MEETINGS OF BOARD AND ITS POWERS

At the end of this Chapter, you will be able to:

- Understand the procedure and requirements of convening the Board meeting
- Know the requisite quorum for the conduct of the meeting
- Identify the Audit Committee, Nomination and Remuneration Committee, and Stakeholders Relationship Committee of the Board
- Explain the powers and restriction on powers of Board
- Know about the various provisions related to contribution of companies to charitable funds, towards political contributions, National defence fund, etc.
- Explain the provisions related to disclosure of interest by directors, restrictions on Loan to directors and loans and investments made by company.
- Understand the concept related to related party and related party transactions.
- Know the provisions in relation to payment to director for loss of office, etc., restrictions on non-cash transactions with directors, Prohibition on forward dealings in securities by director /KMP, and prohibition on insider trading of securities.
1. INTRODUCTION

Two main organs, the shareholders in general meetings and the directors acting as a Board conduct the affairs of a company. Therefore, directors frequently meet up to discuss various matters relating to the management and administration of the affairs of the company in the interest of the public and the shareholders. The modern practice is to confer upon the directors the right to exercise all company’s powers except for those matters, which are by law required to be exercised by the company in general meeting. The Board of directors oversees management of the company to ensure that the interests of shareholders are protected.

The provisions related to meetings of Board and its powers are dealt under sections 173 to 195 of the Companies Act, 2013 and Rules. This chapter specifies the laws related to convening of Board meeting, requisite quorum for the conduct of the meeting, various committees of the Board, Powers of Board and the imposed restrictions, Disclosure of interest by directors, Loan and investment, related party transactions and etc.

2. MEETINGS OF BOARD [SECTION 173]

Section 173 of the Companies Act, 2013 provides for Meetings of Board. According to this section:

(i) **Frequency of Board Meetings** [Section 173 (1)]:

(a) **First Board meeting:** Every company shall hold the first meeting of the Board of Directors within 30 days of the date of its Incorporation.

(b) **Subsequent Board meetings:** Every company shall hold minimum of 4 meetings every year provided that the gap between two consecutive board meetings shall not be more than 120 days.

However, the Central Government may by notification, direct that these provisions will not apply in relation to any class or descriptions of companies or will apply in relation thereto subject to such exceptions, modifications or conditions as may be specified in the notification.

(ii) **Exceptions** [Section 173(5)]:

(a) A **One Person Company, small company and dormant company** shall be deemed to have complied with the provisions of section 173 if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than 90 days.

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1 In case of Specified IFSC Public Company & IFSC Private Company - In sub-section (1) of Section 173, after the proviso, the following proviso shall be inserted, namely:-

“Provided further that a Specified IFSC public company shall hold the first meeting of the Board of Directors within sixty days of its incorporation and thereafter hold at least one meeting of the Board of Directors in each half of a calendar year.”. Notification Dated 4th January 2017.
(b) Provided that, a One Person Company in which there is only one director on its Board of Directors, it shall not be required to hold at least one Board meeting in each half of a calendar year. Thus, it is exempt from following the provisions of section 173(5).

Vide Notification G.S.R. 466(E) dated 5th June 2015, this sub-section 1 of section 173 shall apply to the company formed under section 8 of the Companies Act, 2013 only to the extent that the Board of Directors, of such companies shall hold at least one meeting within every six calendar months.

(iii) Participation in Board meeting [Section 173 (2)]:

(a) Section 173(2) allows directors to attend Board meetings in the following manner-

Directors may attend board meeting -
• in person
• Through video conferencing
• other audio visual means as may be prescribed under Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014

(b) Such audio visual means should be capable of recording and recognising the participation of the directors and of recording and storing the proceedings of such meetings along with date and time.

(c) However, the Central Government may by notification specify such matters as given under Rule 4 of the Companies (Meetings of Board and its Powers) Rules, 2014 which shall not be dealt with in a meeting through video conferencing and other audio visual means.

“Video conferencing or other audio visual” means audio-visual electronic communication facility employed which enables all the persons participating in a meeting to communicate concurrently with each other without an intermediary and to participate effectively in the meeting.

As per Rule 4, the following matters shall not be dealt with in any meeting held through video conferencing or other audio visual means.-

(i) the approval of the annual financial statements;
(ii) the approval of the Board’s report;
(iii) the approval of the prospectus;
(iv) the Audit Committee Meetings for consideration of financial statement including consolidated financial statement if any, to be approved by the board under sub-section (1) of section 134 of the Act, and
(v) the approval of the matter relating to amalgamation, merger, demerger, acquisition and takeover.

(d) Some of the key points related to meetings of Board that are held through conferencing or other audio visual means, as provided in Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014 are as under:

<table>
<thead>
<tr>
<th>SL. No.</th>
<th>Key points related to meetings of Board that are held through conferencing or other audio visual means</th>
<th>For convening and conducting the Board meetings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Every Company shall make necessary arrangements</td>
<td>to avoid failure of video or audio visual connection</td>
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<tr>
<td>2.</td>
<td>The Chairperson of the meeting and the company secretary, if any, shall take due and reasonable care-</td>
<td>(A) to safeguard the integrity of the meeting by ensuring sufficient security and identification procedures;</td>
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<tr>
<td></td>
<td>(B) to ensure availability of proper video conferencing or other audio visual equipment or facilities for providing transmission of the communications for effective participation of the directors and other authorized participants at the Board meeting;</td>
<td></td>
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<tr>
<td></td>
<td>(C) to record proceedings and prepare the minutes of the meeting;</td>
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<td></td>
<td>(D) to store for safekeeping and marking the tape recording(s) or other electronic recording mechanism as part of the records of the company at least before the time of completion of audit of that particular year.</td>
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<tr>
<td></td>
<td>(E) to ensure that no person other than the concerned director are attending or have access to the proceedings of the meeting through video conferencing mode or other audio visual means;</td>
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<td></td>
<td>(F) to ensure that participants attending the meeting through audio visual means are able to hear and see the other participants clearly during the course of the meeting.</td>
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<td></td>
<td>However, the differently abled persons may make a request to the Board to allow a person to accompany him.</td>
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</table>
3. Notices of the meeting and the further process

- (A) shall be sent to all the directors in accordance with the provisions of Section 173 (3)
- (B) shall inform the directors regarding the options available to them to participate through video conferencing mode or other audio visual means, along with all other information to enable the directors to participate through such mode;
- (C) A director intending to participate through video conferencing mode or other audio visual means shall communicate his intention to the chairman or the company secretary of the company.
- (D) If a director intends to participate through video conferencing or other audio visual means, he shall give prior intimation to that effect, to enable the company to make arrangements in this behalf.
- (E) The director, who desires, to participate may intimate his intention of participation through the electronic mode at the beginning of the calendar year and such declaration shall be valid for one calendar year.
- (F) In the absence of any such intimation from the director, it shall be assumed that he will attend the meeting in person.

4. Process of a roll call at the Board Meeting

- A director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.

5. Scheduled venue of the meeting as mentioned in the notice convening the meeting

- shall be deemed to be the venue of the meeting which is conducted through video conferencing or other audio visual means authorized under these rules and all recordings at such meeting shall be deemed to have been made at that place.

6. Circulation of draft minutes of the meeting

- among all the directors within 15 days of the meeting either in writing or in electronic mode as may be decided by the Board.

7. After completion of meeting

- Minutes shall be entered in the minute book signed by the chairperson.
(iv) **Notice of the Board meeting** [Section 173 (3)]:

<table>
<thead>
<tr>
<th>Period of notice</th>
<th>to all the directors at registered address</th>
<th>sent by hand delivery or by post or by electronic means</th>
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<tbody>
<tr>
<td>at least 7 days’ notice in writing</td>
<td></td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>Shorter notice (than 7 days)</th>
<th></th>
<th>In absence, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any</th>
</tr>
</thead>
<tbody>
<tr>
<td>to transact an urgent business</td>
<td>Atleast one independent director, if any, shall be present</td>
<td></td>
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**Option to participate through video conferencing mode or other audio visual means (Rule 3)**

- notice of the meeting shall inform the directors regarding the option available to them to participate through video conferencing mode or other audio visual means, and shall provide all the necessary information to enable the directors to participate through video conferencing mode or other audio visual means

**On receival of notice**

- a director intending to participate through video conferencing or audio visual means shall communicate his intention to the Chairperson or the company secretary of the company in prior

**No intimation from director of his participation through the electronic mode**

- it shall be assumed that the director shall attend the meeting in person

(v) **Penalty for failure to give notice**: The Act under section 173(4) has prescribed a penalty of ₹ 25,000 on every officer of the Company2 whose duty is to give notice under this section and who has failed to do so.

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2 According to Secretarial Standard 1, any Director of a company may, at any time, summon a Meeting of the Board, and the Company Secretary or where there is no Company Secretary, any person authorised by the Board in this behalf, on the requisition of a Director, shall convene a Meeting of the Board, in consultation with the Chairman or in his absence, the Managing Director or in his absence, the Whole-time Director, where there is any, unless otherwise provided in the Articles.
Example: Seafood Limited, a public limited company was incorporated on 1st April, 2016. The company has conducted four Board meetings during the financial year 2016-17 i.e. on 6th April, 2016, 28th August, 2016, 30th September, 2016 and 30th March, 2017.

(i) Has the company contravened the provisions of the Companies Act, 2013 in respect of the conduct of the meetings?

(ii) Will your answer differ if the company was incorporated under Section 8 of the Companies Act, 2013?

Answer: (i) Company has contravened the section 173 of the Companies Act, 2013 in respect of the conduct of the subsequent board meetings. The gap between two consecutive board meetings i.e. the meeting held on 6th April, 2016 and 28th August, 2016 is 143 days which is more than 120 days and similarly the gap between the meeting held on 30th September 2016 and 30th March 2017 is 181 days which is again more than 120 days.

(ii) In the case of company incorporated under section 8 of the Companies Act, 2013, since the board meetings have been conducted within 6 calendar months, so there is no contravention of the provision related to holding of board meetings.

Example: The Board of Directors of Infotech Consultants Limited, registered in Kolkata, proposes to hold the next board meeting in the month of May, 2014. They seek your advice in respect of the following matters:

(i) Can the board meeting be held in Chennai through video conferencing, when all the directors of the company reside at Kolkata?

(ii) Is it necessary that the notice of the board meeting should specify the nature of business to be transacted?

Answer: (i) There is no provision in the Companies Act, 2013 under which the board meetings must be held at any particular place. Therefore, there is no difficulty in holding the board meeting at Chennai even if all the directors of the company reside at Kolkata and the registered office is situated at Kolkata provided that the requirements regarding the holding of a valid board meeting and the other provisions relating to the signing of register of contracts, taking roll calls, etc. are complied with.

(ii) Section 173 (3) of the Companies Act, 2013 provides for the giving of notice of every board meeting of not less than seven days to every director of the company. There is no provision in the Act laying down the contents of the notice. Hence, it may be construed that notice may be interpreted as intimation of the meeting and does not necessarily include the sending of the Agenda of the meeting. However, considering the importance of Board Meetings and the responsibilities placed on the directors for decisions taken at the meetings, it is inevitable for them to be properly prepared and informed about the items to be discussed at the Board Meetings.

The Agenda, setting out the business to be transacted at the Meeting, and Notes on Agenda shall be given to the Directors at least seven days before the date of the Meeting, unless the Articles prescribe a longer period as a matter of good secretarial practice.
The articles of association of the company may make it mandatory to do so in almost all cases.

**Example:** XYZ Ltd. is a foreign collaborator in ABC Ltd. incorporated in India under the Companies Act, 2013. The foreign collaborator holds 49% of the shareholding. The Board meetings of ABC Ltd are usually held in India and sometimes meetings of the Board are called at a very short notice for which there is a provision in the Articles of Association that during such situations notices of the meetings of the Board can be sent by e-mail. State in this connection whether such a provision in the Articles of Association of a foreign collaborated company is valid.

**Answer:** In terms of the proviso to section 173(3) of the Companies Act, 2013 a meeting of the Board may be called at shorter notice to transact urgent business subject to the condition that at least one independent director, if any, shall be present at the meeting. No exception is made for any class or classes of companies.

Further, under section 173(3) a meeting of the Board shall be called by giving not less than seven days’ notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

If we examine the above provision, it is clear that the notice shall be sent by hand delivery or by post or by electronic means.

Hence, the sending of notice by e-mail is an ordinary mode of sending notice of a board meeting under the Companies Act, 2013.

Therefore, in the given case the shorter notice is legally permitted with the only condition being the presence of the quorum and at least one independent director. The provision of the Articles in this regard is not relevant as the position is amply clear in the Act itself.

**3. QUORUM FOR MEETINGS OF BOARD [SECTION 174]**

A quorum is the minimum number of qualified persons who must attend in order to transact business at a duly convened Board meeting. A meeting shall not be deemed to have been properly held unless the quorum was present at that meeting.

Section 174 of the Companies Act, 2013 provides for Quorum for meetings of Board. According to this section:

(i) The quorum for a Board Meeting shall be one-third of its total strength or two directors, whichever is higher.

(ii) The directors who participate by video conferencing or by other audio visual means shall also be counted for the purpose of determining the quorum at the meeting.

Further, the explanation as given in Rule 3 of *the Companies (Meetings of Board and its Powers) Rules, 2014* provides that the director participating in a meeting through video conferencing or other audio visual means shall be counted for the purpose of quorum, unless he is to be excluded for any items of business under any provisions of the Act or the rules.
(iii) The continuing directors may notwithstanding any vacancy in the Board; but, if and so long as their number is reduced below the quorum fixed by the Act for a meeting of the Board, the continuing directors or director may act for the purpose of increasing the number of directors to that fixed for the quorum, or of summoning a general meeting of the company and for no other purpose.

(iv) Where at any time the number of interested directors exceeds or is equal to two-thirds of the total strength of the Board of Directors, the quorum shall be the number of directors who are present at the meeting and not interested directors and are not be less than 2.

“Interested director” for the purposes of this sub section means a director within the meaning of section 184 (2). Under section 184(2) “interested director” means every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting:

However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested.

