After studying this chapter, the students would be able to:

- Know the provisions related appointment of Managing Director, Whole Time Director or Manager.
- Know the provisions of appointment of Key Managerial Personnel.
- Analyze overall maximum managerial remuneration and managerial remuneration in case of absence or inadequacy of profits.
- Calculating the profits and recovery of managerial remuneration in certain cases.
- Explain the concepts of compensation for loss of office of managing or whole time director or manager.
- Know the functions of Company Secretary and Secretarial audit requirements.
1. INTRODUCTION

"Chief Executive Officer" [Section 2(18)] means an officer of a company, who has been designated as such by it.

"Chief Financial Officer" [Section 2(19)] means a person appointed as the Chief Financial Officer of a company.

"Company Secretary" or "secretary" [Section 2(24)] means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the Company Secretaries Act, 1980 (56 of 1980) who is appointed by a company to perform the functions of a company secretary under this Act;

"Company secretary in practice" [Section 2(25)] means a company secretary who is deemed to be in practice under sub-section (2) of section 2 of the Company Secretaries Act, 1980 (56 of 1980).

"Key managerial personnel" [Section 2(51)], in relation to a company, means—

(i) the Chief Executive Officer or the managing director or the manager;

(ii) the company secretary;

(iii) the whole-time director;

(iv) the Chief Financial Officer; and

(v) such other officer as may be prescribed.

"Manager" [Section 2(53)] means an individual who, subject to the superintendence, control and direction of the Board of Directors, has the management of the whole, or substantially the whole, of the affairs of a company, and includes a director or any other person occupying the position of a manager, by whatever name called, whether under a contract of service or not.

Managing Director [Section 2(54)]: Section 2(54) of the Companies Act, 2013 defines a "Managing Director" as a director who is entrusted with substantial powers of management of the affairs of the company by:

(i) virtue of the articles of a company or

(ii) an agreement with the company or

(iii) a resolution passed in its general meeting, or by its Board of Directors,

and includes a director occupying the position of the managing director, by whatever name called.

Explanation to Section 2 (54) clarifies that substantial powers of the management shall not be deemed to include the power to do such administrative acts of a routine nature when so authorised by the Board such as:
(i) the power to affix the common seal of the company to any document or
(ii) to draw and endorse any cheque on the account of the company in any bank or
(iii) to draw and endorse any negotiable instrument or
(iv) to sign any certificate of share or
(v) to direct registration of transfer of any share.

Whole Time Director [Section 2(94)]: "Whole-time director” includes a director in the whole-time employment of the company.

2. APPOINTMENT OF MANAGING DIRECTOR, WHOLE TIME DIRECTOR OR MANAGER [SECTION 196]

Section 196 of the Companies Act, 2013 provides for the provisions for appointment of Managing Director, Whole Time Director or Manager. According to this section:

(i) A company shall not appoint or employ a managing director and a manager at the same time. [Section 196(1)]

(ii) Tenure [section 196(2)]:

(a) No company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time.

(b) It is further provided that no re-appointment shall be made earlier than one year before the expiry of his term.

Example: ‘X’ was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2016. Examine in this connection, Can ‘X’ be appointed for life as Managing Director?

Answer: Section 196(2) of the Companies Act, 2013 lays down that no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding five years at a time. No concession or exception is allowed by the Act to private companies. Hence, ‘X’ cannot be appointed as Managing Director for life in a private company.

(iii) Disqualification: For appointing a person as a Managing Director, whole-time director or manager, firstly he shall not be disqualified for appointment as a director under section 164.

As per section 196(3), no company shall appoint or continue the employment of any person as managing director, whole-time director or manager who-

(a) is below the age of 21 years or has attained the age of 70 years.
Provided that a person who has attained the age of seventy years may be appointed to such office by the passing of a special resolution in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

(b) is an undischarged insolvent or has at any time been adjudged as an insolvent; or

(c) has at any time suspended payment to his creditors or makes, or has at any time made, a composition with them; or

(d) has at any time been convicted by a court of an offence and sentenced for a period of more than six months.

(e) Schedule V to the Companies Act, 2013, has prescribed additional conditions for managing or whole-time director or a manager to be eligible for appointment without approval of Central Government:

(1) he had not been sentenced to imprisonment for any period, or to a fine exceeding one thousand rupees, for the conviction of an offence under 16 Acts as specified under Schedule V.

(2) he had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974:

Provided that where the Central Government has given its approval to the appointment of a person convicted or detained under para (1) or para (2), as the case may be, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

(3) where he is a managerial person in more than one company, he draws remuneration from one or more companies subject to the ceiling provided in section V of Part II

(4) he is resident of India.

Explanation I: Here, resident in India includes a person who has been staying in India for a continuous period of not less than twelve months immediately preceding the date of his appointment as a managerial person and who has come to stay in India,-

(a) for taking up employment in India; or

(b) for carrying on a business or vacation in India.

Explanation II: This condition shall not apply to the companies in Special Economic Zones as notified by Department of Commerce from time to time:
Provided that a person, being a non-resident in India shall enter India only after obtaining a proper Employment Visa from the concerned Indian mission abroad. For this purpose, such person shall be required to furnish, along with the visa application form, profile of the company, the principal employer and terms and conditions of such person’s appointment.

(iv) Procedure of appointment [section 196(4)]:

(1) Subject to the provisions of section 197 and Schedule V, a managing director, whole-time director or manager shall be appointed, and the terms and conditions of such appointment and remuneration payable be

(i) approved by the Board of Directors at a meeting.

(ii) approved by shareholders by a resolution at the next general meeting of the company.

(2) In case such appointment is at variance to the conditions specified in the Schedule V of the Companies Act, 2013, the appointment shall be approved by the Central Government.

(3) The notice convening Board or general meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.

(4) A return in the prescribed form along with the prescribed fee shall be filed with the Registrar within sixty days of such appointment.

