict the definition, it makes the definition enumerative but not exhaustive. This is to say, the term defined will retain its ordinary meaning may or may not compromise. The word "includes" by the legislature shows the intention of the legislature that it wanted to give extensive and enlarged meaning to such expression.

Example of few Definitions under the Companies Act, 2013

• "**Director**" means a director appointed to the Board of a company;
• "**Employees' stock option**" means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price;
• "**Charge**" means an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage;
• "**Body Corporate or Corporation**" includes a company incorporated outside India, but does not include:
(i) a co-operative society registered under any law relating to co-operative societies; and
(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf;
• "**Book and paper**" include books of account, deeds, vouchers, writings, documents, minutes and registers maintained on paper or in electronic form;
• "**Deposit**" includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India;

'**Explanations' in Statutes:**

Object and Purpose of explanations:

• To explain/clarify the meaning of words contained in the particular section,

• Part and Parcel of the enactment,

• Does not widen the scope of the word explained.

For eg: “holding company”, in relation to one or more other companies, means a company of which such companies are subsidiary companies;

Explanation.—For the purposes of this clause, the expression “company” includes anybody corporate.

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Lesson 6- Distribution of Profits – Dividend

1) The Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2021(Notification No: G.S.R. 396 (E), dated June 09, 2021)

The Central Government has made the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Amendment Rules, 2021 to further amend the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

(i) In the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, in rule 3, in sub-rule (2), after clause (f), the following shall be inserted, namely:-

"(fa) all shares held by the Authority in accordance with proviso of subsection (9) of section 90 of the Companies Act, 2013 and all the resultant benefits arising out of such shares, without any restrictions;"

Impact:
Insertion of a new clause (fa) in Rule 3 sub-rule 2 of IEPF (Accounting, Audit, Transfer and Refund) Rules, 2016.
In addition to the existing amounts which shall be credited to the Investor Education Protection Fund, a new clause (fa) is inserted in Rule 3 sub-rule 2 of IEPF (Accounting, Audit, Transfer and Refund) Rules, 2016, which states that all shares held by the Authority in accordance with proviso of Section 90(9) of the Act and all the resultant benefits arising out of such shares, without any restrictions shall also be credited to the fund.

Section 90(9) of the Companies Act, 2013 is reproduced below for reference:
Register of significant beneficial owners in a company
90(9) 'The company or the person aggrieved by the order of the Tribunal may make an application to the Tribunal for relaxation or lifting of the restrictions placed under sub-section (8), within a period of one year from the date of such order.

Provided that if no such application has been filed within a period of one year from the date of the order under sub-section (8), such shares shall be transferred, without any restrictions, to the authority constituted under sub-section (5) of section 125, in such manner as may be prescribed'.

(ii) After rule 6 of the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016, following rule shall be inserted, namely:-

"6A. Manner of transfer of shares under sub-section (9) of section 90 of the Companies Act, 2013 to the Fund.-

(1) The shares shall be credited to DEMAT Account of the Authority to be opened by the Authority for the said purpose, within a period of thirty days of such shares becoming due to be transferred to the Fund:

Provided that transfer of shares by the companies to the Fund shall be deemed to be transmission of shares and the procedure to be followed for transmission of shares shall be followed by the companies while transferring the shares to the fund:

Provided further that such shares shall be transferred to the Authority without any restrictions and no application shall be filed for claiming back such shares from the Authority.

(2) For the purposes of effecting transfer of such shares, the Board shall authorise the Company Secretary or any other person to sign the necessary documents.

(3) The company shall follow the following procedure while transferring the shares, namely:-

(A) for the purposes of effecting the transfer, where the shares are dealt with in a depository-

(i) the company shall inform the depository by way of corporate action, where the shareholders have their accounts for transfer in favour of the Authority,

(ii) on receipt of such intimation, the depository shall effect the transfer of shares in favour of DEMAT account of the Authority;

(B) for the purposes of effecting the transfer of shares held in physical form-

(i) the Company Secretary or the person authorised by the Board shall make an application, on behalf of the concerned shareholder, to the company, for issue of a new share certificate;

(ii) on receipt of the application under clause (a), a new share certificate for each such shareholder shall be issued and it shall be stated on the face of the certificate that "Issued in lieu of share certificate No..... for the purpose of transfer to IEPF under subsection (9) of section 90 of the Act" and the same be recorded in the register maintained for the purpose;

(iii) particulars of every share certificate shall be in Form No. SH-1 as specified in the Companies (Share Capital and Debentures) Rules, 2014;

(iv) after issue of a new share certificate, the company shall inform the depository by way of corporate action to convert the share certificates into DEMAT form and transfer in favour of the Authority.

(4) The company shall make such transfers through corporate action and shall preserve copies for its records.

(5) While effecting such transfer, the company shall send a statement to the Authority in Form No. IEPF-4 within thirty days of the corporate action taken under sub-rule (4) of rule 6A containing details of such transfer and the company shall also attach a copy of order of the Tribunal under sub-section (8) of section 90 of the Act along with a declaration that no application

under sub-section (9) of section 90 of the Act has been made or is pending before the Tribunal.

(6) The voting rights on shares transferred to the Fund shall remain frozen: Provided that for the purpose of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the shares which have been transferred to the Authority shall not be excluded while calculating the total voting rights.

(7) The company shall maintain all such statements filed under sub – rule (3) in the same format along with all supporting documents and the Authority shall have the powers to inspect such records.

(8) All benefits accruing on such shares like bonus shares, split, consolidation, fraction shares and the like except right issue shall also be credited to such DEMAT account [by the company which shall send a statement to the Authority in Form No. IEPF-4 within thirty days of the corporate action containing details of such transfer.]

(9) If the company is getting delisted, the Authority shall surrender shares on behalf of the shareholders in accordance with the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 and the proceeds realised shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

(10) In case the company whose shares or securities are held by the Authority is being wound up, the Authority may surrender the securities to receive the amount entitled on behalf of the security holder and credit the amount to the Fund and a separate ledger account shall be maintained for such proceeds.

(11) Any further dividend received on such shares shall be credited to the Fund and a separate ledger account shall be maintained for such proceeds.

(12) Any amount required to be credited by the companies to the Fund as provided under sub-rules (9), (10) and sub-rule (11) shall be remitted into the specified account of the IEPF Authority maintained in the Punjab National Bank [and the details thereof shall be furnished to the Authority in Form No. IEPF-7 within thirty days from the date of remittance].

Provided further that all such amounts shall be transferred to the Authority without any restrictions and no application shall be filed for claiming back such amounts from the Authority.

(13) Authority shall furnish its report to the Central Government as and when noncompliance of the rules by companies came to its knowledge."

For details: https://egazette.nic.in/WriteReadData/2021/227437.pdf

2) The Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Second Amendment Rules, 2021 (Notification No: G.S.R. 785(E), dated November 09, 2021)

The Central Government has notified the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Second Amendment Rules, 2021, to further amend the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

This amendment is a major step towards the mission and vision of Government of India of Ease of Living and Ease of Doing Business, Ministry of Corporate Affairs (MCA) and has further simplified claim settlement process through rationalization of various requirements under Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016.

- For claimants, requirement of Advance Receipt has been waived off;
- Requirement of Succession Certificate/ Probate of Will/ Will has been relaxed up to Rs 5,00,000 (five lakh) both for Physical & DEMAT shares;
- Notarization of documents has been replaced with self-attestation and requirements of Affidavits and Surety relatively have been eased.

For companies, requirement of attaching documents related to Unclaimed Suspense Account has been eased and companies have been given flexibility to accept transmission document viz. Succession Certificate, Will etc. as per their internal approved procedures and Newspaper Advertisement requirement for loss of physical Share Certificate has been waived off up to an amount of Rs.5,00,000.

The focus of the change has been to make the process simpler and quicker for the claimants.

For details:
https://www.mca.gov.in/bin/dms/getdocument?mds=hN09WrxY89kYWPXEaho1nq%253D%253D&type=open

CORRIGENDUM (November 12, 2021)

The MCA has released Corrigendum pertaining to the notification of the Government of India in the Ministry of Corporate Affairs number G.S.R. 785(E), dated November 09, 2021, related to the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Second Amendment Rules, 2021, as published in the Gazette of India.