3 In case of Specified IFSC Public Company and IFSC Private Company - Section 174(3) shall apply with the exception that interested director may participate in such meeting provided the disclosure of his interest is made by the concerned director either prior or at the meeting. -Notification Dated 4th January, 2017.
3.10 CORPORATE AND ECONOMIC LAWS

Vide Notification No. G.S.R. 464(E) dated 5th June 2015, this Sub section (2) of section 184 shall apply on private company with the exception that the interested director may participate in such meeting after disclosure of his interest.

(v) Meeting could not be held for want of quorum: Where a meeting of the Board could not be held for want of quorum, then, unless the articles of the company otherwise provide, the meeting shall automatically stand adjourned to the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place.

(vi) Exception: The provisions of section 174 are not applicable on One Person Company in which there is only one director on its Board of directors.

Notes:
1. For the purpose of calculating quorum, any fraction of a number shall be rounded off as one.
2. “Total strength” shall not include directors whose places are vacant.

Example: Discuss the following situations with respect to the quorum.
(a) There are 9 directors in a company and out of which 2 offices of the directors have fallen vacant.
(b) There are 15 directors in a company and during discussion of a particular item, 13 of the directors are said to be ‘interested’ within the meaning of section 184(2) of the Companies Act, 2013.

Answer: (a) According to section 174(1) of the Companies Act, 2013, quorum is one third of the total strength of Board (any fraction contained in the said one third being rounded off as one) or two directors whichever is higher. The total strength is to be derived after deducting the number of directors whose offices are vacant. Therefore, where total number of directors is 9 and 2 offices of the directors have fallen vacant, we find: 1/3 of (9-2) = 1/3 of 7 = 21/3 directors which will be rounded off as 3. Being higher than 2, therefore 3 directors would constitute the quorum for the Board meetings.

(b) Under section 174(3) of the Companies Act, 2013 if at any time the number of the interested directors exceeds or is equal to two thirds of the total strength of the Board of Directors, the number of the directors who are non-interested but present at the meeting, not being less than two
shall constitute the quorum. Accordingly, in the given problem, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the meeting, an item comes up for discussion in respect of which 13 happen to be “interested” directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 are present at the meeting and can transact the particular item of business.

**Example:** A meeting of the Board of ‘No Holiday Ltd’ was held on a holiday on account of Ganesh Chaturthi. However due to lack of quorum, the proceedings of the meeting could not be held and therefore the Chairman of the meeting decided with the consent of the majority that the Board meeting be adjourned to next week on the same day. However, the date fixed for the adjourned meeting happened to be a Sunday. Whether the adjourned meeting of the Board can be held on a Sunday.

**Answer:** When a board meeting is adjourned due to lack of quorum, then under section 174(4) the adjourned meeting can be held on the same day at the same time and place in the next week or if that day is a national holiday, till the next succeeding day, which is not a national holiday, at the same time and place, unless the Articles provide otherwise.

Since the section specifies of exclusion of only national holiday, so any original /adjourned/committee meetings can be held on Sundays and other holidays except national holidays. So meeting can be held on Sunday.

### 4. PASSING OF RESOLUTION BY CIRCULATION [SECTION 175]

Section 175 of the Companies Act, 2013, provides for Passing of resolution by circulation. According to this section:

(i) **Requirements to pass resolution by circulation:** The Act allows the Board of directors to pass resolution by Circulation also. No resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation unless:

The resolution has been circulated in draft, together with the necessary papers, if any, to all the directors, or members of the committee, as the case may be,

at their addresses registered with the company in India,

by hand delivery or by post or by courier, or through such electronic means as may be prescribed, and

and has been approved by a majority of the directors or members, who are entitled to vote on the resolution.

*Rule 5 of the Companies (Meetings of Board and its Powers) Rules, 2014* provides that a resolution in draft form may be circulated to the directors together with the necessary papers.
for seeking their approval, by electronic means which may include E-mail or fax. If at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

(ii) Noting of passed resolution in next meeting: A resolution that has been passed by circulation shall have to be necessarily be noted in the next meeting of board or the committee, as the case may be, and made part of the minutes of such meeting.

5. AUDIT COMMITTEE [SECTION 177]

Section 177 of the Companies Act, 2013 provides for constitution of Audit committee. According to this section:

(i) Formation of an Audit Committee:

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

(ii) Composition of an Audit committee: According to sub section 2 of section 177, the Audit Committee shall consist of a minimum of 3 directors with independent directors forming a majority.

Provided that the majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement.
Disclosure of composition of Audit Committee [Section 177(8)]: The Board’s report under sub-section (3) of section 134 shall disclose the composition of an Audit Committee and where the Board had not accepted any recommendation of the Audit Committee, the same shall be disclosed in such report along with the reasons therefor.

Vide Notification G.S.R. 466(E) ‘Independent Directors forming a majority’ is omitted in constitution of audit committee for the Companies covered under Section 8 of the Companies Act, 2013.

(iii) Responsibilities of an Audit Committee: According to sub section (4) of section 177, every Audit Committee shall act in accordance with the terms of reference specified in writing by the Board which shall, inter alia, include,-

(a) the recommendation for appointment, remuneration and terms of appointment of auditors of the company;

(b) review and monitor the auditor’s independence and performance, and effectiveness of audit process;

(c) examination of the financial statement and the auditors’ report thereon;

(d) approval or any subsequent modification of transactions of the company with related parties;

Provided that the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to such conditions as prescribed under Rule 6A inserted by Companies (Meeting of Board and its powers) Second Amendment Rules, 2015;

(e) scrutiny of inter-corporate loans and investments;

(f) valuation of undertakings or assets of the company, wherever it is necessary;

(g) evaluation of internal financial controls and risk management systems;

(h) monitoring the end use of funds raised through public offers and related matters.

(iv) Rights of Audit Committee:

(a) The Audit Committee may call for the comments of the auditors about internal control systems, the scope of audit, including the observations of the auditors and review of financial statement before their submission to the Board and may also discuss any related issues with the internal and statutory auditors and the management of the company. [Section 177(5)]
(b) The Audit Committee shall have authority to investigate into any matter in relation to the items specified in sub-section (4) or referred to it by the Board and for this purpose shall have power to obtain professional advice from external sources and have full access to information contained in the records of the company. [Section 177(6)]

(v) The auditors of a company and the key managerial personnel shall have a right to be heard in the meetings of the Audit Committee when it considers the auditor’s report but shall not have the right to vote. [Section 177(7)]

Vigil mechanism

(i) Formation of vigil mechanism: According to section 177(9), a Vigil mechanism shall be formed by:

(a) Every listed company, and

(b) Such other prescribed classed of companies.

Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed the following classes of companies that shall constitute Vigil mechanism:

(1) the Companies which accept deposits from the public;

(2) the Companies which have borrowed money from banks and public financial institutions in excess of 50 crore rupees.

(ii) Objective of formation of vigil mechanism:

(a) A vigil mechanism shall be formed for directors and employees to report genuine concerns in such manner as prescribed in Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014.
(b) The vigil mechanism shall provide for adequate safeguards against victimisation of persons who use such mechanism and make provision for direct access to the chairperson of the Audit Committee in appropriate or exceptional cases. It is imperative for the company to disclose the details of the establishment of vigil mechanism on the website of the company and in Board’s report.

According to Rule 7 of the Companies (Meetings of Board and its Powers) Rules, 2014:

1. “Persons who use such mechanism” means employees and directors who avail the vigil mechanism.

2. The companies which are required to constitute an audit committee shall oversee the vigil mechanism through the audit committee and if any of the members of the committee have a conflict of interest in a given case, they should recuse themselves and the others on the committee would deal with the matter on hand.

3. In case of other companies, the Board of directors shall nominate a director to play the role of audit committee for the purpose of vigil mechanism to whom other directors and employees may report their concerns.

4. The employees and directors who avail of vigil mechanism may have direct access to the Chairperson of the Audit Committee or the director nominated to play the role of Audit Committee, as the case may be, in exceptional cases.

5. In case of repeated frivolous complaints being filed by a director or an employee, the audit committee or the director nominated to play the role of audit committee may take suitable action against the concerned director or employee including reprimand.

(vi) Penalty for contravention [Section 178(8)]:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Who is liable</th>
<th>Quantum of liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a)</td>
<td>company</td>
<td>punishable with fine which shall be varying from 1 lakh to 5 lakh rupees, and</td>
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</tbody>
</table>
| (b)    | every officer of the company who is in default | • punishable with imprisonment for a term extending to 1 year, or  
• with fine varying from 25,000 to 1 lakh rupees, or  
• with both. |

Note: In the case of Listed company formation, composition, responsibilities and rights of Audit committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.
6. NOMINATION AND REMUNERATION COMMITTEE AND STAKEHOLDERS RELATIONSHIP COMMITTEE [SECTION 178]

Section 178 of the Companies Act, 2013 provides for Nomination and Remuneration Committee as well as Stakeholders Relationship Committee.

This section 178 shall not apply to the Companies covered under section 8 of the Companies Act, 2013.

In case of Government company - Sub-sections (2), (3) and (4) of Section 178, shall not apply except with regard to appointment of 'senior management' and other employees. - Notification dated 5th June, 2015.

Sections 178 (1) to (4) lay down the provisions in respect of the Nomination and Remuneration Committee as under:

Nomination and Remuneration Committee

(i) **Formation of nomination and remuneration committee by:**

\[
\begin{align*}
\text{Every Listed company} & \\
\text{Unlisted public company with a paid up capital of ten crore rupees or more; or} & \\
\text{Unlisted public company having turnover of one hundred crore rupees or more; or} & \\
\text{Unlisted public company having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding fifty crore rupees or more} & \\
\end{align*}
\]

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

(ii) **Composition of nomination and remuneration committee:**

(a) This committee shall consist of 3 or more non-executive directors out of which not less than one-half shall be independent directors.

(b) The Chairman (whether executive or non-executive) of the company shall not chair such a committee. However, he may be appointed as a member to the committee.

(c) The chairperson or in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

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(iii) **Functions of the committee**

(a) The Nominations and Remuneration Committee shall formulate the criteria for determining qualifications; positive attributes and independence of a director recommend to the Board a policy, relating to the remuneration for the directors, key managerial personnel and other employees [Sub section (3)].

(b) identify persons who are qualified to become directors and who may be appointed in senior management in accordance with the criteria laid down. [Sub-section (2)]

(c) recommend to the Board their appointment and removal of directors and senior management carry out evaluation of every director’s performance.

(d) According to section 178(4), the Nomination and Remuneration Committee shall, while formulating the policy under sub-section (3) of section 178 ensure that—

- the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully;

- relationship of remuneration to performance is clear and meets appropriate performance benchmarks; and

- remuneration to directors, key managerial personnel and senior management involves a balance between fixed and incentive pay reflecting short and long-term performance objectives appropriate to the working of the company and its goals.

It is imperative to disclose such a policy in Board’s Report.

(iv) **Penalty for contravention**: Same as penalty mentioned in the topic of Audit Committee.

**Note:** In the case of Listed company formation, composition, responsibilities and rights of Nomination and Remuneration committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.

**Stakeholders Relationship Committee (SRC)**

**Formation and functioning of SRC**: Section 178 (5) and (6) lay down the provisions relating to the formation, constitution and functioning of the Stakeholders Relationship Committee as under:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Sub-sections</th>
<th>With respect to</th>
<th>Provisions says</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>(5)</td>
<td>Formation and constitution of stakeholder’s relationship committee</td>
<td>The Board of Directors of a company which consists of more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during a financial year shall constitute a Stakeholders Relationship Committee.</td>
</tr>
</tbody>
</table>
(ii) Chairperson of stakeholder’s relationship committee

It shall be headed by a chairperson who shall be a non-executive director and consist of such other members as may be decided by the Board.

(iii) Objective of the committee

The Stakeholders Relationship Committee shall consider and resolve the grievances of security holders of the company. This committee shall protect the interests of all security holders, not merely the equity investors.

(iv) Chairperson of committees

The chairperson of each of the above committees constituted under this section or, in his absence, any other member of the committee authorised by him in this behalf shall attend the general meetings of the company.

Penalty for contravention: Section 178 (8) provides for the penalty for contravention of any of the provisions of either section 177 or 178 and has been explained above page no. 3.16 earlier on.

Exception: Provided that the non-consideration of a resolution of any grievance by the Stakeholders Relationship Committee in good faith shall not constitute a contravention of section 178.

Here, for the purposes of section 178, the expression “senior management” means personnel of the company who are members of its core management team excluding Board of Directors comprising all members of management one level below the executive directors, including the functional heads.

Note: In the case of Listed company formation, composition, responsibilities and rights of Stakeholder Relationship committee shall be governed by SEBI (LODR) Regulations issued under SEBI Act, 1992.

7. POWERS OF BOARD [SECTION 179]

Section 179 of the Companies Act, 2013 provides Powers of Board. According to this section:

(i) **BoD is entitled to exercise the same powers as the company is authorised:** The Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.

However, while exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in
any regulations not inconsistent therewith and duly made thereunder, including regulations made by the company in general meeting.

(ii) **Exception to Board’s Power:** The Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the memorandum or articles of the company or otherwise, to be exercised or done by the company in general meeting.

(iii) **Prospective effect:** No regulation made by the company in general meeting shall invalidate any prior act of the Board which would have been valid if that regulation had not been made. [Sub-section (2)]

(iv) **Powers of Board:** Powers of the Board to be exercised by the Board by means of the resolution passed at a duly convened Board meeting [Sub-section 3]:

(a) to make calls on shareholders in respect of money unpaid on their shares;
(b) to authorise buy-back of securities under section 68;
(c) to issue securities, including debentures, whether in or outside India;
(d) to borrow monies;
(e) to invest the funds of the company;
(f) to grant loans or give guarantee or provide security in respect of loans;
(g) to approve financial statement and the Board’s report;
(h) to diversify the business of the company;
(i) to approve amalgamation, merger or reconstruction;
(j) to take over a company or acquire a controlling or substantial stake in another company;
(k) any other matter which may be prescribed in Rule 8 of the Companies *(Meetings of Board and its Powers)* Rules, 2014.