(v) Validity of acts [Section 196(5)]: Subject to the provisions of this Act, where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, any act done by him before such approval shall be deemed to be valid.

Example: A Managing Director is appointed in board meeting on 1st June, 2017. General meeting was to be held on 7th June, 2017 for approval of the same. The Managing Director executed an agreement on 3rd June, 2017. The General meeting was held accordingly on 7th June, 2017 but did not approve the appointment of Managing Director. Whether the executed agreement by Managing Director is valid?

Answer: Yes, the agreement is valid. Acts done by the managing director from 1st June, 2017 to 7th June, 2017 i.e. upto the non approval of the general meeting, shall be valid subject to the provisions of this Act.
3. APPOINTMENT OF KEY MANAGERIAL PERSONNEL [SECTION 203]

Section 203 of the Companies Act, 2013 lays down the provisions for appointment of Key Managerial Personnel of companies.

(i) **Who is KMP [section 203(1)]**: Every company belonging to such class or classes of companies as may be prescribed, shall have the following whole time key managerial personnel:-

(a) Managing Director, or Chief Executive Officer or Manager and in their absence, a Whole-time Director;

(b) Company Secretary; and

(c) Chief Financial Officer.

According to Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 every listed company and every other public company having a paid-up share capital of ₹ 10 crore or more shall have whole-time key managerial personnel.

Further, as per the Companies (Appointment and Remuneration of Managerial Personnel) Amendment Rules, 2014, a company other than a company covered under Rule 8 above, which has a paid up share capital of ₹ 5 crore or more shall have a whole-time company secretary.

With the insertion of Rule 8 A to the above rules, it is now mandatory of every other company to have a whole time company secretary if it’s paid up share capital is ₹ 5 Crores or more.

(ii) **Prohibition on individual to be appointed as chairperson as well as Managing Director or Chief Executive Officer at the same time [Proviso to section 203(1)]**: An individual shall not be appointed or reappointed as the chairperson of the company, in pursuance of the articles of the company, as well as the managing director or Chief Executive Officer of the company at the same time unless,—
(a) the articles of such a company provide otherwise; or

(b) the company does not carry multiple businesses. [First proviso to section 203(1)]

Provided that the above mentioned prohibition shall not apply to such class of companies engaged in multiple businesses and which has appointed one or more Chief Executive Officers for each such business as may be notified by the Central Government. [Second proviso to section 203(1)]

The MCA vide Notification No. S.O. 1913(E) dated 25th July, 2014 notifies that public companies having paid-up share capital of ₹ 100 crore or more and annual turnover of ₹ 1,000 or more which are engaged in multiple businesses and have appointed Chief Executive Officer for each such business shall be the class of companies for the purpose of the second proviso to sub-section (1) of section 203 of the said Act.

Explanation- For the purpose of this notification, the paid-up share capital and the annual turnover shall be decided on the basis of the latest audited balance sheet.

(iii) Conditions for appointment:

(a) Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration. [Section 203 (2)]

(b) A whole-time key managerial personnel shall not hold office in more than one company at the same time except in its subsidiary company. [Section 203 (3)]

Provided that nothing in the above sub section shall disentitle a key managerial personnel from being a director in any company with the permission of the Board.

(iv) Managing Director or manager in more than one company [Third proviso to section 203(3)]:

(a) A company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company.

(b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting.

(c) It is further provided that specific notice of such meeting, and of the resolution to be moved thereat has been given to all the directors then in India.

(v) Casual Vacancy [section 203(4)]: If the office of any whole-time KMP is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of six months from the date of such vacancy.
(vi) Penalty for contravention [Section 203(5)]:

(a) **On company:** If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than ₹ 1 lac but which may extend to ₹ 5 Lacs.

(b) **On director and KMP:** Every director and KMP of the company who is in default shall be punishable with fine which may extend to ₹ 50,000 and where the contravention is a continuing one, with a further fine which may extend to ₹ 1,000 for every day after the first during which the contravention continues.

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**Exemptions**

In case of Government companies, after sub-section (4), the following sub-section shall be inserted vide Notification No. G.S.R. 463(E) dated 5th June, 2015, namely:

“(4A) The provisions of sub-section (1), (2), (3) and (4) of this section shall not apply to a managing director or Chief Executive Officer or manager and in their absence, a whole-time director of the Government company.”

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4. FUNCTIONS OF COMPANY SECRETARY [SECTION 205]

Once the Company Secretary is appointed in terms of requirements of section 203, the Company Secretary shall perform the functions covered under Section 205.

(i) **Functions of the Company Secretary:** According to Section 205(1) read with the Rule 10 of the *Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014*, the functions of the company secretary shall include,—

(a) to report to the Board about compliance with the provisions of this Act, the rules made thereunder and other laws applicable to the company;

(b) to ensure that the company complies with the applicable secretarial standards;

(c) to provide to the directors of the company, collectively and individually, such guidance as they may require, with regard to their duties, responsibilities and powers;

(d) to facilitate the convening of meetings and attend Board, committee and general meetings and maintain the minutes of these meetings;

(e) to obtain approvals from the Board, general meeting, the government and such other authorities as required under the provisions of the Act;

(f) to represent before various regulators, and other authorities under the Act in connection with discharge of various duties under the Act;

(g) to assist the Board in the conduct of the affairs of the company;
(h) to assist and advise the Board in ensuring good corporate governance and in complying with the corporate governance requirements and best practices; and

(i) to discharge such other duties as have been specified under the Act or rules; and

(j) such other duties as may be assigned by the Board from time to time.

Here, the expression “secretarial standards” means secretarial standards issued by the Institute of Company Secretaries of India constituted under section 3 of the Company Secretaries Act, 1980 and approved by the Central Government.

(ii) According to Section 205 (2), the provisions contained in section 204 and section 205 shall not affect the duties and functions of the Board of Directors, chairperson of the company, managing director or whole-time director under this Act, or any other law for the time being in force.

