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CS EXECUTIVE

MODULE-1

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

BY:-**CS NITESH KR. JAISWAL**

(Company Secretary (FCS), M.Com, LL.B.)

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Dedicated to

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And Father **SHRI SURENDRA PRASAD**

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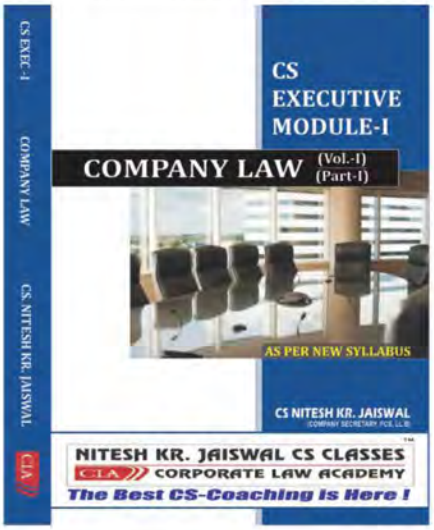

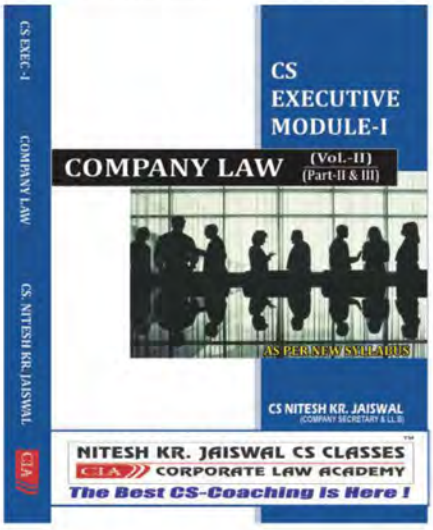

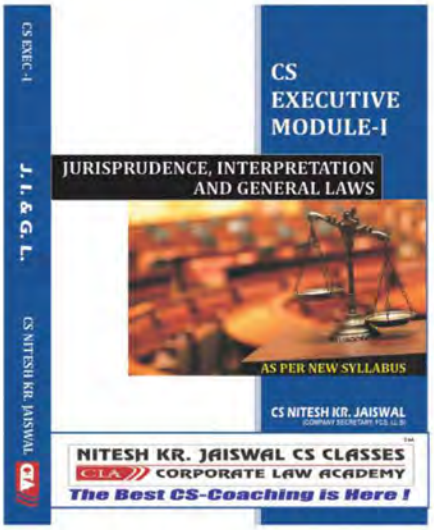

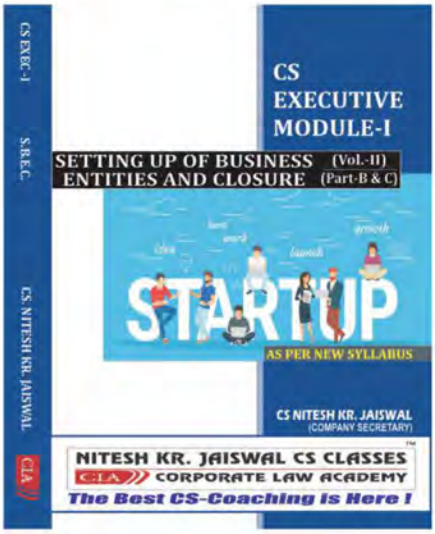

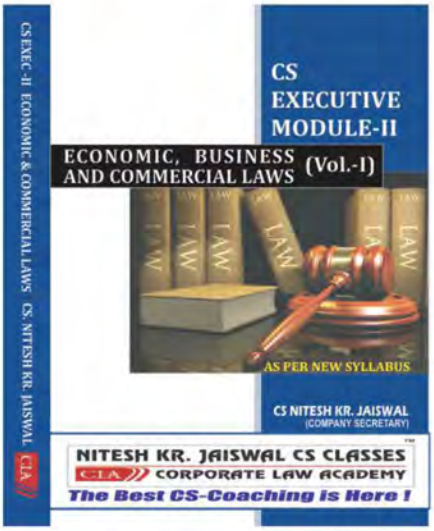

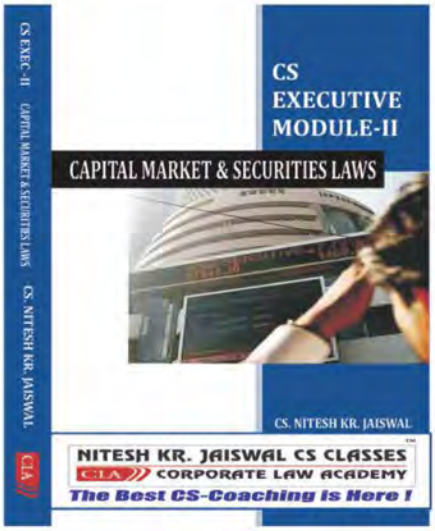

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And

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Preface

We have great pleasure in placing the book on Setting up of Business Entities and Closurein the hands of students. This book gives a complete and overall prospect about Setting up of Business Entities and Closure from examination point of view and meets the requirements of all levels of students preparing for Company Secretaryship examination. The focus continues on equipping the students with theories, concepts and techniques that can be applied to various spheres of Company Secretary professional.

The important features of this book are as follows:

- It is user friendly and provides information in well structured manner.
- It incorporates latest changes relating to the subject, Setting up of Business Entities and Closure.
- It elaborates the concept through practical problems.
- Tables and diagrams are used for explaining the key concepts.
- Lucid and comprehensive presentation of the complex and advanced subjects matter will help the students in easy understanding.
- **The book is comprehensive and even a student who has not studied the subject earlier can easily understand the concept and system of Setting up of Business Entities and Closure.**

There is no denying the fact that improvement is an unending process.

We look forward to the comments, suggestions and criticisms from the readers for improvement of this book and will be gratefully acknowledged.

However, it becomes necessary for every student to constantly update with legislative changes made as well as judicial pronouncements rendered from time to time by referring to the ICSI's monthly journal 'Chartered Secretary' and e-bulletin 'Student Company Secretary' as well as other law/professional journals and reference books.

Besides, as per the Company Secretaries Regulations, 1982, students are expected to be conversant with the amendments to the laws made upto six months preceding the date of examination.

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CS. NITESH KR. JAISWAL
(Company Secretary (FCS), M.Com, LL.B.)

EXECUTIVE PROGRAMME
Module 1
Paper 3
Setting up of Business Entities and Closure

SYLLABUS

Objectives

To provide working knowledge and understanding of setting up of Business entities and their closure.

Part – A: Setting up of Business (40 Marks)

1. Choice of Business Organisation
2. Types of Companies and their Formation
3. Part I : Charter Documents

   Part II : Alteration of Charter Documents
4. Legal Status of Registered Company
5. Formation of Limited Liability Partnerships
6. Different Forms of Business Organisation and its Registration
7. Formation and Registration of NGOs- Section 8 Company, Trust and Society
8. Financial Services Organisation and its Registration Process
9. Start-ups and its registration
10. Joint Ventures Collaboration and Special Purpose Vehicles
11. Setting up of Business outside India and issues relating thereto
12. Procedure of conversion of business entities.

Part – C: Setting up of Business (25 Marks)

19. Dormant Company
20. Strike off and restoration of name of the company and LLP
21. Insolvency Resolution process, Liquidation and Winding-up

SETTING UP OF BUSINESS ENTITIES AND CLOSURE (VOL-1)

{Strictly as per new syllabus (2017) prescribed by The Institute of Company Secretaries of India (ICSI)}

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This book should be read along with "SBEC Vol-2" containing additional 11 Chapter of SBEC Part - B

This book is updated
With all amendments
Till 30th December 2019

(Afterwards amendments will be included / discussed in live lectures at classroom)

ICSI Question Paper June 2019

NEW SYLLABUS

423

Roll No. .....

Time allowed : 3 hours ***Maximum marks : 100***

Total number of questions : 6 ***Total number of printed pages : 8***

NOTE : *Answer **ALL** Questions.*

PART–A

1. (*a*) ABC Private Ltd., a 'start-up' company, received an amount of ₹ 25 lakh in a single tranche from an investor by way of a Note, convertible into equity shares (convertible after 3 years but within 5 years from the date of issue). CFO of the Company was of the view that the said amount is not a deposit. In the light of the statutory provisions, explain whether the view of the CFO is correct ?

(*5 marks*)

(*b*) Actavis Ireland Ltd. a pharma firm incorporated in Ireland :

(*i*) has a share transfer office in Kanpur

(*ii*) Directors of the company frequently stayed in a hotel in Noida and Mumbai for looking after matters of business, the company does not have any physical office or property in India

As a practising Company Secretary, advise under the provisions of the Companies Act, 2013, whether the company will be treated as having place of business in India ?

(*5 marks*)

(*c*) The majority of the shareholders of Kasi Textiles Private Ltd., passed a special resolution to alter its Articles of Association and gave the directors a power to require any shareholder who is doing competing business with that of the company's business to transfer his shares. Swaroop, who is carrying on a competing business, challenged the validity of the alteration. Decide whether Swaroop will succeed in the light of the provisions of the Companies Act, 2013 and decided case law.

(*5 marks*)

(*d*) The paid up share capital of PKA India Pvt. Ltd. is ₹ 20 crore, consisting of 150 lakh fully paid up Equity Shares of ₹ 10 each, and 50 lakh fully paid up Cumulative Preference Shares of ₹ 10 each. PKA India Capital Pvt. Ltd. and PKA India Tele Services Pvt. Ltd. are holding 55 lakh and 25 lakh Equity Shares respectively in PKA India Pvt. Ltd.

PKA India Capital Pvt. Ltd. and PKA India Tele Services Pvt. Ltd. are subsidiaries of Lord Krishna Pvt. Ltd. Referring to the provisions of the Companies Act, 2013 examine whether PKA India Pvt. Ltd. is a subsidiary of Lord Krishna Pvt. Ltd. ? Would your answer be different if Lord Krishna Pvt. Ltd. has five out of total seven directors on the Board of Directors of PKA India Pvt. Ltd. ?

(*5 marks*)

Attempt all parts of either Q. No. 2 or Q. No. 2A

2. (*a*) Ragavi and her six more relatives & friends want to incorporate a Nidhi Company. They seek your advice on the following issues with respect to the formation of company :

(*i*) Whether Nidhi Company can be formed as a private company ? Is there any specific law for the Nidhi Companies ?

(*ii*) Whether the approval of Reserve Bank of India (RBI) is required ?

(*iii*) Whether Nidhi is allowed to raise funds through issue of equity shares and preference shares ?

(*iv*) Whether Nidhi is allowed to carry on business other than the business of borrowing or lending in its own name ?

As a practising Company Secretary, advise with reference to the provisions of the Companies Act, 2013.

(*4 marks*)

(*b*) Divyesh Digital Networks LLP wants to expand its business through investment in an overseas Joint Ventures (JV) or/and Wholly Owned Subsidiaries (WOS). The partners of the firm seek your advice about the various sources/modes of funding through which overseas investment can be made. Advise them in light of the provisions of Foreign Exchange Management Act, 1999.

(*4 marks*)

(*c*) Moorthy wants to form a society to promote the 'Beti Bachao, Beti Padao Movement' of Government of India. He seeks your advice on the following :

(*i*) The purposes for which a society can be formed under the Societies Registration Act, 1860;

(*ii*) Whether the foreigners and other registered societies can be members of a society ?

(*4 marks*)

(*d*) 'Every equity based joint venture gives birth to a new entity'. Discuss in brief the different types of entities which are permitted by Government of India to form a joint venture entity.

(*4 marks*)

(*e*) Paramvir & Associates, a firm of Practising Professionals consists of three partners Ashok, Paramvir and Vir having one third share each in the firm. According to Ashok and Paramvir, the activities of Vir are not in the interest of the firm and thus want to expel Vir from the firm. Advise Ashok and Paramvir whether they can do so quoting the relevant provisions of the Indian Partnership Act, 1932.

(*4 marks*)

OR (Alternate question to Q. No. 2)

2A. Comment on the following :

(*i*) A Company under Section 8 can be registered as a Small Company under the provisions of the Companies Act, 2013.

(*ii*) Choice of business locations outside India involves consideration of many factors.

(*iii*) The promoters can avail numerous benefits by incorporating a Special Purpose Vehicle.

(*iv*) Requirement of Capital affects the choice of suitable form of a business organization.

(*v*) The Financial Statements of Limited Liability partnership are nor mandatorily required to be audited by a Chartered Accountant.

(*4 marks each*)

PART–B

3. (*a*) Rajkumar is running a business of handicraft in Jaipur. He has explored some opportunities for handicraft products abroad and he wants to encash the huge demand outside India for such products. He seeks your advice whether he would be required to get himself registered with Directorate General of Foreign Trade (DGFT) for exporting goods, if yes what are all the documents required for such registration ? And also enlighten him the features/benefits available from such Registration.

(*5 marks*)

(*b*) Govind, has newly started a ready to eat food products Manufacturing Company, he seeks your advice for the selection of a trade mark for his products. Brief him with example on the following Categories of Trade marks referring to the provisions of the Trade Marks Act, 1999 :

(*i*) Generic marks

(*ii*) Descriptive marks

(*iii*) Arbitrary marks

(*iv*) Suggestive marks and

(*v*) Invented/Coined marks

Also suggest him which Category or Categories are Strong Marks and which are weak with respect to protection of Trade mark rights.

(*5 marks*)

(*c*) Satvik is running a dyeing factory seeks your guidance in knowing various responsibilities imposed upon his business and to be complied under the Water (Prevention and Control of Pollution) Act, 1974.

(*5 marks*)

(*d*) Harischander wants to start a manufacturing business but he is not able to decide on the form of business (Type of Business Entity). He seeks your advice about the legal implications and requirements for the various business forms in India on the basis of the following parameters :

(*i*) Registration

(*ii*) Member's liability

(*iii*) No. of members required

(*iv*) Taxation

(*v*) Legal Status

(*5 marks*)

Attempt all parts of either Q. No. 4 or Q. No. 4A

4. (*a*) Abishek has recently been appointed as Finance and Legal Compliance officer of a Charitable Organisation — doing palliative care services to aged persons, seeks to receive foreign funds, has approached you to find out the eligibility criteria for obtaining registration. Brief him the provision of the Foreign Contribution (Regulation) Act, 2010 on eligibility criteria for registration.

(*b*) List out the grounds under which the Insurance Regulatory and Development Authority of India (IRDAI) is compulsorily required to cancel the Certificate of Registration granted for Insurer/Insurance business.

(*c*) Srivastva is the owner of a unit manufacturing Beedi in Jabalpur. 22 persons are employed in the unit. Of these 22 employees, one is a graduate for supervising the work and another apprentice learning work. The remaining 20 are employed not on the time wage system, but on the piece work system. Is the unit, a 'factory' within the meaning of the term under the Factories Act, 1948 ?

(*d*) In the light of the provision of Copyright Act, 1970, in the following cases who are the owners of the copyrights :

(*i*) Musical Sound Recordings

(*ii*) Works by Journalists

(*e*) Bermuda Sports Manufacturing Unit, a Micro and Small Enterprise, seek registration under Single Point Registration Scheme of NSIC. State the various benefits/facilities available to the registered units.

(*3 marks each*)

OR (Alternate question to Q. No. 4)

4A. Write short notes on :

(*i*) Public Liability Insurance

(*ii*) Industrial Entrepreneurs Memorandum (IEM)

(*iii*) Enforcement of Trade mark rights

(*iv*) Labour Welfare Fund for social assistance to workers

(*v*) Arbitral Award for industrial disputes

(*3 marks each*)

PART–C

5. (*a*) Glory Technology LLP is not carrying on any business for a period of two years desirous of striking off its name from the register of Limited Liability Partnership maintained by Registrar of Companies. Whether LLP is allowed to do so ? Examine.

(*3 marks*)

(*b*) Cute Garments Ltd., has recently obtained the status of dormant company. The Board of Directors seeks your advice about the required compliances in respect of the following :

(*i*) Minimum number of Directors

(*ii*) Requirement of Return filing

(*iii*) Meeting of Board of Directors

(*3 marks*)

(*c*) Comment on the following :

(*i*) The term 'Winding up' and 'Dissolution' can be used inter-changeably to denote cessation of existence of a legal entity.

(*ii*) Situations under which a company cannot apply for Strike off.

(*iii*) Time limit and extension of period in Corporate Insolvency Resolution Process under Insolvency and Bankruptcy Code, 2016.

(*3 marks each*)

6. (*a*) Elaborate on 'Waterfall Arrangement' under the Insolvency and Bankruptcy Code, 2016.

(*b*) RoC can Strike off the name of a company on *Suo Moto* basis only after following certain procedures — Comment.

(*5 marks each*)

———— o ————

ICSI Question Paper December 2018

NEW SYLLABUS **423**

Roll No. .....

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6 *Total number of printed pages : 8*

NOTE : Answer ALL Questions.

PART–A

1. (*a*) Amar is a young entrepreneur willing to establish an incubator set up in the space of IT, software development, cloud computing or hardware/software maintenance. Advise Amar regarding the benefits available to entrepreneurs in establishing start-ups.

(*b*) Ehsan along with his nine (9) friends desires to incorporate a Company, not for profit, for the protection of environment, as permissible under the Companies Act, 2013. Advise on the procedural aspects for the incorporation and formation of such Company.

(*c*) 43% of the paid up share capital of V4C Ltd. is held by the Central Government and 8% is held by the Life Insurance Corporation of India and Unit Trust of India (Public Institutions). Analyze the definition of 'Government Company' under the provisions of the Companies Act, 2013 and decide whether V4C Ltd. is a Government Company.

(*d*) As a practicing Company Secretary, advise your client regarding the annual compliance requirements to be followed by LLP.

(*5 marks each*)

Attempt all parts of either Q. No. 2 or Q. No. 2A

2. (*a*) Partnership can be formed according to the nature of the agreement amongst partners. Explain.

(*b*) Payment Banks is a new model of banks conceptualized by Reserve Bank of India. Elucidate.

(*c*) 'Start up India' initiative has been started by Government of India for creating conducive environment for start-ups in India. Explain the pre-conditions for determining an entity as a start up venture.

(*d*) Explain the Doctrine of 'ALTER EGO' with suitable case law.

(*e*) Global Education Network, Pakistan based Education Company wants to set up equity based joint venture in India. As a professional in India, Company seeks your advice about various restrictions under Foreign Direct Investment (FDI) of Government of India that a foreign entity may face. Advice.

(*4 marks each*)

OR (Alternate question to Q. No. 2)

2A. (*i*) Ankur has passed out MBA from a premier institution. He wants to become an entrepreneur but he is confused in choosing the form of ownership. Advise Ankur on the aspects which he should consider before deciding the form of ownership.

(*4 marks*)

(*ii*) State any *six* powers which are prudent to be included in the object clause of the Memorandum of Association of a Company as general and ancillary objects.

(*4 marks*)

(*iii*) Global Infra Ltd., an Indian entity, is in the process of drafting a joint venture agreement for forming joint venture (JV) with a foreign company based out of Singapore to expand its business outside India. Advise on the key issues which parties to the agreement should consider while drafting the JV agreement.

(*4 marks*)

(*iv*) Pratham Food Trading Pvt. Ltd. has a paid up capital of ` 50 lakh and turnover of ` 1.20 crore in the last financial year 2017-18. The company has filed its annual return for the relevant financial year signed by only one director of the company. With reference to the provisions of the Companies Act. 2013, analytically comment whether the act of the company is in order ?

(*4 marks*)

(*v*) Easy Finance Ltd. is willing to enter into banking business via "Payment Bank". The Board of directors of the company seeks your advice with respect to the required criteria to be fulfilled by the company with respect to the following :

(*i*) Application for license

(*ii*) Minimum capital requirement

(*iii*) Voting rights of shareholders

(*iv*) Services that can be undertaken by the bank.

(*4 marks*)

PART–B

3. (*a*) Rakesh is interested to form a Non-Banking Financial Company (NBFC) for carrying business of providing micro finance in the rural areas in the name of 'SABKO Loan Company Ltd.'. Advise him about the various categories of NBFCs and let him know as to which category of NBFC will suit him for applying the license.

(*5 marks*)

(*b*) Pankaj, Director of M/s Mustered Oil Manufacturing Company, seeks your advice for the selection of a trademark which he proposes to be used for its products. Describe various natures of trade marks and which trade marks are considered as strong in nature.

(*5 marks*)

(*c*) A group of labourers from Bharat Railways Catering were having some conflict of interest with their management. They filed a case in front of labour commissioner to decide upon their issues and concerns. During the pendency of the matter, they suddenly went on a strike against the management stopping the entire work at the Company. This strike was not supported by any prior notice to the management. Is the strike in this manner valid ? Discuss the matter of issuing a notice before the strike in terms of Industrial Disputes Act, 1947.

(*5 marks*)

(*d*) Mamta Coir Foam Ltd. was having 25 workers during previous year 2017-18 and they are in the process of reviewing the compliances under the Factories Act, 1948. Advise the company in the following matters in complying the provisions of Factories Act, 1948 :

(*i*) Weekly & daily hours

(*ii*) Interval for rest

(*iii*) Extra wages for overtime

(*iv*) Annual leave with wages

(*v*) Employment of young persons.

(*5 marks*)

Attempt all parts of either Q. No. 4 or Q. No. 4A

4. (*a*) Any corporate body doing business in India requires a Permanent Account Number (PAN), whether it is registered in India or not. Elucidate.

(*b*) A private limited company in the process of dissolution stops maintaining statutory registers. Company argues that since they are in the process of dissolution, there is no need to maintain statutory registers. What is the validity of the argument ? Explain the consequences of non-maintenance of such registers.

(*c*) Registration under Central Goods & Services Tax Act, 2017 is made compulsory in certain cases, irrespective of the aggregate turnover. Explain.

(*d*) Ramesh has purchased a shop in local market of New Delhi and wants to set up a business of electronic goods. Is he required to get his shop registered under the Shops and Establishment Act ? If so, advise him with the procedure.

(*e*) Discuss the classes of work for which copyright protection is available under Copyright Act, 1957 duly amended from time to time.

(*3 marks each*)

OR (Alternate question to Q. No. 4)

4A. (*i*) Which industries come under the purview of compulsory licensing as per New Industrial Policy, 2015 ?

(*3 marks*)

(*ii*) Prof. Ritika Verma has authored a book named 'IFRS – A Practical & Simple Approach'. She wants to get copyright of the some under the Copyright Act, 1957. Advise Ritika on the rights that are protected to her after obtaining the copyright of her book.

(*3 marks*)

(*iii*) Bhaskar Bhat has recently opened a school for providing elementary education to kids. He has hired both male and female employees in teaching and non-teaching cadre. He approached you to seek advice whether school is required to comply with the provisions of Maternity Benefit (Amendment) Act, 2017. Also state who are eligible to avail for maternity benefit under the Act ?

(*3 marks*)

(*iv*) ABC Ltd. is planning to enter into the business of Insurance for which Board of Directors of the Company seeks your advice about the norms in respect of paid up equity capital for carrying out the business of an insurer. Advise them accordingly with reference to the provisions of Insurance Act, 1938 as amended by Insurance Regulatory and Development Authority Act, 1999. Also state the items that are excluded in determining the amount of paid up equity capital of an insurer under the said Acts.

(*3 marks*)

(*v*) Managing Director of Goa Tourism Ltd. wants to constitute an Internal Complaint Committee (ICC) under the Prevention of Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 as well as under such Rules, 2013. Advise him in the light of the provisions of the Act on the constitution of ICC to be formed.

(*3 marks*)

PART–C

5. (*a*) Radha Manufacturing Ltd. want to file an application for removal of name of company from the Registrar of Companies (ROC). Enumerate the various grounds for which Company is permitted to file an application for removal of name from ROC under the provisions of the Companies Act, 2013.

(*b*) Anshul Gold Farm Ltd. has obtained the status of dormant company on 15th December, 2018. Enumerate the various exemptions which the company shall be entitled to under the Companies Act, 2013.

(*c*) List out various situations in which a Company is not permitted to apply for strike off the name of the Company from Registrar of Companies.

(*d*) Registrar of Companies may file an appeal before the National Company Law Tribunal for restoration of the name of the Company. Elucidate.

(*e*) Explain the term "Significant Accounting Transaction" while determining status of a company as a dormant company under the Companies Act, 2013.

(*3 marks each*)

6. (*a*) RKG Infrastructure Ltd. were incurring continuous losses and its financial position went bad to worse. Now, Company is undergoing a corporate insolvency resolution process. Dinesh who is one of the senior employees of the company has not been paid his salary for over 3 months amounting to ` 4,50,000. He files an application for initiating corporate insolvency resolution process with an Adjudicating Authority. Analyze and state whether Dinesh is entitled to make an application to initiate corporate insolvency resolution process.

(*b*) The Registrar has *suo moto* struck off the name of M/s A2Z Solutions, a LLP from the register as Registrar has a reasonable cause to believe that the LLP is not carrying on any business for last two years. Being aggrieved by the order of Registrar, the LLP wants to file an appeal before National Company Law Tribunal (NCLT) for restoration of the name of the LLP in the Registrar of Partnership maintained by the Registrar. Referring to the provisions of the Limited Liability Partnership Act, 2008, advise the company on the procedure to be followed for making an application to NCLT.

(*5 marks each*)

———— o ————

CHAPTER

1

CHOICE OF BUSINESS ORGANISATION

Covering-

- Business Organisation Meaning
- Types of Business Organisation
- Factors governing the decisions for suitable form of organization
- Nature of business activity
- Scale of operations
- Capital requirements
- Managerial Ability
- Degree of control and management
- Degree of risk and liability
- Stability of business
- Flexibility of administration
- Division of profit
- Costs, procedure, and government regulation
- Tax implication
- Geographical mobility
- Transferability of ownership
- Managerial Needs
- Secrecy
- Independence
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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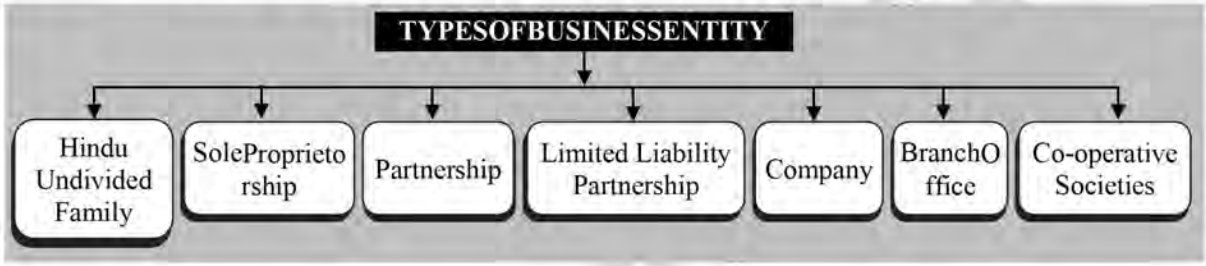
CHOICE OF BUSINESS ORGANISATION

BUSINESS ORGANIZATION-MEANING

Business organisation refers to all **necessary arrangements required to conduct a business** in an optimized manner. It refers to all those steps that need to be undertaken for establishing and maintaining relationship between men, material, and machinery to carry on the business efficiently for earning profits. This may be called the **process of planning and organising whichare the integral part of the business management.**

The arrangement which follows this process of organising the factors required for commencing and carrying on the business is called a business undertaking or organisation.

TYPESOF BUSINESSENTITY/CHOICE OF A BUSINESS ENTITY



Choosing a form of business entity is crucial to a successful organization. The choice of a business entity will depend on an object, nature and size of the business of such entity which will be varied from case-to-case basis and will also depend upon the will of the owners of the business entity which they want to accomplish.

The main types of business entities in India are

1. Sole Proprietorship,
2. Partnership,
3. Hindu Undivided Family (HUF) Business,
4. Limited Liability Partnership (LLP),
5. Co-operative Societies,
6. Branch Office
7. Association of Persons (AOP)
8. Body of Individuals (BOI),
9. Corporation,
10. Co-operative Society,
11. Trust etc.

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TYPES OF BUSINESS ORGANISATION

1. Sole Proprietorship

Sole proprietorship is a form of business entity in which an individual introduces his own capital, uses his own skills and intelligence in the management of its affairs and is solely responsible for the result of its operations.

Important Features

(a) Easy formation
(b) Full control
(c) Direct motivation
(d) Secrecy
(e) Simple dissolution

2. Partnership

A partnership is a type of business entity in which partners (owners) share with each other the profits or losses of the business undertaking in which all have invested carried on by all and any one of them acting for all.

Important Features

(a) Easy to set up
(b) More capital can be brought into the business.
(c) Partners bring new skills and ideas to a business.
(d) Decision making can be much easier with more brains to think about a problem.

3. Limited Liability Partnership

LLP is an incorporated partnership formed and registered under the Limited Liability Partnership Act, 2008 with limited liability and perpetual succession. The Act came into force w.e.f. 1st April, 2009.
An LLP is a hybrid between a company and a partnership firm. The LLP is a separate legal entity, where no partner is liable for the unauthorized action of the other partners, and whose liability is restricted to his own stake in the liability.

Important Features

(a) LLP is a body corporate with distinct legal entity and perceptual succession.
(b) LLP is applicable to any trade or business.
(c) LLP is created and restricted under Limited Liability Partnership Act, 2008.
(d) LLP can be created by minimum 2 partners.
(e) LLP Act is administered by Ministry of Corporate Affairs.

4. CO-Operative Society

A co-operative society is an association of persons who join together on a voluntary basis for the furtherance of their common economic interests.

Important Features

(a) Consumer Cooperatives: These purchase goods in bulk and sell them to its members, and sometimes also to its non-members.
(b) Housing Cooperatives: The housing societies acquire land, plan the layout and construct houses, and later allot them to its members.
(c) Credit Cooperatives: Credit societies are started by persons who are in need of credit. Such Societies provide credit to their members at reasonable rates of interest.
(d) Farming Cooperatives: These are small farmers to work jointly and share the returns, with a view to derive the benefits of economies of scale.

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5. Company

As per Section 2(20 of the Companies Act, 2013, Company means a company registered under this Act (2013) OR any of the previous Companies law.

Important Features

(a)	Separate Legal entity
(b)	Perpetual Succession
(c)	Common Seal (IT IS INKLESS) (Now Optional companies amendment Act 2015).
(d)	Transferability Shares (Section 42).
(e)	Separation of ownership from management.

FACTORS GOVERNING THE DECISIONS FOR SUITABLE FORM OF ORGANIZATION

For a new or proposed business, the selection of a suitable form of a business organisation is generally governed by the following factors:

1. Nature of business activity

This is an important factor having a direct bearing on the choice of a form of ownership. In small trading businesses, professions, and rendering of personal services, **sole-proprietorship** is predominant.

The **partnership** is suitable in all those cases where sole proprietorship is suitable, provided the business is to be carried on a slightly bigger scale with help of one or more partner (owner).Besides, partnership is also advantageous in case of manufacturing activities on a modest scale.

The business lines such as carrying on large chain stores, multiple shops, superbazaars, engineering industrial activities with high capital and working capital requirements and software industrial activities are generally in the form of **companies.**

2. Scale of operations

The second factor that affects the form of business organisation is the scale of operations. If the scale of operations of business activities is small, sole proprietorship or a One Person Company (OPC) is suitable; if the scale of operations is modest — neither too small nor too large — partnership or limited liability partnership (LLP) is preferable; whereas, in case of large scale of operations, the company form is advantageous.

3. Capital requirements

Capital is one of the most crucial factors affecting the choice of a particular form of ownership organisation. Requirement of capital is closely related to the type of business and scale of operations. Enterprises requiring heavy investment (like iron and steel plants, large scale infrastructure projects, etc.) should be organised as companies. Depending on the capital required, they can be set up as public companies and in some cases, may be in the form of listed companies by raising money from the public and being listed on the stock exchanges.

Enterprises requiring small investment (like retail business stores, personal service enterprises, etc.) can be best organised as sole proprietorships or even as Partnerships.

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4. Managerial Ability

It is difficult for a sole proprietor to have expertise in all functional areas of business. Further, the size of the business may not permit engagement of professional management.

In other forms of organizations like partnership and company, there is division of work among the partners which allows the partners to specialize in specific areas, leading to better outputs and decision making. However, this may sometimes lead to conflicts due to differences of opinion.

Company form of organization is a better alternative if the operations are far flung, complex in nature and require professional management at various levels.

5. Degree of control and management.

A person wishing to have complete and direct control of business prefers proprietary organization rather than partnership or company. If he is prepared to share it with others, he will choose partnership.

But, if the activities are large, professional managers are required to handle the day to day affairs and there is need for corporate structure and management, he will prefer the company form of organisation.

6. Degree of risk and liability

Thus, a sole proprietary business carries small amount of risk with it as compared to partnership or company. However, the sole proprietor is personally liable for all the debts of the business to the extent of his entire property. Likewise, in partnership, partners are individually and jointly responsible for the liabilities of the partnership firm.

Companies and LLPs have a real advantage, as far as the risk is concerned, over the other forms of business organisation.

7. Stability of business

The illness of owner may derange the business and his death cause the demise of the business. Partnerships are also unstable, since they are terminated by the death, insolvency, insanity, retirement, admission, expulsion or withdrawal of/ by one of the partners. Companies and LLPs have the most business stability due to its feature or perpetuity being an artificial or legal person.

8. Flexibility of administration

The internal organisation of a sole proprietary business, for instance, is very simple, and therefore, any change in its administration can be effected with least inconvenience and loss. To the large extent, the case is the same in a partnership business also. While, in case of company, administration is not that flexible because its activities are conducted on a large scale and they are quite rigidly structured.

9. Division of profit

An entrepreneur desiring to pocket all the profits of business will naturally prefer sole proprietorship Of course, in sole proprietorship, the personal liability is also unlimited.

But, if he is willing to share the profits, partnership form of organisation would be preferred. In company organisation, however, the profits (whenever the Board of Directors decides) are distributed among Shareholders in proportion to their shareholding.

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10. Costs, procedure, and government regulation:

Partnerships are also quite simple to be initiated. Even a written document is not necessarily a prerequisite since an oral agreement can be equally effective.

Company form of business organisation is more complicated to form. It can be created by law, dissolved by law, and operate under the express provisions of the law.

11. Tax implication

The applicable tax rates for different forms of business organisation**are summarised below:**

(i) Sole Proprietorship

In case of sole proprietorship (where the age of the proprietor is less than 60 years), the income tax rates for assessment year is applicable. If the proprietor is above 80 years of age, more tax concession is available.

(ii) Partnership firm

Partnership firms (including Limited Liability Partnership Firm) are liable to pay income tax at the rate of 30%of total income. In addition to the income tax, a partnership firm is liable to pay income tax surcharge on the amount of income tax at the rate of 12%, when total income exceeds Rs. 1 crore.

Similar to a private limited company or LLP, partnership firms are also required to pay alternate minimum tax at the rate of 18.5% of "adjusted total income". Alternate minimum tax would be increased by the applicable surcharge, education cess and secondary and higher education cess.

(iii) Domestic Company

Net Profit of a domestic company (including a Limited Liability Partnership to which the Income Tax rates for domestic companies is applicable) is taxable at 30%.