At Page No: 9, in the English version, in line 9, for "sub-rule (7)", read "sub-rule (2)".

For details: https://www.egazette.nic.in/WriteReadData/2021/231047.pdf

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Lesson 7- Corporate Social Responsibility

1) Frequently Asked Questions (FAQs) on Corporate Social Responsibility (CSR) (General Circular No: 14/2021, dated August 25, 2021)

In view of several amendments in Section 135 of the Companies Act, 2013 as well in the CSR Rules, the MCA has issued an updated set of Frequently Asked Questions (FAQs) on the Corporate Social Responsibility (CSR), in supersession of clarifications and FAQs issued vide General Circular no. 21/2014 (dated June 18, 2014), 36/2014 (dated September 17, 2014), 01/2016 (dated January 12, 2016) ,05/2016 (dated May 16, 2016), clarification issued vide letter dated January 25, 2018 and General Circular no. 06/2018 (dated May 28, 2018), for better understanding and facilitating effective implementation of CSR.

For details:

https://www.mca.gov.in/bin/dms/getdocument?mds=GTatbQatWaZKl7Zzifcd9Q%253D%253D&type=open

2) CSR: Case Studies

01.	**13.11.2019**	**Apurvanatvar & Company India (P) Limited vs. Registrar of Companies, Mumbai**	**NCLT, Mumbai**

Company Violated provisions of Section 135 read with Section 134(3) of the Companies Act, 2013

Background

Apurva Natvar Parikh & Co Private Limited is a Private incorporated on 26th June 1959. It is classified as Nongovt company and is registered at Registrar of Companies, Mumbai. It is inolved in supporting and auxiliary transport activities; activities of travel agencies. The Company had violated the provision of Section 135 read with Section 134(3)(o) of the Companies Act, 2013 read with Rule 8 of Companies (Corporate Social Responsibility Policy) Rules, 2014 wherein the Company had not made CSR Expenditure and has not explained the reasons in Board's Report of F. Y. 2014-15 for non-spending of the CSR amount along with other disclosure as required under Section 135(2) of the Act.

Timeline of Events

Apurva Natvar Parikh & Co Private Limited filed a compounding application with NCLT, Mumbai on January 10, 2018 as it has violated the CSR provisions. It received a notice dated December 8, 2017 from ROC, Mumbai stating that the Company has not complied with the provisions of Section 135 read with Section 134(3)(o) of the Companies Act,2013 by not disclosing the details in the Financial Year 2014-15, the Composition of CSR Committee of the Company and/or not specifying any reasons for under spending the CSR amount in its Boards Report for F.Y. 2014-15 as required under Section 135 r/w Section 134(3)(o) of the Act and with Rule 8 of Companies(Corporate Social Responsibility Policy) Rules, 2014 r/w General Circular 21/2014 issued by the Ministry of Corporate Affairs. Pursuant to the receipt of the Notice, the Company sent a reply dated December 16, 2017 to Registrar of Companies enclosing the Directors Report of the Company dated

September 2, 2015, issued by the Board of Directors of the Company in respect of the Company's activities for the F.Y. 2014-15. Thereafter, on February 01, 2018, the Applicants received another notice from the ROC dated January 3, 2018 wherein the ROC has asked the Company and the officers in default to file the necessary application in order to compound the above-mentioned offence committed by them as per the procedure prescribed, under the Companies Act, 2013.

It is submitted that as per Section 135 of the Act, the Company was required to spend an amount of Rs. 5,26,047.30 towards its Corporate Social Responsibility objectives in the F.Y. 2015-16. In compliance with the provisions of the Act, the Company spent an amount of Rs. 35,08,500/- towards its Corporate Social Responsibility objectives in the F.Y. 2015-16. However, in spite of having spent the requisite amount, the Company inadvertently did not attach the CSR Policy of the Company to the Director's Report for the F.Y. 2015-2016. In order to rectify the inadvertent error, the Company has written to the ROC vide letter dated February 9, 2018, whereby the Company has informed the ROC of the said violation of Section 134(3)(0) of the Act.

It is further submitted that to make default good the Board in its Board Meeting held of July 18, 2014 framed the CSR Policy in accordance with the Schedule VII of the Companies Act, 2013.

It is further submitted that the Company had constituted the CSR Committee, framed the CSR Policy as per the provisions of the Act and made the necessary disclosures as required under Section. 134 (3) (o) in the Board of Directors Report for the F. Y. 2015-16. Consequently, the Default has been made good.

Provisions of Companies Act, 2013

Section 135(5)
According to the provision of Section135 (5) of the Act, the Board of the Company was required to spend, in every financial year, at least 2% of the average net profit of the Company during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility (CSR) policy, applicable to every company having net worth of Rs. Five Hundred Crore or more, or turnover of Rs. One thousand crore or more, or having net profit of Rs. Five Crore or more, during Financial Year.

Section 134(3)(o)
Further the provision of Section 134 (3) (o) provides that, if company fails to comply with the provision of Section 135 (5), then the Board in its report shall specify the reasons for not spending the amount.

Judgment
The Bench gone through the pleadings on record and the submissions made by the ApurvaNatvar Parikh & Co Private Limited and ROC reply herein and said that the Applicants/Defaulters had violated the provision of S. 134 (3) (o) of the Act, and for the said violation the punishment is provided u/Section 134 (8) of Companies Act, 2013.

The ROC has also reported that, the Company has made the said default good by formulating the Corporate Social Responsibility (CSR) Policy, constituting the CSR Committee and giving the requisite disclosure as per the relevant provisions of the Act, in the Board Report of the Company

for the F.Y. 2015-16 and onwards.

The bench considered the entire records, pleadings of the Applicants and submissions of the Ld. Authorised Representative and imposed a Compounding Fee of Rs 1,00,000/- on the Company and Rs. 1,00,000/- each on the Directors of the Company that the Compounding fee should be paid within a period of three weeks from the date of order in the account of "Prime Minister's National Relief Fund."

02.	**28/11/2018**	**In the Matter of M/s. Hira Power and Steels Limited**	**NCLT, Mumbai**

The determination of the Quantum of the CSR responsibility can only be ascertained after the finalization of accounts at the close of the Books of Accounts of a particular financial year.

Background

Hira Power & Steels Limited, promoted by the Agrawal family is a leading player in the Steel Segment in Central India. The Company's main business interests are in Ferro Alloys, Power and Mining and it has its manufacturing facilities in Chhattisgarh, India, an area known for low cost production of Steel due to the easy availability of Raw Materials, Cheap Labour and Supportive Government Policies. The Company filed a Compounding application before Registrar of Companies (ROC), Chattisgarh and the same has been forwarded to the NCLT, Mumbai along with ROC Report.

Timeline of Events

ROC had informed that, this application was filed because the Company had violated the provision of Section 134 (3) (o) of the Companies Act, 2013 read with Rule 8 of Companies (Corporate Social Responsibility Policy) Rules, 2014 wherein the Company fails to give explanation for the non-spending of the CSR amount for the Financial Year 2014-15 in Director's Report.

Hira Power & Steels Limited submitted that due to inadvertent mistake the Company has failed to comply with the provisions of the S. 134 (3) (o) and were willing to comply with the provisions of the Act bona fidely. They had made all endeavours to comply with the provisions of the Act however, because of number of Circulars which were issued by the Ministry of Corporate Affairs with respect to CSR there was ambiguity in the correct implementation of the provisions.

It is further stated that the Company had constituted the CSR Committee as per the provisions of the Act on August 05, 2015 and made the necessary declarations as per Section 134 (3) (o) in the Director's Report for the F. Y. 2015-16. Consequently, the Default has been made good.

It is also submitted that, due to number of Circulars / Notifications issued by the Government the Applicants / Defaulters herein, could not ascertain the actual position of the CSR amount to spend and therefore the said contravention has happened.