5. CENTRAL GOVERNMENT OR COMPANY TO FIX LIMIT WITH REGARD TO REMUNERATION [SECTION 200]

According to section 200 of the Companies Act, 2013, notwithstanding anything contained in this Chapter, the Central Government or a company may, while according its approval under section 196, to any appointment or to any remuneration under section 197 in respect of cases where the company has inadequate or no profits, fix the remuneration within the limits specified in this Act, at such amount or percentage of profits of the company, as it may deem fit and while fixing such remuneration the Central Government shall have regard to:

| (a) | the financial position of the company; |
| (b) | the remuneration or commission drawn by the individual concerned in any other capacity; |
| (c) | the remuneration or commission drawn by him from any other company; |
| (d) | professional qualifications and experience of the individual concerned; |
| (e) | any other matters as may be prescribed. |

According to Rule 6 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, for the purposes of clause (e) above the Central Government or the company shall have regard to the following matters, namely:-

(1) the Financial and operating performance of the company during the three preceding financial years.

(2) the relationship between remuneration and performance.

(3) the principle of proportionality of remuneration within the company, ideally by a rating
methodology which compares the remuneration of directors to that of other directors on the board and employees or executives of the company.

(4) whether remuneration policy for directors differs from remuneration policy for other employees and if so, an explanation for the difference.

(5) the securities held by the director, including options and details of the shares pledged as at the end of the preceding financial year.

6. OVERALL MAXIMUM MANAGERIAL REMUNERATION AND MANAGERIAL REMUNERATION IN CASE OF ABSENCE OR INADEQUACY OF PROFITS [SECTION 197]

Section 197 of the Companies Act, 2013 lays down the provisions for overall maximum managerial remuneration by every public company and managerial remuneration in case of absence or inadequacy of profits. The section read with Schedule V defines maximum remuneration payable to KMPs. This section does not apply to the private company. According to this section:

(i) Overall Maximum Managerial Remuneration [Section 197(1)]

(a) The overall managerial remuneration to the Directors including managing director, whole time director and manager in respect of any financial year is summarized as under:

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Conditions</th>
<th>Maximum remuneration in any financial year</th>
<th>Conditions when remuneration can exceed as referred in column (b)</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td></td>
<td>(b)</td>
<td>(c)</td>
</tr>
<tr>
<td>(i)</td>
<td>Overall limit</td>
<td>11% of the net profits of the company for that financial year</td>
<td>Company in general meeting with approval of Central Government subject to provisions of Schedule V</td>
</tr>
<tr>
<td>(ii)</td>
<td>If there is one Managing director/ Whole time director/ manager</td>
<td>5% of the net profits of the company for that year</td>
<td>With the approval of the company in general meeting this limit may be exceeded.</td>
</tr>
<tr>
<td>(iii)</td>
<td>If there is more than one Managing director/ Whole time director/ manager</td>
<td>10% of the net profits</td>
<td>With the approval of the company in general meeting this limit may be exceeded.</td>
</tr>
</tbody>
</table>
(iv) If there is directors who are neither Managing director nor whole time directors 1% of the net profits of the company if there is a managing director or a whole time director Approval of the company in general meeting is required.

(v) If there are directors who are neither Managing director nor whole time directors 3% of the net profits of the company if there is no managing director or whole time director Approval of the company in general meeting is required.

Section 197(2) provides that above percentages shall be exclusive of any fees payable to directors under section 197(5).

(b) Section 197(8) further provides that the net profits shall be computed in the manner laid down in section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

(ii) No profits or profits are inadequate [Section 197(3) & (11)]

(a) If in any financial year, a company has no profits or its profits are inadequate, the company shall not pay by way of remuneration any sum exclusive of sitting fees to its directors, including any managing or whole-time director or manager except in accordance with the provisions of Schedule V.

(b) If the company is not able to comply with such provisions of Schedule V in the above case, then previous approval of the Central Government shall be taken.

(c) In cases where Schedule V is applicable on grounds of no profits or inadequate profits, any provision relating to the remuneration of any director which purports to increase or has the effect of increasing the amount thereof, whether the provision be contained in the company’s memorandum or articles, or in an agreement entered into by it, or in any resolution passed by the company in general meeting or its Board, shall not have any effect unless such increase is in accordance with the conditions specified in that Schedule and if such conditions are not being complied, the approval of the Central Government had been obtained.

**Section II of part II of Schedule V- Remuneration payable by companies having no profit or inadequate profit without Central Government approval**

Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding, the limits under (A) and (B) given below:-
2.12 CORPORATE AND ECONOMIC LAWS

(A):

<table>
<thead>
<tr>
<th>(1)</th>
<th>(2)</th>
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</thead>
<tbody>
<tr>
<td>Where the effective capital is</td>
<td>Limit of yearly remuneration payable shall not exceed (Rupees)</td>
</tr>
<tr>
<td>(i) Negative or less than 5 crores</td>
<td>60 Lakhs</td>
</tr>
<tr>
<td>(ii) 5 crores and above but less than 100 crores</td>
<td>84 Lakhs</td>
</tr>
<tr>
<td>(iii) 100 crores and above but less than 250 crores</td>
<td>120 Lakhs</td>
</tr>
<tr>
<td>(iv) 250 crores and above</td>
<td>120 lakhs plus 0.01% of the effective capital in excess of ₹ 250 crores:</td>
</tr>
</tbody>
</table>

Provided that the above limits shall be doubled if the resolution passed by the shareholders is a special resolution.

Explanation- It is hereby clarified that for a period less than one year, the limits shall be pro-rated.