12. Geographical mobility

If a concern deals with local market, a seasonal product or perishable goods, or is meant to cater to a specific city or locality, then sole proprietorship or partnership form of business may be suitable. If it is proposed to market the product or service all over India (which may also entail providing customer support services), a company form of organisation may be preferred.

13. Transferability of ownership

Sole proprietorship, being a one-person entity does not lend itself to transferability of ownership as the owner himself enjoys the profits and suffers the losses in his business.

In Partnership partner, may decide to induct a new partner with benefits of ownership and share of profits or losses.

In the company form of organisation, transfer of ownership is possible by transfer of shareholding by any person or group of persons in favour of another person or group of persons

14. Secrecy

Secrecy is of supreme importance, particularly in small business concerns. Accordingly, the entrepreneur would select the sole proprietorship for that reason. I

n case, he has partners, he will have to carefully weigh whether other partners will be able to maintain the secrecy.

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In case of a company certain aspects of their business such as their board of directors, shareholding, financial statements and other information which are statutorily required to be placed in public domain are accessible to any person.

15. Independence

The company is subject to strict government regulations. So, if the entrepreneur wants to have a freedom in business with little governmental interference, he has to go for either sole proprietorship or partnership.

" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. Ankur has passed out MBA from a premier institution. He wants to become an entrepreneur but he is confused in choosing the form of ownership. Advice Ankur on the aspects which he should consider before deciding the form of ownership. **[Dec. 2018; 4 Marks]**

Ans. One of the first decisions that is faced by an entrepreneur is how the business should be structured. All businesses must adopt some legal configuration that defines the rights and liabilities of participants in the business's ownership, control, personal liability, life span and financial structure.

This decision will have long term implications, so he has to select the form of ownership that is right for him.

In making a choice, he (in our case, Ankur) should take into account the followings:

- His vision regarding the size and nature of business;
- The level of control he wishes to have;
- The level of structure", he is willing to deal with;
- The business's vulnerability to litigation;
- Tax implications of the different organizational structures; Expected profit or loss of the business;
- Whether or not, he will need to re-invest earnings into the business; and
- His need for access to cash out of the business for himself.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



FROM ICSI MODULE

Answer the Following:-

1. What are the factors which govern the choice of a business organisation?
2. Why would you prefer a Limited Liability Partnership compared to a Private Limited Company?
3. Distinguish between a sole proprietorship and partnership.
4. In which form of business organisation the owner is personally liable for all the debts of thebusiness?
5. What are the advantages of partnership compared to a private limited company?
6. Why would you prefer One Person Company (OPC) compared to a Sole Proprietorship?

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

2

TYPES OF COMPANY

Covering-

- Section Charts
- ABC Analysis
- Private Company
- One Person Company
- OPC v/s Sole proprietorship
- Small Company
- Public Company
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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N.K.J - SECTION CHART

Section	Short Description
Section 2(42)	Definition of Foreign Companies
Section 2(45)	Definition of Government Company
Section 2(62)	Definition of One Person Company
Section 2(68)	Definition of Private Company
Section 2(71)	Definition of Public Company
Section 2(77)	Definition of Relative
Section 2(85)	Definition of Small Company
Rule	Companies (Specification of definition details) Rules, 2014
Rule	Companies (Incorporation) Rules, 2014

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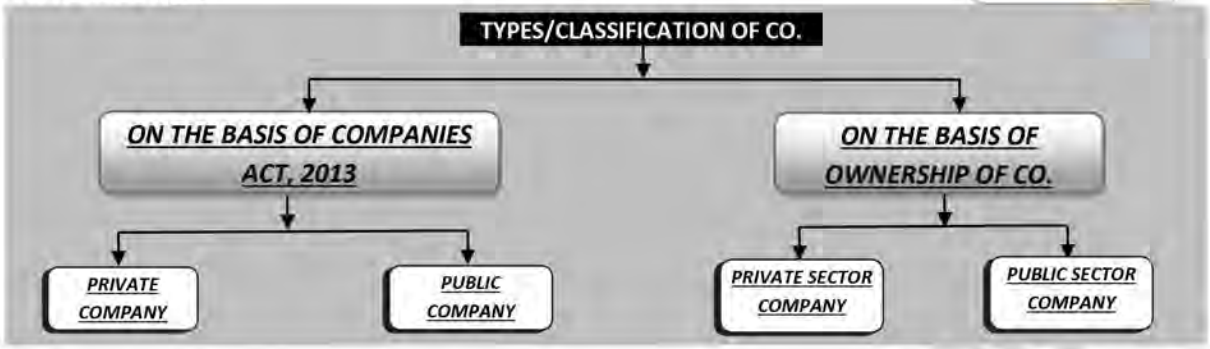
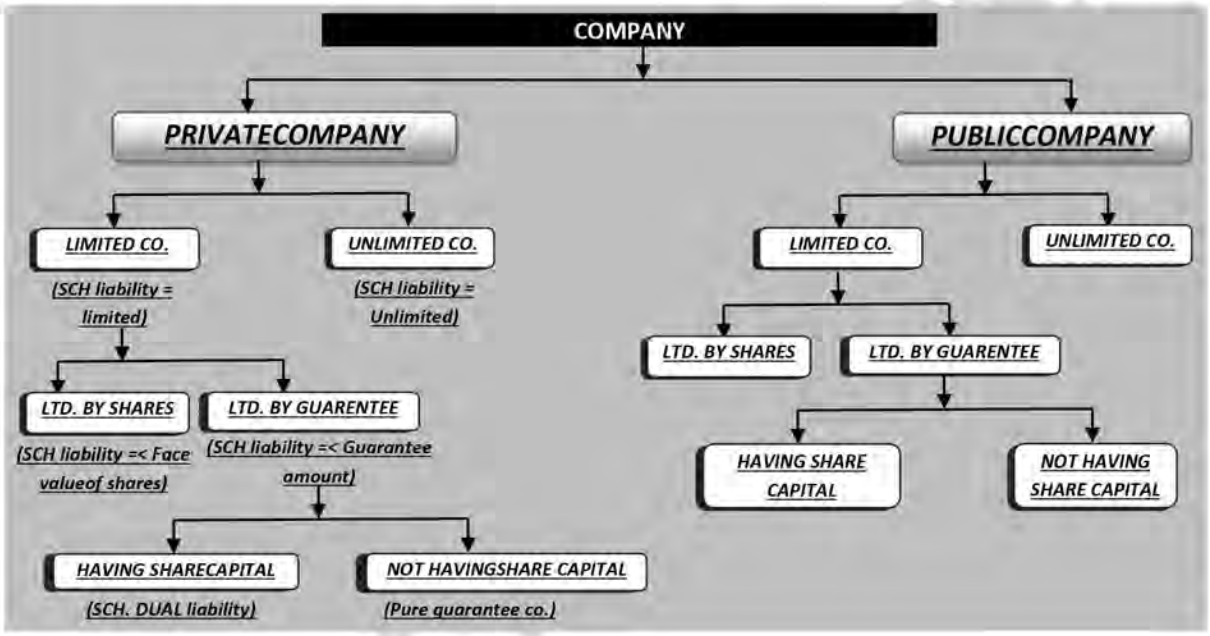
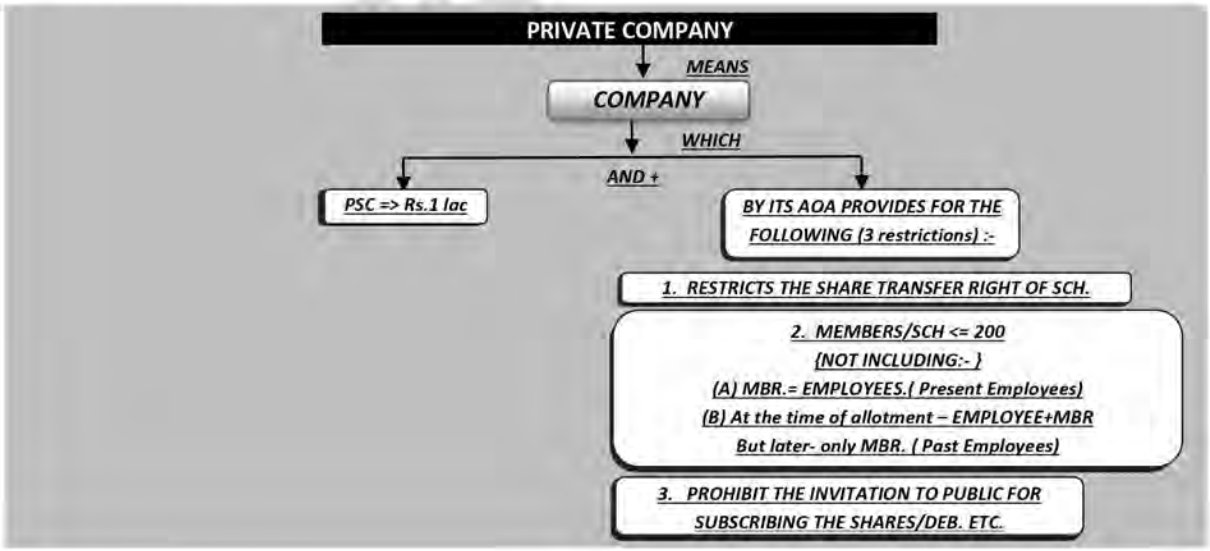






TYPES OF COMPANY

PRIVATE COMPANY -MEANING

SECTION 2(68)

"Private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles:-

(*a*) **restricts** the right to transfer its shares, if any;

(*b*) except in the case of one person company (OPC), **limits** the number of its members to **two hundred (200)** (*Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:)*

not including—

(*i*) persons who are in the employment of the company; and

(*ii*) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased; and

(*c*) **prohibits** any invitation to the public to subscribe for any securities of the company;

There should be at least two persons to form a private company. The name of a private company must end with the words "Private Limited". A private company should have at least two directors.

RELATIVE-DEFINITION

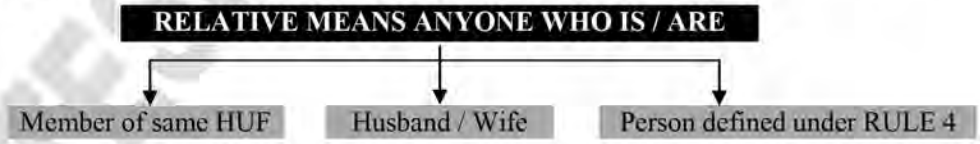
SECTION 2(77)

A person shall be deemed to be a relative of another if, and only if,:—

(*a*) they are members of a Hindu undivided family; or

(*b*) they are husband and wife; or

(*c*) the one is related to the other in the manner indicated in **Rule 4** of Companies (specification of definition details) Rules, 2014.



RELATIVES under Rule 4 of Companies (specification of definition details) Rules, 2014

A person shall be deemed to be the relative of another, if he or she is related to another in thefollowing manner, namely:-

(a) Father: *(includes step-father)*
(b) Mother: *(includes the step-mother)*
(c) Son: *(includes the step-son)*
(d) Son's wife
(e) Daughter
(f) Daughter's husband
(g) Brother *(includes the step-brother)*
(h) Sister *(includes the step-sister)*

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. KMP Systems Pvt. Ltd. Continues to retain its status as a Private Limited Company. What are restrictions which will remain imposed on it under the provisions of the Companies Act, 2013. **[June. 2018; 4 Marks]**

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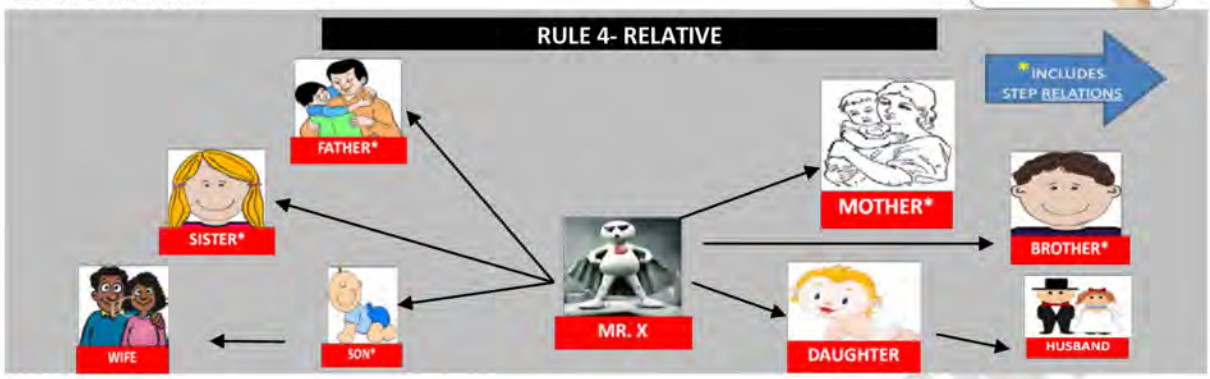

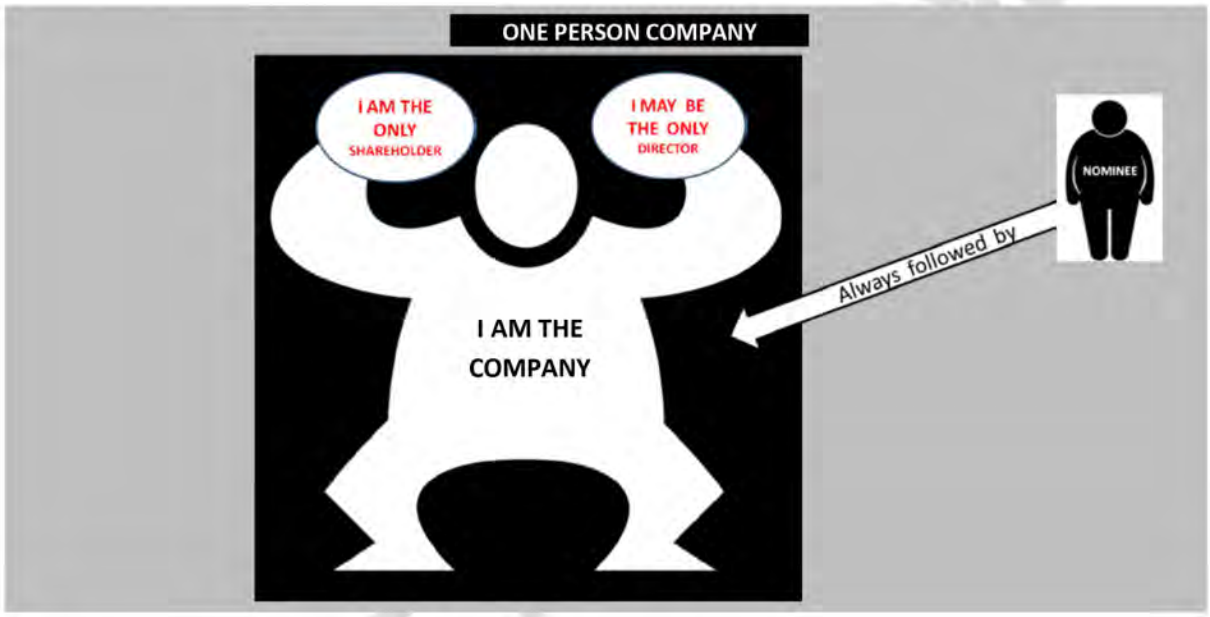

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ONE PERSON COMPANY (OPC) - MEANING

SECTION 2(62)

"One Person Company" means a company which has only one person as a member.

As per section 3(1)(c), One person Company is considered as a private company. *So, basically it is a type of private company with some different/unique features or characteristics.*

There should be at least one persons to form an OPC. The name of an OPC must end with the words "one Person Company" or "OPC". An OPC should have at least one director.

OPC- SALIENT FEATURES/CHARACTERSTICS

Following are some of the salient features of OPC;-

(a) Desire for personal freedom that allows the Professional skilled person to adopt the business of his choice.

(b) It is run by individuals, yet OPCs are a separate legal entity similar to that of any registered corporate.

(c) A One Person Company is incorporated as a **private limited company**.

(d) It must have only **one member** at any point of time and may have only **one director**.

(e) The member and nominee should be **natural persons, Indian Citizens and resident in India**.

(f) One person **cannot incorporate more than one OPC** or become nominee in more than one OPC.

(g) OPC to lose its status if paid up **capital exceeds ₹ 50 lakhs and** average annual **turnover is more than 2 crores** in three immediate preceding consecutive years.

(h) **No minor** shall become member or nominee of the One Person Company or hold share with beneficial interest.

(i) OPC **cannot be incorporated or converted** into a company under **section 8** of the Companies Act, 2013.

(j) OPC **cannot carry out Non Banking Financial Investment activities** including investment in securities of anybody corporate.

(k) OPC **cannot convert voluntarily** into any kind of company unless **2 years have expired** from the date of incorporation, except in cases where capital or turnover threshold limits are reached.

(l) An existing private company other than a company registered under section 8 of the Act which has paid up share capital of ₹ 50 Lakhs or less **and** average annual turnover during the relevant period is ₹2 Crores or less may convert itself into one Person Company by passing a **special resolution** in the general meeting.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Explain the provisions governing one person company (OPC). Can a person incorporate more than one OPC? **[Dec. 2015; 4 Marks]**

Q. 2. Comment on Only a naturally born person, who is an Indian citizen and resident in India, can form a One Person Company. **[Dec. 2017; 5 Marks]**

PRIVILEGES AND EXEMPTION AVAILABLE TO OPC UNDER COMPANIES ACT, 2013

Following are some of the privileges and benefits identified with OPCs :-

(a) Unlike a private limited or public limited company (listed or unlisted), OPCs need not bother too much about compliances.

(b) A One Person Company needs to have minimum of one director.

(c) OPC is not required to hold general meetings.

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(d) The requirement of minimum no. of board meetings to be convened doesn't apply on OPC having only one director.

(e) For One Person Companies with more than one director, atleast one Board Meeting must be held in **each half of the calendar year** and the gap between the **two meetings should not be less than 90 days**.

(f) Mandatory rotation of auditor after expiry of maximum term is not applicable.

(g) The annual return of a One Person Company shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

(h) The financial statements of a one person company can be signed by one director alone.

(i) Cash Flow Statement is not a mandatory part of financial statements for a OPC.

(j) Board's report to be annexed to financial statements may only contain lesser information's. like only explanations or comments by the Board on qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

Non applicability of certain sections to OPC

Section 122 provides that the following sections are not applicable to a One Person Company:-

(a) Power of Tribunal to call meetings of members, etc. **(Section 98).**

(b) Calling of extraordinary general meeting **(Section 100).**

(c) Notice of meeting **(Section 101).**

(d) Statement to be annexed to notice **(Section 102).**

(e) Quorum for meetings **(Section 103).**

(f) Chairman of meetings **(Section 104).**

(g) Proxies **(Section 105).**

(h) Restriction on voting rights **(Section 106).**

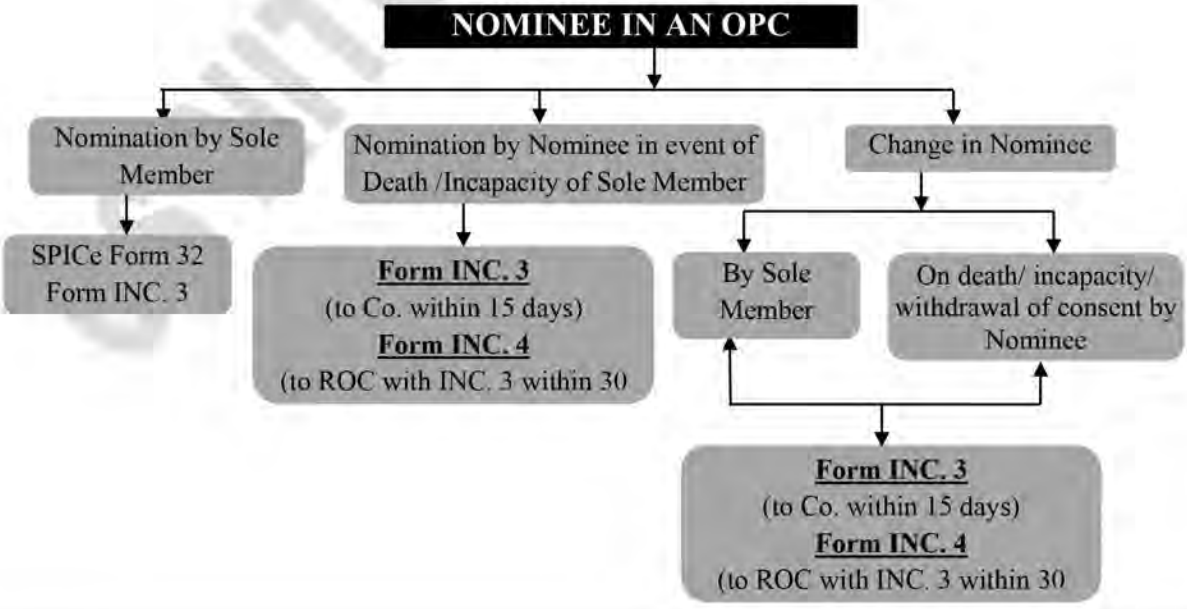
(i) Voting by show of hands. (**Section 107**).

(j) Voting through electronic means (**Section 108**).

(k) Demand for poll (**Section 109**).

(l) Postal ballot (**Section 110**).

NOMINATION BY THE SUBSCRIBER OR MEMBER OF OPC



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The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company.

The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in **SPICEe Form 32** along with **consent** of such nominee obtained in **Form No INC. 3** and fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.

Only a natural person who is an **Indian citizen and resident in India**, *(i.e., a person who has stayed in India for a period of not less than **one hundred and eighty two days** during the immediately preceding one calendar year)* shall be eligible to incorporate a One Person Company and a nominee for the sole member of a One Person Company.

WITHDRAWAL OR DEATH OF NOMINEE OR MEMBER OF OPC

(a) The person nominated by the subscriber or member of a One Person Company may, withdraw his consent by giving a notice in writing to such sole member and to the One Person Company

(b) The sole member shall nominate another person as nominee within **fifteen days** of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written **consent** of such other person so nominated in **Form No. INC.3**.

(c) The company shall within **thirty days** of receipt of the notice of withdrawal of consent file with the Registrar, a notice of such withdrawal of consent and the intimation of the name of another person nominated by the sole member in **Form No INC.4** along with fee as provided in the Companies (Registration offices and fees) Rules, 2014 and the written **consent** of such another person so nominated in **Form No. INC.3**.

CHANGE OF NOMINEE BY SOLE MEMBER

The subscriber or member of a One Person Company may, by intimation in writing to the company, change the name of the person nominated by him at any time for any reason including in case of death or in capacity to contract of nominee and nominate another person after obtaining the prior consent of such another person in **Form No INC. 3.**

The company shall, on the receipt of such intimation, file with the Registrar, a notice of such change in **Form No INC.4** along with fee as provided in the Companies (Registration offices and fees) Rules, 2014 and with the written consent of the new nominee in **Form No.INC.3** within **thirty days** of receipt of intimation of the change.

DEATH OF SOLE MEMBER

Where the sole member of One Person Company ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such One Person Company, such new member shall nominate within **fifteen days** of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company.

The company shall file with the Registrar an intimation of such cessation and nomination in **Form No INC. 4** along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 within **thirty days** of the change in membership and with the prior written **consent** of the person so nominated in **Form No. INC. 3**.

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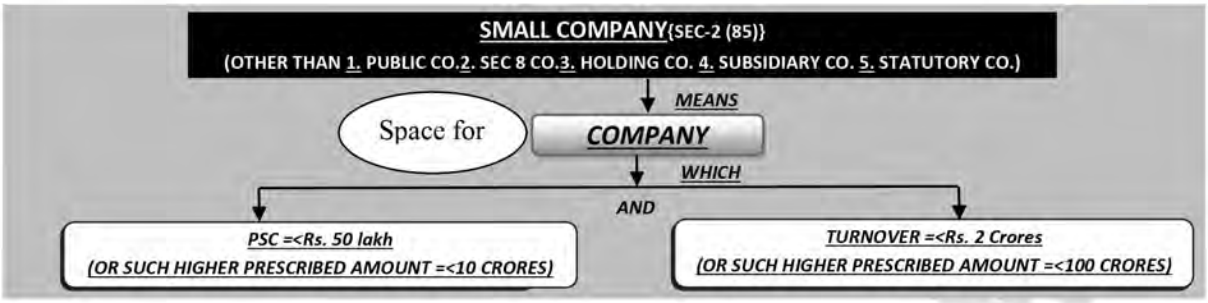

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OPC v/s SOLE PROPRIETORSHIP

OPC	SOLE PROPRIETORSHIP
(a) Separate legal entity.	**(a)** Owner & entity is same personality
(b) Limited liability.	**(b)** Unlimited Liability
(c) Debt – not the sole responsibility of the owner.	**(c)** Debt – sole responsibility of the owner
(d) Finance – credit record of the company.	**(d)** Finance – credit history of the owner.
(e) Legal requirements – will need to register itself as such	**(e)** Legal requirements – will not have to draw up paper declaring its status.
(f) Separate tax.	**(f)** Tax paid by the owner.

SMALL COMPANY

SECTION 2(85)

''Small company'' means a company, other than a public company ;-

(*i*) paid-up share capital of which does not exceed **fifty lakh rupees** or such higher amount as may be prescribed which shall not be more than **ten crore rupees**; **and**

(*ii*) turnover of which as per profit and loss account for the immediately preceding financial year"does not exceed **two crore rupees** or such higher amount as may be prescribed which shall not be more than **one hundred crore rupees**:

Provided that nothing in this clause shall apply to—

(a) a holding company or a subsidiary company;

(b) a company registered under section 8; or

(c) a company or body corporate governed by any special Act;

It means a holding company or a subsidiary company, a company registered under section 8, or a company or body corporate governed by any special Act cannot be a small company **even if it fulfils the criteria of paid up capital or turnover.**

Small company is basically, a type of private company with some different/unique features or characteristics.

PRIVILEGES AND EXEMPTION AVAILABLE TO SMALL COMPANY UNDER COMPANIES ACT, 2013

Small company is subject to certain relaxations in terms of compliances under Companies Act, 2013.

Following are some of the privileges and benefits identified with Small company :-	**(a)** In case of small company, atleast one Board Meeting must be held in each half of the calendar year and the gap between the two meetings should not be less than 90 days.
	(b) Cash Flow Statement is not a mandatory part of financial statements for a Small Company.
	(c) Merger or amalgamation between two or more small companies has been simplified without the requirement of court process.

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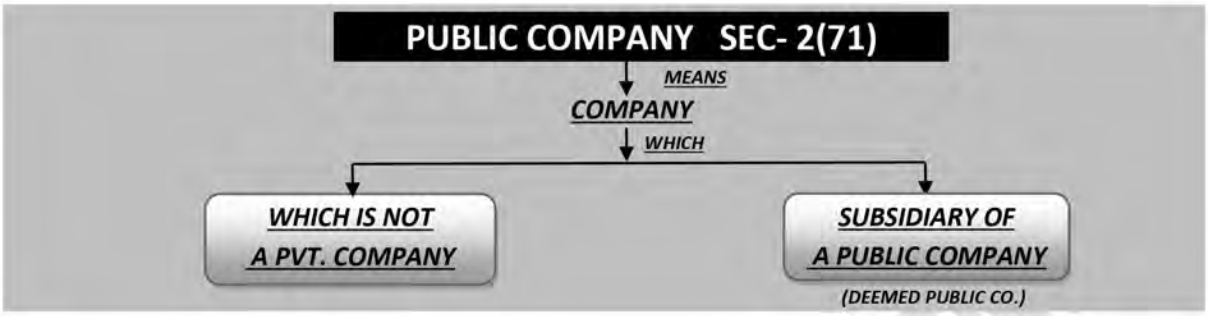

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LESSER PENALTIES FOR ONE PERSON COMPANIES OR SMALL COMPANIES

Section 446B

Notwithstanding anything contained in this Act, if a One Person Companyor a small company fails to comply with the provisions of sub-section (*5*) of section 92,sub-section (*2*) of section 117 or sub-section (*3*) of section 137, such company andofficer in default of such company shall be punishable with fine or imprisonment orfine and imprisonment, as the case may be, which shall not be more than one-half of thefine or imprisonment or fine and imprisonment, as the case may be, of the minimum ormaximum fine or imprisonment or fine and imprisonment, as the case may be, specifiedin such sections.".

PUBLIC COMPANY-MEANING

SECTION 2 (71)

"Public company" means a company which is not a private company and has a minimum paid-up share as may be prescribed; **Provided** that a company which is a subsidiary of a company, not being a private Company*(i.e. public co.)*, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

There should be at least seven persons to form a public company. Name of every Public company must end with the word "Limited". A Public company should have at least three directors.

LISTED COMPANY

Sec-2(52)

"listed company" means a company which has any of its securities listed on any recognised stock exchange.

COMPANY-WITH REFERENCE TO LIABILITY OF MEMBERS

1. COMPANY LIMITED BY SHARES

A company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them, is known as "a company limited by shares".

In case of company limited by shares, the liability of members to pay can arise in going concern as well as in the event of winding up.

2. COMPANY LIMITED BY GUARENTEE

A company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake by the memorandum to contribute to the assets of the company in the event of its being wound up is termed "a company limited by guarantee".

In case of company limited by guarantee, the liability of members to pay their guaranteed amount arises only when the company has gone into liquidation and not when it is a going concern.

Company limited by guarantee may be of two types;-

(i) company limited by guarantee not having share capital

(ii) company limited by guarantee having share capital.

Company limited by guarantee having share capital have **dual features**of;-

1. Company limited by guarantee, and
2. Company limited by shares.

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3. UNLIMITED COMPANY

A company not having any limit on the liability of its members is known as "an unlimited company".

Thus in the case of unlimited companies, liability of members could extend to their entire personal property to meet the debts and obligations of company.

However, it may be noted that **members of unlimited companies are not personally liable directly to the creditors of the company** unlike in the case of partners of the firm. The liability of the members is only towards the company.

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Q. 1. A private company incorporated under the Companies Act, 2013 may issue debentures to any number of persons and can accept deposit from the public. **[Dec. 2017]**

Ans. According to the definition of private company under Section 2(68), a private limited company may not make an invitation to the public to subscribe for any securities of the company. However under Section 42 read with Section 2(68), it may issue such securities to any person (number of persons not exceeding 200).

In terms of provisions of Section 73(2) read with Exemption Notification dated 5th June, 2015, a private company may accept from its members monies not exceeding one hundred per cent of aggregate of the paid-up share capital and free reserves subject to the passing of a resolution in general meeting and subject to such rules as may be prescribed in consultation with the Reserve Bank of India, accept deposit from its members on such terms and conditions, as may be agreed upon between the company and its member subject to the fulfillment of certain conditions, as provided under the act.

Q. 2. A private limited company can accept deposit from its members under the provisions of the Companies Act, 2013. **[June 2018]**

Ans. A private limited company can accept deposit from its members in accordance with Section 73 of the Companies Act, 2013 and rules made there under. Moreover, the Government has exempted the private companies vide notification dated 13th June, 2017, from applicability of section 73(1)(a) to (e).

Accordingly, a private company may accept deposit from its members:

(a) Not exceeding one hundred percent of aggregate of the paid up share capital free reserves and securities premium account; or

(b) Is a start-up for live years from the date of its incorporation: or

(c) If it fulfils all of the following conditions, namely:-

- **(i)** Is not an associate or a subsidiary company of any other company ;
- **(ii)** If the borrowings of such a company from or financial institutions or anybody corporate is less than twice of its paid up share capital or fifty corer rupees, whichever is lower; and
- **(iii)** Such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section :

Provided that the company referred to in clauses (A), (B) or (c) shall file the details of monies accepted to be to the Registrar in such manner as may be specified.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



FROM ICSI MODULE

Answer the Following:-

1. State in brief the various kinds of companies which can be registered under the Companies Act, 2013.
2. Define a private company and state the special privileges which it enjoys under the Companies Act, 2013.
3. A private company has 210 members in total of which 10 are the employees of the company. 5 of the these employees leave the employment of the company. Comment.
4. Discuss in brief disadvantages and obligations of a private company.
5. Define a public company and distinguish it from a private company.
6. What is a Government Company? Summarise the special provisions of the Companies Act relating to Government Companies.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

3

TYPES OF COMPANIES – SPECIFIC CLASSIFICATION

Covering-

- Section Charts
- Holding and Subsidiary Company
- Associate Company
- Section 8 Companies / Company not for profit purpose / Power to Dispense with word "Limited"
- Government Company
- Power of Central Government to exempt and modify the Applicability of ACT
- Government Company as a 'State' under article 12 of the Constitution of India
- Foreign Company
- Public Financial Institutions
- Statutory Companies
- Investment Company
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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N.K.J - SECTION CHART

Section	Short Description
Section 2(87)	Definition of Holding / Subsidiary Company
Section 8	Definition of Not for Profit Companies/Charitable Companies
Section 379	Application of Act to Foreign Companies
Section 394	Annual Report on Government Companies
Section 395	Annual Reports where one or more State Governments are members of companies
Section 406	Power to modify Act in its application to Nidhis / Nidhi Companies
Section 455	Definition of Dormant Companies
Section 462	Power to exempt class or classes of companies from provisions of this Act.
Rule	Companies (Specification of definition details) Rules, 2014
Rule	Companies (Incorporation) Rules, 2014

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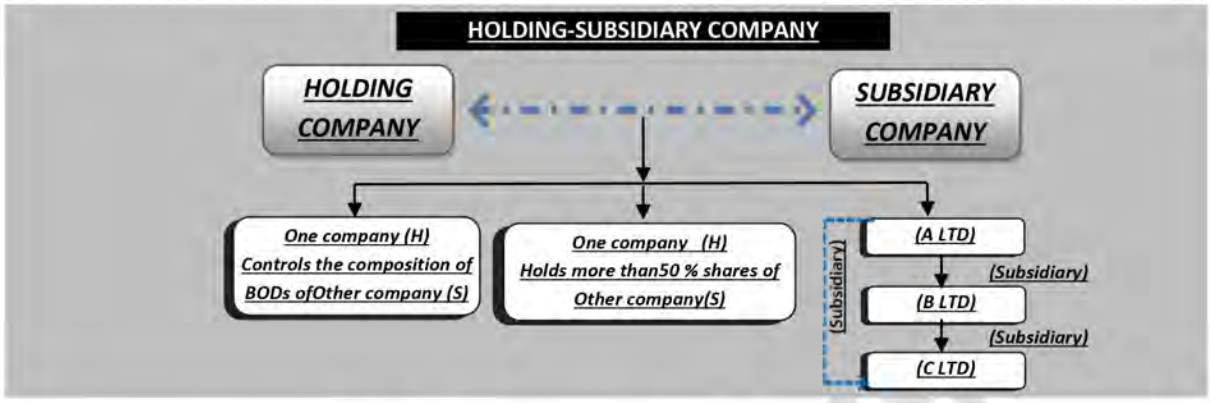

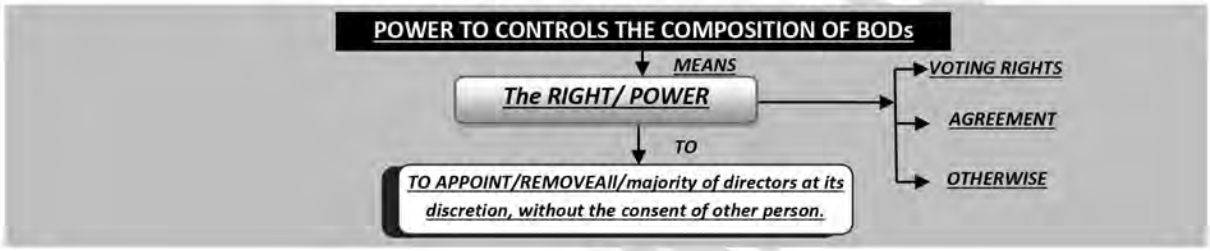

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TYPES OF COMPANY – SPECIFIC CLASSIFICATION

HOLDING AND SUBSIDIARY COMPANY

HOLDING COMPANY
SECTION 2(46)

"Holding company", in relation to one or more other companies, means a company of which such companies are subsidiary companies.