In light of above submissions it is submitted that since, the Applicants / Defaulters herein had not

deliberately contravened the provisions of the Companies Act, 2013 and subsequently, after ascertaining the correct position, made the committed default hence, this Application may be allowed and minimum Compounding Fee may be imposed**.**

Judgment
The Bench said that, this provision regarding CSR is newly incorporated in the Statute and thereafter number of circulars was issued and as a result of those circulars no clear clarification regarding the provision can be recorded by the Company or its Directors. It is also noticed that the Company had made the default good by constituting the CSR committee and by furnishing declaration in the Director's Report for the F. Y. 2015-16.

The determination of the Quantum of the CSR responsibility can only be ascertained / quantified after the finalisation of accounts at the close of the Books of Accounts of a particular financial year. As a result, the amount to be contributed for charitable purpose as CSR responsibility can be intimated to the concerned authorities thereafter only i.e. after the finalisation of accounts of a particular financial year.

Compounding Fee of Rs. 10,000/- by the each Applicant / Defaulter herein (i.e. Rs. 50,000/- in total) was levied on the Company.

03.	**01.07.2019**	**M/S Shri Santosh Meenakshi Textiles (P) Ltd. vs. Roc, Tamilnadu, Coimbatore**	**NCLT,Chennai**

CSR Committee must be constituted if net profit exceeds the prescribed threshold limit

Background
Sree Santhosh Meenakshi textiles private limited is established at thekkalur, the Manchester of South India. The company has carved niche of its own in the competitive yarn market. Shri Santosh Meenakshi Textiles Pvt Ltd. filed an appeal under Section 421 of the Companies Act, 2013 against the impugned order of National Company Law Tribunal, Chennai by which the appellant company is held liable to spend the amount of Corporate Social Responsibility (CSR) for the FY 2014-15 taking into account only the net profit for the FY 2013-14; the appellant company is held liable to adhere to the other provisions of Section 135 of the Act and the company is permitted to file an application for revision of financial statement or Board report after incorporating the information of CSR.

When the appellant filed its financial statement along with Board Report with the ROC, the ROC observed the same and issued a Show Cause Notice to the Company as to why they have not complied with Section 135(1), 135(5) and Section 134(3)(o) of the Companies Act, 2013. The appellant filed Company Petition before the NCLT, Chennai under Section 131 of the Companies Act, 2013 and the NCLT passed the impugned order wherein it held that – "…… Petitioner Company is liable to spend the amount on account of CSR for FY 2014-15 taking into account only the net profit before tax for the FY 2013-14…."

Issues involved

NCLAT identifies the issue involved as whether the appellant is covered under Section 135(1) of the Act or not. NCLAT observes that as per the appellant's own calculation the net profit is Rs.5,68,70,023/- for the FY 2013-14 which is apparently more than Rs. 5 crores i.e. threshold limited prescribed under Section 135(1) of the Act. Therefore, the company is covered under Section 135(1) of the Act and as such appellant was liable to constitute Corporate Social Responsibility Committee of the Board in the year 2014-15. Section 135(5) of the Act stipulates that Board of every company who comes under Section 135(1) of the Act shall ensures that the company spends in every year at least 2% of the average net profit of the company made during the three immediately preceding financial years in pursuance of the CSR. The net profit will be calculated as per Section 198 of the Companies Act, 2013 and that the profit before tax will be taken as 'Net Profit'.

Further, NCLAT examines the next issue argued by the appellant that even if it is the company is deemed to be covered under Section 135(1) of the Act, then also it is not liable to expend any sum towards CSR in as much since the company had incurred losses in FY 2011-2012 and 2012-13 and the average net profit calculated for the three FY comes in negative. NCLAT disagrees with the observations of the NCLT which directed the appellant herein to spend the amount on account of CSR for the FY 2014-15 taking into account only the net profit before tax for the FY 2013-14 as it is clearly against the mandate of law that the amount to be spent is to be at least 2% of the average net profit of the company made during the three immediately preceding financial years in pursuance to its CSR Policy. NCLAT observes that the calculations submitted by the appellant shows that in the last three years the company is made a profit of Rs.1,38,69,595/- and average net profit of three years will come to Rs.46,23, 198/- and further that the company would never be covered under the average net profit of three preceding years.

NCLAT observed that that the appellant has resorted to deducting the losses twice over to somehow arrives at a negative figure to show that it is not required to spend any amount on the CSR for the FY 2014-15. NCLAT states that the method of calculation of average net profit for immediately preceding three years as directed by the NCLT will not be applicable.

NCLAT further observes that the company is a defaulter for spending an amount on CSR activities during the year 2014-15 since company has not constituted the CSR Committee and no proof substantiating the amount spent by the company on CSR activities has been placed.

Judgment

NCLAT passes an order modifying the impugned order holding that the appellant is liable to constitute Corporate Social Responsibility Committee of the Board in terms of Section 135(1) in 2014-15 as net profit of the company in the preceding year was more than Rs.5 crores; and further prescribes a method of calculation for the purpose of Section 135(5).

NCLAT holds appellant liable to constitute CSR committee of the Board in terms of Section 135(1) as the net profit of the company exceeds the threshold limit under Section 135(1) of the Act; prescribes method for calculation of average net profit for immediately preceding three years for the purpose of Section 135(5).

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Lesson 8- Accounts, Audit and Auditors

1) The Companies (Indian Accounting Standards) Amendment Rules, 2021 (Notification No: G.S.R. 419(E), dated June 18, 2021)

The Central Government, in consultation with the National Financial Reporting Authority, has notified the Companies (Indian Accounting Standards) Amendment Rules, 2021 to further amend the Companies (Indian Accounting Standards) Rules, 2015, pertaining to various Indian Accounting Standards (Ind AS), including those related to:

Additional disclosures w.r.t. interest rate benchmark reform to enable users of financial statements to understand the effect of interest rate benchmark reform on an entity's financial instruments and risk management strategy, regarding this an entity shall disclose information about:

(a) the nature and extent of risks to which the entity is exposed arising from financial instruments subject to interest rate benchmark reform, and how the entity manages these risks; and

(b) the entity‘s progress in completing the transition to alternative benchmark rates, and how the entity is managing the transition.

Further amendments including changes in the basis for determining the contractual cash flows as a result of interest rate benchmark reform, additional temporary exceptions arising from interest rate benchmark reform etc., has been introduced.

For details: https://egazette.nic.in/WriteReadData/2021/227712.pdf

2) The Companies (Accounting Standards) Rules, 2021 (Dated June 23, 2021)

The MCA vide notification dated June 23, 2021 has notified the Companies (Accounting Standards) Rules, 2021 for Small and Medium sized companies (SMCs), with which the turnover and borrowing limits has been revised as well as disclosure requirements has been made less onerous for SMCs.

The revised definition of “Small and Medium Sized Company” (SMC) means, a company-

(i) whose equity or debt securities are not listed or are not in the process of listing on any stock exchange, whether in India or outside India;

(ii) which is not a bank, financial institution or an insurance company;

(iii) whose turnover (excluding other income) does not exceed two hundred and fifty crore rupees in the immediately preceding accounting year;

(iv) which does not have borrowings (including public deposits) in excess of fifty crore rupees at any time during the immediately preceding accounting year; and

(v) which is not a holding or subsidiary company of a company which is not a small and medium-sized company.

Explanation - For the purposes of this clause, a company shall qualify as a Small and Medium

Sized Company, if the conditions mentioned therein are satisfied as at the end of the relevant accounting period.

Obligation to comply with Accounting Standards

(1) Every company, other than companies on which Indian Accounting Standards as notified under Companies (Indian Accounting Standards) Rules, 2015 are applicable, and its auditor(s) shall comply with the Accounting Standards in the manner specified.

(2) The Accounting Standards shall be applied in the preparation of Financial Statements.

Qualification for exemption of relaxation in respect of SMC

An existing company, which was previously not a Small and Medium sized Company (SMC) and subsequently becomes a SMC, shall not be qualified for exemption or relaxation in respect of Accounting Standards available to a SMC until the company remains a SMC for two consecutive accounting periods.