(B):

In case of a managerial person who is functioning in a professional capacity, no approval of Central Government is required, if such managerial person is not having any interest in the capital of the company or its holding company or any of its subsidiaries directly or indirectly or through any other statutory structures and not having any, direct or indirect interest or related to the directors or promoters of the company or its holding company or any of its subsidiaries at any time during the last two years before or on or after the date of appointment and possesses graduate level qualification with expertise and specialised knowledge in the field in which the company operates:

Provided that any employee of a company holding shares of the company not exceeding 0.5% of its paid up share capital under any scheme formulated for allotment of shares to such employees including Employees Stock Option Plan or by way of qualification shall be deemed to be a person not having any interest in the capital of the company;

Provided further that the limits specified under items (A) and (B) of this section shall apply, if-

(i) payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee;

(ii) the company has not committed any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in
the preceding financial year before the date of appointment of such managerial person and in case of a default, the company obtains prior approval from secured creditors for the proposed remuneration and the fact of such prior approval having been obtained is mentioned in the explanatory statement to the notice convening the general meeting;

(iii) an ordinary resolution or a special resolution, as the case may be, has been passed for payment of remuneration as per the limits laid down in item (A) or a special resolution has been passed for payment of remuneration as per item (13), at the general meeting of the company for a period not exceeding three years.

(iv) a statement along with a notice calling the general meeting referred to in clause (iii) is given to the shareholders containing the following information, namely:-

I. General information:
   (1) Nature of industry
   (2) Date or expected date of commencement of commercial production
   (3) In case of new companies, expected date of commencement of activities as per project approved by financial institutions appearing in the prospectus
   (4) Financial performance based on given indicators
   (5) Foreign investments or collaborations, if any.

II. Information about the appointee:
   (1) Background details
   (2) Past remuneration
   (3) Recognition or awards
   (4) Job profile and his suitability
   (5) Remuneration proposed
   (6) Comparative remuneration profile with respect to industry, size of the company, profile of the position and person (in case of expatriates the relevant details would be with respect to the country of his origin)
   (7) Pecuniary relationship directly or indirectly with the company, or relationship with the managerial personnel, if any.

III. Other information:
   (1) Reasons of loss or inadequate profits
   (2) Steps taken or proposed to be taken for improvement
   (3) Expected increase in productivity and profits in measurable terms
IV. Disclosures: The following disclosures shall be mentioned in the Board of Director’s report under the heading “Corporate Governance”, if any, attached to the Financial statement:

(i) all elements of remuneration package such as salary, benefits, bonuses, stock options, pension, etc., of all the directors;

(ii) details of fixed component and performance linked incentives along with the performance criteria;

(iii) service contracts, notice period, severance fees; and

(iv) stock option details, if any, and whether the same has been issued at a discount as well as the period over which accrued and over which exercisable.

Explanation: For the purposes of Section II of this part, “Statutory Structure” means any entity which is entitled to hold shares in any company formed wider any statute.

(iii) Determination of remuneration [Section 197(4)]

(a) The remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

(i) by the articles of the company, or

(ii) by a resolution or,

(ii) if the articles so require, by a special resolution, passed by the company in general meeting, and

(b) the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

(c) Any remuneration for services rendered by any such director in other capacity shall not be so included if—

(1) the services rendered are of a professional nature; and

(2) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Example: Star Health Specialties Ltd. owns a Multi-Specialty Hospital in Chennai. Dr. Hamilton, a practicing Heart Surgeon, has been appointed by the company as its director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013.
Answer: In the given case, Dr. Hamilton has been appointed as a director. He has to be paid a fee for surgeries performed by him; it shall be fully possible under section 197(4) which states that the remuneration payable to the directors including managing or whole-time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:

(a) the services rendered are of a professional nature; and
(b) in the opinion of the Nomination and Remuneration Committee (if applicable) or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

The company can therefore, pay a remuneration to Dr. Hamilton a fee for surgeries performed by him as a professional fee which shall not be construed as a Managerial Remuneration under the Act.

(iv) Sitting Fees to directors [Section 197(5)]:

(a) A director may receive remuneration by way of fee for attending meetings of the Board or Committee thereof or for any other purpose whatsoever as may be decided by the Board.

(b) The sitting fees shall not exceed one lakh rupees per meeting of the Board or committee thereof. [As per the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014]

However, for Independent Directors and Women Directors, the sitting fee shall not be less than the sitting fee payable to other directors.

(c) The percentages under sub-section (1) shall be exclusive of any sitting fees payable to directors for attending meetings of the Board or committee thereof or for any other purpose whatsoever as may be decided by the Board.

(d) Different fees for different classes of companies and fees in respect to independent directors may be such as may be prescribed.

Example: The Article of Association of a listed company have fixed payment of sitting fee for each Meeting of Directors subject to maximum of ₹ 30,000. In view of increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to ₹ 45,000 per meeting. Advise the company about the requirement under the Companies Act, 2013 to give effect to the proposal.

Answer: Section 197(5) of the Companies Act, 2013 provides that a director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose as may be decided by the Board, provided that the amount of such fees shall not exceed the amount as may be prescribed. The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or
committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which shall not exceed the sum of rupees 1 lakh per meeting of the Board or committee thereof. Further, the Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

From the above, it is clear that fee to independent directors can be increased from ₹ 30,000 to ₹ 45,000 per meeting by passing a resolution in the Board Meeting and alternating the Articles of Association by passing Special Resolution.

(v) Mode of payment of remuneration [Section 197(6)]: A director or manager may be paid remuneration either by way of a monthly payment or at a specified percentage of the net profits of the company or partly by one way and partly by the other.

(vi) Restriction on remuneration of Independent Director [Section 197(7)]: Notwithstanding anything contained in any other provision of this Act but subject to the provisions of this section, an independent director shall not be entitled to any stock option and may receive remuneration by way of

1. sitting fees in terms of section 197(5),
2. reimbursement of expenses for participation in the Board and other meetings; and
3. profit related commission as may be approved by the members.