'Explanation– For the purposes of this clause, the expression "company" includes anybody corporate;

SUBSIDIARY COMPANY
SECTION 2(87)

"Subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company–

(*i*) controls the composition of the board of directors; or

(*ii*) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation—for the purposes of this clause,—

(*a*) a company shall be deemed to be a subsidiary company of the holding Company even if the control referred to in sub-clause (*i*) or sub-clause (*ii*) is of another subsidiary company of the holding company;

(*b*) the composition of a company's board of directors shall be deemed to be controlled by another company if that other company by exercise of some Power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(*c*) the expression "company" includes any body corporate;

(*d*) "layer" in relation to a holding company means its subsidiary or Subsidiaries;

Companies (Restriction on number of layers) Rules, 2017

w.e.f20th September, 2017

(1) No company, other than a company belonging to a class specified in sub-rule (2), shall have more than **two layers of subsidiaries:**

Provided that the provisions of this sub-rule shall not affect a company from acquiring a company incorporated outside India with subsidiaries beyond two layers as per the laws of such country:

Provided further that for computing the number of layers under this rule, one layer which consists of one or more wholly owned subsidiary or subsidiaries shall not be taken into account.

(2) The provisions of this **rule shall not apply** to the following classes of companies, namely:—

(a) a banking company

(b) a non-banking financial company

(c) an insurance company

(d) a Government company

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(4) Every company, other than a company referred to in sub-rule (2), existing on or before the commencement of these rules, which has number of layers of subsidiaries **in excess of the layers specified**

(i) shall file, with the Registrar a return in **Form CRL-1** disclosing the details specified therein

(ii) shall not, after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date;

(5) If any company contravenes any provision of these rules the company and every officer of the company who is in default shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

ASSOCIATE COMPANY-MEANING

SECTION 2 (6)

Associate Company, as defined under **Section 2(6)**, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation;-

(a) **"Significant influence"** means control of at least **twenty per cent of** total voting power (aggregate of the paid- up equity share capital and convertible preference share capital), or control of or participation in business decisions under an agreement;

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

SECTION 8 COMPANIES / COMPANY NOT FOR PROFIT PURPOSE/ POWER TO DISPENSE WITH WORD "LIMITED"

SECTION 8

(*1*) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a **limited company**—

(*a*) **has in its objects the promotion of commerce, art, science, sports, education, Research, social welfare, religion, charity, protection of environment or any such other Object;**

(*b*) **intends to apply its profits, if any, or other income in promoting its objects;** and

(*c*) **intends to prohibit the payment of any dividend to its members,**

the Central Government ***(POWER DELEGATED TO ROC)*** may, by licence issued in such manner as may be prescribed, and on Such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section **without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited"** , and thereupon the Registrar shall, onApplication, in the prescribed form, register such person or association of persons as aCompany under this section.

(*2*) The company registered under this section shall enjoy all the privileges and be Subject to all the obligations of limited companies.

(*3*) A firm may be a member of the company registered under this section.

(*4*) (*i*) A company registered under this section shall not alter the provisions of its Memorandum or articles except with the previous approval of the Central Government.

(*ii*) A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed

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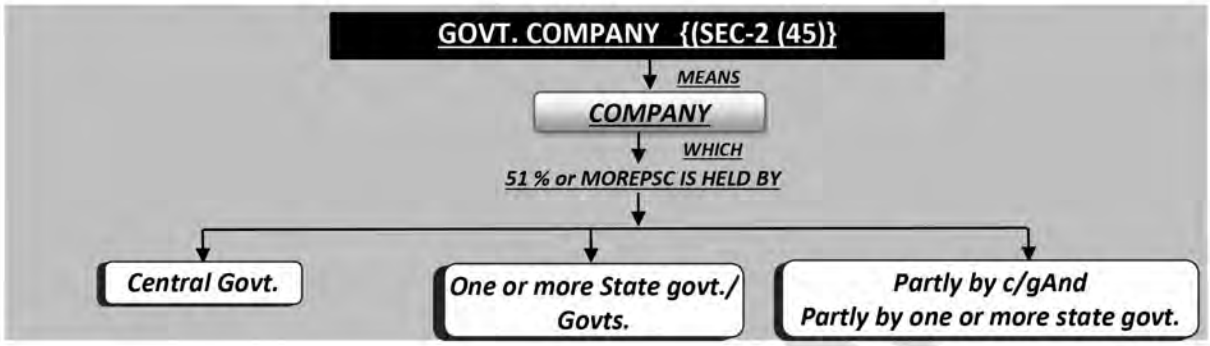

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(*5*) Where it is proved to the satisfaction of the Central Government that a limited Company registered under this Act or under any previous company law **has been formed With any of the objects** specified in clause (*a*) of sub-section (*1*) and with the restrictions and Prohibitions as mentioned respectively in clauses (*b*) and (*c*) of that sub-section, it may, by Licence, allow the company to be registered under this section subject to such conditions as The Central Government deems fit and **to change its name by omitting the word "Limited", or as the case may be, the words "Private Limited"** from its name and thereupon the Registrar Shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company.

(*6*) The Central Government may, by order, **revoke the licence** granted to a company Registered under this section if the company contravenes any of the requirements of this Section or any of the conditions subject to which a licence is issued or the affairs of the Company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and without prejudice to any other action against the company under this Act, **direct the company to convert its status and change its name to add the word "Limited" or the words "Private Limited",** as the case may be, to its name and thereupon the Registrar shall, without prejudice to any action that may be taken under sub-section (*7*), on Application, in the prescribed form, register the company accordingly:

Provided that no such order shall be made unless the **company is given a reasonable Opportunity of being heard:**

Provided further that a **copy of every such order shall be given to the Registrar**.

(*7*) **Where a licence is revoked** under sub-section (*6*), the Central Government may, by Order, if it is satisfied that it is essential in the public interest, **direct that the company be Wound up under this Act or amalgamated with another company registered under this section**:

Provided that no such order shall be made unless the company **is given a reasonable Opportunity of being heard**.

(*8*) **Where a licence is revoked** under sub-section (*6*) and where the Central Government is satisfied that it is essential in the public interest that the company registered under this Section should be **amalgamated with another company** registered under this section and Having similar objects, then, **notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single Company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations** as may be specified in the order.

(*9*) If on the **winding up or dissolution** of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section **and having similar objects, subject to such Conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to the Rehabilitation and Insolvency Fund formed under section 269.**

(*10*) A company registered under this section **shall amalgamate only with another Company registered under this section and having similar objects.**

(*11*) If a company makes any default in complying with any of the requirements laid down in this section, the companyshall, without prejudice to any other action under the Provisions of this section, be punishable with fine which shall not be less than **ten lakh** Rupees but which may extend to **one crore rupees** and the directors and every officer of the Company who is in default shall be punishable with imprisonment for a term which may extend to **three years** or with fine which shall not be **less than twenty-five thousand rupees** But which may extend to **twenty-five lakh rupees,** or with **both**:

Provided that when it is proved that the affairs of the company were conducted Fraudulently, every officer in default shall be liable for action under **section 447**.

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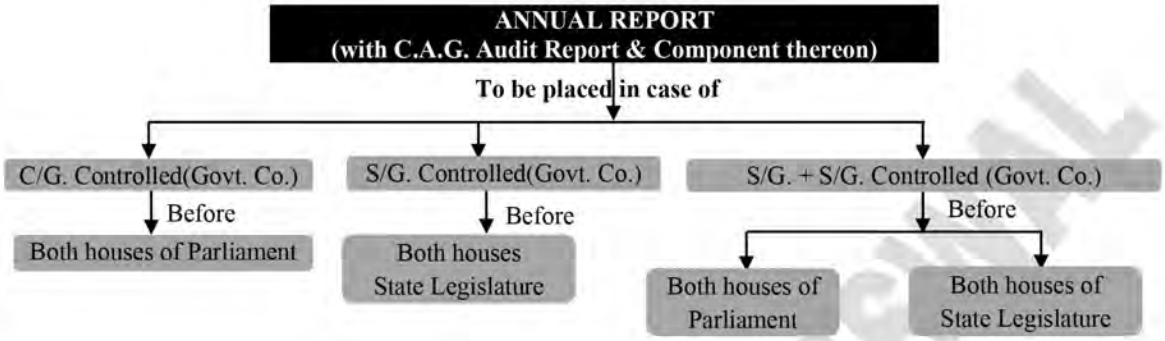

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GOVERNMENT COMPANY

SECTION 2 (45)

"Government Company" means any **company in which not less than fifty one per cent of the paid-up share capital is held by;-**

(a) the Central Government, or

(b) by any State Government or Governments, or

(c) partly by the Central Government and partly by one or more State Governments, **and includes** a company which is a subsidiary company of such a Government company;

ANNUAL REPORT OF GOVERNMENT COMPANY

SECTION 394 & 395

SECTION 394

Where the Central Government is a member of a Government company, the Central Government shall cause an annual report on the working and affairs of that company to be—

(*a*) prepared within three months of its annual general meeting before which the Comments given by the Comptroller and Auditor-General of India and the audit report Is placed under the proviso to sub-section (*6*) of section 143; and

(*b*) as soon as may be after such preparation, laid before both Houses of Parliament Together with a copy of the audit report and comments upon or supplement to the audit Report, made by the Comptroller and Auditor-General of India.

Where in addition to the Central Government, any State Government is also a Member of a Government company, that State Government shall cause a copy of the annual Report prepared under sub-section (*1*) to be laid before the House or both Houses of the State Legislature together with a copy of the audit report and the comments upon or Supplement to the audit report referred to in sub-section (*1*).

SECTION 395

Where the Central Government is not a member of a Government company, **every State Government which is a member of that company, or where only one State Government is a member of the company**, that State Government shall cause an annual report on the working and affairs of the company to be—

(*a*) prepared within the time specified in sub-section (*1*) of section 394; and

(*b*) as soon as may be after such preparation, laid before the House or both Houses of the State Legislature together with a copy of the audit report and comments Upon or supplement to the audit report referred to in sub-section (*1*) of that section.

POWER OF CENTRAL GOVERNMENT TO EXEMPT AND MODIFY THE APPLICABILITY OF ACT

SECTION 462

(1) The Central Government may in the public interest, by notification direct that any of the provisions of this Act,—

(a) shall not apply to such class or classes of companies; or

(b) shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification

(2) A copy of every notification proposed to be issued under sub-section (1), shall be laid in draft before each House of Parliament, while it is in session, **for a total period of thirty days**, and if, both Houses agree in disapproving the issue of notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may be agreed upon by both the Houses.

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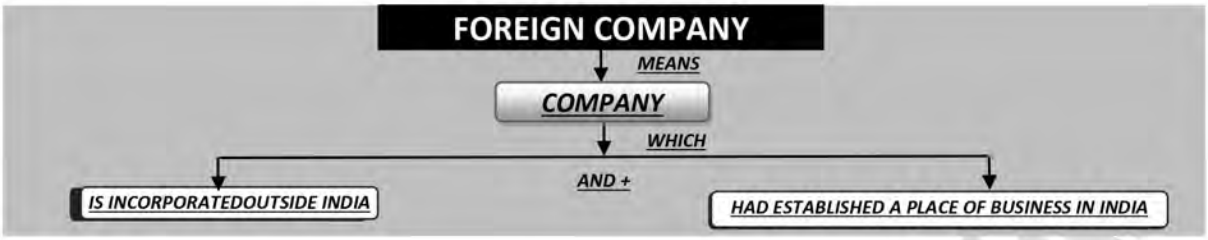

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(3) In reckoning any such period of thirty days as is referred to in sub-section (2), **no** account shall be taken of any period during which the House referred to in subsection (2) is **adjourned for more than four consecutive days**.

(4) The copies of every notification issued under this section shall, as soon as may be after it has been issued, be laid before each House of Parliament."

GOVERNMENT COMPANY AS A 'STATE' UNDER ARTICLE 12 OF THE CONSTITUTION OF INDIA

In ***R.D. Shetty v. International Airports Authority*** & in ***Ajay Hasia v. Khalid Mujib***Supreme Court has pointed out that government company would become 'State' under Article 12 if :-

(i) the **entire share capital** of the Corporation is held by the Government,

(ii) the **financial assistance** of the State is so much as to meet almost the **entire expenditure** of the corporation it would afford some indication of the corporation being impregnated with government character.

(iii) the corporation enjoys a **monopoly status** which is conferred or protected by the State.

(iv) the state exercises **deep and pervasive control** in corporations.
if in a government company, there is substantial foreign holding, the foreign collaborator has power to nominate directors on the Board and all major decisions require approval of foreign collaborator, such a company cannot be regarded as an instrumentality of State as the Government did not enjoy an all-pervasive control and Government was not its only source of finance. ***(P.B.Ghayalod v. Maruti Udyog Ltd).***

(v) the functions of the corporation are of **public importance** and closely related to government functions,

(vi) If a **department** of government is transferred to a corporation.
Inspite of all the control of the Government, a Government company is neither a Government department nor a Government establishment, it is just an agency of the Government. Similarly, the employees of a Government Company are not the employees of the Central or State Government. (***Hindustan Steel Works Construction Ltd. v. State of Kerala).***

NKJ-CLASSROOM PRACTICE

SCANNER

Q. 1. Attempt the following:
"Some definite criteria will have to be fulfilled to identify a corporation as State within the meaning of Article 12 of the Constitution of India." **[Dec. 2009; 5 Marks]**

FOREIGN COMPANY

SECTION 2 (42)

"Foreign Company" means any company or body corporate incorporated outside India which—

(*a*) has a place of business in India whether by itself or through an agent, physically or through electronic mode; **and**

(*b*) conducts any business activity in India in any other manner.

SECTION 379

Where **not less than fifty per cent** of the paid-up share capital, whether equity or preference or partly equity and partly preference, of a foreign company is held by one or more citizens of India or by one or more companies or bodies corporate incorporated in India, or by one or more citizens of India and one or more companies or bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with the provisions of this Chapter and such other provisions of this Act as may be prescribed with regard to the business carried on by it in India **as if it were a company incorporated in India.**

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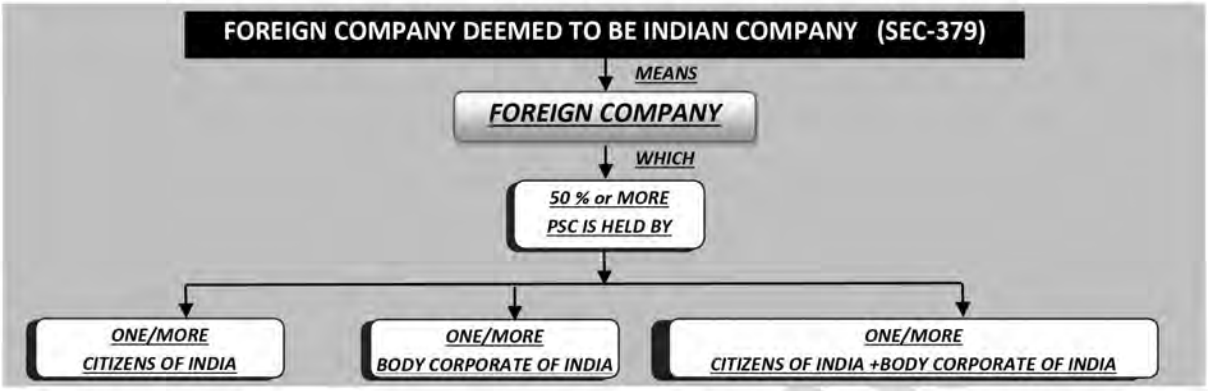

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PUBLIC FINANCIAL INSTITUTIONS

According to Section 2 (72),"Public financial institution" means—

(i) the Life Insurance Corporation of India, established under section 3 of the Life Insurance Corporation Act, 1956;

(ii) the Infrastructure Development Finance Company Limited, referred to in clause (vi) of sub-section (1) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

(iii) specified company referred to in the Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002;

(iv) institutions notified by the Central Government under sub-section (2) of section 4A of the Companies Act, 1956 so repealed under section 465 of this Act;

(v) such other institution as may be notified by the Central Government in consultation with the Reserve Bank of India:

However, no institution shall be so notified unless—

(a) it has been established or constituted by or under any Central or State Act other than this Act or the previous company law"; or

(b) not less than fifty-one per cent. of the paid-up share capital is held or controlled by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments.

STATUTORY COMPANIES

These are constituted by special Act of Parliament or State Legislature. The provisions of the Companies Act, 2013 do not apply to them. Examples of these types of companies are Reserve Bank of India, Life Insurance Corporation of India, etc.

PRINCIPAL CHARACTERISTICS OF STATUTORY CORPORATIONS

The principal characteristics of a statutory corporation are as discussed below:-

(i) It is owned by the State.

(ii) It is created by a special law of Parliament or State Legislature defining its objects, powers and privileges and prescribing the form of management and its relationship with Government departments.

(iii) Another distinguishing characteristic of a public corporation is that excluding the officers taken from the Government department on deputation, its employees are not civil servants and are not governed by Government regulations in respect of conditions of service.

(iv) Each statutory corporation is a body corporate and can sue and be sued, enter into contracts and acquire property in its own name.

(v) A major plank of autonomy of a statutory corporation is its independence in respect of its finances. Except for appropriations to provide capital or to cover losses, it is usually independent in its finances.

INVESTMENT COMPANY

Investment Company means a company whose principal business is the acquisition of shares, debentures or other securities.

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" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. A group of Indian citizens hold 60% of the paid up share capital of a foreign company. This group of shareholders claim that since the company was incorporated outside the country, the company is not bound to comply with the provisions of the Companies Act, 2013 in relation to its business in India. Examine the validity of such a claim by the group. **[Dec. 2017; 4 Marks]**

Ans. **Section 379 provides** that where not less than 50% of the paid-up snare capital, whether equity or preference or partly equity and partly preference of a foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

Therefore, the company is bound to comply with the provision of the Companies Act, 2013. As such the shareholders, claim is not valid in the given case.

CS NITESH KR. JAISWAL

Q. 1. KPS India Producer Company Limited having an average annual turnover exceeding six crore in each of the three consecutive financial year. The company has to appoint a Company Secretary. Advise the company by referring to the provisions of the Companies Act, 1956 as applicable to Producer Company relating to such appointment. **[June. 2017]**

Ans. In accordance with the provisions of the companies Act, 1956, as contained in section 581X, every Producer company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall appoint a member of the institute of company secretaries of India as a whole- time Secretary of the company.

If a producer company fails to appoint Company Secretary, the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs.500 for every day during which the default continues. However, in any proceeding against a person in respect of any offence for failure to appoint company Secretary, it shall be a defence to prove that all reasonable efforts were made to comply with the provision or that the financial position of the company was such that it was beyond its capacity to appoint a whole-time Company Secretary.

Therefore, a according to the above provision, KPS India Producer Company Limited has to be appoint a whole – time Company Secretary.

Q. 2. Directors of ABC Ltd. want to incorporate a producer company. ABC Ltd. itself is in the production and harvesting business. You are the company secretary of ABC Ltd. You are requested to advise the Board of ABC Ltd. about incorporation of such a producer company and set out its objectives as per relevant provisions of the Companies Act. **[Dec. 2017]**

Ans. **Producer Company**

Provisions of producer Companies as given in Companies Act 1956 would continue to apply in a special act is enacted for Producer Company.

Accordingly in terms of Section 581B of Companies Act, 1956 the object of the producer company shall relate to all or any of the following matters *viz.*

(a) Production, harvesting, procurement, grading, pulling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefits.
(b) Processing including preserving, drying, distilling, brewing, venting, ca and packaging of the produce of its members.
(c) Manufacturing, sale or supply of machinery, equipment or consumables mainly to its members.
(d) Providing education on the mutual assistance principles to its members and others.
(e) Rendering technical services, consultancy services, training, research and development and all other activities of the promotion of the interests of its members.
(f) Generation, transmission and distribution of power revitalization and land and water resources, their use, conservation and communications relatable to primary produce.
(g) Insurance of producer or their primary produce.
(h) Promoting techniques and mutually and mutual assistance.
(i) Welfare measures or facilities for the benefit of the members as may be decided by the Board.
(j) Any other activity, ancillary or incidental to any of the activities referred to in clause (a) to (i) above or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner.
(k) Financing of procurement, processing, marketing or other activities specified in clause (a) to (i) above, which include extending to credit facilities or any other financial services to its members.

Every producer company shall deal primarily with the produce of its active members for carrying out any of its specified objects.

The following provisions set out in section 581C of the Companies Act, 1956 pertaining to the Formation of Producer Company and its Registration may be looked upon for the incorporation of a Producer Company:

(1) Any ten or more individuals, each of them being producer or two or more Producer institutions, or a combination of ten or more individuals and Producer institutions, desirous of forming a producer company having its object specified in Section 581B and otherwise complying with the requirements of this Part and the provisions of this Act in respect of registration and incorporated Company as a Producer company under this Act.
(2) If the registrar is satisfied that all the requirements of this Act have been compiled with in respect of registration and matters precedent and incidental thereto, he shall, within thirty days of the receipt of the documents required for registration, register the memorandum, the articles and other documents if any, and issue a certificate of incorporation under this Act.

(3) The Producer Company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the Members.

(4) On registration under sub-section (1) the Produce Company shall become a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limited to the number of Members thereof, and the Producer Company shall not, under any circumstance, whatsoever, become or be deemed to become a public limited company under this Act.

Q. 3. A group of Indian citizens hold 60% of the paid up share capital of a foreign company. This group of shareholders claim that since the company was incorporated outside the country, the company is not bound to comply with the provisions of the Companies Act, 2013 in relation to its business in India. Examine the validity of such a claim by the group. **[Dec. 2017]**

Ans. Section 379 provides that where not less than 50% of the paid-up share capital, whether equity or preference or party equity and party preference of a foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

Therefore, the company is bound to comply with the provisions of Companies Act, 2013. As such the shareholders' claim is not valid in the given case.

Q. 4. International Financial Service Center (IFSC) companies are attractive for foreign investment. **[June 2018]**

Ans. International Financial Service Centre (IFSC) is a hub of financial services within a country, which has laws and regulations different from the rest of the country .Usually these centers have low tax rates and flexible regulations for securities and currency trading. Banking and insurance, which makes them attractive for foreign investment .it can be said that there centers deal mainly with the flow of money, financial products and services across borders.

An IFSC caters to customers outside the jurisdiction of the domestic economy. Such centers deal with flows of finance, financial products and services across borders. London, New York and Singapore can be counted as global financial centers.

Q. 5. South village Farmers Producer Company Ltd. Wants to give loan to its Directors. Explain the provision with reference to the Companies Act. What would be your answer if lone is being given to its members? **[June 2018]**

Ans. In accordance to section 581ZK of Companies Act, 1956, any loan or advance to any director or his relative shall be granted only after the approval of members by a resolution in general meeting.

In the present case South village Farmers' Producer Company Ltd, may give loan to its Directors only after the approval of members by a resolution.

In case the loan is given to the members, the section provides that the Board may, provisions made in the Articles of the company, provide financial assistance to the members by way of credit facility in connection with the business of the Producer Company, for a period not exceeding six months.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Distinguish between:----------
   a) 'Investment Companies' and 'holding company'.
   b) 'Subsidiary company' and 'holding company'.

2. Comment on the following:----------
   a) "Some definite criteria will have to be fulfilled to identify a corporation as state within the meaning of Article 12 of the Constitution of India."
   b) It is always mandatory for an unlimited company to have share capital.
   c) The name of every company must end with the word "limited".

3. Practical Questions:----------
   a) Grow More Ltd. is a government company in which the Central Government and many State Governments in India are members. The company has recently convened its annual general meeting at its registered office. Does the Legislature have any access to the annual reports of such a company?

4. Short notes:----------
   a) Government Company

FROM ICSI MODULE

Answer the Following:-

1. What is a Government Company? Summarise the special provisions of the Companies Act relating to Government Companies.

2. Write short notes on:
   (a) Holding and Subsidiary companies.
   (b) Associate Companies
   (c) Investment Companies
   (d) Finance Companies.
   (e) Unlimited Companies.
   (f) Small Companies
   (g) One Person Companies

3. Discuss in brief the law relating to statutory corporations.

4. What is a foreign company? Summarise the provisions of the Companies Act relating to foreign companies.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

4

CHARTERED DOCUMENTS

Covering-

- Sections Chart
- ABC Analysis
- Memorandum of Association
- Purpose of Memorandum
- Statutory Requirements
- Form of MOA
- Contents of Memorandum
- Doctrine of Ultra Vires
- Articles of Association
- Statutory Requirements
- Form of AOA
- Content of Articles
- Registration of Articles
- Entrenchment Provisions
- Provision in articles as regards expulsion of a member
- Legal effect of memorandum and articles
- Constructive notice of Memorandum and Articles
- Doctrine of ALTER EGO
- Doctrine of indoor management
- Amendment in Government Company Dated 5th June 2015
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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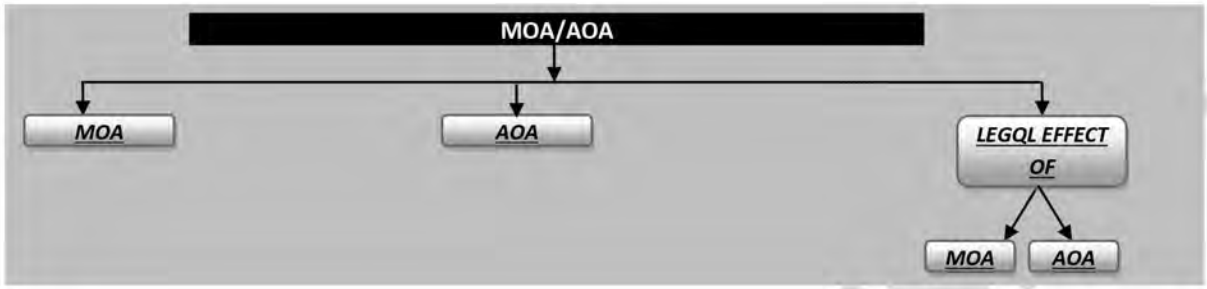

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N.K.J - SECTION CHART

Section	Short Description
Section 4	Memorandum of Association
Section 5	Article of Association
Section 6	Act to override memorandum/article of association
Rule	Companies (Incorporation) Rules, 2014

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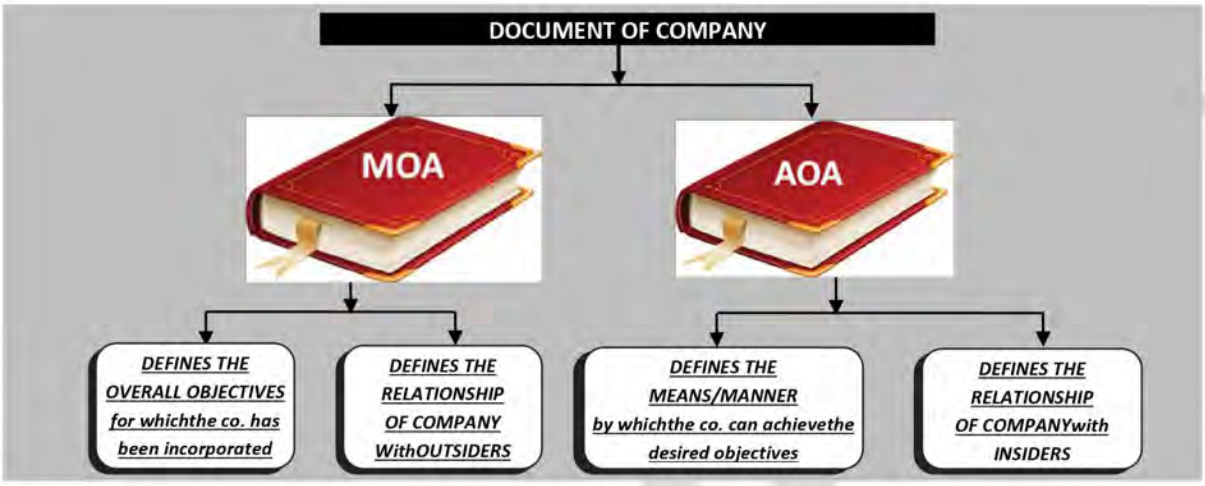

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CHARTERED DOCUMENTS

ABC Analysis
(ICSI -Exam Point of view)

A

1. Doctrine of Ultra Vires
2. Constructive notice of Memorandum and Articles
3. Doctrine of Indoor Management

B

4. Alteration of Memorandum of Association
5. Alteration of Articles of Association

C

6. Entrenchment Provisions
7. Rules/ Limitations on Alteration of AOA

The memorandum and articles of association of a company are the most important documents for the formation of a company and for its functioning thereafter.

DIFFERENCE BETWEEN MOA AND AOA

Basic of distinction	MEMORANDUM	ARTICLES
Definition	Memorandum means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous Companies Law or of this Act [Sec. 2(56)]	Articles means the Articles of Association of a Company as originally framed or as altered from time-to time in pursuance of any previous Company laws or of this Act.[Sec. 2(5)]
Meaning	The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated.	The Articles' are the rules for the management of the internal affairs of the company.
Powers and rules	Memorandum contains the objects and power of the company.	Articles contain the rules and regulation for the internal management of the company.
Scope	The Memorandum lays the objects for which the company is formed.The Memorandum identifies the possible scope of operations of the company, beyond which the company cannot go.	The articles are farmed so as to facilitate the achievement of objects as enshrined in the memorandum.The articles generally define, as well as restrict the powers of directors, officers and employees of the company.
Hierarchy	In case of any inconsistency.the memorandum shall prevail over the articles.	The articles subordinate to the memorandum.

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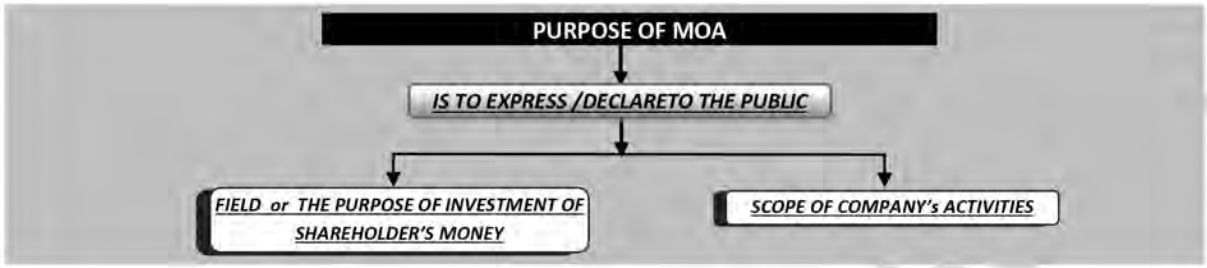

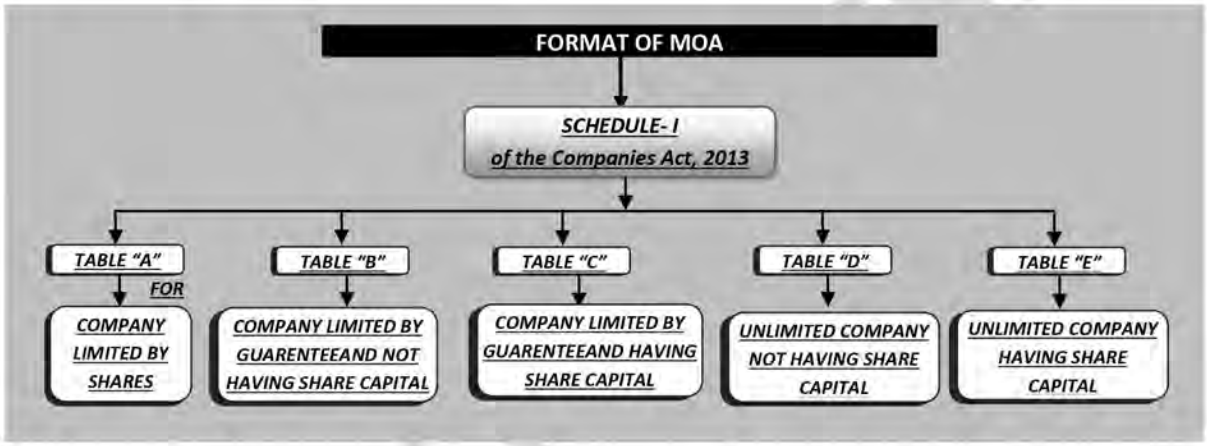

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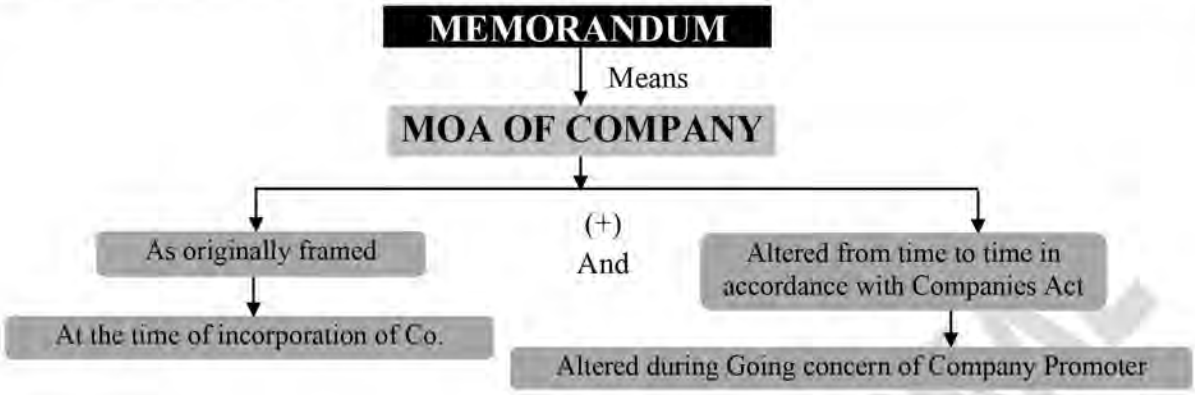
MEMORANDUM OF ASSOCIATION



The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the **scope of the company's activities and its relations with the outside world.**

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact memorandum is one of the most essential pre-requisites for incorporating any form of company under the Act.