<table>
<thead>
<tr>
<th>Exemption</th>
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<tbody>
<tr>
<td>Matters referred to in clauses (d), (e), and (f) of sub-section (3) of section 179 may be decided by the board by circulation instead of at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013.</td>
</tr>
</tbody>
</table>

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5 In case of Specified IFSC Public Company and IFSC Private Company - In sub-section (3) of Section 179, after the second proviso, the following proviso shall be inserted, namely:-

“Provided also that in case of a Specified IFSC public company and IFSC Private Company, the Board can exercise powers by means of resolutions passed at the meetings of the Board or through resolutions passed by circulation.”. Notification Dated 4th January 2017.
Additionally, Rule 8 of the Companies (Meetings of Board and its Powers) Rules, 2014 has prescribed certain more powers that shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:

1. to make political contributions;
2. to appoint or remove KMP
3. to appoint internal auditors and secretarial auditor;

(v) Power to delegate certain powers of the Board: The Board may, by a resolution passed at a meeting, delegate the powers specified in points (d) to (f) above, on such conditions as it may specify to:

1. any committee of directors,
2. the managing director,
3. the manager or any other principal officer of the company, or
4. the principal officer of the branch office (in the case of a branch office of the company).

Exemption to banking companies: However, the acceptance by a banking company in the ordinary course of its business of deposits of money from the public repayable on demand or otherwise and withdrawable by cheque, draft, order or otherwise, or the placing of monies on deposit by a banking company with another banking company on such conditions as the Board may prescribe, shall not be deemed to be a borrowing of monies or, as the case may be, a making of loans by a banking company within the meaning of this section.

Explanation I—Nothing in point (d) above shall apply to borrowings by a banking company from other banking companies or from the Reserve Bank of India, the State Bank of India or any other banks established by or under any Act.

Explanation II—In respect of dealings between a company and its bankers, the exercise by the company of the power specified in point (d) above shall mean the arrangement made by the company with its bankers for the borrowing of money by way of overdraft or cash credit or otherwise and not the actual day-to-day operation on overdraft, cash credit or other accounts by means of which the arrangement so made is actually availed of.

(vi) The company through the general meeting has powers to impose restrictions and conditions on the exercise by the Board of any of the powers specified in this section above. [Sub-section (4)]

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6 Vide Notification No. G.S.R. 206(E) dated 18th March, 2015, in Rule 8 item numbers (3),(5),(6),(7),(8),and (9) and the entries relating thereto have been omitted by the Companies( Meetings of Board and its Powers) Amendment Rules, 2015.
8. RESTRICTIONS ON POWERS OF BOARD [SECTION 180]

Section 180 of the Companies Act, 2013 provides for Restrictions on powers of Board.

According to this section:

(i) **BoD to exercise powers with the consent of the company passed by a special resolution:** The Board of Directors of a company shall exercise the following powers only with the consent of the company by a special resolution, namely:—

   (a) To **sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company** or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

   “Undertaking” shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent. of the total income of the company during the previous financial year;

   The expression “substantially the whole of the undertaking” in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance sheet of the preceding financial year;

   (b) To **invest otherwise in trust securities** the amount of compensation received by it as a result of any merger or amalgamation;

   (c) **to borrow money**, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves, apart from temporary loans obtained from the company’s bankers in the ordinary course of business.

   The acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be a borrowing of monies by the banking company within the meaning of this clause.

   “Temporary loans” means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature;

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7 In case of Specified IFSC Public Company - Section 180 Shall apply in case of a Specified IFSC public company, unless the articles of the company provides otherwise - Notification Dated 4th January 2017.

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(d) **Settlement of amount**: To remit, or give time for the repayment of, any debt due from a director.

(ii) **Limit of borrowing may be specified**: Every special resolution passed by the company in general meeting in relation to the exercise of the powers referred to in point (c) above shall specify the total amount up to which monies may be borrowed by the Board of Directors.

(iii) **Exception**: Nothing contained in above point (a) with respect to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company shall affect—

1. the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, in good faith; or
2. The sale or lease of any property of the company where the ordinary business of the company consists of, or comprises, such selling or leasing.

(iv) **Imposition of condition**: Any special resolution passed by the company consenting to the transaction as is referred to in above point (a) may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

**Exemption**: Provided that, this sub section shall not be deemed to authorise the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

(v) **Effect on the debt made in excess of limit**: No debt incurred by the company in excess of the limit imposed by above point (c) shall be valid or effectual, unless the lender proves that he advanced the loan in good faith and without knowledge that the limit imposed by that clause had been exceeded. [Sub-section (5)]

**Example**: The Board of Directors of Stepping Stones Publications Ltd. at a meeting held on 15.1.2017 resolved to borrow a sum of ₹ 15 crores from a nationalized bank. Subsequently the said amount was received by the company. One of the Directors, who opposed the said borrowing as not in the interest of the company has raised an issue that the said borrowing is outside the powers of the Board of Directors. The Company seeks your advice and the following data is given for your information:

(i) **Share Capital**: ₹ 5 crores

(ii) **Reserves and Surplus**: ₹ 5 crores

(iii) **Secured Loans**: ₹ 15 crores

(iv) **Unsecured Loans**: ₹ 5 crores

Advice the management of the company.

**Answer**: According to the provisions of Section 180(1)(c) of the Companies Act, 2013, there are restrictions on the borrowing powers to be exercised by the Board of directors. According to the
said section, the borrowings should not exceed the aggregate of the paid up capital and free reserves. While calculating the limit, the temporary loans obtained by the company from its bankers in the ordinary course of business will be excluded. However, from the figures available in the present case the proposed borrowing of ₹ 15 crores will exceed the limit mentioned. Thus, the borrowing will be beyond the powers of the Board of directors.

Thus, the management of Stepping Stone Publications Ltd., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1)(c) of the Companies Act, 2013. Then the borrowing will be valid and binding on the company and its members.

**9. COMPANY TO CONTRIBUTE TO BONA FIDE AND CHARITABLE FUNDS, ETC. [SECTION 181]**

Section 181 of the Companies Act, 2013 provides for Company to contribute to bona fide charitable and other funds.

Prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent. of its average net profits for the three immediately preceding financial years.

The expression “other funds” is wide enough to enable contributions of the kind, specified in the special resolution to be made by the company. [Straw Products Ltd. Vs. Registrar of Companies [1969]

**Example:** The Board of directors of Very Well Ltd., are contributing every year to a charitable organization a sum of ₹ 60,000/-. In a particular year, the company suffered losses and the directors are contemplating to contribute the said amount in spite of the losses. In this connection, state whether the directors can do so?

**Answer:** Under section 181 of the Companies Act, 2013 the Board of Directors of a company is authorized to contribute to bonafide charitable and other funds. However, in case the aggregate amount of such contribution in any financial year exceeds five per cent. of its average net profits for the three immediately preceding financial years, prior permission of the company in general meeting shall be required.

The section does not make it mandatory for the company to have a profit for making a charitable contribution in a financial year. As the amount of donation is restricted to the average of previous 3 years’ profits, it is possible for a company suffering a loss to make a contribution provided it is to a bonafide charitable fund.

In the present case, even though the company has incurred a loss it can contribute to the charitable fund only if it is a bonafide charitable fund and the amount is upto 5% of the average of the preceeding three years’ profits. In case the contribution exceeds the limit, the prior approval of the members must be taken at a general meeting of the company.
Section 182 of the Companies Act, 2013 deals with the provisions related to prohibitions and restrictions regarding political contributions. According to this section:

(i) **Contribution by company to political parties**: Notwithstanding anything contained in any other provision of this Act, a company may contribute any amount directly or indirectly to any political party. Here, “political party” means a political party registered under section 29A of the Representation of the People Act, 1951.

(ii) **Exception**: The following companies are not allowed to contribute to any political party:

   (a) a Government company; and

   (b) a company which has been in existence for less than three financial years.

(iii) **Required duly passed resolution for contribution**: No such contribution shall be made by a company unless a resolution authorising the making of such contribution is passed at a meeting of the Board of Directors and such resolution shall be deemed to be justification in law for the making of the contribution authorised by it. [Section 182(1)]

(iv) **Other requirements**: Without prejudice to the generality of the provisions of sub-section (1),

   (a) a donation or subscription or payment caused to be given by a company on its behalf or on its account to a person who, to its knowledge, is carrying on any activity which, at the time at which such donation or subscription or payment was given or made, can reasonably be regarded as likely to affect public support for a political party shall also be deemed to be contribution of the amount of such donation, subscription or payment to such person for a political purpose;

   (b) the amount of expenditure incurred, directly or indirectly, by a company on an advertisement in any publication, being a publication in the nature of a souvenir, brochure, tract, pamphlet or the like, shall also be deemed,—

      (1) where such publication is by or on behalf of a political party, to be a contribution of such amount to such political party, and

      (2) where such publication is not by or on behalf of, but for the advantage of a political party, to be a contribution for a political purpose.

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8 Proviso given in this section 182(1) is omitted, and the other given proviso to this section is amended by the Finance Act, 2017, w.e.f 31.3.2017.
(v) **Disclosure of contributed amount:** Every company shall disclose in its profit and loss account the total amount contributed by it under this section during the financial year to which the account relates. [Section 182(3)]

(vi) **Mode of contribution:** Notwithstanding anything contained in sub-section (1), the contribution under this section shall not be made except by an account payee cheque drawn on a bank or an account payee bank draft or use of electronic clearing system through a bank account:

Provided that a company may make contribution through any instrument, issued pursuant to any scheme notified under any law for the time being in force, for contribution to the political parties.'''[Section 182(3A)]

(vii) **Contribution made in contravention of the provision:** If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

The MCA vide General Circular 19/2013 dated 10th December 2013, issued a clarification on disclosures to be made under section 182 relating to ‘Prohibition and restrictions regarding political contributions’ of the Companies Act, 2013.

The circular says that, with the coming into force of the scheme relating to ‘Electoral Trust Companies’ under the Income Tax Act, 1961 read with Ministry of Finance Notification No. S.O. 309(E) dated 31st January, 2013, it will be expedient to explain the requirements of disclosure on part of a company of any amount or amounts contributed by it to any political parties under section 182(3) of the Companies Act, 2013.

The Ministry hereby clarifies that:

(i) Companies contributing any amount or amounts to an ‘Electoral Trust Company’ for contributing to a political party or parties are not required to make disclosures required under section 182(3) of Companies Act 2013. It will be sufficient, if the Accounts of the company disclose the amount released to an Electoral Trust Company.

(ii) Companies contributing any amount or amounts directly to a political party or parties will be required to make the disclosures laid down in section 182(3) of the Companies Act, 2013.

(iii) Electoral trust companies will be required to disclose all amounts received by them from other companies/sources in their Books of Accounts and also disclose the amount or amounts contributed by them to a political party or parties as required by section 182(3) of Companies Act, 2013.

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9 Sub-sections (3) was amended by the Finance Act, 2017, w.e.f. 31.3.2017.

10 This section 3A has been inserted vide Finance Act, 2017, w.e.f. 31.3.2017.
Example: The Board of Directors of LM Ltd., incorporated in 2015, propose to donate ₹ 50,000 to a political party during the Financial year ending 31st March, 2017. The average net profits determined in accordance with the provisions of the Companies Act, 2013 during the two immediately preceding financial years is ₹ 20,00,000. Whether the proposed donation is within the power of the Board of Directors of company.

Answer: As per section 182(1) of the Companies Act, 2013 any company may contribute any amount directly or indirectly to any political party except a government company and a company which has been in existence for less than three financial years.

In the given case, LM Ltd falls within the exception case. i.e., a company which has been in existence for less than three financial years. So LM Ltd. cannot donate amount to the political party.

Example: Sea Hawk Cycles Limited is a company incorporated four years ago. It has earned profits amounting ₹ 5 lakhs, ₹ 8 lakhs and ₹ 11 lakhs respectively during the last three financial years. The Board of Directors of the company propose to donate a sum of ₹ 50,000 to a political party. Whether the proposed donation is within the powers of the Board of Directors of the company.

Answer: According to section 182(1) of the Companies Act, 2013, a company except a Government Company and a company which has been in existence for not less than three financial years, can make political contributions, directly or indirectly, to any political party.

Further, the contribution shall be made by a company only after passing a resolution at meeting of the Board of Directors authorizing such contributions.

Yes, Sea Hawk Cycles Limited can contribute the amount in compliance with the applicable provisions of the Companies Act, 2013 by passing Board Resolution.

11. POWER OF BOARD AND OTHER PERSONS TO MAKE CONTRIBUTIONS TO NATIONAL DEFENCE FUND, ETC. [SECTION 183]

Section 183 of the Companies Act, 2013 provides for Power of Board and other persons to make contributions to national defence fund, etc. According to the section:

(i) Contribution of amount to National defence fund / other fund as approved by the Central Government: The Board of Directors of any company or any person or authority exercising the powers of the Board of Directors of a company, or of the company in general meeting, may, notwithstanding anything contained in sections 180, 181 and section 182 or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.
(ii) **Disclosure in profits and loss account:** Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the Fund referred to in point (i) as specified above, during the financial year to which the amount relates.

### 12. DISCLOSURE OF INTEREST BY DIRECTOR [SECTION 184]

Section 184 of the Companies Act, 2013 provides for Disclosure of interest by director. According to this section:

Section 184 is applicable on all directors of the company and all types of Companies.

(i) **When to disclose:** Every director shall:

(a) At the First meeting of the Board in which he participates as a director, and

(b) Thereafter, at the first meeting of the Board in every financial year, or

(c) Whenever there is any change in the disclosures already made, then at the first Board meeting held after such change. [Section 184(1)]

(ii) **General Disclosure:** Every director shall disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall include the shareholding, in such manner as prescribed in Rule 9 of the *Companies (Meetings of Board and its Powers) Rules, 2014*. [Section 184(1)]

The said rule prescribes that the directors shall disclose his concern or interest, by giving a notice in writing in form MBP-1.

(iii) **Specific Disclosure:** Whenever any director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting. Following are the circumstances where disclosure is necessary:

Whenever any director of the company, who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into—

(a) with a body corporate in which such director or such director in association with any other director, holds more than two per cent. shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate; or

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11 In case of Specified IFSC Public Company - Sub-section (2) of section 184 shall apply with the exception that interested director may participate in such meeting provided the disclosure of his interest is made by the concerned director either prior or at the meeting. - Notification Dated 4th January 2017.

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(b) with a firm or other entity in which, such director is a partner, owner or member, as the case may be.