(vii) Refund of excess remuneration paid to a director [Section 197(9)]: If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without the prior sanction of the Central Government, where it is required, he shall refund such sums to the company and until such sum is refunded, hold it in trust for the company.

The company shall not waive the recovery of any sum refundable to it under sub-section (9) unless permitted by the Central Government. [Section 197(10)]

(viii) Disclosure by listed company [Section 197(12)]:

(a) It shall disclose in the Board’s report, the ratio of the remuneration of each director to the median employee’s remuneration and such other details as may be prescribed. The details are prescribed under the Rule 5 of the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.

(b) The board’s report shall include a statement showing the names of the top ten employees in terms of remuneration drawn and the name of every employee, who-

1. if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than one crore and two lakh rupees;
(ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than eight lakh and fifty thousand rupees per month;

(iii) if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

(c) The statement referred to in above para (b) shall also indicate some particulars of the above employees like designation, remuneration received, nature of employment, qualification and experience, date of commencement of employment, age, last employment held by such employee before joining the company, the percentage of equity shares held by the employee in the company within the meaning of clause (iii) of para (b) above, and whether any such employee is a relative of any director or manager of the company and if so, name of such director or manager.

(ix) Insurance for indemnification [Section 197(13)]:

(a) Where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

(b) Provided that, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration.

(x) Receiving Commission [Section 197(14)]: Subject to the provisions of this section, any director who is in receipt of any commission from the company and who is a managing or whole-time director of the company shall not be disqualified from receiving any remuneration or commission from any holding company or subsidiary company of such company subject to its disclosure by the company in the Board’s report.

(xi) Contravention [Section 197(15)]: If any person contravenes the provisions of section 197, he shall be punishable with fine which shall not be less than ` 1 Lakh but which may extend to ` 5 Lakhs.

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<th>Exemptions</th>
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<td>(i) In case of Government Companies, section 197 shall not apply (Notification No. G.S.R. 463(E) dated 5th June, 2015).</td>
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2.18 CORPORATE AND ECONOMIC LAWS

(ii) In case of Nidhis, second proviso to sub-section (1) of section 197 shall apply with the modification that the remuneration of a director who is neither managing director nor whole-time director or manager for performing special services to the Nidhis specified in the articles of association may be paid by way of monthly payment subject to the approval of the company in general meeting and also to the provisions of section 197:

Provided that no approval of the company in general meeting shall be required where,-

(a) a Nidhi does not have a managing director or a whole-time director or a manager;

(b) the remuneration payable during a financial year to all the directors of the Nidhi does not exceed ten per cent. of the net profits of such Nidhi or fifteen lakh rupees, whichever is less; and

(c) a remuneration payable under clause (b) is approved by a special resolution passed in this behalf by the Nidhi (Notification No. G.S.R. 465(E) dated 5th June, 2015)

(iii) In case of Specified IFSC Public Company - Section 197 shall not apply (Notification Dated 4th January, 2017)

7. RECOVERY OF MANAGERIAL REMUNERATION IN CERTAIN CASES [SECTION 199]

Section 199 of the Companies Act, 2013 provides for recovery of remuneration in certain cases. According to this section:

Without prejudice to any liability incurred under the provisions of this Act or any other law for the time being in force, where a company is required to re-state its financial statements due to fraud or non-compliance with any requirement under this Act and the rules made thereunder, the company shall recover from any past or present managing director or whole-time director or manager or Chief Executive Officer (by whatever name called) who, during the period for which the financial statements are required to be re-stated, received the remuneration (including stock option) in excess of what would have been payable to him as per restatement of financial statements.

8. CALCULATION OF PROFITS [SECTION 198]

According to section 198 of the Companies Act, 2013:

Net profits for the purpose of managerial remuneration payable under section 197 shall be calculated as follows:

(i) Credit shall be given for the sums specified in section 198(2)

Add: Bounties and subsidies received from any Government, or any public authority constituted or
authorised in this behalf, by any Government, unless and except in so far as the Central Government otherwise directs.

(ii) Credit shall not be given for those specified in section 198(3)

Less: (if credited to the P & L A/c for arriving at Profit before tax

(a) profits, by way of premium on shares or debentures of the company, which are issued or sold by the company;

(b) profits on sales by the company of forfeited shares;

(c) profits of a capital nature including profits from the sale of the undertaking or any of the undertakings of the company or of any part thereof;

(d) profits from the sale of any immovable property or fixed assets of a capital nature comprised in the undertaking or any of the undertakings of the company, unless the business of the company consists, whether wholly or partly, of buying and selling any such property or assets:

Provided that where the amount for which any fixed asset is sold exceeds the written-down value thereof, credit shall be given for so much of the excess as is not higher than the difference between the original cost of that fixed asset and its written-down value;

(e) any change in carrying amount of an asset or of a liability recognised in equity reserves including surplus in profit and loss account on measurement of the asset or the liability at fair value.

9. FORMS OF, AND PROCEDURE IN RELATION TO, CERTAIN APPLICATIONS [SECTION 201]

When the company is not complying with condition given in Schedule V, then the company would apply to Central Government for approval and the process for approval is given in section 201.

According to section 201 of the Companies Act, 2013:

(i) Every application made to the Central Government under this Chapter shall be in prescribed form and shall be accompanied by fee as may be specified for the purpose.

(ii) Before any application is made by a company to the Central Government under any of the sections aforesaid, there shall be issued by or on behalf of the company a general notice to the members thereof, indicating the nature of the application proposed to be made.

(iii) Such notice shall be published at least once in a newspaper in the principal language of the district in which the registered office of the company is situate and circulating in that district, and at least once in English in an English newspaper circulating in that district.