According to Section 2(56) of the Companies Act, 2013 ***"memorandum" means the memorandum of association of a company as originally framed and altered from time to time in pursuance of any previous company law or this Act.***

PURPOSE OF MEMORANDUM

The purpose of the object clause in the memorandum is **two fold**. **First,** the intending shareholder before making investment in the company should know the field in, or the purpose for which it is going to be used and what risk he is taking in making the investment. The **second** purpose is that anyone dealing with the company will know without doubt what is the permitted range of enterprise of the company.

STATUTORY REQUIREMENTS

The memorandum must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum. The memorandum **must not contain anything illegal, nor should it be contrary to the provisions of the Companies Act, 2013**.

FORM OF MEMORANDUM OF ASSOCIATION

Section 4(6) of the Companies Act, 2013 provides that the memorandum of association should be in any one of the Forms specified in Tables of Schedule I to the Act, as may be applicable in relation to the type of company or in a Form as near thereto as the circumstances admit.

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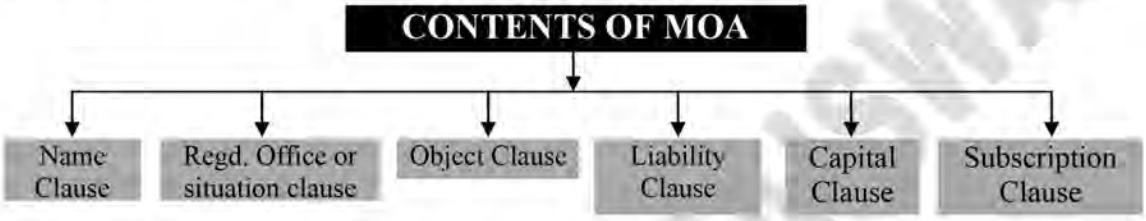
FORMAT OF MOA	*TYPE OF COMPANY*
TABLE 'A'	Companies limited by shares
TABLE 'B'	Companies limited by guarantee not having a share capital
TABLE 'C'	Companies limited by guarantee having a share capital
TABLE 'D'	Unlimited companies not having a share capital
TABLE 'E'	Unlimited companies having a share capital

However, while incorporating a company under SPICe Route the MOA shall be in **Form No. INC-33(e-Memorandum of Association (e-MOA)**.

CONTENTS OF MEMORANDUM

SECTION 4



*It is to be noted that as per **Section 6,** the **Companies Act, 2013 shall override** the provisions in the memorandum of a company, if the latter contains anything contrary to the provisions in the Act.*

1. NAME CLAUSE

A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known.

The company may adopt any suitable name provided it is not undesirable.

Section 4(2) provides that the name stated in the memorandum shall not be such that its use by the company, in the opinion of the Central Government, is undesirable. A name which is identical to or too nearly resembles, the name by which a company in existence has been previously registered, will be deemed to be undesirable

The object is to prevent the use of a name likely to mislead the public. For example, a company is not allowed to use a name which is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950, or suggestive of any connection with Government or of State patronage where there is none.

Publication of Name

The name of the company and the address of its registered office must be painted or displayed outside every office or place at which its business is carried on, in a conspicuous position and in legible letters in English and in the language in general use in that locality. The name must also be engraved on the company's common seal.

Further, the name of the company and the address of the registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any must be mentioned in legible characters in all business letters, in all its bill heads, letter papers and in all its notices and other official publications, as well as in all negotiable instruments and other prescribed documents (Section 12).

However, where a company has changed its name or names during the last two years, it shall paint or display or print, as the case may be, along with its name, the former name or names so changed during the last two years as required above.

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PROVIOUS APPROVAL OF THE CENTRAL GOVERNMENT FOR CERTAIN NAMES

SECTION 4(3)

Previous approval of the Central Government is required for

1. Any word or expression which is likely is to give the impression that the company is in any way connected with, or having the patronage of, the Central Government ,any State Government or any State Government under any law for the time being in force; or
2. Such word or expression, as may be prescribed.

FOLLOWING WORDS SHALL BE USED IN NAME OF COMPANY ONLY WITH CG APPROVAL **RULE 8(6) of the Companies (Incorporation) Rules, 2014**	**1.** Board **2.** Commission **3.** Authority **4.** Undertaking **5.** Central **6.** Union **7.** Federal **8.** President **9.** Rashtrapati **10.** Municipal **11.** Nation **12.** Minister **13.** Prime minister **14.** Chief Minister Etc.

2. *SITUATION CLAUSE*

The name of the State in which the registered office of the company is to be situated must be given in the memorandum. But the exact address of the registered office is not required to be stated therein.

Within thirty days of its incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent. The company must also furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed.

OBJECTS CLAUSE

The third compulsory clause in the memorandum **sets out the objects for which the company has been formed**. Under section 4(1) of the Companies Act, 2013, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because it determines the purpose and the capacity of the company. It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified.

CASE LAW



Attorney General v. G.E. Rly. Co.	Although express powers are necessary, **a company may do anything which is incidental to and consequential** upon the powers specified, and the act will not be ultra vires

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DOCTRINE OF ULTRA VIRES

The word 'ultra' means beyond and the word 'vires' means powers. ***Ultra vires*** *means an act or transaction of a company, which though it may not be illegal, is beyond the company's powers by reason of not being within the objects of the memorandum of association.*

The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. **The acts beyond object clause are ultra vires and hence void**.

The Memorandum of Association is the **'Lakshman Rekha'** for a company. An act beyond the objects mentioned in the memorandum is ultra vires and void and cannot be ratified. Even the entire body of shareholders cannot ratify such acts. As a result, an act which is ultra vires is void, and does not bind the company. Neither the company nor the contracting party can sue on it.

CASE LAW



Radha Cinema & Co. ***v.*** ***Chitralipi Films***	Where no connection or nexus exists between the exercise of a power and the attainment of an object, exercise of power will be ultra vires

(Ashbury Railway Carriage and Iron Co. Ltd. v. Riche)

The memorandum of the company in the said case defined its objects thus: "The objects for which the company is established are to ***make and sell, or lend or hire, railway plants*** *to carry on the business of mechanical engineers and general contractors".*

The company entered into a contract with M/s. Riche, a firm of railway contractors ***to finance the construction of a railway line in Belgium.*** *On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words "general contractors" in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.*

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term "general contractor" was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, "That is a contract which we desire to make, which we authorise the directors to make", still it would be ultra vires.

Whether a transaction is ultra vires the company can be decided on the basis of the following:-

(a) if a transaction entered into by a company falls within the objects, it is not ultra vires and hence not void;
(b) if a transaction is outside the capacity (objects) of the company, it is ultra vires;
(c) if a transaction is in excess or abuse of the company's powers, such transaction will be set aside by the shareholders;

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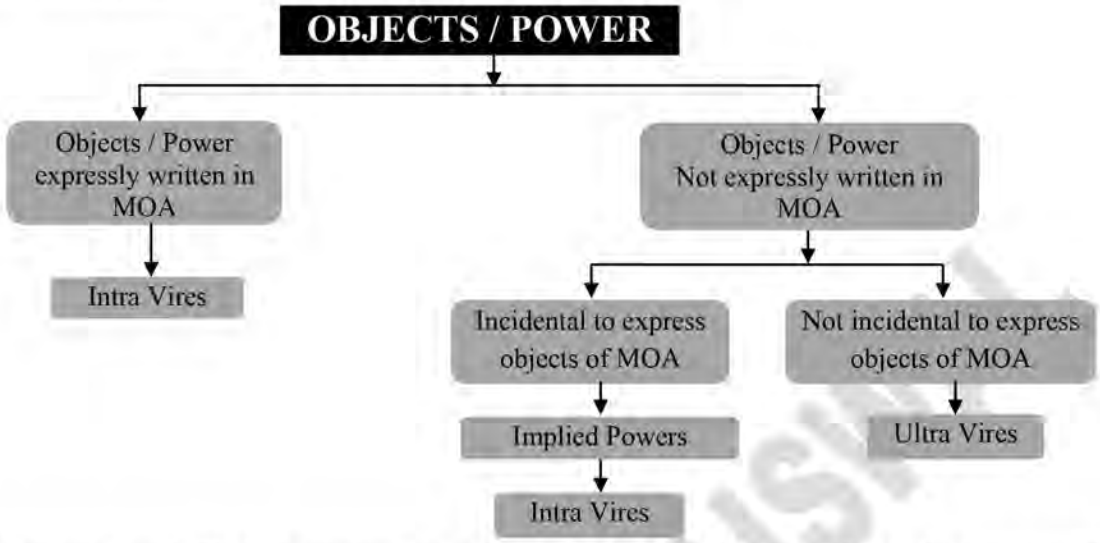
IMPLIED POWERS



The powers exercisable by a company are to be confined to the objects specified in the memorandum. While the objects are to be specified, the powers exercisable in respect of them may be express or implied and need not be specified.

Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act through agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers expressed in the memorandum.

Powers which are not implied:-	**(a)** acquiring any business similar to the company's own business.
	(b) entering into an agreement with other persons or companies for carrying on business in partnership or for sharing profit, joint venture or other arrangements.
	(c) taking shares in other companies having similar objects.
	(d) a power to sell and dispose of the whole of a company's undertaking;
	(e) a power to use funds for political purposes;
	(f) a power to give gifts and make donations or contribution for charities not relating to the objects stated in the memorandum;
	(g) acting as a surety or as a guarantor.
Shareholder's right in respect of ultra vires acts:-	**(a)** An ultra vires contract is as null and void.
	(b) A shareholder can get back the money paid by him to the company under an ultra vires allotment of shares.
	(c) The members can get an injunction to restrain a company wherein ultra vires act has been or is about to be undertaken.
Effects of ultra vires Transactions:-	**(a)** **Void ab initio -** The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon.
	(b) **Injunction:** The members can get an injunction to restrain a company wherein ultra vires act has been or is about to be undertaken.
	(c) **Personal liability of Directors:** It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes alien to the company's memorandum, the directors will be personally liable to replace it.

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NKJ–CLASSROOM PRACTICE



Q. 1. State any six powers which are prudent to be included in the object clause of the Memorandum of Association of a Company as general and ancillary objects.
[Dec. 2018; 4 Marks]

4. LIABILITY CLAUSE

The fourth compulsory clause must state that liability of the members is limited, if it is so intended that the company be limited by shares or by guarantee. The effect of this clause is that, in a company limited by shares, no member can be called upon to pay more than what remains unpaid. If his shares are fully paid up, his liability is nil.

In a company limited by guarantee, the liability clause will state the amount which each member should undertake to contribute to the assets of the company in the event of liquidation of the company. He cannot be called upon to pay anything before the company goes into liquidation.

5. CAPITAL CLAUSE

This clause state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously described as "nominal", "authorised" or "registered".

The usual way to state the capital in the memorandum is:***"The capital of the company is₹10,00,000 divided into 1,00,000 equity shares of₹10 each".***

This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013.If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorised to issue capital beyond its authorised/nominal/registered capital.

6. SUBSCRIPTION CLAUSE

The memorandum concludes with the subscription clause in which there is a declaration of association. The subscribers to the memorandum declare: "We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names".

The statutory requirements regarding subscription of memorandum are that:-	**(a)**	the memorandum must be signed by each subscriber in the presence of at least one witness who must attest the signatures;
	(b)	each subscriber must take at least one share;
	(c)	each subscriber must write opposite his name the number of shares which he agrees to take

ARTICLES OF ASSOCIATION

According to Section 2(5) of the Companies Act, 2013, ***'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.***

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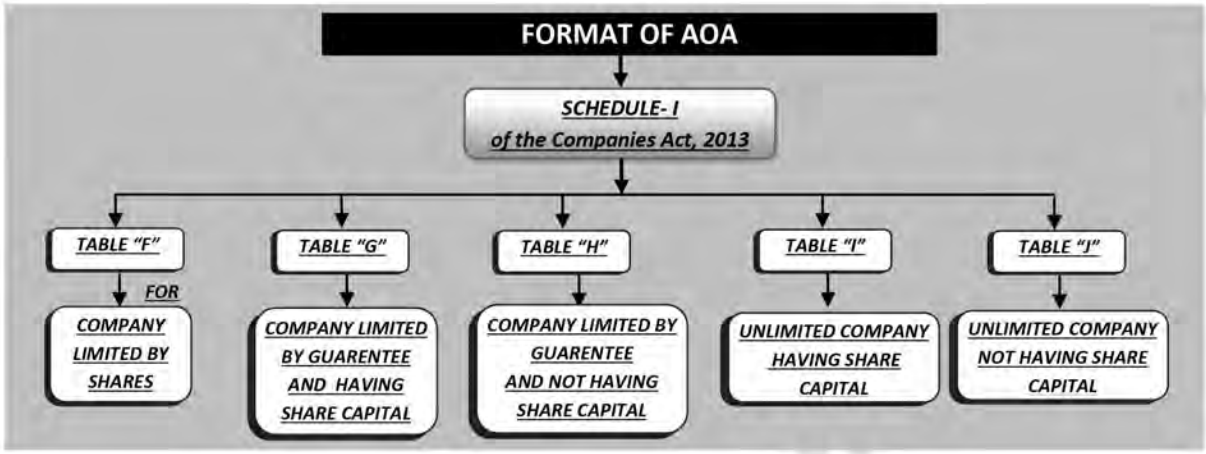

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In terms of section 5, the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company inter se.

ARTICLES SUBORDINATE TO MEMORANDUM

The memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles of a company are subordinate to and subject to the memorandum of association and any clause in the Articles going beyond the memorandum will be *ultra vires*. Articles that go beyond the company's sphere of action are inoperative, and anything done under the authority of such article is *void* and incapable of ratification.

STATUTORY REQUIREMENTS

The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum. The articles must not contain anything illegal or *ultra vires* the memorandum, nor should it be contrary to the provisions of the Companies Act, 2013.

FORM OF ARTICLES OF ASSOCIATION

Section 5(6) of the Companies Act, 2013 provides that the articles of association should be in any one of the Forms specified in Tables of Schedule I to the Act, as may be applicable in relation to the type of company or in a Form as near thereto as the circumstances admit.

FORMAT OF AOA	***TYPE OF COMPANY***
TABLE 'F'	Companies limited by shares
TABLE 'G'	Companies limited by guarantee having a share capital
TABLE 'H'	Companies limited by guarantee not having a share capital
TABLE 'I'	Unlimited companies having a share capital
TABLE 'J'	Unlimited companies not having a share capital

However, while incorporating a company under SPICe Route the AOA shall be in **in Form No. INC-34 (e-Articles of Association (e-AOA)**.

CONTENTS OF ARTICLES

Section 5 provides that the articles shall also contain such matters, as may be prescribed. However, nothing prescribed in this sub-section shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management.

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:-

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.

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7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.
10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. Share certificates.
14. Dematerialisation.
15. Conversion of shares into stock.
16. Voting rights and proxies.
17. Meetings and rules regarding committees.
18. Directors, their appointment and delegations of powers.
19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.
22. Managing director, Whole-time director, Manager, Secretary.
23. Additional directors.
24. Seal.
25. Remuneration of directors.
26. General meetings.
27. Directors meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalisation of reserves.

REGISTRATION OF ARTICLES

Section 7 provides that at the time of incorporation of a company there shall be filed with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in the prescribed manner.

Every type of company whether public or private and whether limited by shares or limited by guarantee having a share capital or not having a share capital or an unlimited liability company must register their articles of association.

The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company.

A company may adopt all or any of the regulations contained in the model articles applicable to such company.

In terms of Section 5, **a public company limited by shares** may at its option register its **own articles of association** or alternatively it may **adopt all or any of the regulations contained in Table F of First Schedule of the Act**.

If articles are not registered, **automatically Table F** in Schedule I apply, and if registered, Table F in Schedule I apply except in so far as it is excluded or modified by the articles. To avoid any confusion, it should be specifically stated therein that Table 'F' will not apply.

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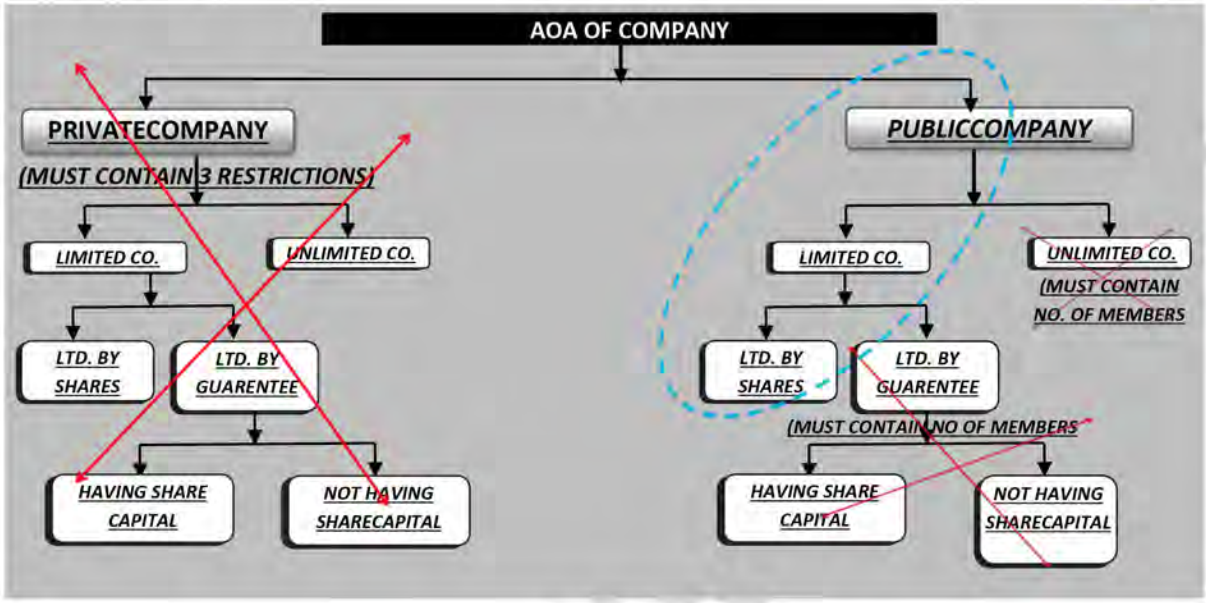

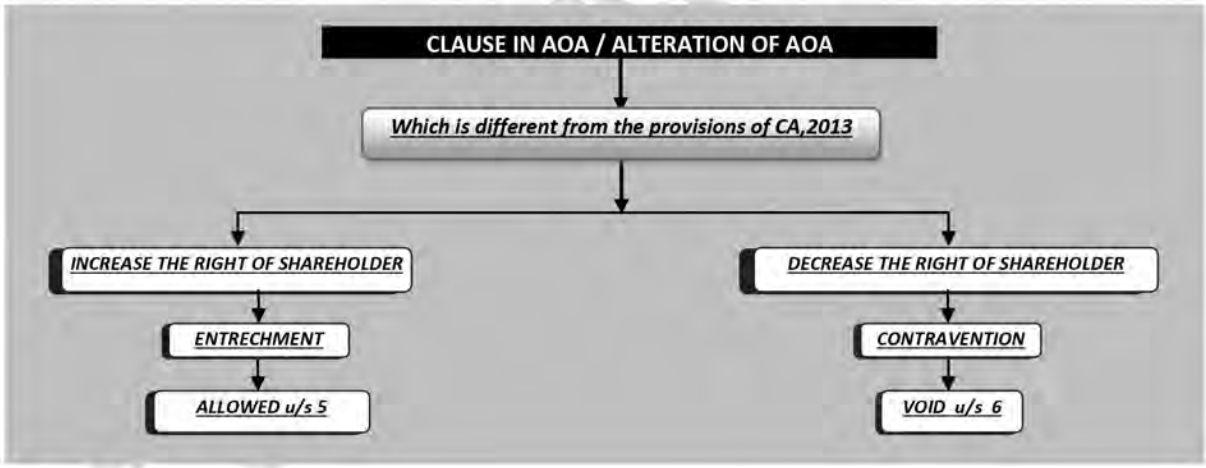

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The articles of a private company must contain the three restrictions as contained in Section 2(68).

A company limited by guarantee having a share capital or a company limited by guarantee not having a share capital or an unlimited company having a share capital or an unlimited company not having a share capital might adopt any of the appropriate regulations of Table G, H, I and J respectively in Schedule I.

ENTRENCHMENT PROVISIONS

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The Companies Act, 2013 recognizes an interesting concept of entrenchment. Essentially, the entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions (such as obtaining a 100% consent) greater than those prescribed under the Act. This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment shall be made either on formation of a company, or by an amendment in the articles agreed **to by all the members of the company in the case of a private company** and by a **special resolution in the case of a public company**. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions.

PROVISION IN ARTICLES AS REGARDS EXPULSION OF A MEMBER

If there is a provision in the Articles empowering the Directors of the company to expel any member of the company under any of the given conditions, then such a provision shall be totally inconsistent with the provisions of Section 6 of the Act. It is opposed to the fundamental principles of the company's jurisprudence and is ultra vires of the company.

CASE LAW



Madras Stock Exchange Ltd. **v.** ***S.S.R. Raj Kumar***	However, the Stock exchanges, registered under the provisions of the Companies Act, can carry such a provision in its Articles. The regulation of stock exchanges is mainly governed by Securities Contracts Regulation Act, 1956 (SCRA) and SEBI, Act, 1992 which are Special Acts.

LEGAL EFFECT OF THE MEMORANDUM AND ARTICLES

The memorandum and articles, **when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member** to observe and be bound by all the provisions of the memorandum and of the articles.

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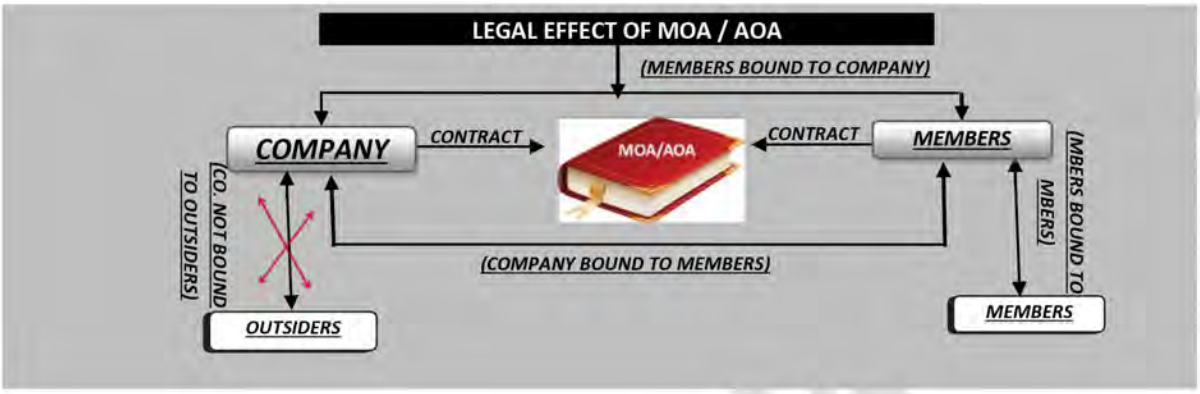

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The memorandum and articles bind:

(a) the members to the company;
(b) the company to the members;
(c) the members *inter se;* and
(d) the company to outsiders.

1. Members Bound to the Company

The memorandum and articles constitute a contract binding the members of the company. The members, as members, are bound to the company. Each member must, therefore, observe the provisions of the memorandum and articles.

Boreland's Trustee v. Steel Brother and Co. Ltd.	The articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. B, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles, as the shares were purchased by B in terms of the articles.

2. Company Bound to the Members

Since the articles constitute a contract binding the company to its members in their capacity as members, a member can bring an action against the company for infringement by it of the memorandum or articles. Normally, action for breach of articles against the company can be brought only by a majority of the members. Individual or minority members cannot bring such a suit except when it is intended for enforcement of personal rights of members or to prevent the company from doing any ultra vires or illegal act, fraud, or oppression and mismanagement.

3. Member Bound to Member

As between the members inter se each member is bound by the articles to the other members but that does not mean the memorandum and articles create an express contract among the members of the company.

Thus, a member of a company has no right to bring a suit to enforce the articles in his own name against any other member or members. It is the company alone which can sue the offender so as to protect the aggrieved member. It is in this way that the rights of members inter se are regulated. A shareholder may, however, sue in his own name to restrain another, or others from doing fraudulent or ultra vires acts.

4. Company not Bound to Outsiders

The term "outsider" signifies a person who is not a member of the company even if he is a director of or solicitor to the company.

As between outsiders and the company, neither the memorandum nor the articles would give any contractual rights to outsiders against the company or its members even though the names of outsiders are mentioned in those documents in connection with the arrangements that the company might have contemplated for carrying on its business. The articles do not confer any contractual rights even upon a member in a capacity other than that of a member. To succeed, the party suing must prove a contract outside and independent of the articles

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Re. ***Eley*** **v.** ***Positive Life Insurance Co.***	In the articles provided that the solicitor to the company would not be removed from office except for misconduct. Eley acted as solicitor to the company and also became a member of the company. The company discontinued his services and then he sued the company for damages for breach of contract. It was held that he had no cause of action because the articles did not constitute any contract between the company and himself. His action was dismissed.

INTERPRETATION OF MEMORANDUM AND ARTICLES

Articles should be construed as a business document so as to give business efficacy preference to a construction which will prove unworkable.

The memorandum must like any other document be construed according to accepted principles applicable to the interpretation of all legal documents.

The memorandum and articles must be read together in the event of any ambiguity.

CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES/ DOCTRINE OF CONSTRUCTIVE NOTICE

The memorandum and articles, when registered, become public documents and can be inspected by anyone on payment of nominal fee. Every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. In fact, he is regarded not only as having read those documents but also as having understood them according to their proper meaning.

Mohony **v.** ***East Holyfrod Mining Co.***	Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company
KotlaVenkataswamy **v.** ***Rammurthy***	In the articles required that all documents should be signed by the managing director, secretary and the working director on behalf of the company. A deed of mortgage was executed by the secretary and the working director only and the Court held that no claim would lie under such a deed. The Court said that the mortgagee should have consulted the articles before the deed was executed.

DOCTRINE OF INDOOR MANAGEMENT

While the doctrine of 'constructive notice" seeks to protect the company against the outsiders, the principal of indoor management operates to protect the outsiders against the company.

According to this doctrine, Persons dealing with a company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire the regularity of any internal proceedings.

In other words, while persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is no part of the duty of an outsider to see that the company carries out its own internal regulations.

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CASE LAW



Royal British Bank* v. *Turquand	The directors of a banking company were authorised by the articles to borrow on bonds such sums of money as should from time to time, by resolution of the company in general meeting, be authorised to borrow. The directors gave a bond to Turquand without the authority of any such resolution. It was held that *Turquand* could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed.

EXCEPTIONS TO THE DOCTRINE OF INDOOR MANAGEMENT

Relief on the ground of 'indoor management' cannot be claimed by an outsider dealing with the company in the following circumstances;-

1. ***Where the outsider had knowledge of irregularity*** —The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowing fully well that the directors do not have the authority to make the transaction but still enters into it, cannot seek protection under the rule of indoor management.

CASE LAW



Howard* v. *Patent Ivory Co.	The articles of a company empowered the directors to borrow upto one thousand pounds only. They could, however, exceed the limit of one thousand pounds with the consent of the company in general meeting. Without such consent having been obtained, they borrowed 3,500 pounds from one of the directors who took debentures. The company refused to pay the amount. Held that, the debentures were good to the extent of one thousand pounds only because the director had notice or was deemed to have the notice of the internal irregularity.

2. ***No knowledge of memorandum and articles*** — Again, the rule cannot be invoked in favour of a person who did not consult the memorandum and articles and thus did not rely on them.

CASE LAW



Rama Corporation* v. *Proved Tin & General Investment Co.	T was a director in the *company*. He, purporting to act on behalf of the company, entered into a contract with the Rama Corporation and took a cheque from the latter. The articles of the company did provide that the directors could delegate their powers to one of them. But Rama Corporation people had never read the articles. Later, it was found that the directors of the company did not delegate their powers to T. The Plaintiff relied on the rule of indoor management. Held, they could not because they even did not know that power could be delegated.

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3. ***Forgery*** — The rule of indoor management does not extend to transactions involving forgery or to transactions which are otherwise void or illegal *ab initio*.

CASE LAW



Rouben **v.** ***Great Fingal Consolidated***	The secretary of a company forged signatures of two of the directors required under the articles on a share certificate and issued certificate without authority, the applicants were refused registration as members of the company. The certificate was held to be nullity and the holder of the certificate was not allowed to take advantage of the doctrine of indoor management.

4. ***Negligence*** —The 'doctrine of indoor management', in no way, rewards those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry, he is estopped from relying on the Rule.

CASE LAW



Anand Behari Lal **v.** ***Dinshaw & Co. (Bankers) Ltd.***	An accountant of a company transferred some property of a company in favour of Anand Behari. On an action brought by him for breach of contract, the Court held the transfer to be void. It was observed that the power of transferring immovable property of the company could not be considered within the apparent authority of an accountant.

5. Again, the doctrine of indoor management does not apply **where the question is in regard to the very existence of an agency**.

6. This Doctrine is also not applicable **where a pre-condition is required to be fulfilled** before company itself can exercise a particular power. In other words, the act is not merely ultra vires the company its self.

DOCTRINE OF *ALTER EGO*

It is used by the courts to ignore the status of shareholders, officers, and directors of a company in reference to their liability in their respective capacity so that they may be held personally liable for their actions when they have acted fraudulently or unjustly.

CASE LAW



Lennards Carying Co. Ltd. **v.** ***Asiatic Petroleum Co. Ltd.***	In the House of Lords stated that the default of the managing director who is the "directing mind and will" of the company, would be attributed to him and he be held for the wrong doing of the company.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Explain the Doctrine of 'ALTER EGO' with suitable case law **[Dec. 2018; 4 Marks]**

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Q. 1. One of the subscribers to Memorandum of Association of a company under process of incorporation is a foreign national residing outside India. State the provisions of Companies Act, 2013 regarding authentication of his signature and address. Will the requirement of business visa be applicable to his case if he is a person of Indian origin of overseas citizen of India? **[Dec. 2017]**

Ans. Where a subscriber to memorandum is a foreign national residing outside India.

(a) in a country in any part of the Commonwealth, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.

(b) in a country which is a party to the Huge Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the notary (Public)of the country of his origin and be duly apostillised in accordance with the said Hague Convention.

(c) in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address and the memorandum and articles of association and proof of identity, shall be notarized before the notary (Public) of such country and the certificate of the notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under section 3 of the Diplomatic and Consular Officers (Oaths and Fees)Act, 1948 (40 of 1948) or, where there is no such officer by any of the officials mentioned in Section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vic.C.10), or in any Act amending the same

(d) visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa. However, in case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not applicable.

Q. 2. ABC Ltd. has altered its name from BCD Ltd. to ABC Ltd. However, the fact of alteration of name of the company was not brought to the notice of NCLT. Please advise the company ABC Ltd. whether it has right to execute a decree in its new name after the change name. **[Dec. 2017]**

Ans. The fact that alteration in the name was not brought to the notice of the court/Tribunal would not in any manner render defective or irregular proceedings initiated by a company in its former name. the change of name does not affect the rights of the company. It does not necessary that the new name should have been entered in the decree. [Abdul Qayum (FS) v. Manindra Land & Building Corporation Ltd.].

Q. 3. Semon Ltd., a strategic investor was introduced in Raybon Pvt. Ltd. To bring a new technology or investment. Such strategic investor wishes to protect its interests in the Company. Advise how he can safeguard it's through Articles of Association of the company. **[June 2018]**

Ans. Strategic investor may negotiate with the company to amend its articles to protect its interest. Section 5 the of the Act, provide additional safeguard to prevent unauthorized alteration of articles by way of entrenchment.

According to Section 5 of Companies Act, 2013, the articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution are met or complied with.

This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment referred above shall be made either (a) on formation of a company, or (b) by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.

SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Distinguish Between:----------
   a) 'Doctrine of indoor management' and 'doctrine of constructive notice'.
2. Write notes on the following:----------
   a) Doctrine of alter ego
3. Descriptive Question:- ----------
   a) While the doctrine of constructive notice seeks to protect the company against the company. Elucidate.
   b) In the case of a company whatever is not stated in the memorandum of association as objects of the company is prohibited by the doctrine of ultra vires.
4. Comment on the following :----------
   a) A company has a statutory right to alter its articles of association.
   b) The alteration of articles of association must not constitute a fraud on the minority by a majority.
5. A registered office was shifted from one State to another. A labour litigation was pending before the Court/ Tribunal. So, the employees objected to transfer. Whether the objection of the employees is sustainable?
6. "Outsiders are bound to know the external position of a company but not bound to know its indoor management."
7. What are the main purposes of memorandum of association of a company?

FROM ICSI MODULE

Answer the Following:-

1. What do you understand by the memorandum of association? What is its purpose?
2. "Memorandum of association is a charter of the company". Comment upon the statement and explain the clauses which are included in a memorandum of association of a company.
3. What is "registered office" of a company? Within how much time a company must have a registered office?
4. What do you understand by the doctrine of *"ultra-vires"*? Discuss the decided case *"Ashbury Railway & Iron Co.* v. *Riche"*.
5. What is the importance of the objects clause of the memorandum of association? If a company undertakes to do anything which is not either expressly or impliedly provided for by the objects clause, what would be the consequences?
6. "The power of altering the articles is wide, yet it is subject to a large number of limitations". Explain.
7. Discuss the extent to which articles of association binds:
   (a) the members to the company,
   (b) the company to the members,
   (c) the members among themselves, and
   (d) the company to the outsiders.
8. Distinguish Articles from Memorandum.
9. "The articles may contain provisions for entrenchment." Comment upon the statement and explain the significance of the entrenchment provisions.
10. What is the meaning and significance of the doctrine of "Indoor Management". Discuss with reference to decided case *"Royal British Bank* v. *Turquand"*.

Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

5

ALTERATION OF CHARTERED DOCUMENTS

Covering-

- Sections Chart
- Alteration of Memorandum of Association
- Alteration of name clause
- Alteration of Registered office
- Alteration of Objects clause of the company
- Aletration of Liability clause
- alteration of capital clause
- Altereation of AOA
- Rules/Limitations on alteration of AOA
- Advance Your Knowledge
- Self Test Questions

EXPECTED MARKS COVERAGE (5 to 10)

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N.K.J - SECTION CHART

Section	Short Description
Section 12	Registered office of company
Section 13	Alteration of memorandum
Section 16	Rectification of name of company
Section 61	Power of limited company to alter its share capital
Rule	Companies (Incorporation) Rules, 2014

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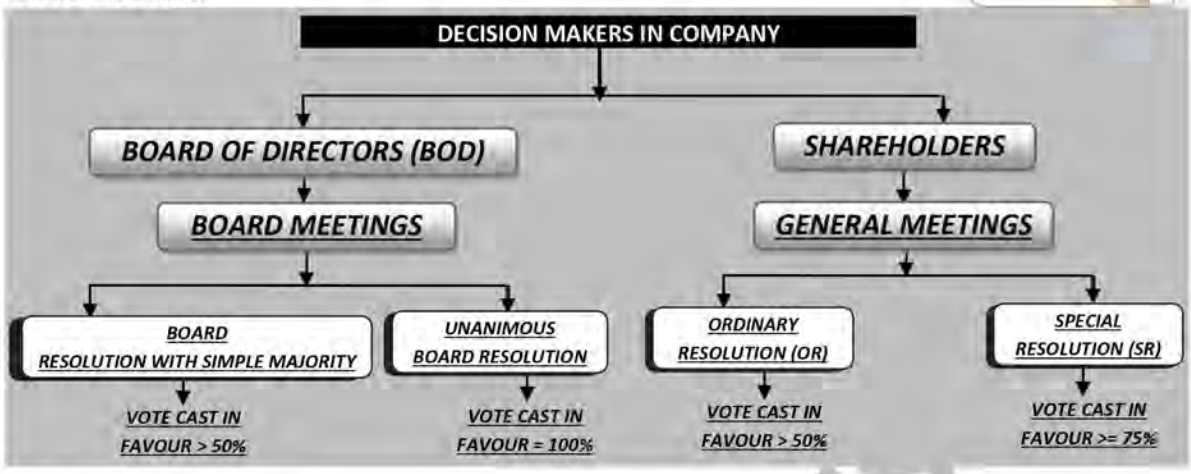

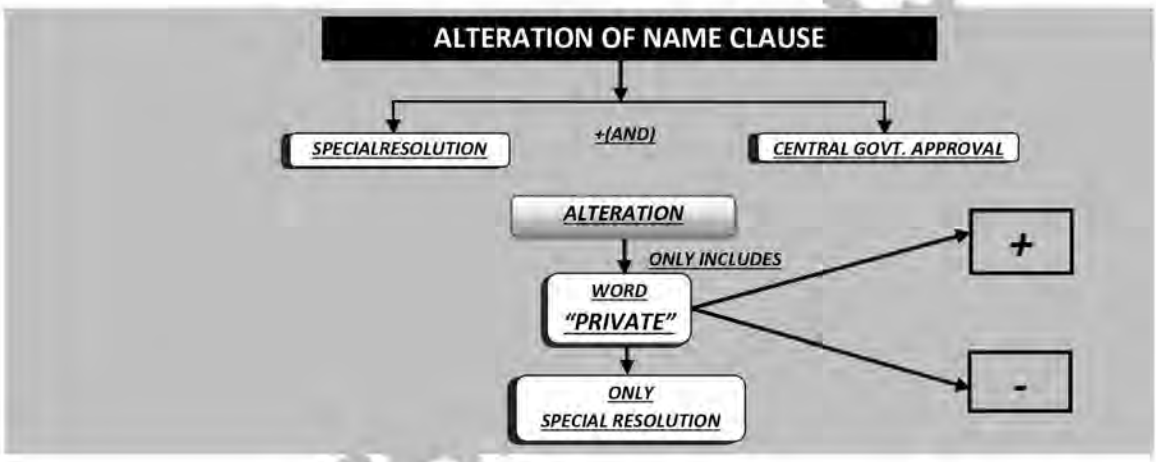

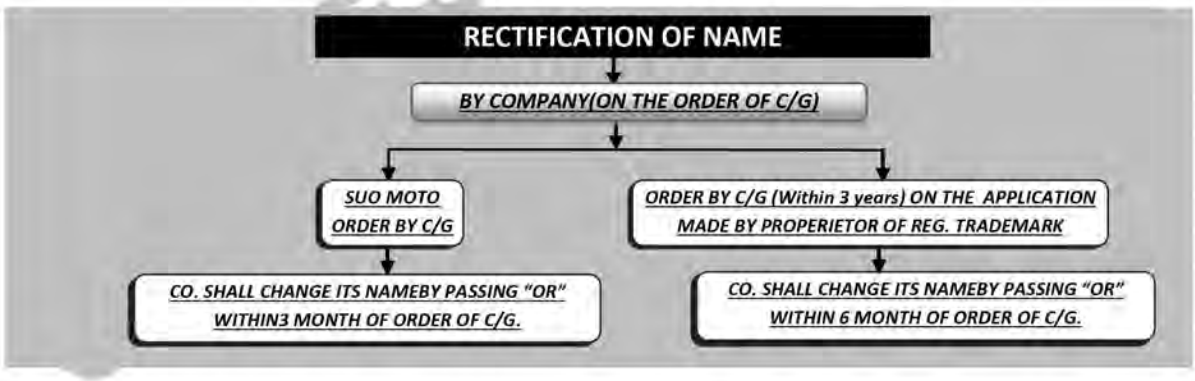

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PART-II
ALTERATION OF CHARTERED DOCUMENTS

ALTERATION OF MEMORANDUM OF ASSOCIATION
SECTION 31

Section 13(1) of the Companies Act, 2013 provides that a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of it memorandum.

1. ALTERATION OF NAME CLAUSE
SECTION 13

The name of the company can be altered by a **special resolution and with the approval of the Central Government** in writing.

However, approval of the Central Government is **not** necessary if the change relates to the **addition/deletion of the word 'Private'** to the name of the company consequent to the conversion of a private company into a public company and vice versa.

When any change in the name of a company is made under section 13(2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a **fresh certificate of incorporation** with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

Rule 29 of Companies (incorporation) Rules 2014 states that:-	**(a)** the change of name shall not be allowed to a company which has **defaulted in filing its annual returns or financial statements or any document** due for filing with the Registrar or which has defaulted in **repayment of matured deposits or debentures** or interest on deposits or debentures.
	(b) **An application** shall be filed in **Form No.INC.24** along with the fee for change in the name of the company and a **new certificate of incorporation in Form No.INC.25** shall be issued to the company consequent upon change of name.

RECTIFICATION OF THE NAME OF THE COMPANY
SECTION 16

Under Section 16 of the Act, rectification of the name of the company is required to be carried out if, through inadvertence or otherwise, a company (whether on its first registration or on its registration by a new name) is registered by a name which is identical to or too nearly resembles the name of a company already in existence.

The rectification of the name must also be carried out if the Central Government so directs at any point of time after the registration of the company. The direction of the Central Government is required to be complied with by the company within a period of 3 months from the date of issue thereof.

Further where a company changes its name or obtains a new name under section 16, it shall within a period of **fifteen days** from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

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EFFECT OF CHANGE OF NAME

(a) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against it, and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.

(b) When any change in the name of a company is made under section 13(2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a **fresh certificate of incorporation** with the new name and the change in the name shall be complete and effective only on the issue of such a certificate.

2. ALTERATION OF REGISTERED OFFICE/SITUATION CLAUSE

SECTION 12

(A) Change within the local limits of same town

According to Section 12(5), a company can change its registered office from one place to another within the local limits of the city, town or village, where it is situated, by merely passing a **Board resolution.** This does not involve alteration of memorandum.

A notice of the change is required to be given to the Registrar in **Form no INC 22**, within 15 days of such change.

(B) Change from one city to another within the same State

If the registered office is to be shifted from one city, town or village to another city, town or village within the same State, a **special resolution** has to be passed in the general meeting of the company.

A notice of the change is required to be given to the Registrar in Form no INC 22, within 15 days of such change along with **Form no MGT 14.**

(C) Change within the **same State** from the jurisdiction of **one Registrar of Companies to the jurisdiction of another Registrar of Companies**

Proviso to Section 12(5) provides that **confirmation by the Regional Director** after passing special resolution in general meeting will be necessary for changing registered office of a company from one place to another if the change of registered office is from the jurisdiction of one Registrar to the jurisdiction of another within the same State.

Section 12(6) states that the Regional Director, after hearing the parties shall pass necessary orders within a period of **thirty days** from the date of the receipt of the application. Thereafter, the company concerned shall file a **copy of the said order with the Registrar of Companies (ROC) within a period of sixty days** from the date of the confirmation order by Regional Director. The said ROC shall record the ordered changes in its records.

The ROC of the state where the registered office of the company was previously situated, shall transfer all the documents and papers to the new ROC.

Rule 28 of Companies (Incorporation) Rules 2014 states that;-

(a) An application seeking confirmation from the Regional Director shall be filed by the company with the Regional Director in **Form no. INC. 23** along with the fee.

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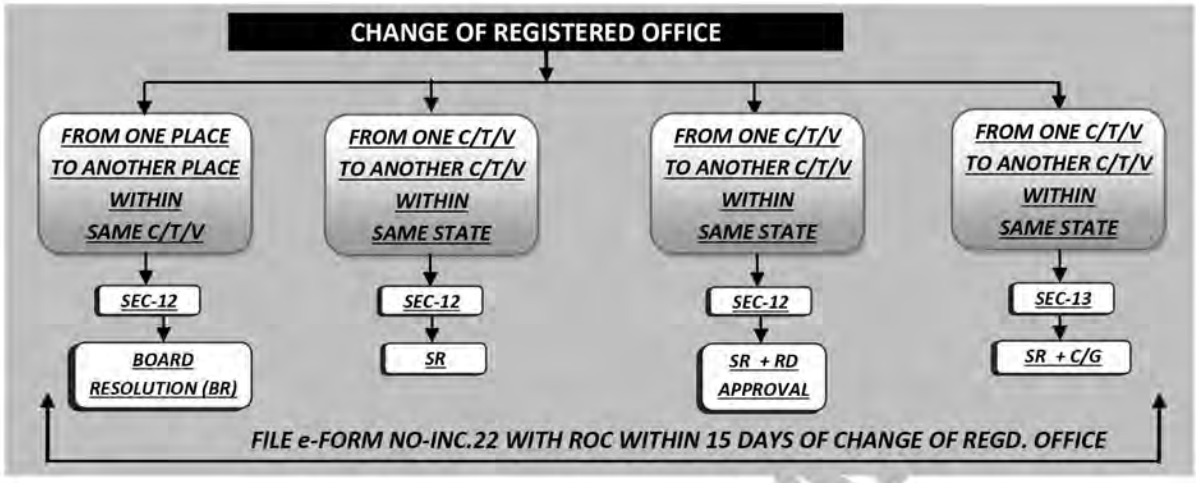

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(b) The company shall, not less than one month before filing any application with the Regional Director for the change of registered office.-

(i) publish a notice, at least once in a daily newspaper published in English and in the principal language of that district in which the registered office of the company is situated and circulating in that district; and

(ii) serve individual notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within twenty one days of the date of publication of that notice:

(c) A notice of the change is required to be given to the Registrar in Form no INC 22, within 15 days of such change along with **Form no MGT 14.**

(d) Change of Registered office from one State to another

The change of registered office from one State to another State involves alteration of memorandum, and the change can be effected by a **special resolution of the company which must be confirmed by the Central Government** on an application made to it [Section 13(4)].

The Central Government **shall dispose** of the application under sub-section (4) within a period of **sixty days** and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture- holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge. [Section 13(5)].

A certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. [Section 13(7)].

Rule 30 of Companies(Incorporation) Rules 2014 states that;-

An application for the purpose of seeking approval for change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in **Form No. INC.23.**

Rule 31 of Companies(Incorporation) Rules 2014 states that;-

The certified copy of the order of the Central Government, shall be filed in **Form No.INC.28**along with the fee as with the Registrar of the State within **thirty days** from the date of receipt of certified copy of the order.

CASE LAW



Where the alteration is affected by changing the registered office from one State to another State, the ***loss of revenue in one State would be accompanied by increase in revenue in the other and in such a case the interest of a particular State ought not to be considered but it is the interest of the country as a whole which should be considered***. The decision to shift the registered office of the company to another state being a domestic matter rests with shareholders and the company is the best judge of how to run its business more economically, efficiently or conveniently, even though it would result in loss of revenue to the State. ***(In Re. Satyashree Balaji Wires & Cables (P) Ltd.)***

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In the case of ***(In Re. Bharat Commerce and Industries Ltd)***, it was held that the ***employees' union cannot oppose on the ground that there would be loss of revenue or unemployment in the State*** or that the meeting at which the special resolution was passed was itself not valid.

Shifting of Registered Office	**Effect on MOA**
Within the local limits of city, town or village	No alteration required
Outside the local limits of the city, town or village (within the same state) and within the jurisdiction of the same ROC	No alteration required
Outside the local limits of the city, town or village (within the same state) but from the jurisdiction of one ROC to another	No alteration required
From one state to another	MOA to be altered

3. ALTERATION OF OBJECTS CLAUSE OF THE COMPANY

SECTION 13

According to section 13, a company may, by a **special resolution** and after complying with the procedure specified in this section, alter the provisions of its memorandum.

Further in case of a listed company, the special resolution for alteration in the objects clause of the Memorandum of Association needs to be passed through **Postal Ballot** in terms of section 110.

Further, section 13(8) lays down that a company, **which has raised money from public through prospectus and has any unutilised amount out of the money so raised,** shall **not change** its objects for which it raised the money through prospectus **unless ;-**

(a) a **special resolution** is passed by the company and,

(b) the details, as may be prescribed, in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating therein the justification for such change;

(c) the **dissenting shareholders shall be given an opportunity to exit** by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

4. ALTERATION OF LIABILITY CLAUSE

SECTION 13

According to section 13, a company may, by a **special resolution** and after complying with the procedure specified in this section, can change the liability clause of its memorandum of association by passing a special resolution.

Further a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Nice Ltd. proposes to alter its liability clause of Memorandum of Association. Referring to the provisions of the Companies Act, 2013 advise the company.
[June. 2018; 4 Marks]

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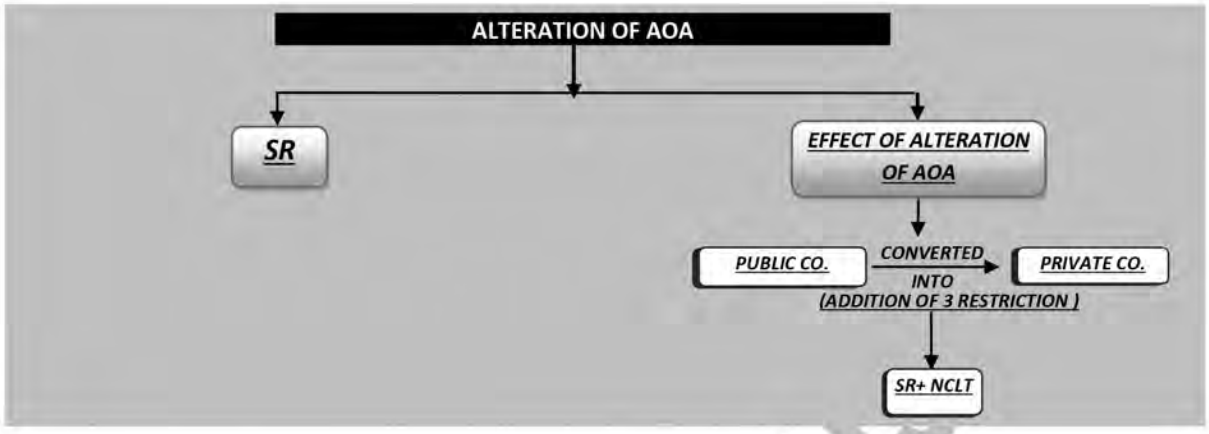

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5. ALTERATION OF CAPITAL CLAUSE

SECTION 61

A limited company having a share capital may make the following types of alterations in its memorandum by an **ordinary resolution, if so authorised by its articles**, at its general meeting to;-

(i)	**increase** its authorised share capital by such amount as it thinks expedient;
(ii)	**consolidate** and divide all or any of its share capital into shares of a larger amount than its existing shares:
(iii)	**convert** all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
(iv)	**sub-divide** its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that the proportion between the amount paid and unpaid shall remain the same.
(v)	**cancel** shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

All the above alterations do not require the confirmation by the **Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders** shall not take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of the passing of the resolution along with an altered memorandum. [Section 64(1)]

The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both. It must be noted that cancellation of shares in pursuance of section 61(1) does not amount to reduction of share capital.

ALTERATION OF ARTICLES OF ASSOCIATION

Section 14(1) provides that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a **special resolution,** alter its articles.

Second proviso to section 14(1) stipulates that any alteration having the effect of **conversion of a public company into a private company** shall not take effect except with the **approval of the Tribunal** which shall make such order as it may deem fit. Every alteration of the articles under this section and a copy of the order of the Tribunal approving the alteration as per section 14 shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Section 8 Company cannot alter Article except with the approval of Central Government.

RULES/ LIMITATIONS ON ALTERATION OF ARTICLES OF ASSOCIATION

However, in spite of the power to alter its articles, a company can exercise this power subject only to certain limitations. These are:-

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1.	The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.
2.	The alteration must not be inconsistent with any provisions of the Companies Act or any other statute.
3.	where a resolution was passed expelling a member and authorising the director to register the transfer of his shares without an instrument of transfer, the resolution was held to be invalid as being against the provisions of the Act ***[Madhava Ramachandra Kamath v. Canara Banking Corporation)***
4.	articles may impose on the company conditions stricter than those provided under the law; for example, they may provide that a matter should be passed by a special resolution when the Act requires it to be passed by an ordinary resolution.
5.	The Articles must not include anything which is illegal or opposed to public policy.
6.	The alteration must be *bona fide* for the benefit of the company as a whole.
7.	The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad.
8.	Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing.
9.	By effecting alteration in its articles, a company cannot defeat escape from its contractual obligation with any person. The company will always be liable in such a case.
10.	The Articles of Association cannot be altered so as to have retrospective effects. The articles only operate from the date of the amendment ***[Pyare Lal Sharma v. Managing Director, J.K. IndustriesLtd.)***
11.	The Articles in a company can be altered and no clause can be included in the Articles that it is not alterable. Persons who become members of a company have no right to assume that the Articles will always remain in a particular form.
12.	A company is not prevented from altering its Articles on the ground that such an alteration would be breach of a contract but an action for damages may lie against the company. **[*Southern Foundries v. Shirlaw,*)**

EFFECT OF ALTERED ARTICLES

Alteration binds members in the same way as original articles. The altered articles shall bind the company and the members to the same extent as if they had been signed by the company and by each member, means the articles as originally framed, or as they may from time to time stand altered are valid under the provisions of the Act. There is clear power to alter the articles, and as altered, they bind members just in the same way as did the original articles.

ALTERATIONS OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY

Every alteration made in the memorandum or articles of a company shall be noted in every copy of the memorandum or articles, as the case may be. [Section 15(1)].

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" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. ABC Ltd. has altered its name from BCD Ltd. to ABC Ltd. However, the fact of alteration of name of the company was not brought to the notice of NCLT. Please advise the company ABC Ltd. whether it has a right to execute a decree in its new name after the change of name.

[Dec. 2017; 4 Marks]

Ans. The fact that alteration in the name was not brought to the notice of the Court/Tribunal would not in any manner render defective or irregular proceedings initiated by a company in its former name. The change of name does not affect the rights of the company. It does not necessary that the new name should have been entered in the decree. [Abdul Qayum (FS) v. Manindra Land & Building Corporation Ltd.].

" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. Semon Ltd., a strategic investor was introduced in Raybon Pvt. Ltd. to bring a new technology or investment. Such strategic investor wishes to protect its interests in the company. Advise how he can safeguard its interests through Articles of Association of the company. **[June. 2018; 4 Marks]**

Ans. Strategic Investor may negotiate with the company to amend its articles to protect – its interest. Section 5 of the Act, provide additional safeguard to prevent unauthorized alteration of articles by way of entrenchment.

According to Section 5 of the Companies Act, 2013, the articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution are met or complied with.

This Provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

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Q. 1. Nice Ltd. Proposes to alter its liability clause of Memorandum of Association. Referring to the provisions of Companies Act, 2013 advise the company. **[June 2018]**

Ans. According to section 13 (1) a Company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change the liability clause of its memorandum of association by passing a special resolution .Father section 13 (6) (a) provides that a company shall ,in relation to the alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13 (1).

Accordingly, Nice Ltd. may alter its liability clause.

SAMPLE SHAREHOLDER'S RESOLUTION TO BE PASSED IN THE GENERAL MEETING FOR SHIFTING OF REGISTERED OFFICE OF THE COMPANY FROM ONE STATE TO

ANOTHER:"RESOLVED THAT pursuant to the provisions of section 13 read with section 12 and other applicable provisions, if any, of the Companies Act, 2013 and rules made thereunder, and subject to the approval of the Regional Director, ... Region or any other Government Authority, the consent of the members of the Company be and is hereby accorded to shift the registered office of the Company from the State of ..... (State) to ..... (State).

RESOLVED FURTHER THAT Clause No. II of the Memorandum of Association of the Company be and is hereby substituted by the following clause:

'II.The Registered Office of the Company shall be situated in the State .....'.

RESOLVED FURTHER THAT Mr. _____ and Mr. ....., the director and the company secretary of the Company respectively, be and are hereby severally authorized for and on behalf of the Company to do all such acts, deeds and things as may be necessary or desirable in this regard for the purpose of giving effect to this resolution."

SAMPLE SHAREHOLDERS RESOLUTION FOR ALTERATION OF ARTICLES

Adoption of new set of Article of Association of the Company:

"RESOLVED THAT pursuant to the provisions of Section 14 and other applicable provisions, if any, of the Companies Act, 2013, (including any amendment thereto or re-enactment thereof), the Articles of Association of the Company be and are hereby altered by replacing all the existing regulations 1 to 49 with the new regulations 1 to 93, a copy of which is annexed to the EXPLANATORY STATEMENT PURSUANT TO SECTION 102 OF THE COMPANIES ACT 2013, be and is hereby adopted as new regulations of the Articles of Association of the Company.

FURTHER RESOLVED THAT for the purpose of giving effect to this resolution, Mr. ..... (DIN: .....), Director of the Company be and is hereby authorized, on behalf of the Company, to do all acts, deeds and things as may be deemed to be necessary, proper or desirable and to sign and execute all the necessary documents, applications and returns for the purpose of giving effect to the aforesaid Resolution along with filing of necessary E-forms with the Registrar of Companies, ..."

EXPLANATORY STATEMENT PURSUANT TO SECTION 102 OF THE COMPANIES ACT, 2013

The Existing regulations 1 to 49 of the Articles of Association of the company are being replaced by the new set of Articles containing regulations 1 to 93 and adopted as new set of Articles of Association of the company. The modification in the Articles of Association of the company is carried out to give effect to the provisions of the Companies Act, 2013. Consent of the shareholders by passing a Special Resolution is

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required in this regard. New set of regulations forming 1 to 93 articles of Articles of Association of the company is attached herewith separately as Annexure A.

Copy of the Articles of Association of the Company together with the proposed alterations is available for inspection by the Members of the Company at its Registered Office during normal business hours on all working days up to the date of the Meeting and is also attached to the accompanying notice.

The Directors recommend the passing of the Resolution under Item No. 1 of the accompanying Notice for the approval of the Members of the Company by way of Special Resolution.None of the Directors of the Company or the Key Managerial Persons of the Company or their relatives are concerned or interested in the passing of the above resolution.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

6

PROMOTERS OF COMPANY

Covering-

- Section Charts
- ABC Analysis
- Promoters
- Legal Position of a Promoter
- Duties of a Promoter
- Liabilities of a Promoter
- Right of a Promoter
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (4 to 8)

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N.K.J - SECTION CHART

Section	Short Description
Section 2(69)	Definition of Promoter
Section 7	Incorporation of company
Section 26	Mater to be stated in prospectus.
Section 34	Criminal liability for mis-statements in prospectus
Section 35	Civil liability for mis statements in prospectus
Section 42	Offer or invitation for subscription of securities on private placement
Rule	Companies (Incorporation) Rules, 2014

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PROMOTERS AND FORMATION OF COMPANIES

PROMOTERS

Usually the first step to form a company is the process known as 'promotion' where a person persuades others to contribute capital to a proposed company before it is incorporated. Such a person is called the promoter of the company. Promoters also can enter into a contract on behalf of a company before or after it has been granted a certificate of incorporation, and arrange share issues in the name of the company.

PROMOTER- DEFINITION
SECTION 2 (69)

"Promoter" means a person:-

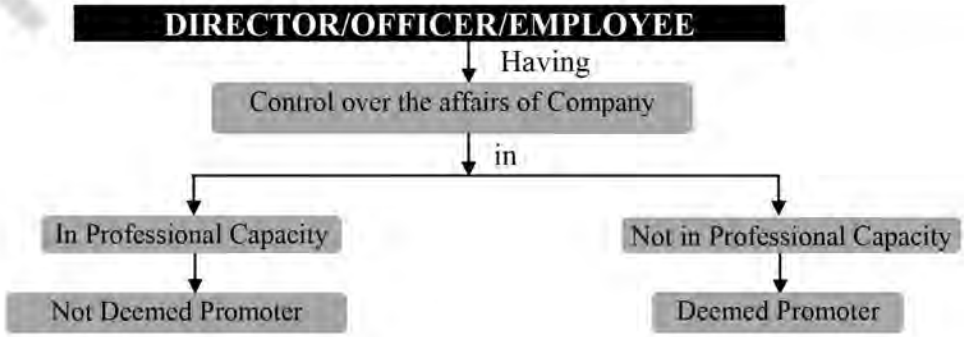
(a)	who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or
(b)	who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
(c)	in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that sub-clause (c) shall not apply to a person who is acting merely in a professional capacity.

Further, according to **SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009,** "promoter" includes:-

(a)	The person or persons who are in control of the issuer;
(b)	The person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public;
(c)	The person or persons named in the offer document as promoters.

IS A DIRECTOR/OFFICER/EMPLOYEE OF THE ISSUER A PROMOTER?



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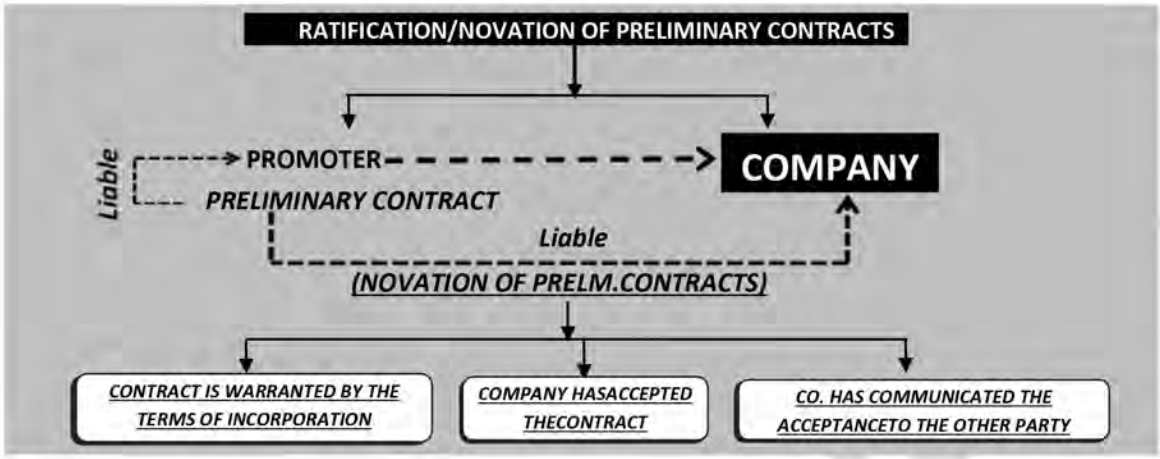

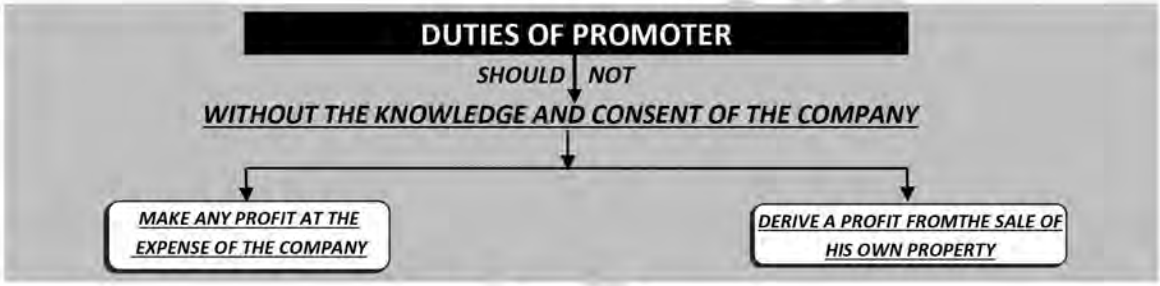

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A director/officer/employee who has **control over the affairs of the company,** directly or indirectly whether as a shareholder, director or otherwise is considered as a promoter.

However, a director or officer or employee of the issuer or a person, if acting as such merely in his professional capacity, shall not be deemed as a promoter.

PRELIMINARY/PROMOTERS' CONTRACT – RATIFICATION THEREOF

A promoter is personally liable to third parties upon all contracts made on behalf of the intended company, until with their consent, the company takes over this liability.

The company could not ratify contract made by a promoter before its incorporation.

Specific performance of a contract may be enforced against a company in respect of contracts entered into by promoters on behalf of the company, if such a **contract is warranted by the terms of incorporation** and the **company has accepted the contract** and **communicated the acceptance to the other party**. Other party can also enforce the contract if the company has adopted it after incorporation and the contract is within the terms of incorporation.

LEGAL POSITION OF A PROMOTER

Erlanger v. New sombrero Phosphate Co.	A promoter is **neither an agent of, nor a trustee for**, the company because it is not in existence. But he occupies a **fiduciary position** in relation to the company and therefore requires full disclosure of the relevant facts, including any profit made.

Promoter, cannot make, either directly or indirectly, any profit at the expense of the company and that if he does make a profit in disregard of this rule, the company can compel him to account for it. The promoters can be compelled to surrender the secret profits.

DUTIES OF A PROMOTER

The **fiduciary duties** of a promoter are as under:-

(a) A promoter **cannot make either directly or indirectly, any profit at the expense of the company** he promotes, without the knowledge and consent of the company and that if he does so, in disregard of this rule, the company can compel him to account for it. In relation to disclosure it may be noted that part disclosure will also attract the same consequences.
A promoter is not forbidden to make profit but he is barred from making any secret profit.

(b) A promoter **is not allowed to derive a profit from the sale of his own property to the company unless all material facts are disclosed.** If a promoter contracts to sell his own property to the company without making a full disclosure, the company may either repudiate the sale or affirm the contract and recover the profit made out of it by the promoter.

(c) As per section 102, w**here as a result of the non-disclosure or insufficient disclosure** in any explanatory statement annexed to the notice of a general meeting, **any benefit accrues to promoter, director, manager or other key managerial personnel or their relatives,** either directly or indirectly, the promoter, director, manager or other key managerial personnel, as the case may be, shall hold such benefit in trust for the company, and shall, without prejudice to any other action being taken against him under this Act or under any other law for the time being in force, be liable to compensate the company to the extent of the benefit received by him.

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LIABILITIES OF PROMOTERS

A promoter is subject to the following liabilities under the various provisions of the Companies Act, 2013:¬

1. **Incorporation of company by furnishing false information:-** As per section 7, the promoters and the persons named as the first directors of the company and the persons making declaration shall be liable for fraud under section 447 if they are involved in Incorporation of company by furnishing false information.
2. The promoter(s) may be held liable for the non-compliance of the provisions of this **Section 26.** Section 26 prescribes disclosures be made in prospectus.
3. **Civil Liability for misstatements in prospectus:-** A promoter is liable for any misleading statement in the prospectus to a person who has subscribed for any securities of the company on the faith of the prospectus under section 35.
4. **Criminal Liability for misstatement in prospectus:** Besides civil liability, the promoters are criminally liable under Section 34 for the issue of prospectus containing untrue or misleading statements in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead.
5. **Punishment for fraudulently inducing persons to invest money:-** As per section 36, any person who, either knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or deliberately conceals any material facts, to induce another person to enter into, or to offer to enter into, (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting securities, shall be liable for punishment for fraud under section 447.
6. **Contravention of provisions relating to private placement:** If a company makes an offer or accepts monies in contravention of the provisions of private placement as stated in section 42, the company, its promoters and directors shall be liable for a penalty which may extend to the amount involved in the offer or invitation or two crore rupees, whichever is higher, and the company shall also refund all monies to subscribers within a period of thirty days of the order imposing the penalty.
7. A company may proceed against a promoter on action for deceit or breach of duty under **Section 340**, where the promoter has misapplied or retained any money or property of the company or is guilty of misfeasance or breach of trust in relation to the company.

RIGHT OF PROMOTERS

A promoter has **no legal right to claim promotional expenses** for his services unless there is a valid contract. Without such a contract **he is not even entitled to recover his preliminary expenses**.

However, when a promoter makes proper disclosure, he may expect to be rewarded for his efforts. **In practice a promoter is remunerated in any of the following ways:**

1. He may sell his own property to the company for cash or against fully paid shares in the company at an over valuation after making full disclosure to an independent Board of directors or to the intended shareholders.
2. He may be given an option to buy further shares in the company at par.
3. He may take commission on the shares sold.

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4. He may take a grant of some shares in the company.
5. He may be paid a lump-sum by the company.
6. The articles may provide for a fixed sum to be paid to him. Such a provision has no contractual effect and he cannot sue to enforce it, but if it is acted upon, the company cannot recover its money.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Descriptive Questions ----------
   a) Promoter's rights to receive preliminary expenses should have been enshrined in the articles of association.
   b) Online incorporation of companies within 24 hours is not possible..

2. Notes on the following:----------
   a) Remuneration of promoters
   b) Conclusive evidence

3. A promoter is neither an agent nor a trustee of the company, but he occupies a fiduciary in relation to the company. Discuss.

FROM ICSI MODULE

Answer the Following:-

1. Who is a promoter? Write a note on the duties and liabilities of promoters.
2. What are the remedies available to the Company against a promoter?
3. A promoter is not a trustee or agent for the company but he stands in a fiduciary position towards t." Discuss.
4 State the legal position of a promoter?
5. What are the remedies available to the company against the promoter?

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

7

FORMATION/ INCORPORATION OF COMPANY

Covering-

- Section Charts
- ABC Analysis
- Formation/Incorporation of a Company
- Procedural Aspects with Regards to Incorporation
- Application for availability of name of company
- Preparation of Memorandum and Articles of Association
- Filing of Documents with ROC.
- Issue of Certificate of Incorporation by Registrar
- COI to be Conclusive Evidence
- Allotment of Corporate Identity Number
- Preservation of Documents of Incorporation
- Punishment for Incorrect information at the time of incorporation
- Incorporation of company through 'RUN' &SPUCe
- Provisions specifically relating to incorporation of Companies with Objects Under Section 8.
- Issue of Licence
- Provisions specifically relating to incorporation of OPC
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (4 to 8)

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PROMOTERS/ INCORPORATION AND FORMATION OF COMPANIES

FORMATION/INCORPORATION/REGISTRATION OF A COMPANY

In terms of Section 3(1), a company may be formed for any lawful purpose by:-	**(a)**	Seven or more persons, where the company to be formed is to be a public company;
	(b)	Two or more persons, where the company to be formed is to be a private company; or
	(c)	One person, where the company to be formed is to be one person company that is to say, a private company, by subscribing their names or his name to a memorandum and complying with the requirements of this act in respect of registration.