For details:

https://www.mca.gov.in/bin/dms/getdocument?mds=RKk43Bmq99ksfV0bUGr6XA%253D%253D&type=open

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Lesson 9 - Transparency and Disclosures

1) CASE LAWS

CASE LAWS PERTAINING TO ANNUAL RETURN

1. In the matter of Anil kumar Poddar vs. Nessville Trading (P.) Ltd.,Appellant made an application for inspection of register of members and annual return of respondent company for the years 2009 to 2012.When company failed to provide copies of aforementioned documents, he filed petition for supply of documents. The Respondent relied upon doctrine of “ejusdem generis” saying the word "any other person" mentioned in Section 163(2) of the erstwhile Companies Act, 1956 (corresponding to section 94 of the Companies Act, 2013) is limited to the person holding commercial interest such as creditor, financier, customer etc., because the preceding would the member and debenture holder to this word "any other person" being the persons having interest in the company, then the following word "any other person" cannot be said as extendable to any person who has no interest in the company, normally, a person considered to aggrieved when his interest is affected by the act of somebody else, but whereas this Petitioner has no interest in these companies, therefore, he cannot be called aggrieved to file these company petitions against the Respondent. The NCLT, Mumbai Bench held that, since petitioner was neither a shareholder, nor debenture holder nor holding commercial interest in respondent company, he was not entitled to seek relief under Section 163 of the erstwhile Companies Act, 1956 (corresponding to section 94 of the Companies Act, 2013) regarding supply of copies of documents for inspection.

2. In the matter of Suhas Chakma vs. South Asia Human Rights Documentation Centre Pvt. Ltd., the contention of the petitioner is that he never executed any instrument of transfer of his shareholdings to the 2nd respondent, and that he came to know that he was not a shareholder of the 1st respondent company by virtue of inspection of the Annual Return and that in relation to the illegal and fraudulent transfer of his shares, he came to know about the same only upon perusal of the Annual Returns. The NCLT, New Delhi Bench observed that, in view of the wordings used in section 164 of the Companies Act, 1956 (now Section 95 under the Companies Act,2013) to the effect that registers, returns and documents shall be only prima facie evidence and hence subject to rebuttal, and therefore, cannot be treated as conclusive evidence and in absence of share transfer forms and specified share certificates/letter of allotment in question, transfer of equity shares of Petitioner by Respondents were fraudulent and sham and declare it to be illegal and void.

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Lesson 10- An overview of Inter-Corporate Loans Investments, Guarantees and Security Related Party Transactions

1) Practical aspects on Inter-Corporate Loans and Investments:

a) **Illustration:**

Mr. A is the managing director in AB Ltd., which is engaged in manufacturing medicines. Mr. A is a qualified software expert. AB Ltd. after following a due process of tendering engages the services of Mr. A in his capacity of a software expert and for which an amount of Rs 50 lakh is proposed to be paid. The next lowest quotation for the proposal is Rs 2 crore.

This is a transaction with a related party. This transaction will fall under the proviso to Section 197(4) of the Act. If the terms and conditions are comparable with those offered by other parties, the transaction will not be treated as an office or place of profit as covered under Section 188. (Price offered by Mr. A is certainly far lower than the next lowest quote but the other terms also need to be examined). However, approval of the Audit Committee will be necessary. Approval of the Nomination & Remuneration Committee as provided under Section 197of the Act will also be required.

b) **Illustration:**

Mr. X was appointed as the managing director in MNP Ltd. on 1st January 2020. MNP Ltd. is engaged in manufacturing automobiles. Mr. X holds a few patents in his name since July 2010 and he is requested by MNP Ltd. for a licence of 5 years of one of the patents for which an amount of Rs 50 lakh is proposed to be paid.

Although this transaction is with a related party, this transaction will be protected under the proviso to Section 197(4) of the Act. Section 188(1) of the Act will be attracted if the transaction is not on an arm's length basis. This transaction is in the same line of business as that of the company and obtaining a license of the patent will be in its ordinary course of business. However, approval of the Audit Committee will be necessary. Approval of the Nomination & Remuneration Committee as provided under Section 197 of the Act will also be required.

2) Various Issues and Views on Inter-Corporate Loans and Investments:

a) **Issue**: Will the requirement of passing a shareholder's resolution 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 for approval before the shareholders at the general meeting of the Holding company?

View: Yes, the fifth proviso to Section 188(1) provides that the requirement of passing the resolution under the first proviso of section (1) of Section 188 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.

It is pertinent to observe that explanation (2) to Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014 provides that in case of a wholly owned subsidiary, the resolution that is passed by the holding company would be sufficient for the purpose of entering into the transaction between the wholly owned subsidiary and the holding company. \

This will mean that in case the fifth proviso to Section 188(1) is not available to a company as the accounts are not so consolidated, then as per explanation (2) to Rule 15 a resolution passed by the holding company will be sufficient.

b) **Issue**: Who determines that the transaction with related party is in the ordinary course of business? Is it the Board or the Audit Committee?

View: The Companies Act, 2013 does not clearly lay down tests for determining whether a transaction is in the ordinary course of business.

The Memorandum of Association of the company should be referred to for ascertaining whether the activity is covered in the objects clause therein. This is not a conclusive test but will assist in determining whether a transaction is in the ordinary course of business or not. The Audit Committee may decide whether a particular transaction is in the ordinary course of business and such decision will be based on the policy on transactions with related parties, if any. The company's policy on transactions with related parties should specify the parameters to guide the Audit Committee on whether a transaction is in the ordinary course of business or not. Apart from such a policy, a company may formulate guidelines approved by the Audit Committee and the Board of Directors on transactions with related parties. In such cases, the company can enter into transactions based on the approved guidelines and every transaction need not be placed before the Audit Committee for determining whether the same is in the ordinary course of business or not. In case the company does not have an Audit Committee, the decision as to whether a transaction is in the ordinary course of business or not will be taken by the Board.

c) **Issue**: Will a transaction of payment of salary to an employee who is a relative of a Director, (where such payment is in the ordinary course of business and on arm's length) require disclosure as a related party transaction in the Board's Report?

View: The same need not be disclosed as a related party transaction in Form AOC-2 in the Board's Report unless the same is material in the context of the company's business.

d) **Issue**: Is it required that items falling in the ambit of the fourth proviso to Section 188(1) of the Act i.e. transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis, be mentioned in Form AOC-2?

View: Form AOC–2 uses the term 'material' and therefore if the transactions are material, the same will need disclosure. A transaction which is in the ordinary course of business and on arm's length basis but which is considered to be material will require disclosure in Form AOC–2. It is to be noted that approvals of the Board and the shareholders are not required if the transaction is in the ordinary course of business and on arm's length basis, but disclosure is required from the perspective of transparency.

e) **Issue**: Where a Board meeting is held prior to the Audit Committee meeting and the Board approves a transaction with a related party. Can the Audit Committee approval be taken subsequently?

View: Yes. The legal requirement is clear that the transactions referred to in Section 188 require approval of the Audit Committee. Audit Committee approval after Board's approval is irregular but not illegal. Further, the approval of the Audit Committee should be obtained before the transaction.

f) **Issue**: Whether approval of the Board will need to be taken by a wholly owned subsidiary which is not required to constitute an Audit Committee, for entering into transactions with related parties in the ordinary course of business and on an arm's length basis?

View: In such case, it is a good practice to place the item pertaining to related party(ies) before the Board. This is, however, not mandatory.

g) **Issue**: Where transactions are between a holding company and its wholly owned subsidiary company, will Section 177 of the Act be attracted?

View: A transaction between a holding company and its wholly owned subsidiary company is exempted from the requirement of Audit Committee approval under Section 177 of the Act and as

per Regulation 23 of the SEBI (LODR) Regulations in case of a listed company. However, if the transaction is a related party transaction i.e. of the nature falling under Section 188(1) of the Act, then approval of the Audit Committee will be required for such transaction.

In case of a transaction between a holding company and a subsidiary company which is not a wholly owned subsidiary, Sections177 and 188 of the Act as well as Regulation 23 of the Listing Regulations will apply.

The company is required to check whether it is a transaction in the ordinary course of business and on an arm's length basis as per Section 188 of the Act. In case it is a material related party transaction for the purpose of Regulation 23 of Listing Regulations, then approval of shareholders will also be necessary.

h) **Issue**: In case of a public company there are three Directors and all are related to each other and there is an item of business in which all the three directors are interested. What is the way forward in such a situation?