(iv) The copies of the notices, together with a certificate by the company as to the due publication thereof, shall be attached to the application.
2.20 CORPORATE AND ECONOMIC LAWS

(v) Rule 7 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, prescribes that the companies other than listed companies and subsidiary of a listed company may without Central Government approval pay remuneration to its managerial personnel, in the event of no profit or inadequate profit beyond ceiling specified in Section II, Part II of Schedule V, subject to complying with the following conditions namely:-

(a) Payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of section 178 also by the Nomination and Remuneration Committee, if any. While doing so, the clear reason and justification for payment of remuneration beyond the said limit has to be recorded in writing.

(b) The company has not made any default in repayment of any of its debts (including public deposits) or debentures or interest payable thereon, preference shares and dividend on preference shares for a continuous period of thirty days in the preceding financial year before the date of payment to such managerial personnel.

(c) The approval of shareholders by way of a special resolution at a general meeting of the company for payment of remuneration for a period not exceeding three years.

(d) a statement along-with a notice calling the general meeting referred to above point (c), shall contain the information as per sub clause (iv) of second proviso to clause (B) of section II of part-II of Schedule V of the Act including reasons and justification for payment of remuneration beyond the said limit.

(e) The company has filed Balance Sheet and Annual Return which are due to be filed with the Registrar of Companies.

(f) Every such application seeking approval shall be made to the Central Government within a period of ninety days from the date of such appointment.

10. COMPENSATION FOR LOSS OF OFFICE OF MANAGING OR WHOLE-TIME DIRECTOR OR MANAGER [SECTION 202]

Section 202 of the Companies Act, 2013 provides the provisions for compensation for loss of office of managing or whole-time director or manager as under:

(i) A company may make payment to a managing or whole-time director or manager, but not to any other director, by way of compensation for loss of office, or as consideration for retirement from office or in connection with such loss or retirement.

(ii) No payment of compensation shall be made in the following cases:

(a) where the director resigns from his office as a result of the reconstruction of the company, or of its amalgamation with any other body corporate or bodies corporate, and is appointed as the managing or whole-time director, manager or other officer of the reconstructed company or of the body corporate resulting from the amalgamation;
(b) where the director resigns from his office otherwise than on the reconstruction of the company or its amalgamation as aforesaid;

(c) where the office of the director is vacated under sub-section (1) of section 167;

(d) where the company is being wound up, whether by an order of the Tribunal or voluntarily, provided the winding up was due to the negligence or default of the director;

(e) where the director has been guilty of fraud or breach of trust in relation to, or of gross negligence in or gross mismanagement of, the conduct of the affairs of the company or any subsidiary company or holding company thereof; and

(f) where the director has instigated, or has taken part directly or indirectly in bringing about, the termination of his office.

(iii) The compensation payable to such managing director or whole-time director or manager shall not exceed the remuneration he would have earned if he would have been in office for the remainder of his term or three years, whichever is shorter, calculated on the basis of the average remuneration earned by him during a period of three years immediately preceding the date on which he ceased to hold such office, or where he held the office of less than three years, then for such shorter period.

(iv) No such payment however can be made at all if winding up of the company is commenced whether before or within 12 months after, the date on which he ceased to hold office, if the assets on winding up (after deducting expenses on winding up) are not sufficient to repay the shareholders the capital, including premiums if any, contributed by them.

(v) Nothing in this section shall be deemed to prohibit the payment to a managing or whole-time director, or manager, of any remuneration for services rendered by him to the company in any other capacity.

11. SECRETARIAL AUDIT FOR BIGGER COMPANIES [SECTION 204]

Section 204 of the Companies Act, 2013 provides the provisions for secretarial audit for bigger companies which are as under:

(i) Companies that are required to conduct secretarial audit: Under Section 204(1), every listed company and a company belonging to other class of companies as may be prescribed, shall annex with its Board’s report made in terms of section 134 (3), a secretarial audit report, given by a company secretary in practice, in such form as may be prescribed.

Rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that for the purposes of section 204 (1), the other class of companies shall be as under:

| (a) | Every public company having a paid up share capital of ₹ 50 crore or more; or |
| (b) | Every public company having a turnover of ₹ 250 crore or more. |
2.22 CORPORATE AND ECONOMIC LAWS

The format of the Secretarial Audit Report shall be in Form No. MR. 3.

(ii) Duty of the company:

(a) It shall be the duty of the company to give all assistance and facilities to the company secretary in practice, for auditing the secretarial and related records of the company [Section 204(2)].

(b) The Board of Directors, in their Report prepared under section [134(3)] shall explain in full any qualification or observation or other remarks made by the company secretary in practice in his report [Section 204 (3)].

(iii) Contravention [Section 204(4)]: If a company or any officer of the company or the company secretary in practice, contravenes the provisions of this section, then

| (a) the company; or |
| (b) every officer of the company; or |
| (c) the company secretary in practice, |

who is in default, shall be punishable with fine which shall not be less than ₹ 1 Lac but which may extend to ₹ 5 Lacs.

12. MANAGERIAL REMUNERATION AS PER PART II, PART III AND PART IV OF SCHEDULE V

Part II

(i) Section I- Remuneration payable by companies having profits: Subject to the provisions of section 197, a company having profits in a financial year may pay remuneration to a managerial person or persons not exceeding the limits specified in such section.

(ii) Section II- Remuneration payable by companies having no profit or inadequate profit without Central Government approval [Discussed in Para 6 of the Study material u/s Section 197(3)]

(iii) Section III— Remuneration payable by companies having no profit or inadequate profit without Central Government approval in certain special circumstances: In the following circumstances a company may, without the Central Government approval, pay remuneration to a managerial person in excess of the amounts provided in Section II above:—

(a) where the remuneration in excess of the limits specified in Section I or II is paid by any other company and that other company is either a foreign company or has got the approval of its shareholders in general meeting to make such payment, and treats this amount as managerial remuneration for the purpose of section 197 and the total managerial
remuneration payable by such other company to its managerial persons including such amount or amounts is within permissible limits under section 197.