A company formed under section 3(1) may be either—

(a) A company limited by shares; or

(b) A company limited by guarantee; or

(c) An unlimited company.

PROCEDURAL ASPECTS WITH REGARD TO INCORPORATION

PROCESS OF INCORPORATION OF COMPANY –HISTORY

Period :- (01.04.2014 to 30.04.2015)

PROCESS

Forms for Incorporation Company Introduced i.e:

INC-1 –Name Approval;
DIR-3 – Director Identification Number
INC-7 –Incorporation of Company
DIR-12 –Appointment of Directors
INC-22 –Registered Office of Company



Period :- (01.05.2015 TO 30.09.2016)

PROCESS

Integrated Incorporation Process in form **INC-29**. This form was 5 in one form.

Route of **INC-7** was also available.



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Period :- (01.10.2016 TO 26.01.2018)

PROCESS

A new form "SPICE" i.e. INC-32 (Specified Performa for Incorporation Company Electronically).

This form was one step ahead

to INC-29. E.g. Electronic MOA & AOA introduced in this Form. However, Company having both the way they can apply name in SPICE or apply name in INC-1 then can file Spice.

PAN & TAN application become mandatory as part of the SPICE.

INC-7 was also available for some specific purposes

W.e.f. :- (26.01.2018)

PROCESS

Following Alteration made by Central Government:

(i) New Process of Name Approval "RUN" notified and e-form INC-1 omitted.

(ii) INC-7 form omitted. Only way out for incorporation of Company is SPICE.

(iii) No ROC fees for Incorporation of Company up to 10 lack of authorized capital.

(iv) Updated version of SPICe notified.

INCORPORATION OF COMPANY THROUGH 'RUN' & SPICe"





On the Occasion of this **69th Republic Day**, **26thJanuary, 2018** Government of India has made a new start of Incorporating a Company through 2 Services:

A. RUN - Reserve Unique Name Service
B. SPICe - Simplified Performa for Incorporating Company electronically

A. RUN – Reserve Unique Name Service

KEY HIGHLIGHTS OF RUN FORM

1. DSC and DIN are not required for filing of RUN (Reservation of Unique Name)
2. Validity of Reserved Name:

   In case of New Companies

   Name shall be reserved for period of 20 days from the date of approval.

   In case of Existing Companies:

   Name shall be reserved for 60 days from approval date

   NOTE :- Approval of Name through "RUN" is an optional way. Companies can also Directly apply for the Name in SPICe form.

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3. Applying 6 Names through RUN is not possible as Only 1 name can be applied through Run.
4. Registrar, Central Registration Centre may allow re-submission of such application within fifteen days.*(Companies (Incorporation) Second Amendment Rules, 2018 Dated : 23rd March, 2018).*
5. Fees for filing of Name through RUN is ₹1000/ and if Rejected, then fresh filing for application of Name through RUN after payment of fees is being initiated.
6. Run form will be available after logging into MCA website and after login into the same Click on the RUN ICON and file application for the Reservation of Name. *(This form can't be download)*
7. **No ROC fees** for Incorporation of Company **up to Rs. 15 lack of authorized capital**.
8. Within 15 days the application may be rejected or approved.

Restriction on certain Undesirable names

According to section 4(2), the name stated in the memorandum of association shall not:-

(i) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(ii) be such that its use by the company:-

(a) Will constitute an offence under any law for the time being in force; or

(b) Is undesirable in the opinion of the central government.

Section 4(3) provides that without prejudice to the provisions of section 4(2), a company shall not be registered with a name which contains:-

(i) Any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(ii) Such word or expression, as may be prescribed, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

PROVIOUS APPROVAL OF THE CENTRAL GOVERNMENT FOR CERTAIN NAMES

SECTION 4(3)

Previous approval of the Central Government is required for

3. Any word or expression which is likely is to give the impression that the company is in any way connected with, or having the patronage of, the Central Government,any State Government or any State Government under any law for the time being in force; or
4. Such word or expression, as may be prescribed.

FOLLOWING WORDS SHALL BE USED IN NAME OF COMPANY ONLY WITH CG APPROVAL **RULE 8(6) of the Companies (Incorporation) Rules, 2014**	**1.** Board **2.** Commission **3.** Authority **4.** Undertaking **5.** Central **6.** Union **7.** Federal **8.** President **9.** Rashtrapati **10.** Municipal **11.** Nation **12.** Minister **13.** Prime minister **14.** Chief Minister Etc.

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B. SPICe–Simplified Performa for Incorporating Company electronically

Rule 38 of Companies (Incorporation) Rules, 2014, *(Added by Companies (Incorporation) Fourth Amendment Rules, 2016,* MCA's notification dated 01/10/2016*)*

SIMPLIFIED PROFORMA FOR INCORPORATION FOR INCORPORATING COMPANY ELECTRONICALLY (SPICe) - MEANING

SPICe means **Simplified Proforma for Incorporating Company Electronically.** MCA has notified simplified integrated process for incorporating a company in E-form INC-32 along with Memorandum Association in E-form INC-33 and Article of Association in E-form INC-34. So by this process MCA has simplified the procedure for incorporation of Company by introducing filing of pre-drafted Memorandum and Article of Association electronically, which will make work easier and also prove to **Ease of Doing Business.**

WHAT IS THE PURPOSE OF SPICE

To Provide better Platform to the Professionals and remove difficulties in day to day business and make sure that the professionals will carry their business in smooth and efficient manner.

WHICH COMPANY WILL BE APPLY UNDER SPICe

1. One Person Company.
2. Private Company.
3. Public Company
4. Incorporation of Seciton-8 Company.
5. Incorporation of Producer Company.

SIMPLIFIED PROFORMA FOR INCORPORATION FOR INCORPORATING COMPANY ELECTRONICALLY (SPICe) - FEATURES

1. The application for incorporation of a company under SPICe shall be in **FORM No. INC-32** (SPICe) alongwith **e-Memorandum of Association (e-MOA) in Form No. INC-33** and **e-Articles of Association (e-AOA) in Form No. INC-34.**

   Provided that in case of incorporation of a company falling under **section 8** of the Act, **FORM No. INC-32 (SPICe) shall be field alongwith FORM No. INC-13** (Memorandum of Association) and **FORM No. INC-31 (Articles of Association)** as attachments.

2. The application for **allotment of Director Identification Number upto three Directors, reservation of a name, incorporation of company** and **appointment of Directors** shall be field in **FORM No. INC-32 (SPICe),** with the Registrar, within whose jurisdiction the registered office of the company is proposed to be situated.

   Provided that where an applicant has applied for reservation of a name in **FORM INC-1** and which has been approved therein, he may fill the reserved name as proposed name of the company.

4. The promoter or applicant of the proposed company shall proposed **only one name** in FORM No. INC-32 (SPICe).

5. The promoter of applicant of the proposed company shall prepare Memorandum of Association (e-MOA) in FORM No. INC-33 and Articles of Association (e-AoA) in FORM No. INC-34.

   Provided that the subscribers and witness or witnesses shall affix their **digital signature** to the e-MoA and AoA.

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6. A company using the provisions of this rule may furnish verification of its registered office under section 12 of the Act by filing Form No. INC-32 (SPICe) in which case the company shall attach along with such FORM No. INC-32 (SPICe), any of the documents referred to in Rule 25.
7. FPRM No. INC-22 shall not be required to be filed in the case the proposed company maintains its registered office at the given correspondence address.
8. Minimum authorized and subscribed share capital required for an OPC is Rupee one or a private company having share capital is Rupees two and in case of a public company Rupees seven. At least one kind of share capital (Equity/ Preference) should be greater than zero in number of shares as well as amount of shares.
9. SPICe (INC-32) will mandatorily require application for both PAN and TAN also.
10. The Certificate of incorporation of company shall be issued by the Registrar in Form No. INC-11.

Single Window Form:

Earlier if a Person wants to incorporate Company then it has to apply for the DIN, Approval of the Name Availability, Separate form for first Director, Registered office address, PAN, TAN etc. But this form is a single window for Incorporation of Company.

This form can be used for the following purposes:

(a) Application of DIN (up to 3 Directors)
(b) Application for Availability of Name
(c) No need to file separate form for first Director (DIR-12)
(d) No need to file separate form for address of registered office (INC-22)
(e) No need to file separate form for PAN & TAN

DOCUMENTS REQUIRED FOR SPICe FORM INC-32

The following documents must be field with SPICe Form INC-32 for incorporation of company:-

1. Memorandum of Association – Applicable and mandatory only in case of Section 8 Company or company with foreign subscription not having DIN.
2. Articles of Association – Applicable and mandatory only in case of Section 8 company or company with foreign subscribe not having DIN.
3. The declaration shall be submitted by each of the subscribers to the memorandum and each of the first directors named in the articles in Form No.INC-9."-mandatory in all cases
4. Proof of office address.
5. Copies of utility bills that are not older than two months.
6. Copy of approval in case the proposed name contains any word(s) or expression(s) which requires approval from central government.
7. If the proposed name is based on a registered trademark or is subject matter of application pending for registration under the Trade Marks Act, then it is mandatory to attach the trademark registration certificate of trademark application copy.
8. NOC form the sole proprietor/partners/other associates/ existing company.
9. Proof of identity and residential address of the subscribers.
10. Proof of identity and residential address of directors.

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ADVANTAGES AND DISADVANTAGES OF INCORPORATION THROUGH 'RUN' & SPICE"

ADVANTAGES

(a) Concept of Ease of doing Business is more Strengthened
(b) Filing through SPICE is based on Concept of Zero fees
(c) Filing procedures is now more easy and simplified
(d) Reduced time

DISADVANTAGES

(a) Name preferability has been reduced from SIX to ONE
(b) If Name is not approved in SPICE, then documents and its stamp papers have to be revised accordingly.
(c) No Resubmission Chances are there in RUN.
(d) Fees is Still ₹ 1000/- for application of Name in RUN.

FAQs ON INCORPORATION THROUGH 'RUN' & SPICE"

Q. 1. How can I apply for a Company Name?

Ans. A proposed name can be reserved for the purpose of incorporation of a company or change of name of an existing company through the RUN service by logging into the MCA portal along with a fee of ₹ 1000/-.

Further, you may use the SPICe form for the integrated process of name reservation and incorporation of a company.

Q. 2. Can I apply for a company name online?

Ans. Yes, you can avail the RUN service at MCA portal for reserving a name online

Q. 3. What is the minimum number of directors required to form a company?

Ans. Minimum no. of directors for One Person Company: One, Private Limited Company: Two, for Public Limited Company: Three and, for producer company: Five.

Q. 4. What is the minimum number of subscribers required for registration of a company?

Ans. Minimum no. of subscribers for One Person Company: One, Private Limited Company: Two, for Public Limited Company: Seven and for Producer company: Ten.

Q. 5. What is the minimum Paid-up Capital at the time of registration of a company?

Ans. The minimum paid up capital at the time of registration of a company **shall be as follows:**

(a) One Person Company: ₹1/-
(b) Private Limited Company: ₹2/-
(c) Public Limited Company: ₹7/-

Q. 6. Whether there is need to file any separate form for PAN & TAN?

Ans. No need to file any separate form. Details in relation to Area Code and other details shall be mention in the form INC-32 itself and PAN & TAN shall be generate with Certificate of Incorporation.

Q. 7. What shall be the government fees for RUN?

Ans. As per Register office Fees Rules, Fees shall be ₹ 1,000/-

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Q. 8. Whether there is any requirement to mention details of Directors in the RUN?

Ans. No, there is no need to mention the name or number of proposed Directors in RUN.

Q. 9. How to file the SPICE form in case of more than 7 subscribers in the Company?

Ans. In case of incorporation of a company having more than 7 subscribers, MOA & AOA shall be filled with INC 32 in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34. (Means Physical attachment of MOA & AOA in e-form INC 32)

Q.10. Whether e-MOA & AOA can be file in case of MOA & AOA is signed by a person at a place outside of India?

Ans. In case of incorporation of a company where any of the subscribers of the MOA/AOA is signing at a place outside India, MOA & AOA shall be filled with INC 32 in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34. (Means Physical attachment of MOA & AOA in e-form INC 32)

Q.11. Whether Companies are required to make payment of Stamp Duty in case of incorporation of Company with authorized Capital of ₹ 10 Lakh or below?

Ans. Yes, Company has to pay the Stamp Duty. Because Stamp Duty is state matter. Companies Act, has given exemptions for the ROC fees not for the stamp duty.

ISSUE OF CERTIFICATE OF INCORPORATION BY REGISTRAR

Section 7(2) states that the Registrar on the basis of documents and information filed shall register all the documents and information and issue a certificate of incorporation in the prescribed form (**form INC.11**) to the effect that the proposed company is incorporated under this Act.

From the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued, by the said name. The subscribers would become the members of the company.

CASE LAW



COI TO BE CONCLUSIVE EVIDENCE

Moosa v. Ebrahim	A Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act.

ALLOTMENT OF CORPORATE IDENTITY NUMBER

Section 7(3) states that on and from the date mentioned in the certificate of incorporation issued the Registrar shall allot to the company a corporate identity number, which shall be a distinct identity for the company and which shall also be included in the certificate.

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PRESERVATION OF DOCUMENTS OF INCORPORATION

Section 7(4) states that the company shall maintain and preserve at its registered office copies of all documents and information as originally filed under sub-section (1) till its dissolution under this Act.

PUNISHMENT FOR FURNISHING FALSE OR INCORRECT INFORMATION AT THE TIME OF INCORPORATION

The Companies Act, 2013 imposes severe punishment for incorporation of a company by furnishing false or incorrect information.

The persons furnishing false or incorrect information shall be liable for following punishment:-

(i) **If any person** furnishes any false or incorrect particulars of any information or suppresses any material information, of **which he is aware** in any of the documents filed with the Registrar in relation to the registration of a company, he shall be punishable **for fraud under section 447.**

(ii) Without prejudice to the above liability, where, **at any time after the incorporation** of a company, it is proved that the company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company, or by any fraudulent action, the promoters, the persons named as the first directors of the company and the persons making declaration shall each be punishable for fraud under **section 447**.

Section 447 *provides that any person who is found to be guilty of fraud "involving an amount of at least ten lakh rupees or one per cent. of the turnover of the company, whichever is lower", shall be punishable with imprisonment for a term which shall not be less than* ***six months*** *but which may extend to* ***ten years*** *and shall also be liable to fine which shall not be less than the* ***amount involved*** *in the fraud, but which may extend to* ***three times*** *the amount involved in the fraud.*

Provided that where the fraud involves an amount less than ten lakh rupees or one per cent. of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.

However, where the fraud in question involves ***public interest****, the term of imprisonment shall not be less than* ***three years.***

AGILE (APPLICATION FOR GOODS AND SERVICES TAX IDENTIFICATION NUMBER, EMPLOYEES STATE INSURANCE CORPORATION REGISTRATION PLUS EMPLOYEES PROVIDENT FUND ORGANISATION REGISTRATION)

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

The application for incorporation of a company shall be accompanied by e-form **AGILE (INC-35)** containing an application for registration of the following numbers, namely:-

(a) GSTIN

(b) EPFO

(c) ESIC

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COMMENCEMENT OF BUSINESS

SECTION 10A

(1) A company incorporated after the commencement of the Companies (Amendment) Ordinance, 2018 and having a share capital shall not commence any business or exercise any borrowing powers unless—

(a) a declaration is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and

(b) the company has filed with the Registrar a verification of its registered office as provided in sub section (2) of section 12.

(2) If any default is made in complying with the requirements of this section, the company shall be liable to a penalty of fifty thousand rupees and every officer who is in default shall be liable to a penalty of one thousand rupees for each day during which such default continues but not exceeding an amount of one lakh rupees.

(3) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

PROVISIONS SPECIFICALLY RELATING TO INCORPORATION OF COMPANIES WITH CHARITABLE OBJECTS UNDER SECTION 8

1. *Rule 19 of Companies (Incorporation) Rules, 2014*

A person or an association of persons desirous of incorporating a company with **limited liability** under section 8 without the addition to its name of the word "Limited", or as the case may be, the words "Private Limited", shall make an application in **Form No.INC.12** along with the prescribed fee to the **Registrar for a license** under section 8.

The **memorandum of association** of the proposed company shall be in **Form No.INC.13**.

Attachment with application;-

The application shall be accompanied by the following documents, namely:-

(a) the draft memorandum and articles of association of the proposed company;

(b) the **declaration** in **Form No.INC.14** by an Advocate, a Chartered Accountant, Cost Accountant or **Company Secretary in practice**, that the draft memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

(c) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;

(d) the **declaration** by each of the persons making the application in **Form No. INC.15.**

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2. *Rule 20 -License for existing companies(conversion):-*

A limited company registered under this Act or under any previous company law, with any of the objects specified in section 8 and which is desirous of being registered under section 8, without the addition to its name of the word "Limited" or as the case may be, the words "Private Limited", shall make an application in **Form No.INC.12** along with the prescribed fee to the Registrar for a licence under section 8.

Attachment with application;-

The application shall be accompanied by the following documents, namely:-

(a) The memorandum and articles of association of the company;

(b) The declaration as given in **form no.INC.14** by an advocate, a chartered accountant, cost accountant or company secretary in practice, that the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

(c) For each of the two financial years immediately preceding the date of the application, or when the company has functioned only for one financial year, for such year **(i)** the financial statements, **(ii)** the board's reports, and **(iii)** the audit reports, relating to existing companies;

(d) A statement showing in detail the assets (with the values thereof), and the liabilities of the company, as on the date of the application or within thirty days preceding that date;

(e) An estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;

(f) The certified copy of the resolutions passed in general/ board meetings approving registration of the company under section 8; and

(g) A declaration by each of the persons making the application in **form no.INC. 15**.

The company shall, within a week from the date of making the application to the Registrar, publish a notice at his own expense, and a copy of the notice, as published, shall be sent forthwith to the Registrar and the said notice shall be in **Form No. INC.26** and shall be published-

(a) At least once in a **vernacular newspaper** in the principal vernacular language of the district in which the registered office of the proposed company is to be situated or is situated, and at least once in English language in an **English newspaper** circulating in that district; and

(b) On the **websites** as may be notified by the Central Government.

ISSUE OF LICENCE

The Registrar shall, after considering the objections, if any, received by it **within thirty days** from the date of publication of notice, and after consulting any authority, regulatory body, Department or Ministry of the Central Government or the State Government(s), as it may, in its discretion, decide whether the license should or should not be granted.

The **licence shall be in Form No.INC.16. or Form No.INC.17,** as the case may be, and the Registrar shall have power to include in the licence such other conditions as may be deemed necessary by him.

The Registrar may direct the company to insert in its memorandum, or in its articles, or partly in one and partly in the other, such conditions of the license as may be specified by the Registrar in this behalf.

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PROVISIONS SPECIFICALLY RELATING TO INCORPORATION OF ONE PERSON COMPANY

NOMINATION BY THE SUBSCRIBER OR MEMBER OF ONE PERSON COMPANY

According to the section 3, the memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the **prescribed form (INC-3)**, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.

Rule 4(2) of Companies (Incorporation) Rules, 2014 states that subscriber of memorandum of one person company shall nominate such person in **SPICe form 32** and the nominee's consent is to be obtained in **INC 3.**

Only a natural person who is an **Indian citizen and resident in India**, *(i.e., a person who has stayed in India for a period of not less than **one hundred and eighty two days** during the immediately preceding one calendar year)* shall be eligible to incorporate a One Person Company and a nominee for the sole member of a One Person Company.

WITHDRAWAL OR DEATH OF NOMINEE OR MEMBER OF OPC

(a) The person nominated by the subscriber or member of a One Person Company may, withdraw his consent by giving a notice in writing to such sole member and to the One Person Company

(b) The sole member shall nominate another person as nominee within **fifteen days** of the receipt of the notice of withdrawal and shall send an intimation of such nomination in writing to the Company, along with the written **consent** of such other person so nominated in **Form No. INC.3**.

(c) The company shall within **thirty days** of receipt of the notice of withdrawal of consent file with the Registrar, a notice of such withdrawal of consent and the intimation of the name of another person nominated by the sole member in **Form No INC.4** along with fee as provided in the Companies (Registration offices and fees) Rules, 2014 and the written **consent** of such another person so nominated in **Form No. INC.3**.

CHANGE OF NOMINEE BY SOLE MEMBER

The subscriber or member of a One Person Company may, by intimation in writing to the company, change the name of the person nominated by him at any time for any reason including in case of death or incapacity to contract of nominee and nominate another person after obtaining the prior consent of such another person in **Form No INC.3.**

The company shall, on the receipt of such intimation, file with the Registrar, a notice of such change in **Form No INC.4** along with fee as provided in the Companies (Registration offices and fees) Rules, 2014 and with the written consent of the new nominee in **Form No.INC. 3** within **thirty days** of receipt of intimation of the change.

*According to section 3 any such change in the name of the nominee **shall not be deemed to be an alteration of the memorandum.***

DEATH OF SOLE MEMBER

Where the sole member of One Person Company ceases to be the member in the event of death or incapacity to contract and his nominee becomes the member of such One Person Company, such new member shall nominate within **fifteen days** of becoming member, a person who shall in the event of his death or his incapacity to contract become the member of such company.

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The company shall file with the Registrar an intimation of such cessation and nomination in **Form No INC.4** along with the fee as provided in the Companies (Registration offices and fees) Rules, 2014 within **thirty days** of the change in membership and with the prior written **consent** of the person so nominated in **Form No.INC. 3**.

ADDITION OF 'OPC" IN NAME OF COMPANY

As per section 12 relating to painting, affixing of details of name, Registered office etc. outside every office or place of business, states that the words ''One Person Company'' shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

ACTIVE COMPANY TAGGING IDENTITIES AND VERIFICATION (ACTIVE)

Rule 25A of the Companies (Incorporation) Rules, 2014

(1) Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE on or before**15.06.2019**

1. Provided that any company which has not filed its due financial statements under section 137 or due annual returns under section 92 or both with the Registrar shall be restricted from filing e-Form-ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on theregister:
2. Provided further that companies which have been struck off or are under process of striking off or under liquidation or amalgamated or dissolved, as recorded in the register, shall not be required to file e-FormACTIVE:
3. Provided also that in case a company does not intimate, the said particulars,the Company shall be marked as "**ACTIVE-non-compliant"** on or after16th June, 2019 and shall be liable for action
4. Provided also that no request for recording the following event based information or changes shall be accepted by the Registrar from such companies marked as "ACTIVE-non-compliant", unless " e-Form ACTIVE" is filed –
   (i) SH-07 (Change in Authorized Capital);
   (ii) PAS-03 (Change in Paid-up Capital);
   (iii) DIR-12 (Changes in Director);
   (iv) INC-22 (Change in RegisteredOffice);
   (v) INC-28 (Amalgamation,de-merger)

(2) Where a company files "e-Form ACTIVE", on or after 16th June, 2019, the company shall be marked as **"ACTIVE Compliant",on payment of fee of ten thousand rupees**

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[Pursuant to sections 4, 7, 8(1), 12, 152 and 153 of the Companies Act, 2013 read with rules made thereunder] - FORM NO. INC-32

SPICe

(Simplified Proforma for Incorporating Company Electronically)

◉ English ○ Hindi

Refer the instruction kit for filing the form.

*Whether name is already approved by Registrar of Companies ○ Yes ○ No

1. (a) *State the type of company

(b) *State the class of company ○ Public ○ Private ○ One Person Company

(c) *State the category of company

(d) *State the sub-category of company

(e) *Whether proposed company is an IFSC company ○ Yes ○ No

(f) *Company is ○ Having share capital ○ Not having share capital

2. (a) *Main division of industrial activity of the company

Description of the main division

(b) Whether Articles of Association is entrenched ○ Yes ○ No

4. (a) *Correspondence address

*Line I	
*Line II	
*City	
*State/Union Territory	*Pin code
*District	
*Phone (with STD code)	-
Fax	
*email ID of the company	

(b) *Whether the address for correspondence is the address of registered office of the company ○ Yes ○ No

(c) *Name of the office of the Registrar of Companies in which the proposed company is to be registered

5. ***Particulars of the proposed or approved name**

(a) Proposed or approved name

6. (a) *Number of first subscriber(s) to MOA and directors of the company

	Having valid DIN	Not having valid DIN
Total number of first subscribers (non-individual + individual)		
Number of non-individual first subscriber(s)		
Number of individual first subscriber(s) cum director(s)		
Total number of directors (director(s) who is/are not subscriber(s) + subscriber(s) cum director(s) as mentioned in above Row no. 3)		

8. Particulars of payment of stamp duty

(a) State or Union territory in respect of which stamp duty is paid or to be paid Pre-Fill

(b) *Whether stamp duty is to be paid electronically through MCA21 system ◯ Yes ◯ No ◯ Not applicable

(i) Details of stamp duty to be paid

Type of document/Particulars	Form	Memorandum of association	Articles of association
Amount of stamp duty to be paid			

(ii) Provide details of stamp duty already paid

Type of document/Particulars	Form	Memorandum of association	Articles of association	Others
Total amount of stamp duty paid(in Rs.)				
Mode of payment of stamp duty				
Name of vendor or Treasury or Authority or any other competent agency authorised to collect stamp duty or to sell stamp papers or to emboss the documents or to dispense stamp vouchers on behalf of the Government				
Serial number of embossing or stamps or stamp paper or treasury challan number				
Registration number of vendor				
Date of purchase of stamps or stamp paper or payment of stamp duty (DD/MM/YYYY)				
Place of purchase of stamps or stamp paper or payment of stamp duty				

9. *Additional Information for applying Permanent Account Number (PAN) and Tax Deduction Account Number (TAN)

Information specific to PAN

Area code	AO type	Range code	AO No.

Information specific to TAN

Area code	AO type	Range code	AO No.

Source of Income

☐ Income from Business/profession ☐ Capital Gains ☐ Income from house property
☐ Income from other source ☐ No Income

Business/Profession code

10. ^Additional Information for Employer registration under Employee State Insurance Corporation (ESIC)

Type of Unit ◯ Factory ◯ Establishment

Exact nature of Work/ Business carried on

Work Sub category

11. ^Does the Employees Provident Fund and Miscellaneous Provisions Act 1952 apply to the establishment ◯ EFP and MP Act ◯ Voluntary Coverage

12. ^Number of employees to be covered under Employees Provident Fund Act

13. ^Number of Employees earning wages less than Rupees fifteen thousand employed directly or through contractor to be covered under Employees State Insurance Act

14. ^Do you need Importer Exporter code ◯ Yes ◯ No

15. ^Particulars of Investment

INVESTMENT	Proposed amount (in Rupees)
a) land (for rented premises, capitalised value of the same to be indicated)	
b) building	
c) plant and machinery	
I indigenous	
II import	
(A) cif value	
(B) landed cost	
(III) Total [(I) + (II)(B)]	

^ The information in Serial number 10-15 are mandatorily required for Employees State Insurance Corporation registration, Employee Provident Fund , Employees State Insurance registration, Importer Exporter Code Registration in case of applicants desirous of applying for these services at the time of incorporation of a company and this facility is available at e-Biz Portal only as per separate procedure prescribed by e-Biz Portal. These services (Serial number 10-15) will not be available for forms filed on MCA21 Portal and no cognizance will be taken of entries in those fields if the form is filed on MCA21 Portal.

Attachments

List of attachments

1. *Memorandum of association — Attach
2. * Articles of Association — Attach
3. *Declaration by first subscriber(s) and director(s) (Affidavit is not required to be attached) — Attach

Remove attachment

22. Optional attachment(s), (if any) — Attach

Declaration

☐ *I [ ]

a person named in the articles as a director of the company has been duly authorized by the promoters of the company to sign this form and declare that all the requirements of the Companies Act, 2013 and the rules made thereunder in respect of Director Identification Number (DIN), registration of the company and matters precedent or incidental thereto have been complied with.

☐ I am authorized by the promoter subscribing to the Memorandum of Association and Articles of Association and the first director(s) to give this declaration and to sign and submit this Form.

☐ I further declare that, company shall not commence its business, unless all the required approval from the sectoral Regulators such as RBI, SEBI etc. have been obtained.

☐ *I, on behalf of all the first director(s) named in the Articles of Association of the proposed company, solemnly declare, that the declaration given herein as stated above are true to the best of my knowledge and belief, the information given in this integrated application form for incorporation and attachments thereto are correct and complete, and nothing relevant to this form has been suppressed. All the required attachments have been completely, correctly and legibly attached to this form and are as per the original records maintained by the promoters subscribing to the Memorandum of Association and Articles of Association.

☐ *

has been engaged to give declaration under section 7(1) (b) and such declaration is attached.

Note: Attention is drawn to the provisions of sections 7(5) and 7(6) which, inter-alia, provides that furnishing of any false or incorrect particulars of any information or suppression of any material information shall attract punishment for fraud under section 447. Attention is also drawn to provisions of section 448 and 449 which provide for punishment for false statement and punishment for false evidence respectively.

*To be digitally signed by director

*DIN / PAN

Declaration and certification by professional

I

having office at *

Who is engaged in the formation of the company declare that I have been duly engaged for the purpose of certification of this form. It is hereby also certified that I have gone through the provisions of the Companies Act, 2013 and rules thereunder for the subject matter of this form and matters incidental thereto and I have verified the above particulars (including attachment(s)) from the original/certified records maintained by the applicant which is subject matter of this form and found them to be true, correct and complete and no information material to this form has been suppressed. I further certify that;

(i) the draft memorandum and articles of association have been drawn up in conformity with the provisions of sections 4 and 5 and rules made thereunder; and
(ii) all the requirements of Companies Act, 2013 and the rules made thereunder relating to registration of the company under section 7 of the Act and matters precedent or incidental thereto have been complied with. The said records have been properly prepared, signed by the required officers of the Company and maintained as per the relevant provisions of the Companies Act, 2013 and were found to be in order;
(iii) I have opened all the attachments to this form and have verified these to be as per requirements,complete and legible;
(iv) I further declare that I have personally visited the premises of the proposed registered office given in the form at the address mentioned herein above and verified that the said proposed registered office of the company will be functioning for the business purposes of the company (wherever applicable in respect of the proposed registered office has been given).
(v) It is understood that I shall be liable for action under Section 448 of the Companies Act, 2013 for wrong certification, if any found at any stage.

Addl. Pages Charts and Additional Writing
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* ○ Chartered Accountant (in whole-time practice) or ○ Cost Accountant (in whole-time practice) or

○ Company Secretary (in whole-time practice) ○ Advocate

Modify | Check Form | Pre-scrutiny | Submit

For office use only:

Affix stamp and filling details

eForm Service request number (SRN) eForm filing date (DD/MM/YYYY)

This e-Form is hereby registered

Digital signature of the authorising officer

Date of signing (DD/MM/YYYY)

SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

Answer the Following:-

1. What does 'conclusive evidence' means in relation to certificate of incorporation? Discuss the same citing case laws?
2. What steps are required to be taken for the formation of a public limited company?
3. What is the punishment for incorporation of companies by furnishing false or incorrect information?

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

8

CONTRACTS AND CONVERSION OF COMPANIES

Covering-

- Section Chart
- Preliminary Contracts / Pre-incorporation Contracts
- Common Seal
- Conversion of a Private Company into a Public Company and Vice Versa
- Conversion of Sec. 8 Co. into a Company of any other kind
- Conversion of OPC into a Public Company or Pvt. Company
- Conversion of Pvt. Co. into OPC
- Conversion of Company into LLP
- Conversion LLP into Company
- Advance you knowledge
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (1 to 5)

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N.K.J - SECTION CHART

Section	Short Description
Section 8	Formation of Companies with charitable objects etc.
Section 14	Alteration of Article of Association
Rule	Companies (Incorporation) Rules, 2014

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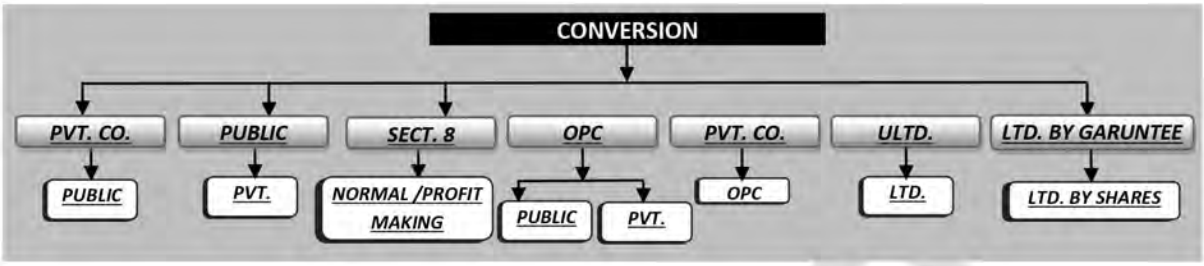

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CONTRACTS AND CONVERSION OF COMPANIES

PRELIMINARY CONTRACTS/ PROMOTERS CONTRACT / PRE-INCORPORATION CONTRACTS

Preliminary contracts are contracts purported to be made on behalf of a company before its incorporation.

When the company is being formed, the promoters, purporting to act on behalf of the company, enter into contracts for the purchase of property, or for securing the services of managers or other experts. Such contracts are known as preliminary contracts and they are made before the incorporation of the company.

PRELIMINARY CONTRACT – RATIFICATION/ NOVATION

A promoter is personally liable to third parties upon all contracts made on behalf of the intended company, until with their consent, the company takes over this liability.

The company could not ratify contract made by a promoter before its incorporation.

Specific performance of a contract may be enforced against a company in respect of contracts entered into by promoters on behalf of the company, if such a **contract is warranted by the terms of incorporation** and the **company has accepted the contract** and **communicated the acceptance to the other party**. Other party can also enforce the contract if the company has adopted it after incorporation and the contract is within the terms of incorporation.

COMMON SEAL

Since a body corporate is not a living person who can sign, therefore every company should necessarily have an instrument known as common seal which is used for making a physical impression to act as its signature on certain important documents.

Pursuant to Section 12(3), every company shall have its name engraved in legible characters on its seal. The seal should be made of metal.

The following deeds and contracts can be made under the seal of the company:-

(i) Power of attorney which would be required to be made in favour of aperson to execute the deeds on behalf of the company in any place either in or outside India;
(ii) Share certificates;
(iii) Share warrants;
(iv) Any deed as required by the Articles.

However vide Companies (amendment) Act, 2015 the use of common seal had been made optional.

CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY AND VICE VERSA

Section 14 (1) states that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of—

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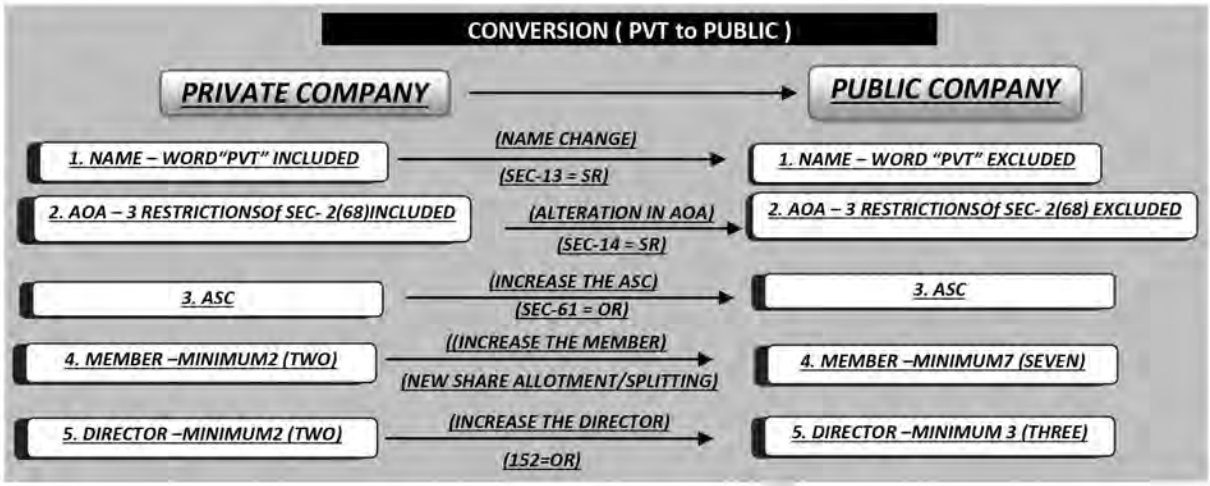

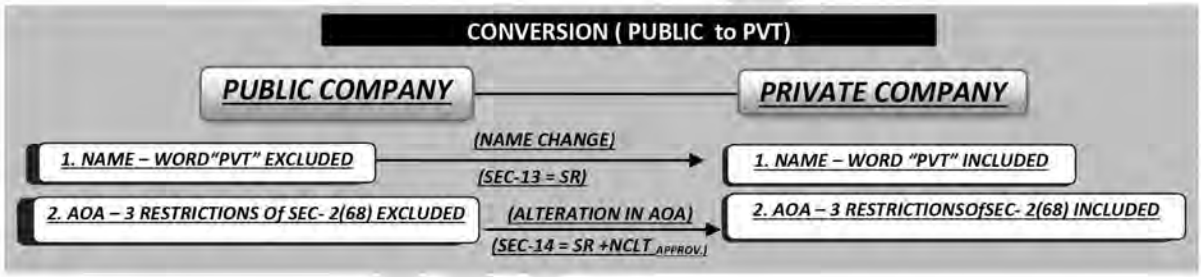

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(a) a private company into a public company; or
(b) a public company into a private company:

CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY

When a company being a private company alters its articles in such a manner that they no longer include any of the three restrictions and limitations which are required to be included in the articles of a private company under section 2(68), the company shall, as from the date of such alteration, cease to be a private company.

It also ceases to have the privileges and exemptions conferred on it by the Act as a private company. It becomes a public company and all the provisions of the Act applicable to such companies become applicable to it.

PRIVATE COMPANY (WHICH IS A SUBSIDIARY OF PUBLIC COMPANY) DEEMED TO BE A PUBLIC COMPANY

Under proviso to section 2(71) of the Companies Act, 2013, a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

CONVERSION OF A PUBLIC COMPANY INTO A PRIVATE COMPANY

The second proviso to Section 14 states that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the central government which shall make such order as it may deem fit.

The second proviso to Section 14 states that any alteration having the effect of conversion of a public company into a private company shall not take effect except with the approval of the Tribunal which shall make such order as it may deem fit.

Section 14(2) states that every alteration of the articles under this section and a copy of the order of the Tribunal approving the alteration as per sub-section *(1)* shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same.

Rule 33 of Companies (Incorporation) Rules 2014

(1) For effecting the conversion of a private company into a public company or vice versa, the application shall be filed in **Form No.INC.27** with fee.
(2) A copy of order of the competent authority approving the alteration shall be filed with the Registrar in **Form No. INC.27** with fee together with the printed copy of the altered articles within fifteen days of the receipt of the order from the Central Government.

CONVERSION OF SECTION 8 COMPANY INTO A COMPANY OF ANY OTHER KIND

Section 8(4) provides that a company registered under section 8 i.e. companies with charitable objects may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

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Rule 21 and 22 of Companies (Incorporation) Rules 2014

(1) A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a **special resolution** at a general meeting for approving such conversion.

(2) Certified copy of Special Resolution to be filed in **Form No MGT-14.**

(3) The company shall file an application in **Form No.INC.18** with the Regional Director along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for converting itself into a company of any other kind and the company shall also attach the proof of serving of the notice served to all the authorities prescribed.

(4) A copy of the application with annexures as filed with the Regional Director shall also be filed with the Registrar.

(5) The company shall, within a week from the date of submitting the application to the Regional Director, publish a notice at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in **Form No. INC.19** and shall be published-

- **(a)** at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district; and
- **(b)** on the website of the company, if any, and as may be notified or directed by the Central Government.

(6) The copy of proof of serving such notice shall be attached to the application.

(7) The company shall attach with the application a certificate from practicing Chartered Accountant or Company Secretary in practice or Cost Accountant in practice certifying that the conditions laid down in the Act and these rules relating to conversion of a company registered under section 8 into any other kind of company, have been complied with.

(8) On receipt of the application, and on being satisfied, the Regional Director shall issue an order approving the conversion of the company into a company of any other kind.

(9) On receipt of the approval of the Regional Director,:-

- **(i)** the company shall convene a general meeting of its members to pass a special resolution for amending its memorandum of association and articles of association as required under the Act consequent to the conversion of the section 8 company into a company of any other kind;
- **(ii)** the Company shall thereafter file with the Registrar.-
  - **(a)** a certified copy of the approval of the Regional Director within thirty days from the date of receipt of the order in **Form No.INC.20** along with the fee;
  - **(b)** amended memorandum of association and articles of association of the company.
  - **(c)** a declaration by the directors that the conditions, if any imposed by the Regional Director have been fully complied with.

(10) On receipt of the documents referred above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

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CONVERSION OF ONE PERSON COMPANY INTO A PUBLIC COMPANY OR PRIVATE COMPANY

Rule 6 of Companies (incorporation) Rules, 2014

(1) When the paid up share capital of an One Person Company **exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees,** it shall cease to be entitled to continue as a One Person Company and shall be required to convert itself, **within six months of the date on which its paid up share capital is increased** beyond fifty lakh rupees or the last day of the relevant period during which its average annual turnover exceeds two crore rupees as the case may be, into either a private company with minimum of two members and two directors or a public company with at least of seven members and three directors.

(2) The One Person Company shall alter its memorandum and articles by passing a resolution to give effect to the conversion and to make necessary changes incidental thereto.

(3) The One Person Company shall within period of sixty days from the date of applicability, give a notice to the Registrar in **Form No.INC.5** informing that it has ceased to be a One Person Company and that it is now required to convert itself into a private company or a public company by virtue of its paid up share capital or average annual turnover, having exceeded the threshold limit.

(4) A One Person company can get itself converted into a Private or Public company after increasing the minimum number of members and directors to two or minimum of seven members and two or three directors as the case may be, and by maintaining the minimum paid-up capital as per requirements of the Act for such class of company.

CONVERSION OF PRIVATE COMPANY INTO OPC

Rule 7 of Companies (incorporation) Rules, 2014

(1) A private company other than a company registered under section 8 of the Act having paid up share capital of **fifty lakhs rupees or less or average annual turnover during the relevant period is two crore rupees or less** may convert itself into one person company by passing a special resolution in the general meeting.

(2) Before passing such resolution, the company shall obtain **No objection in writing from members and creditors.**

(3) The one person company shall file copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in **Form No. MGT.14**.

(4) The company shall file an application in **Form No.INC.6** for its conversion into One Person Company by attaching the following documents, namely:-

- **(i)** The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid up share capital company is fifty lakhs rupees or less or average annual turnover is less than two crores rupees, as the case may be;
- **(ii)** the list of members and list of creditors;
- **(iii)** the latest Audited Balance Sheet and the Profit and Loss Account; and
- **(iv)** the copy of No Objection letter of secured creditors.

(5) On being satisfied and complied with requirements stated herein the Registrar shall issue the Certificate.

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CONVERSION OF UNLIMITED LIABILITY COMPANY INTO A LIMITED LIABILITY COMPANY BY SHARES OR GUARANTEE

Rule 37 of Companies (Incorporation) Rules, 2014, ***(Added by Companies (Incorporation) Third Amendment Rules, 2016)***

(1) For effecting the conversion of an unlimited liability company with or without share capital into limited liability company by shares or guarantee, such a company shall pass a **special resolution** in a general meeting and thereafter, **an application shall be filed in Form No. INC-27.**

(2) The Company shall within **seven days** from the date of passing of the special resolution in a general meeting, **publish a notice, in Form No. INC-27A** of such proposed conversion in two **newspapers** (one in English and one in vernacular language) in the district in which the registered office of the company is situate and shall also place the same on the **website** of the Company, if any, indicating clearly the proposal of conversion of the company into a company limited by shares or guarantee, and **seeking objections** if any, from the persons interested in its affairs to such conversion and cause a copy of **such notice to be dispatched to its creditors and debentures holders** made as on the date of notice of the general meeting by registered post or by speed post or through courier with proof of dispatch. The notice shall also state that the **objections, if any, may be intimated to the Registrar and to the company within twenty-one days of the date of publication of the notice**, duly indicating nature of interest and grounds of opposition.

(3) The Company shall within **forty five days of passing of the special resolution** file an application for its conversion into a company limited by shares or guarantee by attaching the following documents, namely:-

a. notice of the general meeting along with explanatory statement;

b. copy of the resolution passed in the general meeting;

c. copy of the newspaper publication;

d. a copy of altered Memorandum of Association as well as Articles of Association duly certified by any one of the Directors duly authorised in this behalf or Company Secretary of the Company, if any.

e. declaration signed by not less than two Directors of the Company, including Managing Director, if any, that such conversion shall not affect any debts, liabilities, obligations or contracts incurred or entered into by or on behalf of the Company before conversion.

f. a complete list of creditors and debenture holders, to whom individual notices have been sent.

g. a declaration signed by not less than two Directors of the Company, one of whom shall be a Managing Director where there is one, to the effect that they have made a full enquiry into the affairs of the Company and, having done so, have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list of the debts or claims payable on a contingency are proper estimates of the values of such debts and claims and that there are no other debts or claims against the company to their knowledge.

h. a declaration of solvency signed by at least two Directors of the Company, one of whom shall be the Managing Director, where there is one to the effect that the Board of Directors of the Company have made a full inquiry into the affairs of the company, as a result of which they have formed an opinion that it is capable of meeting its liabilities and **will not be rendered insolvent within a period of one year from the date of declaration**, through a resolution, passed in a duly convened meeting or by circulation.

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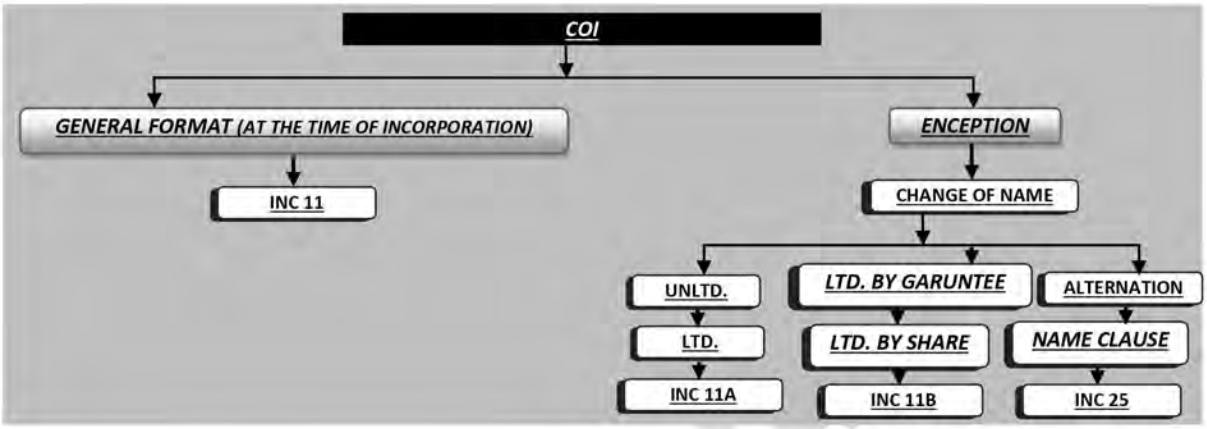

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i. The company shall also obtain a certificate from the Auditors that the company is solvent and that it is a going concern as on the date of passing of resolution by the Board certifying solvency.

j. No Objection Certificate from sectoral regulator, if applicable.

k. No Objection Certificate from all secured creditors, if any.

(4) Declaration signed by not less than two Directors including Managing Director, where there is one, that no complaints are pending against the company from the members or investors and no inquiry, inspection or investigation is pending against the company or its Directors or officers.

(5) The Registrar shall, after considering the application and objections if any, received by the Registrar and after ensuring that the company has satisfactorily addressed the objections received by the company, suitably decide whether the approval for conversion should or should not be granted.

(6) The **certificate of incorporation** consequent to conversion of unlimited liability company to into a company limited by shares or guarantee be in **Form INC-11A** issued to the company upon grant of approval for conversion.

(7) Conditions to be complied with, subsequent to conversion-

(1) Company shall not change its name for a period of one year from the date of such conversion.

(2) The company shall not declare or distribute any dividend without satisfying past debts, liabilities, obligations or contracts incurred or entered into before conversion.

(8) An Unlimited Liability Company shall not be eligible for conversion into a company limited by shares or guarantee in case-

(a) its networth is negative, or

(b) an application is pending under the provisions of the Companies Act 1956 or the Companies Act, 2013 for striking off its name, or

(c) the company is in default of any of its Annual Returns or financial statements under the provisions of the Companies Act, 1956 or the Companies Act, 2013, or

(d) a petition for winding up is pending against the company, or

(e) the company has not received amount due on calls in arrears, from its directors, for a period of not less than six months from the due date; or

(f) an inquiry, inspection or investigation is pending against the company.

(9) The Registrar of Companies shall take a decision on the application filed under these rules within **thirty days** from the date of receipt of application complete in all respects.

CONVERSION OF A COMPANY LIMITED BY GUARANTEE INTO A COMPANY LIMITED BY SHARES

Rule 39 of Companies (Incorporation) Rules, 2014, ***(Added by Companies (Incorporation) Fourth Amendment Rules, 2016)***

(1) A company other than a company registered section 8 of the Companies Act, 2013 may convert itself into a company limited by shares.

(2) The company seeking conversion shall have a share capital equivalent to the guarantee amount.

(3) A **special resolution** is passed by its members authorising such a conversion omitting the guarantee clause in its Memorandum of Association and altering the Articles of Association to provide for the articles as are applicable for a company limited by shares.

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(4) A copy of the special resolution shall be filed with the Registrar of Companies in Form no. **MGT- 14** within thirty days from the date of passing of the same along with fee as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.

(5) An application in **Form No. INC-27** shall be filed with the Registrar of Companies within thirty days from date of the passing of the special resolution enclosing the altered Memorandum of Association and altered Articles of Association and a list of members with the number of shares held aggregating to a minimum paid up capital which is equivalent to the amount of guarantee hither to provided by its members.

(6) The Registrar of Companies shall take a decision on the application filed under these rules within thirty days from the date of receipt of application complete in all respects and upon approval of Form No. INC-27, the company shall be issued with a **certificate of incorporation** in **Form No. INC-11B**.".

CONVERSION OF COMPANY INTO LLP

Any existing private company or existing unlisted public company can be converted into LLP by complying with the Provisions of clause 58 and Schedule III and IV of the LLP Act. Form 18 needs to be filed with the registrar along with Form 2 for such conversion.

1. **Obtain Din**

   Obtain DIN for those designated partners who don't posses DIN already.

2. **Board Meeting**

(a) Call meeting of board of Director.
(b) Pass Resolution for Conversion of Company into LLP.
(c) Pass Resolution to authorize any director to Apply for Name of LLP.

3. **Application for Name Availability**

   (a) File e-form LLP-1 with ROC.

   Attachments: Board Resolution Board resolution passed by the Company approving the conversion into LLP shall be attached with the aforesaid form

4. **Obtain name Approval Certificate from ROC**

5. **Drafting of limited liability partnership agreement:**
   Contents of Agreement are:

(a) Name of LLP
(b) Name of Partners & Designated Partners
(c) Form of contribution
(d) Profit Sharing ratio
(e) Rights & Duties of Partners
(f) Proposed Business
(g) Rules for governing the LLP

It is not necessary to have the LLP Agreement signed at the time of incorporation, as the details of the same needs to field in e-form 3 within 30 days of incorporation but in order to avoid any dispute between the partners as to the terms & conditions of the agreement after the conversion into LLP.

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6. **Filling of Incorporation Documents:**

File **E-Form- 2** with ROC along with following **ATTACHMENTS:**

(a) Proof of Address of Registered office of LLP.

(b) Subscription sheet signed by the promoters. (Notice of Consent & Appointment of Designated

(c) Partners with their personal details)

(d) Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner

7. **Filling of application for conversion:**

8. **File E-FORM- 18** with ROC along with following **Attachments**:

(a) Statement of shareholders.
(b) Incorporation Documents & Subscribers Statements in Form 2 filed electronically.
(c) Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.
(d) List of all the Secured creditors along with their consent to the conversion.
(e) Approval of the governing council (In case of professional private limited companies)
(f) NOC from Income Tax authorities and Copy of acknowledgement of latest income tax return.
(g) Approval from any other body/authority as may be required.
(h) Particulars of pending proceedings from any court/Tribunal etc.

After all formalities and filings been complied with by the applicants and approved by theMinistry, REGISTRAR OF LLP TO ISSUE A CERTIFICATE OF REGISTRATION in form no. 19 as to conversion of the LLP. The Certificate of Registration issued shall be the conclusive evidence of conversion of the LLP.

9. **Filling of E-Form-3:**

This form provides information in respect to the LLP Agreement entered into between the partners.

Attachment: LLP Agreement

10. **Certificate of incorporation as LLP form Roc.**

CONVERSION OF LLP INTO COMPANY

Several businesses started in India as Limited Liability Partnership (LLP), may now wish to convert into a private limited company for more growth in business or for infusing equity capital. An LLP can be converted into a Pvt. Ltd. company as per the provisions contained in Section 366 of the Companies Act, 2013 and Company (Authorised to Registered) Rules, 2014.

This step can be initiated in 2 ways as enumerated below:

(i) Incorporation of a new corporate entity.
(ii) Conversion of existing entity (e.g. LLP/ Partnership Firm) into a Company.

1. Incorporation of a new corporate entity.

There is option available for the LLP which is to establish a separate private limited company and after that get the whole business transferred to the private company with the help of a written agreement.

However, in this situation, there is a levy of capital gain tax. Moreover, stamp duty implication is also applicable to such transfer.

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2. Conversion of existing entity (e.g. LLP/ Partnership Firm) into a Company.

Ministry of Corporate Affairs has passed a notification on 31st May, 2016 in such notification its allowed conversion of LLP into Company. These rules called as "the Companies Authorized to register Amendment Rules, 2016.

However, there are various requirements which need to be satisfied for converting an LLP into a Private Limited Company, for instance, an LLP must have at least 7 partners (however as per Companies Amendment Act, 2017 LLP with 2 partners can be convert into Company), approval from all the partners is required, advertisement in newspaper is to be done in a local and a national newspaper, a No Objection Certificate (NOC) is required from the ROC where such LLP is registered.

Process for Conversion

Approval of name

Hold a meeting of the partners to take assent of majority of its members summoned for the purpose of registering the LLP under Section 366 of the Companies Act, 2013.
One of the major advantages is that the business can be run under the same name as that of the LLP except that in addition to the name of the LLP the words 'limited' or 'private limited' has to be added. The name once accepted by the authority will be valid for 60 days.

Securing DSC and DIN

In case all 7 members, who are future directors of the company after conversion, do not have the Digital Signature Certificate (DSC) and Director Identification Number (DIN) for all the future directors of the company must be obtained.

Filing form no. URC – 1

After getting the approval of name from Registrar of Companies, the applicant must prepare & file the formURC-1 in addition to the following documents.

(a) List of the members with various details viz. names, address, shares held by them appropriately, etc.
(b) List of the first directors of the private company with various details viz. names, address, the DIN, passport number with an expiry date, etc.
(c) An affidavit from every person proposed as first directors, that he is not banned to be a director undersection-164 and all the necessary documents filed with the registrar for the registration of firm must contain information which is complete and correct & true to be best of his belief and knowledge.
(d) A list including the names & addresses of partners of LLP and a copy of LLP agreement & certificate of registration duly verified by two designated partners of LLP must be enclosed.
(e) A statement indicating the following specifications
(f) the nominal share capital of firm & the number of shares into which it is separated
(g) the number of shares taken & the amount paid for every share
(h) the name of the firm, with the addition of word Limited or private limited is required.
(i) A written consent or No objection certificate from all creditors.

Memorandum of Association & Articles of Association

Memorandum of Association (MoA) & Articles of Association (AoA) is to be formulated and then filed with RoC after getting the name approval and sanction of form no. URC-1 – from the registrar.

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E-form INC-32 (SPICE)

Company required to file e-form INC-32 **(SPICE)** along with URC-1 as linked form with all the attachment as required in normal Incorporation of Company like:

(i) MOA & AOA
(ii) INC-9
(iii) INC8
(iv) DIR-2 etc.

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Q. 1. Bright Pvt. Ltd. is a private company. Its Board of Directors want to convert the company into an One Person Company. Can it be converted into an One Person Company? Please advise the company about the conditions and procedure for such a conversion. [Dec. 2017]

Ans. According to Rule 7(1) of Companies (incorporation) Rules, 2014, a private company having paid up share capital of fifty lakh rupees or less and average annual turnover during the relevant period two crore rupees or less may convert itself into one person company by passing a special resolution in the general meeting.

Following steps can be followed for conversion of Bright Pvt. Ltd. into a One Person Company:

1. A special resolution to be passed in the General meeting the company.
2. Before passing such resolution, the company shall obtain no objection in writing from members and creditors.
3. Such resolution shall be filed with Registrar of Companies within 30 days from the date of passing such resolution in Form No. MGT. 14.
4. The company shall file an application in Form No. INC-6 for its conversion into One Person Company along with fees as provided in the Companies (Registration offices and fees) Rules, 2014, by attaching the following documents, namely:-
   a. T directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid up share capital company is fifty lakh rupees or less or average annual turnover is less than two crores rupees, as the case may be.
   b. List of members and list of creditors;
   c. The latest Audited Balance Sheet and Profit and Loss Account; and
   d. The copy of No Objection letter of secured creditors;
   e. On being satisfied and compiled with requirements stated herein the Registrar shall issue the Certificate.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Distinguish Between:----------
   a) 'Preliminary contracts' and 'provisional contracts'.
2. Descriptive Questions:----------
   a) Tuff Ltd. Is a public limited company, which was registered in the year 1991 under the Companies Act, 1956 After eighteen years of existence as a public company, the said company now wants to convert itself into a private limited company. Is it possible / if yes, explain the legal requirements, if any.
3. An existing company wants to commence a new business.Elucidate the procedure laid down therefor.
4. A company cannot ratify a pre- incorporation contract though it is open to it to enter into a fresh contract.

FROM ICSI MODULE

Answer the Following:-

1. (a) Discuss the legal effects of pre-incorporation contracts and provisional contracts.
   (b) "A company cannot ratify a pre-incorporation contract though it is open to it to enter into fresh contract" — Discuss.
2. 'A', a furniture dealer, entered into a contract with the company for the furnishing of the offices of the company. The company went into liquidation before it could obtain certificate of commencement of business. Can 'A' claim in the winding-up for the price of the furniture supplied to the company?
3. What are the requirements for conversion of a public company into a private company?
4. Can contracts before incorporation be enforced against the company?
5. State the provisions for conversion of a private company into a public company.
6. Write short notes on:
   (a) Pre-incorporation contracts;
   (b) Commencement of business;
   (c) Common Seal;
   (d) Conversion by default under proviso to Section 14(1) of the Companies Act, 2013.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

9

NIDHI & PRODUCER COMPANY

Covering-

- Section Charts
- NIDHI Company
- Producer Company
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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N.K.J - SECTION CHART

Section	Short Description
Section 406	Power to modify Act in its application to Nidhis / Nidhi Companies
Rule	Companies (Specification of definition details) Rules, 2014
Rule	Companies (NIDHI) Rules, 2014

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NIDHI & PRODUCER COMPANY

NIDHI COMPANY

SECTION 406

"*Nidhi*" or "Mutual Benefit Society" means a company which the Central Government may, by notification in the Official Gazette, declare to be a *Nidhi* or Mutual Benefit Society, as the case may be.

The Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act specified in the notification—

(a) shall not apply to any Nidhi or Mutual Benefit Society; or

(b) shall apply to any Nidhi or Mutual Benefit Society with such exceptions, modifications and adaptations as may be specified in the notification

***"Nidhi"* means a company** which has been incorporated as a *Nidhi* **with the object** of;-

(a) Cultivating the habit of thrift and savings amongst its members,

(b) receiving deposits from, and lending to, its members only, for their mutual benefit, and Which complies with Companies (**Nidhi Companies**) Rules, 2014

Nidhi in the Indian context / language means "TREASURE". However, in the Indian financial sector it refers to any mutual benefit society notified by the Central / Union Government as a Nidhi Company.

The primary object of Nidhis is to carry on the business of accepting deposits and lending money to member borrowers only against jewels, etc., and mortgage of property. They are created mainly for cultivating the habit of thrift and savings amongst its members. The companies doing Nidhi business, viz. borrowing from members and lending to members only, are known under different names such as Nidhi, Permanent Fund, Benefit Funds, Mutual Benefit Funds and Mutual Benefit Company.

Incorporation of Nidhi

(1)	A Nidhi to be incorporated under the Companies Act, 2013 shall be a public company and shallhave a minimum paid up equity share capital of five lakh rupees.
(2)	Nidhi company shall not issue preference shares.
(3)	If preference shares had been issued by a Nidhi before the commencement of the Companies Act, 2013, such preference shares shall be redeemed in accordance with the terms of issue of such shares.
(4)	No Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.
(5)	Every Company incorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

Requirements for minimum number of members and net owned funds

Nidhi Rules, 2014 deals with requirements for minimum number of members, net owned fund etc. It provides that:

(1)	Every Nidhi shall, within a period of one year from the commencement of these rules, ensure that it has— (a) not less than two hundred members; (b) Net Owned Funds of ten lakh rupees or more;

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(c) unencumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14; and (d) ratio of Net Owned Funds to deposits of not more than 1:20.

Return of statutory compliances by Nidhi Companies

Within ninety days from the close of the first financial year after its incorporation and where applicable, the second financial year, Nidhi shall file a return of statutory compliances in **Form NDH-1** with the Registrar duly certified by a company secretary in practice or a chartered accountant in practice or a cost accountant in practice.

General restrictions or prohibitions

In terms of Rule 6, Nidhi shall not —

(a)	carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by anybody corporate;
(b)	issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;
(c)	open any current account with its members;
(e)	carry on any business other than the business of borrowing or lending in its own name.
(f)	accept deposits from or lend to any person, other than its members;
(g)	pledge any of the assets lodged by its members as security;
(h)	take deposits from or lend money to anybody corporate;
(i)	enter into any partnership arrangement in its borrowing or lending activities;
(j)	issue or cause to be issued any advertisement in any form for soliciting deposit.

Share capital and allotment

(1) Every Nidhi shall issue equity shares of the nominal value of not less than ten rupees each.
(2) No service charge shall be levied for issue of shares.
(3) Every Nidhi shall allot to each deposit holder at least a minimum of ten equity shares or shares equivalent to one hundred rupees:

It may be noted that a savings account holder and a recurring deposit account holder shall hold at least one equity share of rupees ten.

Membership of Nidhi

(1) A Nidhi shall not admit a body corporate or trust as a member.
(2) Every Nidhi shall ensure that its membership is not reduced to less than two hundred members at any time.
(3) A minor shall not be admitted as a member of Nidhi.

It may be noted that deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

Acceptance of Deposits

Rule 13 of the Nidhi Rules, 2014 provides that any of the fixed deposits accepted by a Nidhi company shall be for a minimum period of six months and a maximum period of sixty months. Recurring deposits shall be accepted for a minimum period of twelve months and a maximum period of sixty months. In case of recurring deposits relating to mortgage loans, the maximum period of recurring deposits shall correspond to the repayment period of such loans granted by Nidhi.

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The maximum balance in a savings deposit account at any given time qualifying for interest shall not exceed one lakh rupees at any point of time and the rate of interest shall not exceed two per cent above the rate of interest payable on savings bank account by nationalised banks.

A Nidhi may offer interest on fixed and recurring deposits at a rate not exceeding the maximum rate of interest prescribed by the Reserve Bank of India which the Non-Banking Financial Companies can pay on their public deposits.

Un-encumbered term deposits by Nidhi

Under Rule 14 of the Nidhi Rules, 2014, every Nidhi shall invest and continue to keep invested, in unencumbered term deposits with a Scheduled commercial bank (other than a co-operative bank or a regional rural bank), or post office deposits in its own name an amount which shall not be less than ten percent of the deposits outstanding at the close of business on the last working day of the second preceding month.

Loans by Nidhi

According to Rule 15 A Nidhi shall provide loans only to its members. The loans given by a Nidhi to a member shall be subject to the following limits, namely:—

(a)	two lakh rupees, where the total amount of deposits of such Nidhi from its members is less than two crore rupees;
(b)	seven lakh fifty thousand rupees, where the total amount of deposits of such Nidhi from its members is more than two crore rupees but less than twenty crore rupees;
(c)	twelve lakh rupees, where the total amount of deposits of such Nidhi from its members is more than twenty crore rupees but less than fifty crore rupees; and
(d)	fifteen lakh rupees, where the total amount of deposits of such Nidhi from its members is more than fifty crore rupees

Rate of interest on any loan given by a Nidhi

The rate of interest to be charged on any loan given by a Nidhi shall not exceed seven and half per cent above the highest rate of interest offered on deposits by Nidhi and shall be calculated on reducing balance method.

Nidhi shall charge the same rate of interest on the borrowers in respect of the same class of loans and the rates of interest of all classes of loans shall be prominently displayed on the notice board at the registered office and each branch office of Nidhi.

Directors in a Nidhi Company

The Director shall be a member of Nidhi. The Director of a Nidhi shall hold office for a term up to ten consecutive years on the Board of Nidhi. The Director shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director. Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure. The person to be appointed as a Director shall comply with the requirements of Director Identification Number.

Appointment of Auditor

Nidhi shall not appoint or re-appoint an individual as auditor for more than one term of five consecutive years and Nidhi shall not appoint or re-appoint an audit firm as auditor for more than two terms of five consecutive years.

It may be noted that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of two years from the completion of his or its term.

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PRODUCER COMPANIES

Section 465 of Companies Act 2013 read with Part IX-A to The Companies Act, 1956

REPEAL OF CERTAIN ENACTMENTS AND SAVINGS

Section 465

The Companies Act, 1956 (1 of 1956) and the Registration of Companies (Sikkim) Act, 1961 (Sikkim Act 8 of 1961) (hereafter in this section referred to as the repealed enactments) shall stand repealed.

Provided that the provisions of Part IX A of the Companies Act, 1956 (1 of 1956) shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

PART IX-A TO THE COMPANIES ACT, 1956

The companies (amendment) Act, 2002 has inserted Part IX-A to the Companies Act, 1956 and introduced the concept of Producer Companies.

A **Producer Company means** ***a body Corporate, having objects or activities specified in Section 581B and registered as Producer Company***.

OBJECTS OF PRODUCER COMPANY

SECTION 581B

(1) The objects of the Producer Company shall relate to all or any of the following matters, namely :—

(a)	production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit :
	Provided that the Producer Company may carry on any of the activities specified in this clause either by itself or through other institution;
(b)	processing including preserving, drying, distilling, brewing, venting, canning and packaging of produce of its Members;
(c)	manufacture, sale or supply of machinery, equipment or consumables mainly to its Members;
(d)	Providing education on the mutual assistance principles to its Members and others;
(e)	Rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members;
(f)	Generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce;
(g)	Insurance of producers or their primary produce;
(h)	Promoting techniques of mutuality and mutual assistance;
(i)	Welfare measures or facilities for the benefit of Members as may be decided by the Board;
(j)	any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner;
(k)	Financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) which include extending of credit facilities or any other financial services to its Members.

(2) Every Producer Company shall deal primarily with the produce of its active Members for carrying out any of its objects specified in this section.

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FORMATION OF PRODUCER COMPANY AND ITS REGISTRATION
SECTION 581C

(1) **Any ten or more producer** or **any two or more producer institutions,** or a **combination** of ten or more producers and producer institutions, desirous of forming a Producer Company having its objects specified in section 581B and otherwise complying with the requirements of this Part and the provisions of this Act in respect of registration, may form an incorporated Company as a Producer Company under this Act.

(2) If the Registrar is satisfied that all the requirements of this Act have been complied with in respect of registration and matters precedent and incidental thereto, he shall, within thirty days of the receipt of the documents required for registration, register the memorandum, the articles and other documents, if any, and issue a certificate of incorporation under this Act.

(3) A Producer Company so formed shall have the liability of its Members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them and be termed a company limited by shares.

(4) The Producer Company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the Members.

(5) On registration under sub-section (1), the Producer Company shall become a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limit to the number of Members thereof, and the Producer Company shall not, under any circumstance, whatsoever, become or be deemed to become a public limited company under this Act.

SILENT CONDITION FOR PRODUCER COMPANIES:

i. Only persons engaged in an activity connected with, or related to, primary produce can participate in the ownership.
ii. The members have necessarily to be **primary producers.**
iii. Termed as "Companies with Limited Liability" and the liability of the members will be limited to the amount, if any, unpaid on the shares.
iv. Name of the company shall end with the words **"Producer Company Limited"**.
v. On registration, the producer company shall become as if it is a **Private Limited Company** for the purpose of application of law and administration of the company
vi. However, it shall comply with the specific provisions of part IXA.
vii. The limit of maximum number of members is not applicable to these Companies.

INTERNATIONAL FINANCIAL SERVICE CENTRE (IFSC)

International Financial Service Centre (IFSC) is a hub of financial services within a country, which has laws and regulations different from the rest of the country. Usually these centers have low tax rates and flexible regulations for securities and currency trading. Banking and insurance, which makes them attractive for foreign investment. It can be said that there centers deal mainly with the flow of money, financial products and services across borders.

An IFSC caters to customers outside the jurisdiction of the domestic economy. Such centers deal with flows of finance, financial products and services across borders. London, New York and Singapore can be counted as global financial centers.

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Q. 1. KPS India Producer Company Limited having an average annual turnover exceeding six crore in each of the three consecutive financial year. The company has to appoint a Company Secretary. Advise the company by referring to the provisions of the Companies Act, 1956 as applicable to Producer Company relating to such appointment. **[June. 2017]**

Ans. In accordance with the provisions of the companies Act, 1956, as contained in section 581X, every Producer company having an average annual turnover exceeding five crore rupees in each of three consecutive financial years shall appoint a member of the institute of company secretaries of India as a whole- time Secretary of the company.