View: The Board may approve such items only if a dis-interested quorum is present. Otherwise, the matter would need to be placed for approval at a General Meeting. At a general meeting, if 90% or more of the number of members are related to the promoters or are related parties, then the related parties can also vote on the resolution to approve any contract or arrangement.

In case of a listed public company, the directors need to decide first on the proposed resolution and then the matter needs to be placed before the shareholders for approval.

3) **Case Study**

26.09.2019	**ITC Ltd. (Appellant) vs. Securities and Exchange Board of India & Ors.(Respondents)**	**Securities Appellate Tribunal**

Related-party transactions only contemplate transactions between a company and related party

Securities Appellate Tribunal(SAT): Coram of Justice Tarun Agarwala,(Presiding Officer), Justice M. T. Joshi(Judicial Member), and Dr. C. K. G. Nair (Member), dismissed an appeal filed by ITC Ltd. against the proposed sale transaction of the substantial assets of Hotel Leela ventures Ltd. (Leela) for which the impugned Postal Ballot Notice (PB Notice) was issued and allowed the appeal filed by JM Financial Asset Reconstruction Co. Ltd. (JMF ARC).

Fact of the Case

"Leela" under financial distress, had decided to restructure its debts under the Corporate Debt Restructuring (CDR) mechanism. The majority lender institutes agreed for the same. On 20-09-2012 the CDR package of Leela was approved. Thereafter, a Master Restructuring Agreement was executed on 25-09 2012 between Leela and State Bank of India (SBI) and other lenders on the other hand. Under the said Master Restructuring Agreement, Leela was to comply with certain terms and conditions, which it could not.

Thereafter, on 25-06-2014, a Trusteeship Agreement under the SARFAESI Act was executed between JMF ARC and the lenders under which a Trust was created named as JMF ARC-Hotels June 2014-Trust. This Trust had issued security receipts to these Joint Lenders and also offer documents were issued for the private placement of the said receipts. Eventually, the CDR package was declared as failed and on 30-06-2014, majority lenders had assigned Rs.4150.14 crore of debtto the Trust. JMF ARC paid Rs.865 crores upfront and issued security receipt worth Rs.3200 crores. It filed disclosures under Regulation 29(2) of the Takeover Regulations on 25-10-2017.

JMF ARC later filed a corporate insolvency resolution process before the National Company Law Tribunal Mumbai Bench (NCLT), the proceedings for which are pending.

Due to initiative of JMF ARC, a proposal was received from Brookfield for the "Asset Sale Transaction" of the Company's assets and the additional transactions between Brookfield and some of the promoters. On 18-03-2019, the Board of Directors of Leela approved the framework agreement comprising the Asset Sale Transaction and PB Notice was issued. On 22-04-2019, the appellant ITC filed a Company Petition before the NCLT complaining of oppression and mismanagement, which too is pending before the NCLT. ITC argued that they were not allowed to obtain a copy of the Framework Agreement but could only take notes.

ITC objected that all the transactions were related party transactions which could not be generally put for the vote including the Promoters, Directors being related parties as also JMF ARC. Further, JMF ARC acting as a Merchant Banker Leela was also to gain a remuneration of Rs 70 cores besides its resolution of debt assigned to it by the lenders. Further, JMFARC had acquired 26%ofthe equity of Leela against the provisions of the Takeover Regulations, 2011, it should have been prohibited by SEBI from participating in the voting under the provisions of Regulation 32 of the Takeover Regulations.

SEBI had held that the transactions in question were not related party transactions. They stated that in acquiring 26% of the equity shares of the Leela by JMF ARC, only a technical breach has occurred which could be exempted.

Aggrieved by this order of not restraining Promoters/Directors of Leela and JMF ARC from voting, ITC filed an appeal before SAT.

All the respondents submitted that the appellant was a rival company which was trying to scuttle the transaction only to compel Leela to undergo the debt resolution under the Insolvency and Bankruptcy Code. The appellant, on the other hand, submitted that the Directors and the Promoters of Respondent Leela were pushing ahead with their personal agenda of pocketing an amount of Rs 300 crores through the additional transaction.

The Tribunal answered the following issues:

• Whether the disputed transactions were related party transactions limiting the voting rights of the directors, promoters of the Leela and of JMF ARC?

• Whether JMF ARC could be completely prevented from voting in view of the Takeover Regulations?

Judgment

The Tribunal was of the view that it was not required of them to asses the proposed transaction to find as to whether it is in the interest of the investors. In view of objection to the voting rights or limitations on the voting rights of the directors/promoters of the respondents, the reliefs can be modified in terms of the relevant regulations. The appeal filed by ITC Ltd. was dismissed by the Tribunal citing the following regulations:

Takeover Regulations:

In view of the Takeover Regulations of 2011 an acquirer acquiring 25% or more shares, voting rights or control in a listed Company has to adopt the route as provided by the Takeover Regulations subject to certain exemptions. JMF ARC acquired 26% of the shares of the Company by claiming exemption as provided by Regulation 10 of the Takeover Regulations. SEBI in the impugned order held that the said acquisition was only a technical breach of the Regulations fit for exemption and did not exercise its power to issue directions as provided by Regulation 32 of the Takeover Regulations.

Corporate debt restructuring scheme was announced by the Reserve Bank of India through various circulars from time to time for the purpose of restructuring the debt of financially distressed companies in an attempt to revive such Companies. The circulars provided a basic framework. Specific plans were to be worked out for a Company inter alia regarding interest moratorium, plans of payment, etc. to be worked out in the agreement which would be approved by the Empowered Group of CDR scheme. In the event of default, the agreement can provide for certain contingencies. Clause 7.2 of the Master Restructuring Agreement provided for remedy upon default. Therefore, the covenant regarding conversion right would come into picture only when the CDR scheme fails i.e. default is made by the borrower in pursuance of the CDR scheme.

LODR Regulations: Related Party Transactions:

The appellant had objected the exercise of PB Notice asking all the shareholders including the respondents who are the promoters/directors of the in view of the fact that the proposed Asset Sale Transaction of the Company with Brookfield was a composite transaction to be consummated only when additional transactions with the promoters personally are also agreed. It was submitted that as the nature of the transaction was, the same would be a related party transaction attracting the provisions of Regulation 23 of the LODR Regulations.

Therefore, the entire transaction was held to be a composite transaction. Further, the additional transaction between Brookfield and ITC cannot also be termed as related party transactions and, therefore, the provisions of Regulation 23 of the LODR Regulations would not be attracted.

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Lesson 12- An overview of Corporate Reorganization

1) Case Law

In the matter of Mohit Agro Commodities & Ors. NCLAT, dated June 28, 2021

When the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured and Unsecured Creditors can be dispensed with as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected

Fact of the Case

The Appellant Company ('Transferor Company' and 'Transferee Company') filed Applications under Sections 230 to 232 and other relevant provisions of the Companies Act, 2013 seeking dispensation of the meeting of the Equity Shareholders, Secured Creditors and Unsecured Creditors in respect of the scheme of Amalgamation of the 'Transferor Company' with the 'Transferee Company' with effect from the appointed date on the aggrieved terms and conditions has set out in the scheme in accordance with Sections 230 to 232 of the Companies Act, 2013 and other applicable provisions of the Act. It is contented that there is no change in the capital structure of the 'Transferor Company' till the date of approval of the schemes by the Board of Directors.

It is further stated that the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and that both the Companies are incorporated in similar type of nature of activities and that the 'Transferee Company' had acquired the 'Transferor Company' as a business supportive mechanism for ease of operations.

Judgment

The NCLAT has observed that Section 232(1) of the Companies Act, 2013 uses the word 'may' which introduces an element of discretion to the Tribunal to be exercised in the interest of justice in appropriate situations. Section 232 is a specific provision carved out by the Legislature when both conditions maintained in clauses (a) and (b) of sub-Section (1) of Section 232 are met.

In the instant case the amalgamation sought for is between a Wholly Owned Subsidiary and the Holding Company. The point which needs to be noted is:

• whether such an arrangement alters the rights of the Stakeholders of the Company?

• whether such an amalgamation has any bearing internally on Creditors/Members of both the Companies?

• whether not holding the subject meeting would amount to violation of any of the provisions of the Companies Act, 2013?