(b) where the company—

(i) is a newly incorporated company, for a period of seven years from the date of its incorporation, or

(ii) is a sick company, for whom a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction for a period of five years from the date of sanction of scheme of revival, or

(iii) is a company in relation to which a resolution plan has been approved by the National Company Law Tribunal under the Insolvency and Bankruptcy Code, 2016 for a period of five years from the date of such approval, it may pay remuneration up to two times the amount permissible under section II.

(c) where remuneration of a managerial person exceeds the limits in Section II but the remuneration has been fixed by the Board for Industrial and Financial Reconstruction or the National Company Law Tribunal:

Provided that the limits under this Section shall be applicable subject to meeting all the conditions specified under Section II and the following additional conditions:

(i) except as provided in para (a) of this Section, the managerial person is not receiving remuneration from any other company;

(ii) the auditor or Company Secretary of the company or where the company has not appointed a Secretary, a Secretary in whole-time practice, certifies that all secured creditors and term lenders have stated in writing that they have no objection for the appointment of the managerial person as well as the quantum of remuneration and such certificate is filed along with the return as prescribed under sub-section (4) of section 196.

(iii) the auditor or Company Secretary or where the company has not appointed a secretary, a secretary in whole-time practice certifies that there is no default on payments to any creditors, and all dues to deposit holders are being settled on time.

(d) a company in a Special Economic Zone as notified by Department of Commerce from time to time which has not raised any money by public issue of shares or debentures in India, and has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of thirty days in any financial year, may pay remuneration up to ₹ 2,40,00,000 per annum.
(iv) **Section IV— Perquisites not included in managerial remuneration:**

1. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:

   (a) Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961 (43 of 1961);

   (b) gratuity payable at a rate not exceeding half a month’s salary for each completed year of service; and

   (c) Encashment of leave at the end of the tenure.

2. In addition to the perquisites specified in paragraph 1 of this section, an expatriate managerial person (including a non-resident Indian) shall be eligible to the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II or Section III—

   (a) **Children’s education allowance:** In case of children studying in or outside India, an allowance limited to a maximum of ₹ 12,000 per month per child or actual expenses incurred, whichever is less. Such allowance is admissible up to a maximum of two children.

   (b) **Holiday passage for children studying outside India or family staying abroad:** Return holiday passage once in a year by economy class or once in two years by first class to children and to the members of the family from the place of their study or stay abroad to India if they are not residing in India, with the managerial person.

   (c) **Leave travel concession:** Return passage for self and family in accordance with the rules specified by the company where it is proposed that the leave be spent in home country instead of anywhere in India.

**Explanation I.**—For the purposes of Section II of this Part, “**effective capital**” means the aggregate of the paid-up share capital (excluding share application money or advances against shares); amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, over drafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

**Explanation II.**—

(a) Where the appointment of the managerial person is made in the year in which company has been incorporated, the effective capital shall be calculated as on the date of such appointment;
(b) In any other case the effective capital shall be calculated as on the last date of the financial year preceding the financial year in which the appointment of the managerial person is made.

_Explanation III._— For the purposes of this Schedule, “family” means the spouse, dependent children and dependent parents of the managerial person.

_Explanation IV._— The Nomination and Remuneration Committee while approving the remuneration under Section II or Section III, shall—

(a) take into account, financial position of the company, trend in the industry, appointee’s qualification, experience, past performance, past remuneration, etc.;

(b) be in a position to bring about objectivity in determining the remuneration package while striking a balance between the interest of the company and the shareholders.

_Explanation V._— For the purposes of this Schedule, “negative effective capital” means the effective capital which is calculated in accordance with the provisions contained in Explanation I of this Part is less than zero.

_Explanation VI._— For the purposes of this Schedule:—

(A) “current relevant profit” means the profit as calculated under section 198 but without deducting the excess of expenditure over income referred to in sub-section 4 thereof in respect of those years during which the managerial person was not an employee, director or shareholder of the company or its holding or subsidiary companies.

(B) “Remuneration” means remuneration as defined in clause (78) of section 2 and includes reimbursement of any direct taxes to the managerial person.

(v) Section V—Remuneration payable to a managerial person in two companies:

Subject to the provisions of sections I to IV, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

PART III- Provisions applicable to Parts I and II of this Schedule

1. The appointment and remuneration referred to in Part I and Part II of this Schedule shall be subject to approval by a resolution of the shareholders in general meeting.

2. The auditor or the Secretary of the company or where the company is not required to appointed a Secretary, a Secretary in whole-time practice shall certify that the requirement of this Schedule have been complied with and such certificate shall be incorporated in the return filed with the Registrar under sub-section (4) of section 196.
PART IV: Exemption by the Central Government

The Central Government may, by notification, exempt any class or classes of companies from any of the requirements contained in this Schedule.

The MCA vide General Circular No. 07/2015 dated 10th April, 2015 has clarified that a managerial person who has been appointed in accordance with provisions of Schedule XIII of the Companies Act, 1956, may continue to receive remuneration for his remaining term in accordance with terms and conditions approved by company as per relevant provisions of Schedule XIII of 1956 Act even if the part of his/her tenure falls after 1st April, 2014.
Question 1

Advise Super Specialties Ltd. in respect of the following proposals under consideration of its Board of directors:

(i) Appointment of Managing Director who is more than 70 years of age;

(ii) Payment of commission of 4% of the net profits per annum to the directors of the company;

(iii) Payment of remuneration of ₹40,000 per month to the whole time director of the company running in loss and having an effective capital of ₹95.00 lacs.

Answer

(i) Under the proviso to section 196 (3) of the Companies Act, 2013, a person who has attained the age of seventy years may be employed as managing director, whole-time director or manager by the approval of the members by a special resolution passed by the company in the general meeting and the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person.