However, where any director who is not so concerned or interested at the time of entering into such contract or arrangement, he shall, if he becomes concerned or interested after the contract or arrangement is entered into, disclose his concern or interest forthwith when he becomes concerned or interested or at the first meeting of the Board held after he becomes so concerned or interested. [Section 184(2)]

In case of private company - Section 184 (2) shall apply; with the exception that the interested director may participate in such meeting after disclosure of his interest. - vide Notification G.S.R. 464(E), Notification dated 5th June, 2015.

Whereas with respect to the companies covered under section 8 of the Companies Act, 2013, vide Notification G.S.R. 466(E), dated 5th June 2015, the Section 184(2) shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.

(iv) Consequences of non disclosure:

(a) Voidable at the option of company: A contract or arrangement entered into by the company without disclosing or with participation by a director who is concerned or interested in any way, directly or indirectly, in the contract or arrangement, shall be voidable at the option of the company.

(b) Penalty: If a director of the company contravenes the provisions of sub-section (1) or subsection (2) of section 184, such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees, or with both. [Section 184(3) & (4)]

(v) No restriction on directors: Nothing in section 184 shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company.

(vi) Exception: Section 184 shall not apply to any contract or arrangement entered into or to be entered into between two companies where any of the directors of the one company or two or more of them together holds or hold not more than 2% of the paid-up share capital in the other company.

Example: Company Y Ltd. entered into a contract with company Z with a paid-up capital of ₹ 50 lakhs. The director of Y company is holding equity shares of the nominal value of ₹ 50,000 in Z company. The director of Y Company did not disclose his interest at the Board meeting. Is the director liable for his act?

Answer: As per section 184 (2) of the Companies Act, 2013 the disclosure of interest by directors do not apply to any contract or arrangement within two companies where any of the directors of
one company or two or more of them together holds or hold not more than 2% of the paid up share capital in the other company. In the present case, the holding of the director of Y company in company Z is less than 2% \([(50,000/50,00,000)\times100\% = 1\%]\), so the director of Y company is not liable.

13. DEFECTS IN APPOINTMENT OF DIRECTORS NOT TO INVALIDATE ACTIONS TAKEN [SECTION 176]

Section 176 of the Companies Act, 2013 provides of defects in appointment of directors, shall not to invalidate actions taken. According to this section:

(i) **No act done by a person as a director shall be deemed to be invalid**, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

(ii) **No validity to an act done after noticing of his appointment to be invalid or terminated:** Nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or to have terminated.

**Example:** Mr. MTP was appointed as a director at the Annual General Meeting of a limited company held on 30th September, 2015 and he carried on his duties and functions as a director. In the month of August, 2016, it was found out that there were certain irregularities in his appointment and on 31st August, 2016, his appointment was declared invalid. But Mr. MTP continued to act as director even after 31st August, 2016. Whether the acts done by Mr. MTP are valid and binding upon the company?

**Answer:** In accordance with section 176 of the Companies Act, 2013 acts done by a person as a director shall be deemed to be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company.

The Proviso to section 176 further provide that nothing in this section shall be deemed to give validity to acts done by a director after his appointment has been noticed by the company to be invalid or to have terminated.

In view of the above provisions of section 176 of the Companies Act, 2013, the acts done by Mr. MTP upto the date of the irregularity in his appointment coming to the notice of the company will be deemed as valid and binding on the Company.

Any act done by him after the date on which the irregularity or defect in his appointment was noticed by the company will be deemed invalid. The acts done by Mr. MTP after 31st August, 2014 shall be deemed to be invalid and not binding upon the Company.
14. LOAN TO DIRECTORS, ETC. [SECTION 185]

Section 185 of the Companies Act, 2013 provides for restrictions on loan to directors, etc. According to this section:

(i) No company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

(ii) The above restriction does not apply in the following circumstances:

   (a) the giving of any loan to a managing or whole-time director—

   (1) as a part of the conditions of service extended by the company to all its employees; or

   (2) pursuant to any scheme approved by the members by a special resolution; or

   (b) a company which in the ordinary course of its business provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an interest is charged at a rate not less than the bank rate declared by the Reserve Bank of India.

(c) any loan made by a holding company to its wholly owned subsidiary company or any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary company; or

(d) Any guarantee given or security provided by a holding company in respect of any loan made by any bank or financial institution to its subsidiary company:

Provided that the loans made under clauses (c) and (d) are utilized by the subsidiary company for its principal business activities. [Section 185(1)]

(iii) If any loan is advanced or a guarantee is given or provided in contravention of the provisions of section 185, the following penalties shall be levied-

   (a) On Company: Minimum- 5 lakhs and maximum- 25 lakhs

   (b) On defaulting director and the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person:

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12 In case of Specified IFSC Public & Private Company - In Sub-section (1) of section 185, in the Explanation, for clause (c), the following clause shall be substituted, namely:-

“(c) any private company of which any such director is a director or member in which director of the lending company do not have direct or indirect shareholding through themselves or through their relatives and a special resolution is passed to this effect;” - Notification Dated 4th January, 2017
Imprisonment- Maximum 6 months, or,
Fine- Minimum- 5 lakhs and maximum- 25 lakhs, or,
Both imprisonment and fine.

**Explanation:** The expression “to any other person in whom director is interested” means—

(a) any director of the lending company, or of a company which is its holding company or any partner or relative of any such director;

(b) any firm in which any such director or relative is a partner;

(c) any private company of which any such director is a director or member;

(d) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any such director, or by two or more such directors, together; or

(e) any body corporate, the Board of directors, managing director or manager, whereof is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company. [Section 185(1)]

Thus, penalty is levied only on the company or director or person to whom the loan is given or guarantee or security is provided. However, all other persons who are knowingly a party to default has been kept outside the ambit of penalty clause of section 185.

**Vide Notification no. G.S.R. 465(E), dated 5th June 2015, section 185 shall not apply to the Nidhis, provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note.**

**Vide Notification G.S.R 464(E), dated 5th June 2015, section 185 shall not apply to a private company—**

(a) In whose share capital no other body corporate has invested any money;

(b) If the borrowings of such a company from banks or financial institutions or anybody corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower, and

(c) Such company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.

**Vide notification G.S.R. 463(E), dated 5th June 2015, section 185 shall not apply to Government company in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the state Government before making any loan or giving any guarantee or providing any security under the section.**

**Example:** Mr. DRT is a director of PCS Ltd. The said company is having sufficient liquid funds and Mr. DRT is in dire need of funds. In order to mitigate the hardship of Mr. DRT the board of directors of PCS Ltd. wants to lend ₹ 5 lakh to him and ₹ 2 lakh to his wife. State whether such
loans can be given and if so under what conditions. What would be your answer if the company PCS Ltd. would have been PCS Private Ltd.

Answer: Loan to Director and his relative: According to section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Thus, in the instant case, if PCS Ltd. wants to lend ₹ 5 Lakh to Mr. DRT who is a director in PCS Ltd. and ₹ 2 Lakh to his wife, then it is in violation of section 185 of the Companies Act, 2013.

If PCS Ltd would have been PCS Private Ltd. than vide Notification no. G.S.R. 464 (E) dated 5th June 2015, Section 185 of the Companies Act, 2013 shall not apply to a Private companies in certain conditions.

15. LOAN AND INVESTMENT BY COMPANY [SECTION 186]

Section 186 of the Companies Act, 2013 deals with the provisions related to Loan and Investment by Company. According to this section:

Applicability: This section is applicable on both public as well as private company.

(i) **Investment by company:** According to section 186(1), without prejudice to the provisions contained in this Act, a company shall unless otherwise prescribed, make investment through not more than 2 layers of investment companies: [Section 186(1)]

   Exemption: However, the provisions of sub-section (1) shall not affect,—

   (a) **Acquiring of company incorporated outside India:** a company from acquiring any other company incorporated in a country outside India if such other company has investment subsidiaries beyond two layers as per the laws of such country;

   (b) **Subsidiary from having an investment subsidiary:** a subsidiary company from having any investment subsidiary for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.

(ii) **Limitation/restrictions on the company:** According to section 186 (2) of the Companies Act, 2013, there are three types of transactions:

   (a) Loan

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13 In case of Specified IFSC Public Company & Private Company - In Sub-section (1) of section 186 shall not apply. - Notification Date 4th January, 2017

14 In case of Specified IFSC Public Company and Private Company - In Sub-sections (2) and (3) of section 186 shall not apply if a company passes a resolution either at meeting of the Board of Directors or by circulation. - Notification Date 4th January, 2017.
(b) Guarantee or security in connection with the loan

(c) Acquire by way of subscription, purchase or otherwise the securities of any other body corporate

1. any loan to any person or other body corporate
2. any guarantee or provide security in connection with a loan to any other body corporate or person
3. acquire by way of subscription, purchase or otherwise, the securities of any other body corporate exceeding

No company shall give-

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Vide General Circular No, 04/2015, dated 10/3/2015 clarification has been issued on the applicability of provisions of section 186 of the Companies Act, 2013 relating to grant of loans and advances by Companies to their employees.

It has been clarified that loans and/or advances made by the companies to their employees, other than the managing or whole time directors (which is governed by section 185) are not governed by the requirements of section 186 of the Companies Act, 2013.

This clarification will, however, be applicable if such loans/advances to employees are in accordance with the conditions of service applicable to employees and are also in accordance with the remuneration policy, in cases where such policy is required to be formulated.

It can be interpreted that company can do transactions given in headings 1, 2 or 3 in the diagram upto 60% of paid up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account (whichever is more) and restrictions apply only when such transactions exceeds the limits.

(iii) **Prior approval for exceeding limit** [Section 186(3)]: Prior approval by means of a special resolution passed at a general meeting shall be necessary where the giving of any loan or guarantee or providing any security or the acquisition exceeds the limits specified above.
According to the Rule 11 of the Companies (Meetings of Board and its Powers) Rules, 2014, where a loan or guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, or acquisition is made by a holding company, by way of subscription, purchase or otherwise of, the securities of its wholly owned subsidiary company, the requirement of sub-section (3) of section 186 shall not apply:

Provided that the company shall disclose the details of such loans or guarantee or security or acquisition in the financial statement as provided under sub-section (4) of section 186.

As per the Rule 13 of the Companies (Meetings of Board and its Powers) Rules, 2014, also provides that:

(a) Where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the limits specified under section 186, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Explanation.- For the purpose of this rule, it is clarified that it would sufficient compliance if such special resolution is passed within one year from the date of notification of this section.

(b) A resolution passed at a general meeting in terms of sub-section (3) of section 186 to give any loan or guarantee or investment or providing any security or the acquisition under sub section (2) of section 186 shall specify the total amount up to which the Board of Directors are authorised to give such loan or guarantee, to provide such security or make such acquisition:

Provided, that the company shall disclose to the members in the financial statement the full particulars in accordance with the provision of sub-section (4) of section 186.

(iv) Disclosure to members [Section 186(4)]:

<table>
<thead>
<tr>
<th>Company shall disclose to the members in the financial statement the full particulars of-</th>
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<tbody>
<tr>
<td>loan given, investment made or guarantee given or security provided, the purpose for which the loan or guarantee or security is proposed to be utilized by the recipient of the loan or guarantee or security.</td>
</tr>
</tbody>
</table>

(v) 15Unanimous resolution [Section 186 (5)]: Any investment shall be made or loan or

15 In case of Specified IFSC Public & Private Company - In Sub-section (5) of section 186 after the proviso, the following proviso shall be inserted -

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guarantee or security given by the company only after when the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting. The prior approval of the public financial institution concerned where any term loan is subsisting shall also be obtained.

However, prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in section 186(2) and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

(vi) **Rate of interest on loan**: A loan under this section shall not be given at a rate of interest lower than the prevailing yield of one year, 3 year, 5 year or 10 year Government Security closest to the tenor of the loan. [Section 186 (7)]

> Vide General circular no. 06/2015 dated 9th April, 2015 ministry has clarified that in cases where effective yield (effective rate of return) on tax free bonds is greater than the prevailing yield of one year, three year, five year or ten year, Government Security closest to the tenor of the loan, there is no violation of sub-section(7) of this section of the Companies Act, 2013.

(vii) **No loan till default is subsisting**: No company which is in default in the repayment of any deposits accepted before or after the commencement of this Act or in payment of interest thereon, shall give any loan or give any guarantee or provide any security or make an acquisition till such default is subsisting. [Section 186 (8)]

(viii) **Maintenance of register**: Every company giving loan or giving a guarantee or providing security or making an acquisition under this section shall keep a register which shall contain such particulars and shall be maintained in such manner as prescribed In Rule 12 and MBP 2 of the Companies (Meetings of Board and its Powers) Rules, 2014: [Section 186 (9)]

According to Rule 12 of the Companies (Meetings of Board and its Powers) Rules, 2014:

(a) Every company giving loan or giving guarantee or providing security or making an acquisition of securities shall, from the date of its incorporation, maintain a register in Form MBP 2 and enter therein separately, the particulars of loans and guarantees given, securities provided and acquisitions made as aforesaid.

(b) The entries in the register shall be made chronologically in respect of each such transaction within 7 days of making such loan or giving guarantee or providing security or making acquisition.

“Provided that the Board can exercise powers under this sub-section by means of resolutions passed at meetings of the Board of Directors or through resolutions passed by circulation.” - Notification Date 4th January, 2017.
(c) The register shall be kept at the registered office of the company and the register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or any other person authorised by the Board for the purpose.

(d) The entries in the register (either manual or electronic) shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

(e) The register can be maintained either manually or in electronic mode.

(f) The extracts from such register maintained may be furnished to any member of the company on payment of such fee as may be prescribed in the Articles of the company which shall not exceed 10 rupees for each page.

(ix) **Register to be kept at registered office:**

(a) This register shall be kept at the registered office of the company.

(b) It shall be open to inspection at such office and extracts may be taken therefrom by any member, and copies thereof may be furnished to any member of the company on payment of such fees as prescribed in Rule 12. [Section 186 (10)]

(x) **Non-applicability of section 186:** Nothing contained in section 186, except sub-section (1) of section 186, shall apply—

(a) to a loan made, guarantee given or security provided by a banking company or an insurance company or a housing finance company in the ordinary course of its business or a company engaged in the business of financing of companies or of providing infrastructural facilities;

According to Rule 11(2) of the Companies (Meetings of Board and its Powers) Rules, 2014, the expression “business of financing of companies” shall include, with regard to a Non-Banking Financial Company registered with the Reserve Bank of India, “business of giving of any loan to a person or providing any guaranty or security for due repayment of any loan availed by any person in the ordinary course of its business”.