• whether the Tribunal can exercise their discretion when the 'Transferor Company' is a Wholly Owned Subsidiary of the 'Transferee Company' and financial position of the 'Transferee Company' is positive and the merger is not affecting the rights of the Shareholders or the Creditors?

Therefore, it is held that the rights and liabilities of Secured and Unsecured Creditors were not getting affected in any manner by way of the proposed scheme as no new shares are being issued by the 'Transferor Company' and no compromise is offered to any Secured and Unsecured Creditors of the 'Transferee Company'. Hence, when the 'Transferor and Transferee Company' involve a Parent Company and a Wholly Owned Subsidiary the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors can be dispensed with as the rights of the Equity Shareholders of the 'Transferee Company' are not being affected.

Lesson 13- An Introduction to MCA- 21 and filing in XBRL

1) The Companies (Incorporation) Fourth Amendment Rules, 2021 (Notification No: G.S.R. 392(E), dated June 07, 2021)

The Central Government has made the Companies (Incorporation) Fourth Amendment Rules, 2021 to further amend the Companies (Incorporation) Rules, 2014.

1. In Rule 38 A of the Companies (Incorporation) Rules, 2014,

(i) in the marginal heading, for the words, **"and Opening of Bank Account",**

The following the words shall be substituted,

"Opening of Bank Account and Shops and Establishment Registration"

(ii) in the opening portion, for the letters "AGILE-PRO", the letters "AGILE-PRO-S" has been substituted;

(iii) for clauses "(c) and (d)" relating to "Profession Tax Registration and Opening of Bank Account", the following clauses shall be substituted, namely:-

"(d) Profession Tax Registration with effect from the 23rd February, 2020;

(e) Opening Bank Account with effect from the 23rd February, 2020;

(f) Shops and Establishment Registration."

2. In the Annexure to the Companies (Incorporation) Rules, 2014, for the e-Form No.INC-35 (AGILE-PRO), the e-Form INC-35 (AGILE-PRO-S) has been substituted

BRIEF ANALYSIS:

Rules	**Amendment Highlights**	**Effect**
Rule 38A of the Companies (Incorporation) Rules, 2014	**Change in the Heading** Application for registration of Goods and Service Tax Identification Number (GSTIN), Employee State Insurance Corporation (ESIC) registration, Employees' Provident Fund organisation (EPFO) Registration and Profession Tax Registration, **Opening of Bank Account and Shops and Establishment Registration**	the facility of obtaining Shops and Establishment Registration has been included.
	In the opening portion of the Rule, for the letters "AGILE-PRO", the letters "AGILE-PRO-S" has been substituted;	The application for incorporation of a company in SPICe+ under Rule 38 of the Companies (Incorporation) Rules, 2014 shall be accompanied by the form AGILE-PRO-S (INC-35).
	(d) Profession Tax Registration with effect from the 23rd February, 2020.	Sequence revised and clause (f) w.r.t. Shop and

	(e) Opening of Bank Account with effect from 23rd February, 2020. (f) Shop and Establishment Registration.	Establishment Registration has been added.
Annexure to Rule 38A of the Companies (Incorporation) Rules, 2014	INC-35 "AGILE-PRO-S"	Form Name Revised to "INC-35 AGILE-PRO-S" and respective changes to the form has been notified.

For details:

https://www.mca.gov.in/bin/dms/getdocument?mds=sbRk0d1avtQVQZrw%252BKS2GA%253D%253D&type=open

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Lesson 16 – Directors

1) The Companies (Creation and Maintenance of databank of Independent Directors) Amendment Rules, 2021 (Notification No: G.S.R. 418(E), dated June 18, 2021)

The Central Government has made the Companies (Creation and Maintenance of databank of Independent Directors) Amendment Rules, 2021, to further amend the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, namely:-

(a) In Rule 3(7) in clause (a) of the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019:

after the words "for inclusion", the words "or renewal" shall be inserted;

(b) In Rule 3 after sub-rule (7) of the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, before explanation, the following sub-rule shall be inserted, namely:-

"(8) In case of delay on the part of an individual in applying to the institute under sub-rule (7) for inclusion of his name in the data bank or in case of delay in filing an application for renewal thereof, the institute shall allow such inclusion or renewal, as the case may be, under rule 6 of the Companies (Appointment and Qualification of Directors) Rules, 2014 after charging a further fee of one thousand rupees on account of such delay."

Impact

Accordingly, with this amendment, a new sub-rule 8 has been inserted in Rule 3 of the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, which provides that in case of delay on the part of an individual in applying to the Indian Institute of Corporate Affairs for inclusion of name in the independent director's data bank or in case of delay in filing an application for renewal thereof, the institute shall allow such inclusion or renewal, as the case may be, after charging a further fee of Rs.1000 on account of such delay.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MjAxNDA=&docCategory=NotificationsAndCirculars&type=download

2) The Companies (Appointment and Qualification of Directors) Amendment Rules, 2021 (Notification No. G.S.R. 579(E), dated August 19, 2021)

The MCA has notified the Companies (Appointment and Qualification of Directors) Amendment Rules, 2021 to further amend the Companies (Appointment and Qualification of Directors) Rules, 2014.

(1) In Rule 6(4) of the Companies (Appointment and Qualification of Directors) Rules, 2014, in the first proviso, for clause (B),

the following clause has been substituted, namely:—

"(B) in the pay scale of Director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,—

(i) the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or

(ii) the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.".

(2) after the second proviso, the following proviso has been inserted, namely:—

"Provided also that the following individuals, who are or have been, for at least ten years:—

(A) an advocate of a court; or

(B) in practice as a chartered accountant; or

(C) in practice as a cost accountant; or

(D) in practice as a company secretary,

shall not be required to pass the online proficiency self-assessment test.".

Impact

The Amendment provides that an individual is exempted to pass the online proficiency self-assessment test to be included in independent directors' databank if he has served for a total period of not less than three years as on the date of inclusion of his name in the data bank in the pay scale of Director or equivalent or above in any Ministry or Department, of the Central Government or any State Government, and having experience in handling,—

(i) the matters relating to commerce, corporate affairs, finance, industry or public enterprises; or

(ii) the affairs related to Government companies or statutory corporations set up under an Act of Parliament or any State Act and carrying on commercial activities.".

It is further provided that an individual who are or have been, for at least ten years an advocate of a court or as a chartered accountant in practice or as a cost accountant in practice or as a company secretary in practice, shall not be required to pass the online proficiency self-assessment test.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzU0MTU=&docCategory=Notifications&type=open

3) The Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021 (Notification No: G.S.R. 580(E), dated August 19, 2021)

The MCA has notified the Companies (Creation and Maintenance of databank of Independent Directors) Second Amendment Rules, 2021 to further amend the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019. In the Companies (Creation and Maintenance of databank of Independent Directors) Rules, 2019, after rule 5, the following new rule 6 and the Schedule has been inserted, namely:-

"6. Annual report on the capacity building of independent directors:- The institute shall within sixty days from the end of every financial year send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an independent director in format provided in the Schedule to these Rules." The amendment also prescribes the format of Annual report on Capacity Building of Independent Director.

Impact

With this amendment the Indian Institute of Corporate Affairs (IICA) shall within sixty days from the end of every financial year send an annual report to every individual whose name is included in the data bank and also to every company in which such individual is appointed as an independent director.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzU0MTY=&docCategory=Notifications&type=open

4) Various Issues and Views on Independent Director – Section 149(6)

a. **Issue**: Whether the spouse of Secretarial Auditor or Statutory Auditors of the company, be appointed as an independent director in the company?

View: According to Section 149(6)(e)(ii) of the Act, an independent director in relation to a company, means who neither himself nor any of his relatives 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 a firm of auditors or company secretaries in practice or cost auditors of the company or its holding, subsidiary or associate company. Hence such a person whose spouse is the secretarial auditor/statutory auditor of the company cannot be appointed as an independent director in that company.

b. **Issue**: Can a friend of a director be considered as independent?

View: Law does not prohibit the appointment of a friend of a director of the company as an independent director, if he fulfils all the legal requirements.

c. **Issue**: Can a Spouse of an independent director be appointed as an independent director?