(ii) Under section 197 (7) of the Companies Act, 2013, independent directors may be paid profit related commission as may be approved by the members. However, under section 197 (1) the limit of total managerial remuneration payable by a public company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year shall not exceed eleven per cent of the net profits of that company for that financial year computed in the manner laid down in section 198. Further, the third proviso to section 197 (1) provides that except with the approval of the company in general meeting, the remuneration payable to directors who are neither managing directors or whole-time directors shall not exceed one per cent. of the net profits of the company, if there is a managing or whole-time director or manager; or three per cent of the net profits in any other case.

Therefore, in the given case, the commission of 4% is beyond the limit specified, and the same should be approved by the members by ordinary resolution.

(iii) If, in any financial year, a company has no profits or its profits are inadequate, the company shall not pay to its directors, including managing or whole time director or manager, any remuneration exclusive of any fees payable to directors except in accordance with the provisions of Schedule V. Section II of Part II of schedule V provides that where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding ₹ 60 Lakhs for the year if the effective capital of the company is negative or upto ₹ 5 Crores. In the present case, the proposed remuneration can be paid without the approval of Central Government.
Question 2

Mr. X, a Director of MJV Ltd., was appointed on 1st April, 2013, one of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31st March, 2017, the company suffered heavy losses. The company was not in a position to pay any remuneration but he was paid ₹ 50 lacs for the year, as paid to other directors. The effective capital of the company is ₹ 150 crores. Referring to the provisions of Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X.

Answer

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding ₹ 120 Lakhs in the year in case the effective capital of the company is between ₹ 100 crores to 250 crores. The limit will be doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated.

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of ₹ 50 Lacs in the year as remuneration to Mr. X is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of ₹ 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V.

Question 3

Mr. Doubtful was appointed as Managing Director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2013 on a salary of ₹ 12 lakhs per annum with other perquisites. The Board of directors of the company on coming to know of certain questionable transactions, terminated the services of the Managing Director from 1.3.2016. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of ₹ 5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:

(i) The company is bound to pay compensation to Mr. Doubtful and, if so, how much.

(ii) The company can recover the amount of ₹ 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guiding of corrupt practice.

Answer

According to Section 202 of the Companies Act, 2013, compensation can be paid only to a Managing, Whole-time Director or Manager. Amount of compensation cannot exceed the remuneration which he would have earned if he would have been in the office for the unexpired
term of his office or for 3 years whichever is shorter. No compensation shall be paid, if the director has been found guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company.

In light of the above provisions of law, the company is not liable to pay any compensation to Mr. Doubtful, if he has been found guilty of fraud or breach of trust or gross negligence in the conduct of affairs of the company. But, it is not proper on the part of the company to withhold the payment of compensation on the basis of mere allegations. The compensation payable by the company to Mr. Doubtful would be ₹ 25 Lacs calculated at the rate of ₹ 12 Lacs per annum for unexpired term of 25 months.

Regarding adhoc payment of ₹ 5 Lacs, it will not be possible for the company to recover the amount from Mr. Doubtful in view of the decision in case of Bell vs. Lever Bros. (1932) AC 161 where it was observed that a director was not legally bound to disclose any breach of his fiduciary obligations so as to give the company an opportunity to dismiss him. In that case the Managing Director was initially removed by paying him compensation and later on it was discovered that he had been guilty of breaches of duty and corrupt practices and that he could have been removed without compensation.

**Question 4**

A and B were appointed as first directors on 4th April, 2016 in Sun Glass Ltd. Thereafter, C, D International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.

(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of ₹50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.

You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals.

**Answer**

International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:

(i) **Commission at the rate of 5% of the net profits to its Managing Director, Mr. Kamal:** Part (i) of the second proviso to section 197(1), provides that except with the approval of the company in general meeting, the remuneration payable to any one managing director; or
whole time director or manager shall not exceed 5% of the net profits of the company and if there is more than one such director then remuneration shall not exceed 10% of the net profits to all such directors and manager taken together.

In the present case, since the International Technologies Limited is being managed by a Managing Director, the commission at the rate of 5% of the net profit to Mr. Kamal, the Managing Director is allowed and no approval of company in general meeting is required.

(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of ₹ 50,000 and also commission at the rate of 1% of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed 2% of the net profits of the company: Part (ii) of the second proviso to section 197(1) provides that except with the approval of the company in general meeting, the remuneration payable to directors who are neither managing directors nor whole time directors shall not exceed-

(A) 1% of the net profits of the company, if there is a managing or whole time director or manager;

(B) 3% of the net profits in any other case.

In the present case, the maximum remuneration allowed for directors other than managing or whole time director is 1% of the net profits of the company because the company is having a managing director also. Hence, if the company wants to fix their remuneration at not more than 2% of the net profits of the company, the approval of the company in general meeting is required.

(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized:

(1) According to section 197(4), the remuneration payable to the directors of a company, including any managing or whole-time director or manager, shall be determined, in accordance with and subject to the provisions of this section, either

(i) by the articles of the company, or

(ii) by a resolution or,

(iii) if the articles so require, by a special resolution, passed by the company in general meeting, and

(2) the remuneration payable to a director determined aforesaid shall be inclusive of the remuneration payable to him for the services rendered by him in any other capacity.

(3) Any remuneration for services rendered by any such director in other capacity shall not be so included if—
(i) the services rendered are of a professional nature; and

(ii) in the opinion of the Nomination and Remuneration Committee, if the company is covered under sub-section (1) of section 178, or the Board of Directors in other cases, the director possesses the requisite qualification for the practice of the profession.

Hence, in the present case, the additional remuneration to Mr. Bhatt, a director for professional services rendered as software engineer will not be included in the maximum managerial remuneration and is allowed but opinion of Nomination and Remuneration Committee is to be obtained.

Also, the International Technologies Limited (a listed company) shall disclose in the Board’s report, the ratio of the remuneration of each director to the median employee’s remuneration and such other details as may be prescribed under the Companies (Appointment and Remuneration of Managerial personnel) Rules, 2014.