(b) to any acquisition—

(1) made by a non-banking financial company registered under Chapter IIIIB of the Reserve Bank of India Act, 1934 and whose principal business is acquisition of securities:

Provided that exemption to non-banking financial company shall be in respect of its investment and lending activities;

(2) made by a company whose principal business is the acquisition of securities;

(3) of shares allotted in pursuance of section 62(1)(a) [Section 186 (11)]

(4) made by the banking company or an insurance company or a housing finance company, making acquisition of securities in the ordinary course of its business.
(xi) **Restriction on the inter-corporate loans/deposits:** Further, no company, which is registered under section 12 of the Securities and Exchange Board of India Act, 1992 and covered under such class or classes of companies as may be prescribed, shall take inter-corporate loan or deposits exceeding the prescribed limit and such company shall furnish in its financial statement the details of the loan or deposits. [Section 186 (6)]

According to Rule 11(3) to the *Companies (Meetings of Board and its Powers) Rules, 2014*, no company registered under section 12 of the Securities and Exchange Board of India Act, 1992 and also covered under such class or classes of companies which may be notified by the Central Government in consultation with the Securities and Exchange Board, shall take any inter-corporate loan or deposits, in excess of the limits specified under the regulations applicable to such company, pursuant to which it has obtained certificate of registration from the Securities and Exchange Board of India.

(xii) **Power of Central Government to make Rules:** The Central Government may make rules for the purposes of this section. [Section 186 (12)]

(xiii) **Penalty:** If a company contravenes the provisions of section 186, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than 25,000 rupees but which may extend to 1,00,000 rupees. [Section 186 (13)]

For the purposes of section 186,

(a) the expression “investment company” means a company whose principal business is the acquisition of shares, debentures or other securities;

(b) the expression “infrastructure facilities” means the facilities specified in Schedule VI.

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**In case of Government Company - Section 186 shall not apply to:**

(a) a Government company engaged in defence production;

(b) a Government company, other than a listed company, in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before making any loan or giving any guarantee or providing any security or making any investment under the section. - Notification dated 5th June, 2015.

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16. **INVESTMENTS OF COMPANY TO BE HELD IN ITS OWN NAME [SECTION 187]**

Section 187 of the Companies Act, 2013 provides for Investments of company to be held in its own name. According to this section:
(i) **Investments by a company in its own name:**

All investments

- made or held by a company in any-
  - property
  - security
  - or other assets

Shall be made and held by it in its own

However, the company may hold any shares in its subsidiary company in the name of any nominee or nominees of the company, if it is necessary to do so, to ensure that the number of members of the subsidiary company is not reduced below the statutory limit.

(ii) **Deposition of assets, security etc. held by the company:** Nothing in this section shall be deemed to prevent a company—

(a) from depositing with a bank, being the bankers of the company, any shares or securities for the collection of any dividend or interest payable thereon; or

(b) from depositing with, or transferring to, or holding in the name of, the State Bank of India or a scheduled bank, being the bankers of the company, shares or securities, in order to facilitate the transfer thereof:

Provided that if within a period of 6 months from the date on which the shares or securities are transferred by the company to, or are first held by the company in the name of, the State Bank of India or a scheduled bank as aforesaid, no transfer of such shares or securities takes place, the company shall, as soon as practicable after the expiry of that period, have the shares or securities re-transferred to it from the State Bank of India or the scheduled bank or, as the case may be, again hold the shares or securities in its own name; or

(c) from depositing with, or transferring to, any person any shares or securities, by way of security for the repayment of any loan advanced to the company or the performance of any obligation undertaken by it;

(d) from holding investments in the name of a depository when such investments are in the form of securities held by the company as a beneficial owner.
(iii) **Maintenance of register by company in case of securities not held by it in its own name:** Where in pursuance of clause (d) of sub-section (ii), any shares or securities in which investments have been made by a company are not held by it in its own name, the company shall maintain a register which shall contain such particulars as may be prescribed and such register shall be open to inspection by any member or debenture-holder of the company without any charge during business hours subject to such reasonable restrictions as the company may by its articles or in general meeting impose.

Securities held by any person in which the company holds beneficial interest, compliance of section 89 requires declaration in respect of beneficial interest of any securities.

(iv) **In case of contravention:** If a company contravenes the provisions of this section, the company shall be punishable with fine which shall not be less than 25,000 rupees but which may extend to 25 lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to 6 months or with fine which shall not be less than 25,000 rupees but which may extend to 1 lakh rupees, or with both.

According to Rule 14 of the *Companies (Meetings of Board and its Powers) Rules, 2014*,

(a) Every company shall, from the date of its registration, maintain a register in Form MBP3 and enter therein, chronologically, the particulars of investments in shares or other securities beneficially held by the company but which are not held in its own name and the company shall also record the reasons for not holding the investments in its own name and the relationship or contract under which the investment is held in the name of any other person.

(b) The company shall also record whether such investments are held in a third party’s name for the time being or otherwise.

(c) The register shall be maintained at the registered office of the company. The register shall be preserved permanently and shall be kept in the custody of the company secretary of the company or if there is no company secretary, any director or any other officer authorised by the Board for the purpose.

(d) The entries in the register shall be authenticated by the company secretary of the company or by any other person authorised by the Board for the purpose.

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17. RELATED PARTY TRANSACTIONS [SECTION 188]

*Related Party*- As per section 2(76) of the Companies Act, 2013, related party with reference to a company, means

(i) a director or his relative;

(ii) a key managerial personnel or his relative;

(iii) a firm, in which a director, manager or his relative is a partner;
(iv) a private company in which a director or manager or his relative is a member or director;

(v) a public company in which a director or manager is a director and holds along with his relatives, more than 2% of its paid-up share capital;

(vi) any body corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;

(vii) any person on whose advice, directions or instructions a director or manager is accustomed to act:

Provided that nothing in sub-clauses (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity;

(viii) any company which is—

(A) a holding, subsidiary or an associate company of such company; or

(B) a subsidiary of a holding company to which it is also a subsidiary;

(ix) such other person as may be prescribed;

Rule 3 of the Companies (Specification of Definitions Details) Rules, 2014 provides that For the purposes of sub-clause (ix) of clause (76) of section 2 of the Act, a director other than an independent director or key managerial personnel of the holding company or his relative with reference to a company, shall be deemed to be a related party. The persons covered in items (vi) and (vii) above shall not be related parties if advice, directions or instructions are given by them in a professional capacity.

1. Section 188 of the Companies Act, 2013 relates with the related party transactions (RPT) with related party. According to this section:

(i) Contracts with related parties which are covered under section 188 (Section 188(1)): Except with the consent of the Board of Directors given by a resolution at a meeting of the Board and subject to such conditions as may be prescribed, no company shall enter into any contract or arrangement with a related party with respect to the transaction.

16 In case of private company - Sub-clause (viii) of clause 76 of Section 2, Shall not apply with respect to section 188 - Notification dated 5th June, 2015.

In case of Specified IFSC Public Company - Sub-clause (vii) of clause (76) of Section 2 Shall not apply with respect to section 188 - Notification Dated 5th January, 2017

17 For details regarding prescribed conditions please refer sub rule (1) of rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014.
Transactions referred in sub-section (1)

(a) sale, purchase or supply of any goods or materials;

(b) selling or otherwise disposing of, or buying, property of any kind;

(c) leasing of property of any kind;

(d) availing or rendering of any services;

(e) appointment of any agent for purchase or sale of goods, materials, services or property;

(f) such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and

(g) underwriting the subscription of any securities or derivatives thereof, of the company:

(ii) However, no contract or arrangement, in the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution. [First proviso to section 188(1)]

According to Rule 15(3) of the Companies (Meetings of Board and its Powers) Rules, 2014 except with the prior approval of the company by a resolution, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into,—

(A) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mentioned below -

<table>
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<tr>
<th>Conditions with respect to transactions to be entered into with the prior approval</th>
<th>Prescribed limits for the transactions to be entered into as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188</th>
</tr>
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<tr>
<td>sale, purchase or supply of any goods or materials, directly or through appointment of agent</td>
<td>Amounting to 10% or more of the turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (a) and clause (e) respectively of sub-section (1) of section 188</td>
</tr>
</tbody>
</table>
selling or otherwise disposing of or buying property of any kind, directly or through appointment of agent

| Amounting to 10% or more of net worth of the company or rupees 100 crore, whichever is lower, as mentioned in clause (b) and clause (e) respectively of sub-section (1) of section 188 |

leasing of property of any kind

| Amounting to 10% or more of the net worth of the company or 10% or more of turnover of the company or rupees 100 crore, whichever is lower, as mentioned in clause (c) of sub-section (1) of section 188 |

availing or rendering of any services, directly or through appointment of agent

| Amounting to 10% or more of the turnover of the company or rupees 50 crore, whichever is lower, as mentioned in clause (d) and clause (e) respectively of sub-section (1) of section 188: |

Explanation—It is hereby clarified that the limits specified in sub-clauses (i) to (iv) shall apply for transaction or transactions to be entered into either individually or taken together with the previous transactions during a financial year.

(B) is for appointment to any office or place of profit in the company, its subsidiary company or associate company at a monthly remuneration exceeding 2.5 lakh rupees as mentioned in clause (f) of subsection (1) of section 188; or

(C) is for remuneration for underwriting the subscription of any securities or derivatives thereof, of the company exceeding 1% of the net worth as mentioned in clause (g) of sub-section (1) of section 188.

Explanation:

- The Turnover or Net Worth referred in the above sub-rules shall be computed on the basis of the Audited Financial Statement of the preceding financial year.
- In case of a wholly owned subsidiary, the resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between the wholly owned subsidiary and the holding company.

2. Transaction to be at arm’s length prices: Nothing as provided above shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm’s length basis.

3. The explanatory statement to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:—
(a) name of the related party;
(b) name of the director or key managerial personnel who is related, if any;
(c) nature of relationship;
(d) nature, material terms, monetary value and particulars of the contract or arrangement;
(e) any other information relevant or important for the members to take a decision on the proposed resolution.

No voting by related member: Further no member of the company shall vote on such resolution, to approve any contract or arrangement which may be entered into by the company, if such member is a related party. [Second proviso to section 188(1)]

The MCA vide General Circular No. 30/2014 dated 17th July, 2014 has clarified the scope of second proviso to section 188(1). The second proviso to subsection (1) of section 188 requires that no member of the company shall vote on a resolution to approve the contract or arrangement (referred to in the first proviso), if such a member is a related party. It is clarified that 'related party' referred to in the second proviso has to be construed with reference only to the contract or arrangement for which the said resolution is being passed. Thus, the term 'related party' in the above context refers only to such related party as may be a related party in the context of the contract or arrangement for which the said resolution is being passed.

According to Rule 15(2) of the Companies (Meetings of Board and its Powers) Rules, 2014, where any director is interested in any contract or arrangement with a related party, such director shall not be present at the meeting during discussions on the subject matter of the resolution relating to such contract or arrangement.

Vide Notification G.S.R. 463(E) dated 5th June 2015, first and second proviso to section 188(1) shall not apply to -(a) a government company in respect of contracts or arrangements entered into by it with any other government company; (b) a government company, other than a listed company, in respect of contracts or arrangements other than those referred to in clause(a), in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or as the case may be, the state Government before entering into such contract or arrangement.

4. Passing of resolution is not necessitated: Provided also that the requirement of passing resolution under first proviso shall not be applicable for transactions entered into between a holding company and its wholly owned subsidiary whose accounts are consolidated with such holding company and placed before the shareholders at the general meeting for approval.

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18 This second proviso to section 188(1) shall not apply to private company- Notification dated 5th June, 2015
In case of Specified IFSC Public Company - Second proviso to sub section (1) of section 188 shall not apply. - Notification Date 4th January, 2017
Explanation—

(a) the expression “office or place of profit” means any office or place—

(1) where such office or place is held by a director, if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director, by way of salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(2) where such office or place is held by an individual other than a director or by any firm, private company or other body corporate, if the individual, firm, private company or body corporate holding it receives from the company anything by way of remuneration, salary, fee, commission, perquisites, any rent-free accommodation, or otherwise;

(b) the expression “arm’s length transaction” means a transaction between two related parties that is conducted as if they were unrelated, so that there is no conflict of interest.

5. Related party transaction can be voidable at the option at the Board [Section 188 (3)]: A contract or arrangement shall be voidable at the option of the Board:

(a) Contract / arrangement entered without obtaining the consent of the Board or approval by a resolution: Where any contract or arrangement is entered into by a director or any other employee, without obtaining the consent of the Board or approval by a resolution in the general meeting as required under section 186(1), and

(b) No ratification by Board /shareholders: if it is not ratified by the Board or, as the case may be, by the shareholders at a meeting within 3 months from the date on which such contract or arrangement was entered into.

Further, if the contract or arrangement is with a related party to any director, or is authorised by any other director, the directors concerned shall indemnify the company against any loss incurred by it.

(c) Company may proceed to recover loss in contravention of the provisions of this section: Section 188 (4) provides that it shall be open to the company to proceed against a director or any other employee who had entered into such contract or arrangement in contravention of the provisions of this section for recovery of any loss sustained by it as a result of such contract or arrangement.

6. Penalty for contravention [Section 188 (5)]:

<table>
<thead>
<tr>
<th>In the case of a-</th>
<th>Liability</th>
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<tr>
<td>listed company</td>
<td>Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall-</td>
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</tbody>
</table>
be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees, or with both; and

| any other company | Any director or any other employee of a company, who had entered into or authorised the contract or arrangement in violation of the provisions of this section shall- be punishable with fine which shall not be less than 25,000 rupees but which may extend to 5 lakh rupees. |

7. **Related party transaction to be mentioned in Board’s report** [Section 188 (2)]: Every contract or arrangement entered into under sub section (1), shall be referred to in the Board’s report to the shareholders along with the justification for entering into such contract or arrangement.