View: No, a Spouse of an independent director cannot be appointed as an independent director. Refer to Section 149(6)(b)(ii) which provides that an independent director in relation to a company means one who is not related to promoters or directors in the company, its holding, subsidiary or associate company.

d. **Issue:** Can an independent director be appointed for the first term as an additional director by the board of directors of a company?

View: Section 150(2) of the Act provides that "the appointment of independent director shall be approved by the company in general meeting as provided in sub-section (2) of section 152". Section 152(2) of the Act mandates that save as otherwise expressly provided in the Act, every director shall be appointed by the company in general meeting. Section 161(1) of the Act confers on the Board of Directors of a company the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who 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.

On a holistic reading of sections 150(2), 152(2) and 161 of the Act, it is clear that the Act confers the power on the Board to appoint additional directors designated as independent directors subject to approval of the shareholders at the general meeting of the company.

Further schedule IV of the Act provides that "the appointment of independent director(s) of the company shall be approved at the meeting of the shareholders."

The requirement of the above sections read with Schedule IV and Section 149 (4) do not imply that there is a requirement of prior approval of shareholders for appointment of an independent director. Therefore, it can be said that an independent director can be appointed by the Board as an additional director and his appointment can be approved by the shareholders at the next annual general meeting, as required under section 161(1) and schedule IV to the Act, with effect from the date of the Board meeting. The period of five years shall be counted from the effective date of appointment as approved by the Board in its meeting. Hence, the period between the effective date of appointment of independent director by the Board and the date of approval by the shareholders shall be considered as part of the first term of the independent director.

Further as per second proviso to rule 4(1) of the Companies (Appointment and Qualification of Directors) Rules, 2014, 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. This further substantiates the above conclusion that appointment of independent directors can be done by the Board as additional director subject to

approval of shareholders at the general meeting.

e. **Issue:** Can an independent director be appointed as an additional director by the Board of Directors of a company for a second term once his first term is over?

View: In order to reply to the aforesaid, it is imperative to look into the provisions of section 149(10) of the Act which provides as under: "an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for reappointment on passing of a special resolution by the company." Further section 149(11) of the Act provides as under: "Notwithstanding anything contained in sub-section (10), no independent director shall hold office for more than two consecutive terms, but such independent director shall be eligible for appointment after the expiration of three years of ceasing to become an independent director".

The term "Consecutive" has not been defined in the Act. However reference of the word "consecutive" can be drawn from Merriem Webster dictionary, which provides the meaning as following one after the other or successive. This effectively means both the terms have to follow each other. Similarly, in the Webster dictionary, the term "eligible" is referred to in the context a person or thing that is qualified or permitted to do or be something. The term "re-appointment" is also defined in the Webster dictionary as "to name officially to a position for a second or subsequent time".

While going through the aforesaid definitions as used in sections 149(10) and 149(11), it becomes clear that an independent director is eligible to be reappointed for a second term only on passing of special resolution by the shareholders and not before. Therefore, obtaining shareholders' consent prior to his reappointment for a second term, in considered view, is a pre-requisite for the independent director to be eligible to serve on the Board of the company for a second term.

If the shareholders' approval by special resolution for his reappointment for second term is not taken as on the last date of the first term, then such independent director cannot be re-appointed by Board as an additional director for second term, as he does not possess the eligibility to get re-appointed for second term and hence, he ceases to be a director at the end of his first term.

f. **Issue:** Whether Circular resolution is allowed for appointment of an independent director while appointing him for the first term?

View: There is no restriction on appointment of an independent director by way of a circular resolution, if he is to be appointed by the Board as an additional director. However, it must be ensured that Nomination and Remuneration Committee of the company has duly discussed and recommended the candidate, before circulation of Board resolution.

g. **Issue**: Can appointment of independent director be done to fill the casual vacancy created by resignation of any other independent director?

View: Whenever any existing independent director ceases to be a director of company either due to resignation, death or otherwise, then in order to ensure the requisite Board composition, a new independent director should be appointed. The Board can appoint an individual either as an additional director under section 161(1) of the Act to hold office till the next annual general meeting of the company or he can be appointed as a director in the casual vacancy to fill the vacancy created in the office of independent director. It may be noted that if a director is appointed by the Board to fill the casual vacancy (as mentioned above), then as per Section 161(4) read with Annexure A to the Secretarial Standard on Meetings of the Board of Directors (SS-1), his appointment should be approved at a Board meeting and not through resolution by circulation. Such appointment should also be approved by the members in the immediate next general meeting. Further, as per proviso to section 161(4) of the Act, such director shall hold office only up to the date up to which the director in whose place he is appointed would have held the office of independent director, if had not been vacated. Hence, the first term of such newly appointed independent director shall be for a term lesser than 5 years, which he would have otherwise got if

he had been appointed as an Additional Director.

h. **Issue**: Whether end of first term of director without re-appointment for second term or end of the second term of an Independent Director terminates directorships of a director?

View: Under section 149(10) of the Act, an independent director shall hold office for a term up to five consecutive years on the Board of a company, but shall be eligible for re-appointment on passing of a special resolution by the company based on the recommendation of the Nomination and Remuneration Committee and Board of Directors of the company and disclosure of such appointment shall be made in the Board's Report. Since the term used is holding office for a term up to five consecutive years the independent director will cease to be a Director on the expiry of his term of five years. Hence, the director will lose/ vacate his directorship also on the expiry of the first term or the second term as the case may be.

i. **Issue:** If a known person is to be appointed as Independent Director, should his name be mentioned in Databank?

View: Any individual who intends to get appointed as an independent director in a company shall before such appointment shall register his name with the databank of independent directors.

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Lesson 19- General Meetings

1) Various practical aspects on General Meetings

a. Illustration:

Mr. X, Ms. Y (wife of Mr. X) and Mr. C (son of X & Y) are the Directors of XYZ Ltd. They are also the Members of XYZ Ltd. Along with 4 other persons who are brothers and sisters of Mr. X. XYZ Ltd. proposes to hold the General Meeting at the residence of Mr. X.

In this case, since only the directors and their relatives are members of the company and the residence of Mr. X is generally known to all Members of XYZ Ltd. and can be easily located, the route-map and prominent landmark is not required to be provided in the Notice.

b. **Illustration**:

XYZ Ltd. proposes to enter into a contract with PQR Ltd. Mr. X and Mr. Y, who are promoters of XYZ Ltd. hold 1.5% and 0.5% of the total paid-up share capital of PQR Ltd. respectively. In this case, the shareholding of both, Mr. X and Mr. Y should be disclosed in the explanatory statement of the Notice of General Meeting of XYZ Ltd., since the extent of their shareholding collectively is not less than two percent of the paid-up share capital of PQR Ltd.

c. **Illustration:**

Say, a company XYZ Ltd. wish to hold its General Meeting at a shorter notice, immediately after the Board Meeting on same day and the required consent from 95% of the Members entitled to vote at the Meeting is received before the time fixed for commencement of Meeting. Although in such a case the consent of 95% Members entitled to vote at the meeting is received, still the proxy requirements need to be complied with by the Company.

In other words, in the above case the Board Meeting and General Meeting can't be held on the same day.

d. Illustration:

Considering the above illustration, if the consent of all the Members (i.e. 100%) entitled to vote at such Meeting is received before the time fixed for commencement of the Meeting, the proxy requirements need not be complied with. In other words, in such a case the Board Meeting and General Meeting can be held on the same day.

e. **Illustration:**

Consider a company where the number of Members was originally large, say 500, and the Quorum fixed by the Articles was 100 Members present. Subsequently, 450 Members sold their shares which were acquired by some of the remaining 50 Members. Here, proceedings will be valid if all Members are present in person. In the given case, if less than 50 Members are present, there shall be no Quorum.

f. **Illustration**:

Assume that the General Meeting of a company is scheduled on 22nd September 2020 and company has received 4 proxies for the same holdings of a Member dated with 5th, 12th, 10th and 20th September 2020. The proxy dated last should be considered valid i.e. 20th. However, if the proxies received are not dated or bear the same date without mention of time, all proxies should be treated as invalid.