**Applicability of Section 188 to corporate restructuring, amalgamations etc.:** The MCA vide General Circular No. 30/2014 dated 17\(^{th}\) July, 2014 has clarified that transactions arising out of Compromises, Arrangements and Amalgamations dealt with under specific provisions of the Companies Act, 2013, will not attract the requirements of section 188 of the Companies Act, 2013.

**18. REGISTER OF CONTRACTS OR ARRANGEMENTS IN WHICH DIRECTORS ARE INTERESTED [SECTION 189]**

Section 189 of the Companies Act, 2013 provides for Register of contracts or arrangements in which directors are interested. According to this section:

(i) **Maintenance of register of contracts or arrangements [Section 189(1)]:** Section 189 of the Companies Act, 2013 makes it mandatory for all companies to keep one or more registers giving separately the particulars of all contracts or arrangements as required under:

   (a) section 184(2) [Disclosure of interest by director] or
   (b) section 188 [Related party transaction].

(ii) **Registers to be signed [Section 189(1)]:** The register shall be prepared in such manner and containing such particulars as may be prescribed and after entering the particulars, the duly filled and updated register or registers shall be placed before the next meeting of the Board and signed by all the directors present at the meeting.

(iii) **Manner of preparation of register:** Such register shall be prepared in such manner and contain such particulars as may be prescribed. [Section 189(1)]

According to Rule 16 of the *Companies (Meetings of Board and its Powers) Rules, 2014*, every company shall maintain one or more registers in Form MBP 4, and contain such particulars as required therein.
(iv) **Disclosure to be made by director or KMP [Section 189(2)]:** Every director or key managerial personnel shall, within a period of 30 days of his appointment, or relinquishment of his office, as the case may be, disclose to the company the particulars specified in section 184(1) relating to his concern or interest in the other associations which are required to be included in the register under that sub-section or such other information relating to himself as may be prescribed.

(v) **Register to be kept at registered office [Section 189(3)]:** The register shall be kept at the registered office of the company and it shall be open for inspection at such office during business hours.

(vi) **Extracts from register [Section 189(3)]:** Extracts may be taken from the register, and copies thereof as may be required by any member of the company shall be furnished by the company to such extent, in such manner, and on payment of such fees as may be prescribed.

According to the Companies (Meetings of Board and its Powers) Rules, 2014, such fee will be as provided in the articles of the company, subject to the maximum of ₹ 10 for each page.

(vii) **Register to be produced at AGM [Section 189(4)]:** The register shall also be produced at the commencement of every annual general meeting of the company and shall remain open and accessible during the continuance of the meeting to any person having the right to attend the meeting. Thus, even a proxy has the rights to inspect the Register.

(viii) **Exceptions [Section 189(5)]:** Nothing contained in section 189(1) shall apply to any contract or arrangement-

(a) for the sale, purchase or supply of any goods, materials or services if the value of such goods and materials or the cost of such services does not exceed 5,00,000 rupees in the aggregate in any year; or

(b) by a banking company for the collection of bills in the ordinary course of its business.

(ix) **Penalty [Section 189(6)]:** Every director who fails to comply with the provisions of this section and the rules made thereunder shall be liable to a penalty of 25,000 rupees.

Whereas with respect to the companies covered under section 8 of the Companies Act, 2013, vide Notification G.S.R. 466(E), dated 5th June 2015, the Section 184(2) shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of the contract or arrangement exceeds one lakh rupees.

**19. CONTRACT OF EMPLOYMENT WITH MANAGING OR WHOLE-TIME DIRECTORS [SECTION 190]**

Section 190 of the Companies Act, 2013 provides for Contract of employment with managing or whole-time directors. According to this section:
(i) **Maintenance of copy of contract of employment:** Every company shall keep at its registered office,—

(a) where a contract of service with a managing or whole-time director is in writing, a copy of the contract; or

(b) where such a contract is not in writing, a written memorandum setting out its terms.

(ii) **Inspection:** The copies of the contract or the memorandum shall be open to inspection by any member of the company without payment of fee.

(iii) **Penalty for default:** The Company shall be liable to a penalty of twenty-five thousand rupees and every officer of the company who is in default shall be liable to a penalty of five thousand rupees for each default.

(iv) **Exception:** The provisions of this section shall not apply to a private company.

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### 20. PAYMENT TO DIRECTOR FOR LOSS OF OFFICE, ETC., IN CONNECTION WITH TRANSFER OF UNDERTAKING, PROPERTY OR SHARES [SECTION 191]

Section 191 of the Companies Act, 2013 provides for Payment to director for loss of office, etc., in connection with transfer of undertaking, property or shares. According to this section:

(i) Section 191 lays down elaborate provisions for regulating payment of compensation to directors for loss of office, etc., in connection with transfer of undertaking, property or shares.

(ii) **Application of provisions:** These provisions apply to all companies.

(iii) According to sub section (1), no director of a company shall, in connection with

(a) the transfer of the whole or any part of any undertaking or property of the company; or

(b) the transfer to any person of all or any of the shares in a company being a transfer resulting from—

1. an offer made to the general body of shareholders.
2. an offer made by or on behalf of some other body corporate with a view to a company becoming a subsidiary company of such body corporate or a subsidiary company of its holding company;
3. an offer made by or on behalf of an individual with a view to his obtaining the right to exercise, or control the exercise of, not less than 1/3rd of the total voting power at any general meeting of the company; or
4. any other offer which is conditional on acceptance to a given extent, receive any payment by way of compensation for loss of office, or
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- as consideration for retirement from office, or
- in connection with such loss or retirement from such company or
- from the transferee of such undertaking or property, or
- from the transferees of shares or
- from any other person, not being such company,

unless particulars as may be prescribed with respect to the payment proposed to be made by such transferee or person, including the amount thereof, have been disclosed to the members of the company and the proposal has been approved by the company in general meeting.

(iv) However, nothing in sub-section (1) shall affect any payment made by a company to a managing director or whole-time director or manager of the company by way of compensation for loss of office or as consideration for retirement from office or in connection with such loss or retirement subject to limits or priorities, as prescribed in Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014. [sub – section (2)].

(v) If the above payment is not approved for want of quorum either in a meeting or an adjourned meeting, the proposal shall not be deemed to have been approved.

(vi) Where a director of a company receives payment of any amount in contravention of subsection (1) or the proposed payment is made before it is approved in the meeting, the amount so received by the director shall be deemed to have been received by him in trust for the company.

(vii) If a director of the company contravenes the provisions of this section, such director shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(viii) Nothing in this section shall be taken to prejudice the operation of any law requiring disclosure to be made with respect to any payment received under this section or such other like payments made to a director.

According to Rule 17 of the Companies (Meetings of Board and its Powers) Rules, 2014,

(1) No director of a company shall receive any payment by way of compensation in connection with any event mentioned in sub-section (1) of section 191 unless the following particulars are disclosed to the members of the company and they pass a resolution at a general meeting approving the payment of such amount —

(a) name of the director;
(b) amount proposed to be paid;
(c) event due to which compensation become payable;
(d) date of Board meeting recommending such payment;
(e) basis for the amount determined;
(f) reason or justification for the payment;
(g) manner of payment - whether payable in cash or otherwise and how;
(h) sources of payment; and
(i) any other relevant particulars as the Board may think fit.

(2) Any payment made by a company by way of compensation for the loss of office or as a consideration for retirement from office or in connection with such loss or retirement, to a managing director or whole time director or manager of the company shall not exceed the limit as set out under section 202.

(3) No payment shall be made to the managing director or whole time director or manager of the company by way of compensation for the loss of office or as consideration for retirement from office (other than notice pay and statutory payments in accordance with the terms of appointment of such director or manager, as applicable) or in connection with such loss or retirement if —

(a) the company is in default in repayment of public deposits or payment of interest thereon;
(b) the company is in default in redemption of debentures or payment of interest thereon;
(c) the company is in default in repayment of any liability, secured or unsecured, payable to any bank, public financial institution or any other financial institution;
(d) the company is in default in payment of any dues towards income tax, VAT, excise duty, service tax or any other tax or duty, by whatever name called, payable to the Central Government or any State Government, statutory authority or local authority (other than in cases where the company has disputed the liability to pay such dues);
(e) there are outstanding statutory dues to the employees or workmen of the company which have not been paid by the company (other than in cases where the company has disputed the liability to pay such dues); and
(f) the company has not paid dividend on preference shares or not redeemed preference shares on due date.

Explanation: Pending notification of sub-section (1) of section 247 (i.e., Registered valuers) of the Act and finalisation of qualifications and experience of valuers, valuation of stocks, shares, debentures, securities etc. will be conducted by an independent merchant banker who is registered with the Securities and Exchange Board of India or an independent chartered accountant in practice having a minimum experience of 10 years.
Section 192 of the Companies Act, 2013 specifies restriction on non-cash transactions involving directors. According to this section:

(i) **Restriction on acquiring assets for consideration other than cash:** No company shall enter into an arrangement by which—

   (a) a director of the company or its holding, subsidiary or associate company or a person connected with him acquires or is to acquire assets for consideration other than cash, from the company; or

   (b) the company acquires or is to acquire assets for consideration other than cash, from such director or person so connected, unless prior approval for such arrangement is accorded by a resolution of the company in general meeting and if the director or connected person is a director of its holding company, approval shall also be required to be obtained by passing a resolution in general meeting of the holding company.

(ii) **Value of the assets by registered valuer:** The notice for approval of the resolution by the company or holding company in general meeting shall include the particulars of the arrangement along with the value of the assets involved in such arrangement duly calculated by a registered valuer.

(iii) **In case of contravention:** Any arrangement entered into by a company or its holding company in contravention of the provisions of this section shall be voidable at the instance of the company unless-

   (a) the restitution of any money or other consideration which is the subject-matter of the arrangement is no longer possible and the company has been indemnified by any other person for any loss or damage caused to it; or

   (b) any rights are acquired bona fide for value and without notice of the contravention of the provisions of this section by any other person.

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Section 193 of the Companies Act, 2013 provides for Contracts by One Person Company. According to this section:

(i) **Where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in**

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19 Registered valuer is defined in section 247, however this section is not yet notified.
a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract. However, if contracts are entered into by the company in the ordinary course of its business then such ensurance shall not be necessary.

(ii) The company shall inform the Registrar about every such contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors within a period of 15 days of the date of approval by the Board of Directors.

23. PROHIBITION ON FORWARD DEALINGS IN SECURITIES OF COMPANY BY DIRECTOR OR KEY MANAGERIAL PERSONNEL [SECTION 194]

Section 194 of the Companies Act, 2013 provides for Prohibition on forward dealings in securities of company by director or key managerial personnel. According to this section:

(i) **Restrictions on the forward dealings in securities**: No director of a company or any of its key managerial personnel shall buy in the company, or in its holding, subsidiary or associate company—

   (a) **a right to call for delivery or a right to make delivery** at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures; or

   (b) **a right, as he may elect, to call for delivery or to make delivery** at a specified price and within a specified time, of a specified number of relevant shares or a specified amount of relevant debentures.

(ii) **Punishment in case of contravention**: If a director or any key managerial personnel of the company contravenes the above provisions, such director or key managerial personnel shall be punishable with imprisonment for a term which may extend to two years or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

(iii) **Acquisition of securities in contravention**: Where a director or other key managerial personnel acquires any securities in contravention, he shall along with fine and imprisonment mentioned above, also be liable to surrender the same to the company and the company shall not register the securities so acquired in his name in the register, and if they are in dematerialised form, it shall inform the depository not to record such acquisition and such securities, in both the cases, shall continue to remain in the names of the transferors.

(iv) **“relevant shares” and “relevant debentures”** mean shares and debentures of the company in which the concerned person is a whole-time director or other key managerial personnel or shares and debentures of its holding and subsidiary companies.
**Note:** In addition to above provisions, Regulations issued by SEBI on the subject would also be applicable in such matters.

### 24. PROHIBITION ON INSIDER TRADING OF SECURITIES [SECTION 195]

Section 195 of the Companies Act, 2013 provides for Prohibition on insider trading of securities. According to this section:

(i) **Prohibition:** No person including any director or key managerial personnel of a company shall enter into insider trading. But if any communication is required in the ordinary course of business or profession or employment or under any law, then the above prohibition does not apply.

(ii) **“Insider trading” means—**

(a) an act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or

(b) An act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;

(iii) **“price-sensitive information”** means any information which relates, directly or indirectly, to a company and which if published is likely to materially affect the price of securities of the company.

(iv) **In case of default:** If any person contravenes the provisions of this section, he shall be punishable with-

- imprisonment for a term which may extend to five years or
- with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or
- with both.

**Note:** In addition to above provisions, Regulations issued by SEBI on the subject would also be applicable in such matters.
Question 1

(i) What is the procedure to be followed, when a board meeting is adjourned for want of quorum?

(ii) How is a resolution by circulation passed by the Board or its Committee.

Answer

(i) Section 174(4) of the Companies Act, 2013 provides that, if a Board meeting could not be held for want of quorum, then, unless the articles otherwise provide, the meeting shall automatically stand adjourned to the same day in the next week, at the same time and place, or if that day is a national holiday, till the next succeeding day which is not a national holiday, at the same time and place.

(ii) 1. The Companies Act, 2013 permits a decision of the Board of Directors to be taken by means of a resolution by circulation. Board approvals can be taken in one of the two ways, one by a resolution passed at a Board Meeting and the other, by means of a resolution passed by circulation.

In terms of section 175(1) of the Companies Act, 2013 no resolution shall be deemed to have been duly passed by the Board or by a committee thereof by circulation, unless the following have been complied with:

(a) the resolution has been circulated in draft, together with the necessary papers, if any,

(b) the draft resolution has been circulated to all the directors, or members of the committee, as the case may be;

(c) the Draft resolution has been sent at their addresses registered with the company in India;

(d) such delivery has been made by hand or by post or by courier, or through prescribed electronic means;

The Companies (Meetings of Board and its Powers) Rules, 2014 provides that a resolution in draft form may be circulated to the directors together with the necessary papers for seeking their approval, by electronic means which may include E-mail or fax.

(e) such resolution has been approved by a majority of the directors or members, who are entitled to vote on the resolution;

2. However, if at least 1/3rd of the total number of directors of the company for the time being require that any resolution under circulation must be decided at a meeting, the
chairperson shall put the resolution to be decided at a meeting of the Board (instead of being decided by circulation).