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Lesson 20 - Virtual Meetings

1) The Companies (Meetings of Board and its Powers) Amendment Rules, 2021 (Notification No: G.S.R. 409(E), dated June 15, 2021)*

The MCA vide Notification dated June 15, 2021 has omitted Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 which was related to the matters not to be dealt with in a meeting through video conferencing or other audio-visual means.

Accordingly, with the said amendment, now the following previously restricted matters can be considered in a Board Meeting held through video conferencing or other audiovisual means, namely: -

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 section 134 (1) of the Companies Act, 2013; and

v. the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MTkxMzU=&docCategory=NotificationsAndCirculars&type=download

(* Note: The above-mentioned amendment is also relevant for Lesson No. 9 and 22)

2) Case Laws

1) Achintya Kumar Barua alias Manju Baruah and Ors.Vs. Ranjit Barthkur Company Appeal (AT) No. 17 of 2018 February 08, 2018

NCLAT: Participation in board meeting through video conferencing – Whether right of a director is subject to availability of facility by company?

The NCLAT observed that Section 173(2) gives right to a Director to participate in the meeting through videoconferencing or other audio-visual means and the Central Government has notified Rules to enforce this right and it would be in the interest of the companies to comply with the provisions in public interest.

• It is clear that the Rules require that the company shall comply with the procedure prescribed for convening and conducting the Board meetings through video-conferencing or other audio-visual means.

• The Chairperson and Company Secretary, if any, have to take due and reasonable care as specified in Rule 3(2) of the Companies (Meetings of the Board and its Power) Rules, 2014.

• The appellant contented that sub-Rule (2)(e) puts the burden on the Chairperson to ensure that no person other than the concerned Director is attending and this would not be possible for Chairperson to ensure in video-conferencing.

c The NCLAT observed that they do not find force in the submission as Rules, read as a whole are a complete scheme.

Sub-Clause (4)(d) of Rule 3 puts responsibility on the Director participating also. The Chairperson will ensure compliance of sub-Clause (e) or Clause (2) and the Director will need to satisfy the

Chairperson that Sub-Clause (d) of Clause 4 is being complied.

• Appellants tried to rely on the Secretarial Standard on Meetings of the Board of Directors to submit that the guidelines are that such participation can be done "if the Company provides such facility". NCLAT observed that such guidelines cannot override the provisions under the Rules. The mandate of Section 173(2) read with Rules mentioned above cannot be avoided by the companies.

• Hence, NCLAT came to the conclusion that the provisions of section 173(2) of the 2013 Act are mandatory and the companies not be permitted to make any deviations therefrom and directed non-applicants before it to provide the facilities as per Section 173(2) of the New Act subject to fulfilling the requirements of Rule 3(3)(e) of the Rules.

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Miscellaneous

1) The MCA notified the commencement date for Section 4 of the Companies (Amendment) Act, 2020 (Notification No: S.O. 2904(E), dated July 22, 2021)

The MCA has appointed September 01, 2021 as the commencement date of Section 4 of the Companies (Amendment) Act, 2020 for implementation of amendments in the Rectification of Name of Company provisions under Section 16 of the Companies Act, 2013.

Impact:

- The time limit of compliance of direction given by the Central Government to change the name of company has been reduced from 6 months to 3 months.
- Further, the Central Government has been empowered to allot a new name to the company, in case of default in complying with its direction instead of imposing punishment for non-compliance for such default.

The company is however not prevented from subsequently changing its name.

For details:

https://www.mca.gov.in/bin/dms/getdocument?mds=%252BrVndsNHmju%252FOHCLaLZqVA%253D%253D&type=open

2) The Companies (Incorporation) Fifth Amendment Rules, 2021, (Notification No: G.S.R. 503(E), dated July 22, 2021) (Effective from September 01, 2021)

The Central Government has made the Companies (Incorporation) Fifth Amendment Rules, 2021 to further amend the Companies (Incorporation) Rules, 2014, namely:-

In the Companies (Incorporation) Rules, 2014, after rule 33, the following rule shall be inserted, namely:-

Rule 33A-Allotment of a new name to the existing company under section 16(3) of the Companies Act, 2013

(1) In case a company fails to change its name or new name, as the case may be, in accordance with the direction issued under section 16(1) of the Companies Act, 2013 within a period of three months from the date of issue of such direction, the letters "ORDNC" (which is an abbreviation of the words "Order of Regional Director Not Complied"), the year of passing of the direction, the serial number and the existing Corporate Identity Number (CIN) of the company shall become the new name of the company without any further act or deed by the company, and the Registrar shall accordingly make entry of the new name in the register of companies and issue a fresh certificate of incorporation in Form No. INC-11C.

Provided that nothing contained in sub-rule (1) shall apply in case e-form INC-24 filed by the company is pending for disposal at the expiry of three months from the date of issue of direction by Regional Director unless the said e-form is subsequently rejected.

(2) A company whose name has been changed under sub-rule (1) shall at once make necessary compliance with the provisions of section 12 of the Companies Act, 2013 and the statement, "Order of Regional Director Not Complied (under section 16 of the Companies Act, 2013)" shall be mentioned in brackets below the name of company, wherever its name is printed, affixed or engraved.

Provided, no such statement is required to be mentioned in case the company subsequently changes its name in accordance with the provisions of section 13 of the Companies Act, 2013.

For details: https://www.egazette.nic.in/WriteReadData/2021/228419.pdf

3) The Companies (Specification of definitions details) Third Amendment Rules, 2021, (Notification No: G.S.R. 539(E), dated August 05, 2021)

The Central Government has made the Companies (Specification of definitions details) Third Amendment Rules, 2021 to further amend the Companies (Specification of definitions details) Rules, 2014.

In Rule 2(1)(h) of the Companies (Specification of definitions details) Rules, 2014 under the definition of "Electronic Mode", the following explanation shall be inserted, namely:-

"Explanation.- For the purposes of this clause, electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005) shall not be construed as 'electronic mode' for the purpose of clause (42) of section 2 of the Act."

Impact:

Rule 2(1)(h) of the Companies (Specification of Definitions Details) Rules, 2014 defines the term 'electronic mode' in the context of a foreign company.

With the insertion of this Explanation, it is clarified that electronic-based offering of securities, subscription thereof, or listing of securities in the IFSC under SEZ Act, 2005 is not to be construed as 'electronic mode' for the purpose of Section 2(42) of the Companies Act, 2013 related to the definition of Foreign Companies.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzMzMjM=&docCategory=Notifications&type=open

4) The Companies (Registration of Foreign Companies) Amendment Rules, 2021 (Notification No. G.S.R. 538(E), dated August 05, 2021)

The Central Government has made the Companies (Registration of Foreign Companies) Amendment Rules, 2021 to further amend the Companies (Registration of Foreign Companies) Rules, 2014.

In Rule 2(1)(c) of the Companies (Registration of Foreign Companies) Rules, 2014 under the definition of "Electronic Mode", the following explanation shall be inserted, namely:-

"Explanation.- For the purposes of this clause, electronic based offering of securities, subscription thereof or listing of securities in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005) shall not be construed as 'electronic mode' for the purpose of clause (42) of section 2 of the Act."

Impact:

Rule 2(1)(c) of the Companies (Registration of Foreign Companies) Rules, 2014 defines the term 'electronic mode' in the context of a foreign company.

With the insertion of this Explanation, it is clarified that electronic-based offering of securities, subscription thereof, or listing of securities in the IFSC under SEZ Act, 2005 is not to be construed as 'electronic mode' for the purpose of Section 2(42) of the Companies Act, 2013 related to the definition of Foreign Companies.

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzMzMjI=&docCategory=Notifications&type=open

5) Notification under Section 393A of the Companies Act, 2013 (Notification No: S.O. 3156(E), dated August 05, 2021)

The MCA exempts the following class of companies from the provisions of Sections 387 to 392 (both inclusive) of the Companies Act, 2013, namely:

(a) Foreign companies;

(b) Companies incorporated or to be incorporated outside India, whether the company has or has not established, or when formed may or may not establish, a place of business in India,

insofar as they relate to the offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under Section 18 of the Special Economic Zones Act, 2005 (28 of 2005).

For details:

https://www.mca.gov.in/bin/ebook/dms/getdocument?doc=MzMzMjQ=&docCategory=Notifications&type=open

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