3. A resolution that has been passed by circulation shall have to be necessarily be noted in the next meeting of board or the committee, as the case may be, and made part of the minutes of such meeting.

**Question 2**

Mr. P and Mr. Q who are the directors of the Company informed the Company their inability to attend the meeting because the notice of the meeting was not served on them. Discuss whether there is any default on the part of the Company and the consequences thereof.

**Answer**

Under section 173(3) of the Companies Act, 2013 a meeting of the Board shall be called by giving not less than seven days’ notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

Section 173(4) further provides that every officer of the company whose duty is to give notice under this section and who fails to do so shall be liable to a penalty of ₹ 25,000.

In the given case as no notice was served on Mr. P and Mr. Q who are the directors of the company, thus, under section 173(4) every officer of the company responsible for the default shall be punishable with fine of ₹ 25,000.

Neither the Companies Act, 2013 nor the Companies (Meetings of the Board and its Powers) Rules, 2014 lay down any specific provision regarding the validity of a resolution passed by the Board of Directors in case notice was not served to all the directors as stipulated in the Act. We shall have to go by the provisions of the Act which clearly provide for the notice to be sent to every director failing which the resolutions passed will be invalid. The Supreme Court, in case of Parmeshwari Prasad vs. Union of India (1974) has held that the resolutions passed in the board meeting shall not be valid, since notice to all the Directors was not given in writing. Notice must be given to each director in writing. Hence, even though the directors concerned knew about the meeting, the meeting shall not be valid and resolutions passed at the meeting also shall not be valid.

**Question 3**

A director goes abroad for a period of more than 3 months and an alternate director has been appointed in his place under section 161(2). During the period of absence of the original director, a board meeting was called. In this connection, with reference to the provisions of the Companies Act, 2013, advise whom should the notice of Board meeting be given to the “original director” or to the “alternate director”?

**Answer**

According to Section 161(2) of the Companies Act, 2013, the Board of Directors of a company
may, if so authorised by its articles or by a resolution passed by the company in general meeting, appoint a person, not being a person holding any alternate directorship for any other director in the company, to act as an alternate director for a director during his absence for a period of not less than three months from India.

According to section 173(3), a meeting of the Board may be called by giving at least a 7 days' notice in writing to every director to his registered address with the company and such notice shall be sent by hand delivery or by post or by electronic means.

There is no legal precedence whether the notice of the meeting is to be sent to the original director or the alternate director. But as a matter of prudence the notice of the meeting may be served to both the alternate director as well as the original director who is for the time being outside India.

Question 4

Examine with reference to the provisions of the Companies Act, 2013 whether notice of a Board Meeting is required to be sent to the following persons:

(i) An interested Director;
(ii) A Director who has expressed his inability to attend a particular Board Meeting;
(iii) A Director who has gone abroad (for less than 3 months).

Answer

Notice of Board meeting

(i) Interested director: Section 173(3) of the Companies Act, 2013 makes it mandatory for every director to be given proper notice of every board meeting. It is immaterial whether a director is interested or not. In case of an Interested Director, notice must be given to him even though he is precluded from voting at the meeting on the business to be transacted.

(ii) A Director who has expressed his inability to attend a particular Board Meeting: In terms of section 173(3) even if a director states that he will not be able to attend the next Board meeting; notice must be given to that director.

(iii) A director who has gone abroad: A director who has gone abroad is still a director. Therefore, he is entitled to receive notice of board meetings during his stay abroad. The Companies Act, 2013, allows delivery of notice of meeting by electronic means also. This is important because the Companies Act, 2013 permits a director to participate in a meeting by video conferencing or any other audio visual means.

Question 5

Out of the powers exercisable by the Board under section 179, the board wants to delegate to the Managing Director of the company the power to borrow monies otherwise than on debentures. Advise whether such a delegation is possible? Would your answer be different, if the delegation is given to the manager or any other principal officer including a branch officer of the company?
Answer

Under section 179(3) of the Companies Act, 2013 the Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board:

a. To make calls on shareholders in respect of money unpaid on their shares;
b. To authorise buy-back of securities under section 68;
c. To issue securities, including debentures, whether in or outside India;
d. To borrow monies
e. To invest the funds of the company
f. To grant loans or give guarantee or provide security in respect of loans;
g. To approve financial statement and the Board’s report;
h. To diversify the business of the company;
i. To approve amalgamation, merger or reconstruction;
j. To take over a company or acquire a controlling or substantial stake in another company;
k. Any other matter which may be prescribed:

Provided that the Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in clauses (d) to (f) on such conditions as it may specify.

Matters referred to in clauses (d), (e), and (f) above, may be decided by the board by circulation instead of at a meeting in respect to the companies covered under section 8 of the Companies Act, 2013 vide Notification dated 5th June 2015.

From the above provisions it is clear that the power to borrow monies under (d) above, may be delegated to the Managing Director or to the manager or any other principal officer of the company.

Question 6

Advise the Board of Director of Spectra Papers Ltd. regarding validity and extent of their powers, under the provisions of the Companies Act, 2013 in relation to the following matters:

(i) Buy-back of the shares of the Company, for the first time, upto 10% of the paid up equity share capital without passing a special resolution.

(ii) Delegation of Power to the Managing Director of the company to invest surplus funds of the company in the shares of some companies.
Answer

(i) According to clause (b) of section 179(3), The Board of Directors of a company shall exercise the power to authorise buy-back of securities under section 68, on behalf of the company by means of resolutions passed at meetings of the Board.

According to section 68(2), No company shall purchase its own shares or other specified securities, unless—

(a) the buy-back is authorised by its articles;

(b) a special resolution has been passed at a general meeting of the company authorising the buy-back:

However, nothing contained in this clause shall apply to a case where—

(1) the buy-back is, 10% or less of the total paid-up equity capital and free reserves of the company; and

(2) such buy-back has been authorised by the Board by means of a resolution passed at its meeting.

Thus, we can say that in the case of buy-back of shares of the Company, for the first time, upto 10% of the paid up share capital, a special resolution will not be required if such buy-back has been authorised by the Board by means of a resolution passed at its meeting.

(ii) According to clause (e) of section 179(3), the Board of Directors of a company shall exercise the power to invest the funds of the company, on behalf of the company by means of resolutions passed at meetings of the Board.

The board may under the proviso to section 179(3) of the Companies Act, 2013 delegate the power to invest the funds of the company by a Board Resolution passed at a duly convened Board Meeting. However, the investment in shares of other companies will be governed by the applicable provisions of the Companies Act, 2013 (i.e. section 186 of the Companies Act, 2013). Since the investment of funds is governed by section of the Companies Act, 2013, thus, specific provisions of section 186 will be applicable for such investment. According to section 186(5), No investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned where any term loan is subsisting, is obtained. Thus, a unanimous resolution of the Board is required. Section 186 does not provide for delegation. Hence, the proposed delegation of power to the Managing Director to invest surplus funds of the company in the shares of some other companies, is not in order.

Question 7

An Audit Committee of a Public Limited Company constituted under section 177 of the Companies Act, 2013 submitted its report of its recommendation to the Board. The Board, however, did not accept the recommendations. In the light of the situation, analyze whether:
(a) **The Board is empowered not to accept the recommendations of the Audit Committee.**

(b) **If so, what alternative course of action, would be Board resort to?**

**Answer**

(a) As per Section 177(2) and (3) of the Companies Act, 2013 an audit committee must be formed within a year of the commencement of the Act or within a year of the incorporation of a company as the case may be, and will consist of at least 3 directors out of which the independent directors shall constitute the majority.

Under section 177(8) the Board’s Report which is laid before a general meeting of the company under section 134 (3) where the financial statements of the company are placed before the members, must disclose the composition of the audit committee and also where the Board has not accepted any recommendations of the audit Committee the same shall be disclosed along with the reasons therefor. Therefore, the Board is empowered not to accept the recommendations of the Audit Committee but only under genuine circumstances and with legitimate reasons.

(b) If the Board does not accept the recommendations of the Audit Committee, it shall disclose the same in its report under section 134 (3) placed before a general meeting of the company.

**Question 8**

*MNC Ltd., a company, whose paid up capital was ₹ 4.00 Crores, has issued rights shares in the ratio of 1:1. The said company is listed with Mumbai Stock Exchange. Whether the company is required to appoint any Audit Committee and if yes, draft a suitable Board Resolution to appoint an Audit committee covering the aspects as provided in the Companies Act, 2013.*

**Answer**

Under section 177(1) of the Companies Act, 2013 the Board of Directors of every listed company and such other class or classes of companies, as may be prescribed, shall constitute an Audit Committee. Therefore, MNC Ltd being a listed company will be bound to constitute an audit committee under the Act.

Further under section 177(2) the Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.

Further, the majority of members of Audit Committee including its Chairperson shall be persons with ability to read and understand the financial statement.

The draft Board Resolution for the constitution of an Audit Committee may be as follows:

“Resolved that pursuant to the provision contained in section 177 of the Companies Act 2013 and the applicable clause of Listing Agreement with the Mumbai Stock Exchange, an Audit Committee of the Company be and is hereby constituted with effect from the conclusion of this meeting, with members as under:
1. Mr. A -- An Independent Director.
2. Mr. B -- An Independent Director
3. Mr. C – An Independent Director
4. Mr. D -- An Independent Director
5. Mr. FE -- Financial Executive
6. Mr. MD -- Managing Director

Further resolved that the Chairman of the Committee, who shall be an Independent Director, be elected by the committee members from amongst themselves.

Further resolved that the quorum for a meeting of the Audit Committee shall be the chairman of the Audit Committee and 2 other members (other than the Managing Director).

Further resolved that the terms of reference of the Audit Committee shall be in accordance with the provisions of section 177(4) of the Companies Act, 2013.

Further resolved that the Audit committee shall conduct discussions with the auditors periodically about internal control system, the scope of audit including the observations of the auditors.

Further resolved that the Audit Committee shall review the quarterly and annual financial statements and submit the same to the Board with its recommendations, if any.

Further resolved that the recommendations made by the Audit Committee on any matter relating to financial management including the audit report shall be binding on the Board. However, where such recommendations are not accepted by the Board, the reasons for the same shall be recorded in the minutes of the Board meeting and communicated to the shareholders.

Further resolved that the Company Secretary of the Company shall be the Secretary to the Audit Committee.

Further resolved that the Chairman of the Audit Committee shall attend the annual general meeting of the Company to provide any clarifications on matters relating to audit as may be required by the members of the company.

Further resolved that the Board’s Report/Annual Report to the members of the Company shall include the particulars of the constitution of the Audit Committee and the details of the non acceptance of any recommendations of the Audit Committee with reasons therefor.”
Question 9

The last three years’ Balance Sheet of PTL Ltd., contains the following information and figures:

<table>
<thead>
<tr>
<th></th>
<th>As at 31.03.2015</th>
<th>As at 31.03.2016</th>
<th>As at 31.03.2017</th>
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<td>General Reserve</td>
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<td>Credit Balance in Profit &amp; Loss Account</td>
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<td>Secured Loans</td>
<td>10,00,000</td>
<td>15,00,000</td>
<td>30,00,000</td>
</tr>
</tbody>
</table>

On going through other records of the Company, the following is also determined:

| Net Profit for the year (as calculated in accordance with the provisions of the Companies Act, 2013) | 12,50,000 | 19,00,000 | 34,50,000 |

In the ensuing Board Meeting scheduled to be held on 5th November, 2017, among other items of agenda, following items are also appearing:

(i) To decide about borrowing from Financial institutions on long-term basis.
(ii) To decide about contributions to be made to Charitable funds.

Based on above information, you are required to find out as per the provisions of the Companies Act, 2013, the amount upto which the Board can borrow from Financial institution and the amount upto which the Board of Directors can contribute to Charitable funds during the financial year 2017-18 without seeking the approval in general meeting.

Answer

(i) **Borrowing from Financial Institutions**: As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting, can borrow money including moneys already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves. Such borrowing shall not include temporary loans obtained from the company’s bankers in ordinary course of business. Here, free reserves do not include the reserves set apart for specific purpose.

Since the decision to borrow is to be taken in a meeting to be held on 5th November, 2017, the figures relevant for this purpose are the figures as per the Balance Sheet as at
According to the above provisions, the Board of Directors of PTL Ltd. can borrow, without obtaining approval of the shareholders in a general meeting, up to an amount calculated as follows:

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up Capital</td>
<td>7,500,000</td>
</tr>
<tr>
<td>General Reserve (being free reserve)</td>
<td>5,000,000</td>
</tr>
<tr>
<td>Credit Balance in Profit &amp; Loss Account (to be treated as free reserve)</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption)</td>
<td>----</td>
</tr>
<tr>
<td>Aggregate of paid up capital and free reserve</td>
<td>13,500,000</td>
</tr>
<tr>
<td>Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid up capital and free reserves</td>
<td>13,500,000</td>
</tr>
<tr>
<td>Less: Amount already borrowed as secured loans</td>
<td>3,000,000</td>
</tr>
<tr>
<td>Amount up to which the Board of Directors can further borrow without the approval of shareholders in a general meeting.</td>
<td>10,500,000</td>
</tr>
</tbody>
</table>

(ii) **Contribution to Charitable Funds:** As per Section 181 of the Companies Act, 2013, the Board of Directors of a company without obtaining the approval of shareholders in a general meeting, can make contributions to genuine charitable and other funds up to an amount which, in a financial year, does not exceed five per cent of its average net profits during the three financial years immediately preceding, the financial year.

According to the above provisions, the Board of Directors of the PTL Ltd. can make contributions to charitable funds, without obtaining approval of the shareholders in a general meeting, up to an amount calculated as follows:

Net Profit for the year (as calculated in accordance with the provisions of the Companies Act, 2013):

<table>
<thead>
<tr>
<th>Particulars</th>
<th>₹</th>
</tr>
</thead>
<tbody>
<tr>
<td>For the financial year ended 31.3.2015</td>
<td>12,50,000</td>
</tr>
<tr>
<td>For the financial year ended 31.3.2016</td>
<td>19,00,000</td>
</tr>
<tr>
<td>For the financial year ended 31.3.2017</td>
<td>34,50,000</td>
</tr>
<tr>
<td>TOTAL</td>
<td>66,00,000</td>
</tr>
<tr>
<td>Average of net profits during three preceding financial years</td>
<td>22,00,000</td>
</tr>
<tr>
<td>Five per cent thereof</td>
<td>1,10,000</td>
</tr>
</tbody>
</table>
Hence, the maximum amount that can be donated by the Board of Directors to a genuine charitable fund by PTL Ltd during the financial year 2017-18 will be ₹ 1,10,000 without seeking the approval of the shareholders in a general meeting.

Question 10

Amar Textiles Ltd. is a company engaged in the manufacture of fabrics. The company has investments in shares of other bodies corporate including 70% shares in Amar Cotton Company Ltd. and it has also advanced loans to other bodies corporate. The aggregate of all the investments made and loans granted by Amar Textiles Ltd. exceeds 60% of its paid up share capital and free reserves and also exceeds 100% of its free reserves. In course of its business requirements, Amar Textiles Ltd. has obtained a term loan from Industrial Development Bank of India which is still subsisting. Now the company wants to increase its holding from 70% to 80% of the equity share capital in Amar Cotton Company Ltd. by purchase of additional 10% shares from other existing shareholders. State the legal requirements to be complied with by Amar Textiles Ltd. under the provisions of the Companies Act, 2013 to give effect to the above proposal.

Answer

Amar Cotton Co. Ltd. is not a wholly-owned subsidiary of Amar Textiles Ltd.

1. According to section 186(2) of the Companies Act, 2013, no company shall directly or indirectly —
   (a) give any loan to any person or other body corporate;
   (b) give any guarantee or provide security in connection with a loan to any other body corporate or person; and
   (c) acquire by way of subscription, purchase or otherwise, the securities of any other body corporate,
   exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

As the aggregate of the investments in shares and loans granted to other bodies corporate exceeds 60% of the paid-up share capital and free reserves and also 100% of the free reserves, it exceeds the limit given under section 186 (2) of the Companies Act, 2013. It is therefore, necessary for Amar Textiles Ltd., to pass a special resolution of the members at a duly convened General Meeting before increasing its holding from 70% to 80%.

2. The notice of special resolution must be accompanied by an explanatory statement and must include full particulars of the investment proposed to be made along with the purpose of such investment in compliance with section 186 (4) of the Act.

3. According to section 186(5) of the Companies Act, 2013, no investment shall be made or loan or guarantee or security given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the
prior approval of the public financial institution concerned where any term loan is subsisting, is obtained:

However, prior approval of a public financial institution shall not be required where the aggregate of the loans and investments so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate, along with the investments, loans, guarantee or security proposed to be made or given does not exceed the limit as specified in 186(2), and there is no default in repayment of loan instalments or payment of interest thereon as per the terms and conditions of such loan to the public financial institution.

In the present case, Amar Textiles Ltd., had obtained a term loan from Industrial Development Bank of India (IDBI) which is not a public financial institution within the meaning under Section 2 (72) of the Companies Act, 2013 and therefore the provisions of Section 186 (5) are not attracted even if such loan is still subsisting. The company is not required to obtain prior approval of IDBI for making any further investment.

4. Further, as required by provisions of Section 186 (5), the investment proposal must be passed at the Board meeting by a unanimous decision of all the directors present at the meeting.

5. The company must enter the prescribed particulars of investment in a register of investment required to be maintained under section 186(9) of the Act.

Question 11

Mr. KMP is director of XLS Ltd. He intends to construct a residential building for his own use. The cost of construction is estimated at ₹ 1.50 Crores, which Mr. KMP proposes to finance partly from his own sources to the tune of ₹ 60 lacs and the balance ₹ 90 lacs from housing loan to be obtained from a housing finance company. For the purpose of obtaining the loan, he has approached the housing finance company which has in principle agreed to grant the loan, but has put a condition. The condition put by the housing finance company is that the Company XLS Ltd. of which Mr. KMP is a director should provide the guarantee for repayment of the loan and interest as per the terms of the proposed agreement for granting the loan to Mr. KMP. You are required to advise Mr. KMP on the matter with reference to the provisions of the Companies Act, 2013.

Answer

According to section 185 of the Companies Act, 2013, no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

Thus, guarantee by Company XLS Ltd. of which Mr. KMP is a director, for repayment of the loan and interest as per the terms of the proposed agreement is not allowed.
Further, if any loan is advanced or a guarantee or security is given or provided in contravention of the above provisions, the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, and the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to 6 months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees, or with both.

Question 12

Following is data relating to Prince Company Limited:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Authorised Capital (Equity Shares)</td>
<td>₹ 100 crores</td>
</tr>
<tr>
<td>Paid – up Share Capital</td>
<td>₹ 40 crores</td>
</tr>
<tr>
<td>General Reserves</td>
<td>₹ 20 crores</td>
</tr>
<tr>
<td>Debenture Redemption Reserve</td>
<td>₹ 10 crores</td>
</tr>
<tr>
<td>Provision for Taxation</td>
<td>₹ 5 crores</td>
</tr>
<tr>
<td>Loan (Long Term)</td>
<td>₹ 10 crores</td>
</tr>
<tr>
<td>Short Term Creditors</td>
<td>₹ 3 crores</td>
</tr>
</tbody>
</table>

Board of Directors of the company by a resolution passed at its meeting decided to borrow an additional sum of ₹ 90 crores from the company’s Bankers. You being the company’s financial advisor, advise the Board of Directors the procedure to be followed as required under the Companies Act, 2013.

Answer

Borrowing by the Company (Section 180 of the Companies Act, 2013)

As per Section 180(1)(c) of the Companies Act, 2013, the Board of Directors of a company, without obtaining the approval of shareholders in a general meeting through a special resolution, can borrow the funds including funds already borrowed upto an amount which does not exceed the aggregate of paid up capital of the company and its free reserves. Such borrowing shall not include temporary loans obtained from the company’s bankers in ordinary course of business.

Free reserves do not include the reserves set apart for specific purpose.

According to the above provisions, the Board of Directors of Prince Company Limited can borrow, without obtaining approval of the shareholders in a general meeting, upto an amount calculated as follows:
### Particulars

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Paid up Share Capital</td>
<td>40 Crore</td>
</tr>
<tr>
<td>General Reserve (being free reserve)</td>
<td>20 Crore</td>
</tr>
<tr>
<td>Debenture Redemption Reserve (This reserve is not to be considered since it is kept apart for specific purpose of debenture redemption)</td>
<td>----</td>
</tr>
<tr>
<td>Aggregate of paid up capital and free reserve</td>
<td>60 Crore</td>
</tr>
<tr>
<td>Total borrowing power of the Board of Directors of the company, i.e, 100% of the aggregate of paid up capital and free reserves</td>
<td>60 Crore</td>
</tr>
<tr>
<td>Less: Amount already borrowed as Long term loan</td>
<td>10 Crore</td>
</tr>
<tr>
<td>Amount upto which the Board of Directors can further borrow without the approval of shareholders in a general meeting.</td>
<td>50 Crore</td>
</tr>
</tbody>
</table>

In the present case, the directors of Prince Company Limited by a resolution passed at its meeting decide to borrow an additional sum of ₹ 90 Crore from the company bankers. Thus, the borrowing will be beyond the powers of the Board of directors.

Thus, the management of Prince Company Limited., should take steps to convene the general meeting and pass a special resolution by the members in the meeting as stated in Section 180(1)(c) of the Companies Act, 2013. Then, the borrowing will be valid and binding on the company and its members.

[Note: In case of private companies section 180 shall not apply vide Notification no. G.S.R. 464(E), dated 5th June 2015]

**Question 13**

You are working as the Finance Head of Super Energy Ltd. The company is in advance stage of finalizing projects of wind power generation, which will considerably improve the operational and financial strengths of the company. You have got some information that one of the directors of the company, who is involved in the project, is indulged in trading of shares of the company.

Write a note for internal circulation explaining insider trading of securities and consequences of contravention of the relevant provisions of the Companies Act, 2013

**Answer**

**Note for Internal Circulation to all the Concerned**

It has come to the notice of the Management that somebody is indulging in insider trading of the shares of the company. For the benefit of all the concerned, the scope and the meaning of insider trading is indicated below:
Section 195 has been introduced in the Companies Act, 2013 which provides for prohibition of insider trading in securities. According to this section:

(i) No person including any director or key managerial personnel of a company shall enter into insider trading. But if any communication is required in the ordinary course of business or profession or employment or under any law, then the above prohibition does not apply.

(ii) “Insider trading” means –

(a) An act of subscribing, buying, selling, dealing or agreeing to subscribe, buy, sell or deal in any securities by any director or key managerial personnel or any other officer of a company either as principal or agent if such director or key managerial personnel or any other officer of the company is reasonably expected to have access to any non-public price sensitive information in respect of securities of company; or

(b) An act of counselling about procuring or communicating directly or indirectly any non-public price-sensitive information to any person;

(iii) “price-sensitive information” means any information which relates, directly or indirectly to a company and which if published is likely to materially affect the price of securities of the company.

(iv) If any person contravene the provisions of this section, he shall be punishable with imprisonment for a term which may extend to five years or with fine which shall not be less than five lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of insider trading, whichever is higher, or with both.

Accordingly, all the concerned should note that any act of insider trading will be viewed very seriously and the concerned persons should desist from carrying out any such activities.

**Question 14**

One of the Objects Clauses of the Memorandum of Association of Info Company Limited conferred upon the company power to sell its undertaking to another company with identical objects. Company’s Articles also conferred upon the directors whereby power was conferred upon them to sell or otherwise deal with the property of the company. At an Extraordinary General Meeting of the company, members passed an ordinary resolution for the sale of its assets on certain terms and authorized the directors to carry out the sale. Directors refused to comply with the wishes of the members whereupon it was contended on behalf of the members that they were the principals and directors being their agents, were bound to give effect to their (members’) decisions.

Examining the provisions of the Companies Act, 2013, answer the following:

**Whether the contention of members against the non-compliance of members’ decision by the directors is tenable?**

**Whether it is possible for the members usurp the powers which by the Articles are vested in the directors by passing a resolution in the general meeting?**

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Answer

Powers of Board: In accordance with the provisions of the Companies Act, 2013, as contained under Section 179(1), the Board of Directors of a company shall be entitled to exercise all such powers and to do all such acts and things, as the company is authorized to exercise and do:

Provided that in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under including regulations made by the company in general meeting.

Provided further that the Board shall not exercise any power or do any act or thing which is directed or required, whether under this Act or by the members or articles of the company or otherwise to be exercised or done by the company in general meeting.

Section 180 (1) of the Companies Act, 2013, provides that the powers of the Board of Directors of a company which can be exercised only with the consent of the company by a special resolution. Clause (a) of Section 180 (1) defines one such power as the power to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking of the whole or substantially the whole or any of such undertakings.

Therefore, the sale of the undertaking of a company can be made by the Board of Directors only with the consent of members of the company accorded vide a special resolution.

Even if the power is given to the Board by the memorandum and articles of the company, the sale of the undertaking must be approved by the shareholders in general meeting by passing a special resolution.

Therefore, the correct procedure to be followed is for the Board to approve the sale of the undertaking clearly specifying the terms of such sale and then convene a general meeting of members to have the proposal approved by a special resolution.

In the given case, the procedure followed is completely incorrect and violative of the provisions of the Act. The shareholders cannot on their own make out a proposal of sale and pass an ordinary resolution to implement it through the directors.

The contention of the shareholders is incorrect in the first place as it is not within their authority to approve a proposal independently of the Board of Directors. It is for the Board to approve a proposal of sale of the undertaking and then get the members to approve it by a special resolution. Accordingly the contention of the members that they were the principals and directors being their agents were bound to give effect to the decisions of the members is not correct.

Further, in exercising their powers the directors do not act as agent for the majority of members or even all the members. The members therefore, cannot by resolution passed by a majority or even unanimously supersede the powers of directors or instruct them how they shall exercise their
powers. The shareholders have, however, the power to alter the Articles of Association of the company in the manner they like subject to the provisions of the Companies Act, 2013.

Question 15

(i) R Ltd. wants to constitute an Audit Committee. Draft a board resolution covering the following matters [compliance with Companies Act, 2013 to be ensured].

(1) Member of the Audit Committee
(2) Chairman of the Audit Committee
(3) Any 2 functions of the said Committee

(ii) What would be the minimum likely turnover or capital of this company?

(iii) What is the role of the Audit Committee vis a vis the statutory auditor when the company wishes to engage them to perform certain engagements not restricted under Section 144?

Answer

(i) Audit Committee – Board’s Resolution:

“Resolved that pursuant to Section 177 of the Companies Act, 2013 an Audit Committee consisting of the following Directors be and is hereby constituted.

1. Mr. ---- Independent Director
2. Mr. ---- Independent Director
3. Mr. ---- Independent Director
4. Mr. ---- Independent Director
5. Mr. ---- Managing Director.
6. Mr. ---- Chief Financial Officer"

“Further resolved that the Chairman of the Audit Committee shall be elected by its members from amongst themselves and shall be an independent director’.

“Further resolved that the quorum for a meeting of the Audit committee shall be three directors (other than the Managing Director), out of which at least two must be independent directors”.

“Resolved further that the Audit Committee shall perform all the functions as laid down in section 177(4) of the Companies Act, 2013 including but not limited to:

a. make the recommendation for appointment, remuneration and terms of appointment of the auditors of the company;

b. review and monitor the independence and performance of auditors of the company and the effectiveness of the audit process”.

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Further resolved that the Audit Committee shall review the quarterly and annual financial statements and submit the same to the Board with its recommendations if any”.

(ii) Rule 6 of the Companies (Meetings of Board and its Powers) Rules, 2014 have prescribed that the following classes of companies shall constitute Audit Committee:

(a) all public companies with a paid up capital of 10 crore rupees or more;
(b) all public companies having turnover of 100 crore rupees or more;
(c) all public companies, having in aggregate, outstanding loans or borrowings or debentures or deposits exceeding 50 crore rupees or more.

Hence, in the present question, the likely turnover shall be ₹ 100 crore or more or capital shall be ₹ 10 crore or more.

(iii) According to section 177(5), the Audit Committee is empowered to:

(1) call for the comments of the auditors about:
   (A) internal control systems,
   (B) the scope of audit, including the observations of the auditors,
   (C) review of financial statement before their submission to the Board,
(2) discuss any related issues with the internal and statutory auditors and the management of the company.