If a producer company fails to appoint Company Secretary, the company and every officer of the company who is in default, shall be punishable with fine which may extend to Rs.500 for every day during which the default continues. However, in any proceeding against a person in respect of any offence for failure to appoint company Secretary, it shall be a defence to prove that all reasonable efforts were made to comply with the provision or that the financial position of the company was such that it was beyond its capacity to appoint a whole-time Company Secretary.

Therefore, a according to the above provision, KPS India Producer Company Limited has to be appoint a whole – time Company Secretary.

Q. 2. Directors of ABC Ltd. want to incorporate a producer company. ABC Ltd. itself is in the production and harvesting business. You are the company secretary of ABC Ltd. You are requested to advise the Board of ABC Ltd. about incorporation of such a producer company and set out its objectives as per relevant provisions of the Companies Act. **[Dec. 2017]**

Ans. **Producer Company**

Provisions of producer Companies as given in Companies Act 1956 would continue to apply in a special act is enacted for Producer Company.

Accordingly in terms of Section 581B of Companies Act, 1956 the object of the producer company shall relate to all or any of the following matters *viz.*

(l) Production, harvesting, procurement, grading, pulling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefits.
(m) Processing including preserving, drying, distilling, brewing, venting, ca and packaging of the produce of its members.
(n) Manufacturing, sale or supply of machinery, equipment or consumables mainly to its members.
(o) Providing education on the mutual assistance principles to its members and others.
(p) Rendering technical services, consultancy services, training, research and development and all other activities of the promotion of the interests of its members.
(q) Generation, transmission and distribution of power revitalization and land and water resources, their use, conservation and communications relatable to primary produce.
(r) Insurance of producer or their primary produce.
(s) Promoting techniques and mutually and mutual assistance.
(t) Welfare measures or facilities for the benefit of the members as may be decided by the Board.
(u) Any other activity, ancillary or incidental to any of the activities referred to in clause (a) to (i) above or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner.
(v) Financing of procurement, processing, marketing or other activities specified in clause (a) to (i) above, which include extending to credit facilities or any other financial services to its members.

Every producer company shall deal primarily with the produce of its active members for carrying out any of its specified objects.

The following provisions set out in section 581C of the Companies Act, 1956 pertaining to the Formation of Producer Company and its Registration may be looked upon for the incorporation of a Producer Company:

(5) Any ten or more individuals, each of them being producer or two or more Producer institutions, or a combination of ten or more individuals and Producer institutions, desirous of forming a producer company having its object specified in Section 581B and otherwise complying with the requirements of this Part and the provisions of this Act in respect of registration and incorporated Company as a Producer company under this Act.
(6) If the registrar is satisfied that all the requirements of this Act have been compiled with in respect of registration and matters precedent and incidental thereto, he shall, within thirty days of the receipt of the documents required for registration, register the memorandum, the articles and other documents if any, and issue a certificate of incorporation under this Act.

(7) The Producer Company may reimburse to its promoters all other direct costs associated with the promotion and registration of the company including registration, legal fees, printing of a memorandum and articles and the payment thereof shall be subject to the approval at its first general meeting of the Members.

(8) On registration under sub-section (1) the Produce Company shall become a body corporate as if it is a private limited company to which the provisions contained in this Part apply, without, however, any limited to the number of Members thereof, and the Producer Company shall not, under any circumstance, whatsoever, become or be deemed to become a public limited company under this Act.

Q. 7. South village Farmers Producer Company Ltd. Wants to give loan to its Directors. Explain the provision with reference to the Companies Act. What would be your answer if lone is being given to its members? **[June 2018]**

Ans. In accordance to section 581ZK of Companies Act, 1956, any loan or advance to any director or his relative shall be granted only after the approval of members by a resolution in general meeting.

In the present case South village Farmers' Producer Company Ltd, may give loan to its Directors only after the approval of members by a resolution.

In case the loan is given to the members, the section provides that the Board may, provisions made in the Articles of the company, provide financial assistance to the members by way of credit facility in connection with the business of the Producer Company, for a period not exceeding six months.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

10

LIMITED LIABILITY PARTNERSHIP – INTRODUCTION

Covering-

- ABC Analysis
- LLP – Meaning
- LLP – Features
- LLP – Administration
- LLP – Advantages
- LLP for the Professionals
- Who can be partner in LLP
- Who can not be a partner in LLP
- LLP Agreement
- Essential clauses to be included in the LLP Agreement
- Capital / Contribution
- Name of LLP
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (1 to 5)

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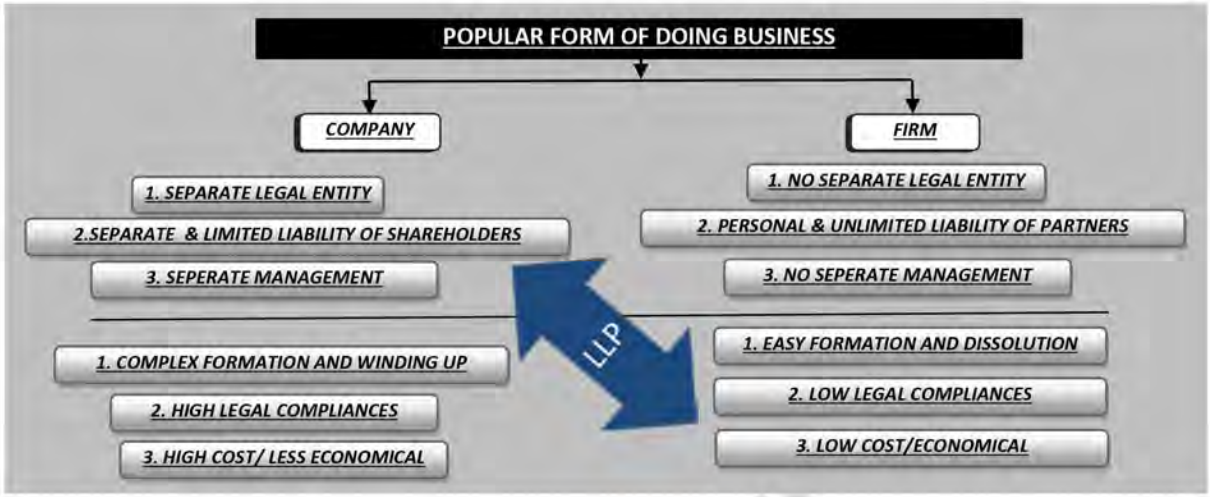

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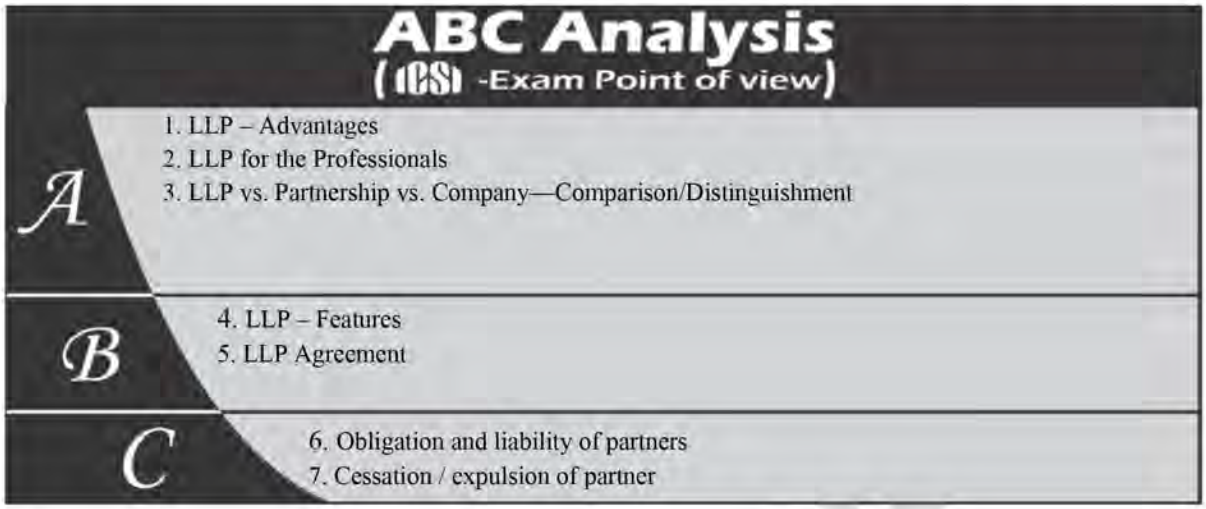
LIMITED LIABILITY PARTNERSHIP (LLP)



LLP-MEANING

Formation of LLP in India is a sequel to the recommendations of Naresh Chandra committee (2003) and Irani Committee (2005) as new form of business entity.

LLP is an incorporated partnership formed and registered under the **Limited Liability Partnership Act, 2008** with limited liability and perpetual succession. The Act came into force w.e.f. 1st April, 2009.

An LLP is a hybrid between a company and a partnership firm. The LLP is a separate legal entity, where no partner is liable for the unauthorized action of the other partners, and whose liability is restricted to his own stake in the liability. Every partner would be agent of the LLP, but the LLP would not be bound by anything done by a partner.

LLP-FEATURES

Following are the features of a LLP:	**(a)** LLP is a body corporate with distinct legal entity and perpetual succession.
	(b) LLP is applicable to any trade or business.
	(c) LLP is created and registered under Limited Liability Partnership Act, 2008.
	(d) LLP can be created by minimum 2 partners.
	(e) LLP Act is administered by Ministry of Corporate Affairs.
	(f) For registration, incorporation document is required to filed to Registrar of LLPs.
	(g) Every partner is the agent of the LLP.
	(h) Liability of partner is limited except in case of fraud and negligence.
	(i) Any person can become partner/member by subscribing to the incorporation document or by an agreement with existing partners/members.
	(j) Right and duties of partners are governed by an agreement between partners or between LLP and its partners.

LLP-ADMINISTRATION

Ministry of Corporate Affairs, New Delhi is the administrative ministry for the LLP Act with a central Registrar at New Delhi and the Registrars of LLPs at the State level.

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LLP-ADVANTAGES

Following are the advantages of forming LLP:	**(a)**	Easy and less expensive formation.
	(b)	No restrictions on maximum number of persons.
	(c)	Flexibility in management.
	(d)	No requirement any of minimum capital contribution by partners.
	(e)	Low compliance cost.
	(f)	Liability of partner is limited except in case of fraud and negligence.
	(g)	Less government intervention.
	(h)	LLP is a body corporate with distinct legal entity and perpetual succession
	(i)	Easy to dissolve or wind-up.
	(j)	LLP is applicable to any trade or business

LLP-DISADVANTAGES

The disadvantages include:-

1. **Requirement of a LLP agreement:** A LLP agreement is a necessity so as to avoid the application of default provisions (First Schedule) and to provide for matters not covered in the default provisions.
2. **Legal uncertainty:** This being a newly introduced concept in the corporate world, it is yet to prove itself as a commercial entity.
3. **Restricted Access to Capital Markets:** LLPs are small form of business and cannot get its shares listed in any stock exchange through initial public offerings.
4. **Public Disclosure of LLP Information:** A LLP must file its Annual Returns, Financial Statements etc to the Registrar of LLPs annually. Which become public document once filed with Registrar of LLPs and may be inspected by general public including competitors.
5. **Limitations in Formation of LLP:** LLP cannot be formed by a single person. A non – resident Indian and a Foreign National willing to form a LLP in India must have one person resident in India to act as Designated Partner. Further FDI in LLP is allowed only through government route only and that too in those sectors only where 100% FDI is allowed under automatic route under the FDI Policy.
6. **Offenses and penalties:** Limited Liability Partnership Act, 2008 provides that for non-compliance on procedural matters such as delay in filing of e-forms, one has to pay default fee for every day for which the default continues.
7. **Limitation in External Commercial Borrowings (ECB):** Limited Liability Partnerships are not allowed to raise ECB. Therefore, a LLP cannot avail commercial loans from its foreign partners, FIIs, Foreign Banks, and any financial institution located outside India.

LLP FOR THE PROFESSIONALS

LLPs are eminently suited to the professionals like Company Secretaries and others. They will get the benefit of limited liability and insulate them from third party claims against professional negligence or deficiency. A cross section of the professionals may come together under the banner of LLP to carry on the professional work in their respective field of specialisation, with the respective statutes according sanction for such a dispensation.

Such an arrangement will bring the professionals closer and this will benefit the corporate and other clients, as they may be able to get solutions to their problems under one roof. This will also create a strong organisation of professionals and acts as a bulwark against keen competition expected to happen from the professionals abroad, with the opening of legal field under the WTO dispensation.

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WHO CAN BE PARTNER IN LLP.

(a) An individual (other than one who has been found to be of unsound mind by court, an undischarged insolvent; has applied to be adjudged insolvent and application is pending)
(b) Indian private and/or Public Company.
(c) Foreign Company.
(d) Any other LLP.
(e) LLP registered outside India.

WHO CAN NOT BE A PARTNER IN LLP

(a) A corporation sole
(b) A co-operative society
(c) Any other person not specified in above para "who can be partner in LLP"

DESIGNATED PARTNERS

Section 7 provides that every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. Provided that in case of a limited liability partnership in which all the partners are body corporates, at least two partners shall nominate their respective individuals who are to act as "designated partners" and one of the nominees shall be a resident of India.

Disqualification of a designated partner

If he;-

(a) Has at any time within the preceding five years been adjudged insolvent; or
(b) Suspends, or has at any time within the preceding five years suspended payment to his creditors and has not at any time within the preceding five years made, a composition with them;
(c) has been convicted by a Court for any offence involving moral turpitude and sentenced in respect thereof to imprisonment for not less than six months; or
(d) has been convicted by a Court for an offence involving section 30 of the Act.

(Section 30 deals with punishment for carrying out acts by the LLP or its partners with intent to defraud its creditors or for a fraudulent purpose).

LLP AGREEMENT

The LLP Agreement determines the mutual rights and duties of the partners and their rights and duties in relation to LLP. This LLP Agreement is required to be filed to RO-LLP.

Section 2(1)(O) of the Limited Liability Partnership Act, 2008 defines it as under:

"Limited liability LLP Agreements mean any written agreement between the partners of the Limited LiabilityPartnership or between the Limited Liability Partnership and its partners which determines mutual rights andduties of the partners and their rights and duties in relation to that limited liability partnership [section 2(1)(0)]."

It is compulsory to make and execute a LLP agreement within 30 days of the incorporation of LLP.

The value of stamp paper on which the LLP agreement must be printed or stamp duty to be paid on the LLPagreement is dependent on the state of incorporation and amount of capital contribution from the partners.

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How to draft LLP agreement

LLP agreement defines the roles, responsibilities, rights, and powers of the partners to LLP and to eachother. Hence, it creates the foundation for the smooth running of LLP. LLP agreement clarifies the managerial, operational as well administrative responsibilities and sets clear methodologies for decision making, adding a new partner and disassociation of existing partner.

ESSENTIAL CLAUSES TO BE INCLUDED IN THE LLP AGREEMENT

1. **INTERPRETATION / DEFINITIONS**

   Section 23(4)

   This clause is the essence of any LLP agreement. An LLP Agreement must provide for various definitions such as the definition of designated partners, the accounting period, business of LLP and the name with which the Lowell be known. The agreement must also provide with full address of the registered office of the LLP as well as the address of all the partner.

2. **DESIGNATED PARTNERS**

   Section 7(1)and 7(2)r.w.rules 7 to 9 of the LLP Rules2009

   LLP agreement shall clearly mention the name, age and address of each of the Designated Partners correctly.

3. **NAME OF THE LLP AND CHANGES TO IT**

   Section 5,16,19read with Rule18 of LLP Rules

   This clause shall state that business of the LLP shall be carried on in the name and style of [Name of LLP]. Any change in the name of the LLP shall be notified to the Registrar by the Designated Partner(s) in accordance with the provisions of the LLP Act and the Rules.

4. **REGISTERED OFFICE OF THE LLP**

   Section 13 read with Rule 17 of LLP rules

   LLP agreement shall state that partnership business shall be carried on at the under mentioned address, which shall also be its registered office The business shall also be carried from such other places as may be mutually decided by the partners from time to time.

5. **BUSINESS OF THE LLP**

   Section 23(4)r.w. the First schedule to help Act 2008

   This clause must clearly specify the nature of the business that the LLP will be carrying on. The LLP may engage in any and all activities necessary, desirable or incidental to the accomplishment of the conduct of such business of the LLP including but not limited to such ancillary business. It may also include any other business conducted in such manner as may be decided by the majority of Partners from time to time.

6. **CAPITAL CONTRIBUTION**

   Section 3(3),32and 33 r.w. rule 2 in the First schedule to the LLP Act2008

   Total contribution of the LLP and the contribution by each partner along with the percentage of contribution to be mentioned in this clause. If any partner is contributing in non-monetary form, that is, he / she is going to render services instead of monetary contribution, add the same. Manner of Additional capital contribution by partner during the course of agreement to be included as well Manner in which contribution can be withdrawn by the partners shall also be stated in this clause.

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7. **PROFIT SHARING RATIO**

Section 42(1)of the LLP Act 2008

An ideal LLP Agreement must also mention the ratio in which the profits and the losses of the business will be shared among the partners. The partners must clearly state the amount of profit that each member receives, or the amount of the loss that they're liable for will be set out in the agreement.

8. **RIGHTS AND DUTIES OF DESIGNATED PARTNERS**

Section 23(4)read with the First schedule of LLP Act2008

The LLP Agreement must specify the various rights and duties of the Designated Partners as may be mutually agreed by them. In the absence of such separate agreement between the partners about such rights and duties, etc., the provisions of Schedule I of the Limited Liability Act, 2008will apply as given in Section 23(4) of the said act.

9. **ADMISSION OF PARTNER, RETIREMENT RESIGNATION ANDEXPULSION OF PARTNERS**

Section22,23read with the First schedule of LLP Act 2008

LLP agreement must include the provisions regarding admission of new partners, retirement as well as the death of a partner, etc. The agreement must provide guidelines for the expulsion of partners as well.

10. **REMUNERATION & INTEREST TO BE PAID TOPARTNERS**

Section 23(4)

The LLP agreement shall contain a clause regarding the amount of remuneration to the Designated Partner(s), for rendering the services assuch. This clause shall contain the rate of interest to be paid to the partners on their capital contribution

11. **BANK ACCOUNT**

Section 23(4)

This clause shall set out the modus operandi of the Bank account transactions of the LLP.

12. **BOOKS OF ACCOUNTS AND ACCOUNTING YEAR**

Section 34(1)

The LLP agreement shall contain clause relating to maintenance of books of accounts and other documents, method of accounting and the details relating to the Accounting year of the LLP.

13. **MEETINGS**

Section 23(4)

LLP agreement shall clearly state the manner in which the decisions of LLP shall be taken in the meeting of the partners and shall also provide as to how the same shall be recorded in the minutes and the place of maintenance of such minutes book etc.

14. **INDEMNITY**

Section 23(4)read with First schedule

The LLP agreement should contain a provision regarding indemnities. The clause of indemnity states that the LLP must protect its partners from any kind of liability or claim incurred by them while carrying the business of the LLP. The partners should also agree to indemnify the LLP for the loss caused by it due to any breach committed by them.

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15. DISPUTE RESOLUTION

Section 23(4)read with First schedule

A well-drafted LLP must always contain a provision for resolving disputes between the members. In a normal course, every LLP prefers Arbitration as a mode of resolving disputes. Such LLP is governed by the Arbitration and Conciliation Act, 1996. Thus, every LLP agreement must incorporate a clause providing for a dispute resolution mechanism to avoid disputes that result in lengthy and expensive litigation.

16. TERM OF LLP /WINDING UP

Section 63 &64

The partners must specify the term of validity of such LLP agreement whether it is a perpetual agreement or is valid for a fixed period. The agreement must also provide for the situations when the partners have agreed to wound up the affairs of the LLP either voluntarily or by an order of Tribunal for the specific violations as mentioned in Section 64 of the Act.

17. GENERAL PROVISIONS

Section 23(4)

The LLP agreement shall in addition to the above mentioned clauses shall include general provisions on binding on heirs, successors, counterparts, serving of notices, waiver, Governing law etc.

CAPITAL / CONTRIBUTION

Partners of LLP can contribute in cash or in kind or even by agreeing to perform services. There is no requirement any of minimum / maximum capital contribution by partners. LLP Agreement to specify about nature and amount of contribution. Liability of partners is limited to extent of contribution agreed in the LLP Agreement.

NAME OF LLP

(1) Every limited liability partnership shall have either the words "limited liability partnership" or the acronym "LLP" as the last words of its name.

(2) No limited liability partnership shall be registered by a name which, in the opinion of the Central Government is—

(*a*) undesirable; or

(*b*) identical or too nearly resembles to that of any other partnership firm or limited liability partnership or body corporate or a registered trade mark, or a trade mark which is subject of an application for registration, of any other person under the Trade Marks Act, 1999.

Rule 18 of the Limited Liability Partnership Rules, 2009, prescribed the following guidelines to be kept in mind, while deciding for the name of LLP.

1. Name should be Original (should not be copied from already registered companies). Unique and Easy to remember.
2. Should not contain sensitive words (can contain but only with permission) like 'British India' and 'Tribunal'.
3. An LLP based company must end its name with either 'Partnership 'or' LLP'.
4. The name should not be offensive in any manner.
5. Use of words like 'National', 'Central', 'Republic', 'Federal' and 'Union' is prohibited until and unless the company has the permission of Central Government or is a part of it.
6. The name should be different from existing LLPs even in terms of sound and pronunciation.
7. The name should not depict any connection with government bodies.

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8. Words like 'Bank', 'Banking', 'Mutual fund' and 'Venture Capital' without permission from the Regulatory authority is not allowed.
9. The name should not contain a registered trademark without the permission of the owner of that particular trademark.
10. The name should not be too general and should be somewhat related to the services or goods to be dealt with by the proposed LLP.
11. The name should not show any kind of connection with a National Leader.
12. The applicants can place 6 choices for names in the form which should be unique.

NKJ–CLASSROOM PRACTICE



Q. 1. Mohan has been appointed as a passive partner in the Limited Liability Partnership (LLP). He seeks your advice on the responsibilities of designated partner where the LLP has contravened the provisions of LLP Act. Referring to the provisions of the LLP Act, 2008 advise him in the matter. Can he sign cheques on behalf of the LLP?

[Dec. 2018; 5 Marks]

Ans. The passive partner would be liable for all the penalties and fines imposed on LLP as there is no distinct provision which differentiates between active partner and passive partner.

According to Section 8 of LLP Act, 2008 designated partner shall be liable to all penalties imposed on the limited liability partnership for any contravention of those provisions.

The designated partner would be liable to all penalties imposed on the LLP for the contravention of the provisions of the Act and as such the designated partner would be required to pay all the monetary fines imposed on the LLP. Further in the following instances apart from the LLP, the designated partner would also be imposed monetary penalties under the Act

- For non –compliance with the directions of the Central Government for change of name under Section 17 of the act,
- For non-maintenance of books of accounts, non-filling of account , duly audited where such an audit is mandatory under Section 34 of the Act,
- For non- filing of the annual return of the LLP with the Registrar under Section 35 of the Act.

Mohan can sign cheques on behalf of the LLP with ,if so authority of the LLP.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

11

FORMATION OF LIMITED LIABILITY PARTNERSHIP

Covering-

- ABC Analysis
- Registered office
- Books of account
- Audit
- Annual filings
- Obligation and liability of partners
- Cessation / expulsion of partner
- Taxation of LLP
- Winding up and dissolution
- LLP vs. Partnership vs. Company—Comparison/Distinguishment
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (1 to 5)

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FORMATION OF LIMITED LIABILITY PARTNERSHIP

STEP BY STEP PROCEDURE TO REGISTER A LIMITED LIABILITY PARTNERSHIP

STEP 1 – OBTAIN DIRECTORS' IDENTIFICATION NUMBER (DIN)

Every applicant who would become the designated partner of the LLP must have a DIN. Application for DIN can be made online through Ministry of Corporate Affairs (MCA) website. The applicant can submit E-form DIR-3 to apply for DIN. A nominal fee of Rs. 100/- has to be paid for each application.

(a) Proof- of Identity — In case of Indian Nationals – PAN card, while in case of Foreign Nationals– Passport

(b) Proof of Residence – Passport, Election (Voter identity) card, Ration card, Driving license, Electricity bill, Telephone bill or Bank account statement. The telephone bill, electricity bill or bank account statement should not older than two months in the case of Indian Nationals and one year in the case of Foreign Nationals.

(c) Affidavit as per Annexure 1 of DIN Rules has to be made by applicants on Stamp Papers, which shall also be notarized.

STEP 2 – REGISTER DIGITAL SIGNATURE OF DESIGNATED PARTNERS

The applicants whose signatures would be placed on the application forms must have a Class 2Digital Signature Certificate (DSC) from an authorized certifying agency. This DSC has to be registered on the MCA website.

STEP 3 – -FILE FORM 1 FOR NAME AVAILABILITY

The application in Form - 1 to the Registrar accompanied by a fee paid electronically should have the following documents as attachment:

STEP 4 – FILING OF (FORM 2) FOR INCORPORATION AND SUBSCRIPTION DOCUMENT

After receiving the Name approval Letter from ROC as per Section 11 of the Limited Liability Partnership Act 2008, the incorporation document shall be filed in Form 2 with the Registrar having jurisdiction over the State in which the registered office of the Limited Liability Partnership is to be situated along with the fee within 60 days from the date of name approval. The form must be digitally signed by a person named in the incorporation document as a designated partner having DIN. Also, it has to be digitally signed by an advocate/Company Secretary/Chartered Accountant/Cost Accountant in practice.

The application in **Form - 2** to the Registrar accompanied by a fee paid electronically should have the following documents as attachment:

1. Proof of address of registered office of LLP
   If the registered office is taken on rent, rent agreement and a no objection certificate from the landlord has to be submitted. No objection certificate will be the consent of the landlord to allow the LLP to use the place as 'registered office'.

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Besides, anyone document out of utility bills like gas, electricity, or telephone bill must be submitted. The bill should contain complete address of the premise and owner's name and the document shouldn't be older than 2 months.

2. Subscribers' sheet including consent in form 9 pursuant to Section 7(3) of the LLP Act 2008.
3. Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner (if applicable).

NOTE:

(a) After the Registrar is satisfied that all the formalities with respect to the incorporation has been complied, he will issue a Certificate of Incorporation as to formation of the LLP within maximum of 14 days from date of filing of documents.

(b) The Certificate of Incorporation issued shall be the conclusive evidence of formation of the LLP.

(c) On incorporation, Every LLP so registered shall be assigned a LLP identification number (LLPIN) in one consecutive series.

Step 5 – DRAFTING & FILING OF LLP AGREEMENT

After incorporation of LLP, LLP agreement has to be drafted in consonance with LLP Act.

LLP agreement is to be filed within 30 days of incorporation of LLP. The Designated Partners has to file the information in Form 3 (Information with regard to Limited Liability Partnership Agreement and changes, if any, made therein).The LLP agreement has to be uploaded as an attachment to Form 3 in the MCA portal. Once it gets approved all the formalities for registration of LLP is deemed to have been completed.

FiLLiP (Form for incorporation of Limited Liability Partnership)

The Limited Liability Partnership (Second Amendment) Rules, 2018.

Introduction of a new integrated Form christened **FiLLiP** (Form for incorporation of Limited Liability Partnership) replacing the erstwhile Form 2 (Incorporation document and subscriber's statement) combining therein 3 services i.e.,

(a) Name reservation.

(b) Allotment of Designated Partner Identification Number(DPIN/DIN).

(c) Incorporation of the LLP.

Change of name

The procedure for the name change is governed by provisions of Section 19 of the Limited Liability Partnership Act, 2008. A Limited Liability Partnership (LLP) that is registered in India may, under certain circumstances, need to change its name. The reasons can be business-related or on account of certain directives from the Central Government (if the name of the LLP is considered undesirable or similar to an already existing LLP, the Government can ask for a name change and failure to comply with the directives could attract a penalty of up to Rs. 5 lakh for the business and up to Rs. 1 lakh for each partner)

Procedure for Changing the Name of the LLP

An application for changing the name of the LLP should be, first, submitted to the Ministry of Corporate Affairs. The application must have maximum six name preferences. One must ensure that the preferences are in tandem with the LLP naming guidelines that have been laid out in India. To start with, it should not be identical or similar to an already existing one. You can also check out the availability of a name on the MCA portal and then finalize a name.

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Along with the LLP name change application, the partners need to submit the following documents.

1. Certified copy of consent of all partners involved for the name change;
2. Copy of the existing LLP agreement;
3. Trademark copy or a copy of the registration certificate;

After the suggested name gets approved, one has to file Form LLP-5, giving notice of the change in the name. The form has to be submitted to the Registrar within 30 days.

The ROC, after taking into consideration the application, will approve/deny the name change.

If the name is approved, the ROC will issue a certificate and the new name will be effective from the date mentioned in the certificate.

Once the partners get the new certificate of registration, a supplementary agreement needs to be laid out mentioning the changes in the LLP agreement as a result of the name change.

REGISTERED OFFICE

Every LLP shall have a registered office in India.

Shifting of Registered office

Notice of change of registered office to be filed with the Registrar within 30 days from the date of the change in LLP -Form 15 prescribed under Rule 17 of the LLP Rules 2009 along with the prescribed fees.

List of documents required to attached with LLP Form 15:

1. Consent letter of all DP's
2. Consent letter of all Secured Creditors
3. Copy of Board Resolution
4. Copy of Advertisement
5. Proof of New Registered Office Address (If Rented then Rent Agreement, Utility Bill in the name of Owner & NOC)

BOOKS OF ACCOUNT

(a) LLP to maintain prescribed books of accounts.
(b) Book keeping can be on cash or accrual basis.
(c) It should be prepared on double entry system of accounting.
(d) Books of accounts to be preserved for eight years.

AUDIT

LLP whose turnover exceeds, in any financial year, ₹ 40 lacs or whose contribution exceeds ₹ 25 lacs shall be required to get its accounts audited. However it may voluntarily get the accounts audited.

NKJ–CLASSROOM PRACTICE



Q. 1. Comment on the "The Financial Statements of Limited Liability partnership are nor mandatorily required to be audited by a Chartered Accountant". **[Dec. 2018; 5 Marks]**

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ANNUAL FILINGS

ANNUAL COMPLIANCES OF LLP

All LLPs registered under the LLP Act, 2008 need to file Annual Returns and Statement of Accounts for every Financial Year. It is mandatory for a LLP to file a return irrespective of whether it has done any business or not. There are three mandatory compliance requirements to be followed by LLPs.

(a) Filing of Annual Return

- Annual returns are filed in Form 11. This form is a summary of the management affairs of the LLP, such as number of partners and their names. Form 11 needs to be filed within 60 days of the closure of the Financial year. Hence this Annual Return should be filed on or before 30th May every year by the LLP.
- In case the annual turnover of the LLP crosses ₹ 5 crores or the Capital contribution from Partners exceeds more than ₹50 Lakhs the Annual return should be accompanied by a Certificate from Practicing Company Secretary.

(b) Filing of Statement of the Accounts or Financial Statements

- All LLPs are required to maintain their Books of Accounts in Double Entry System. They also need to prepare a Statement of Solvency (Accounts) every year ending on 31st March. For this purpose, LLP Form 8 should be filed with the Registrar of Companies on or before 30th October every year.
- It should be noted that LLPs whose annual turnover exceeds Rs. 40 lakh or whose contribution exceeds Rs. 25 lakh are required to get their accounts audited by a qualified Chartered Accountant mandatorily.
- The penalty for non-filing of these forms with the ROC is Rs. 100 per day per form.

(c) Every limited liability partnership shall file within the prescribed time, the **Statement of Account and Solvency** with the Registrar every year in such form and manner and accompanied by such fees as may be prescribed

(d) Every limited liability partnership shall file an annual return duly authenticated with the Registrar **within sixty days of closure of its financial year** in such form and manner and accompanied by such fee as may be prescribed.

(e) Any **limited liability partnership** which fails to comply with the aforesaid requirements shall be punishable with fine which shall **not be less than twenty-five thousand rupees** but which may **extend to five lakh rupees**.

(f) If the limited liability partnership fails to comply with the aforesaid requirements, the **designated partner** of such limited liability partnership shall be punishable with fine which shall **not be less than ten thousand rupees** but which may **extend to one lakh rupees**.

NKJ–CLASSROOM PRACTICE



Q. 1. As a practicing Company Secretary, advise your client regarding the annual compliance requirements to be followed by LLP. **[Dec. 2018; 5 Marks]**

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OBLIGATION AND LIABILITY OF PARTNERS

(a) Every partner of the LLP is an agent of LLP but not of other partners. Only the LLP will be liable for the wrongful act of the partner in the ordinary course of business. A partner will be personally liable only for his own wrongful act and not of other partners

(b) Holding Out-If a person wrongfully represents himself as a partner of a LLP, he will render himself liable to a person who acts in good faith.

(c) In case of an act by LLP or its partners with intend to defraud creditors or other person or any fraudulent purpose, the liability of LLP and the concerned partner shall be unlimited.

CESSATION / EXPULSION OF PARTNER

(a) A partner may cease to be a partner in accordance with the LLP agreement or by giving a notice of at least 30 days to other partners.

(b) A partner ceases to be partner on his death or dissolution of LLP or if he is declared to be of unsound mind or adjudged as insolvent by a competent Court.

(c) A partner cannot be expelled from LLP unless there is specific provision in the LLP agreement.

TAXATION OF LLP

(a) LLPs will be treated as Partnership Firms for the purpose of Income Tax.

(b) Profits will be taxed in the hands of the LLP and not in the hands of Partner.

(c) Remuneration to partners will be taxed as "Income from Business and Profession".

(d) MAT will not be applicable on the LLP.

(e) No dividend distribution tax.

Filing of Income Tax Returns

Every LLP is required to close its financial year on 31st March every year as per the Income Tax Actand is also required to file their returns with the Income Tax Department. The LLP whose annualturnover exceeds Rs. 40 lakhs or capital contribution exceeds ₹ 25 Lakhs are required to get theiraccounts audited under the provisions of the Income Tax Act. Maintenance of book of accounts ismandatory for LLP, irrespective of annual turnover.

However, it is mandatory for LLP to file return of income electronically under digital signature, if its accountsare required to be audited under section 44AB of the Income Tax Act.

Due dates for an LLP to file their Income Tax Returns are as follows:

Particulars	Due Dates
LLP who is required to get its accounts auditedunder the Income-tax Act or under any other law	September 30 of the assessment year
LLP who is required to furnish a report in Form No.3CEB under Section 92E of Income Tax Act	November 30 of the assessment year
In any other case	July 31 of the assessment year

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ALTERATION TO THE LLP AGREEMENT

The Limited Liability Partnership (LLP) Agreement is the charter of the LLP, similar to the Memorandum ofAssociation and Articles of Association for a private limited company. It defines the scope and extent of theLLP's operations as well as the rights, duties, obligations of the partners.

Altering the agreement can be done passing a resolution approving the revision in the LLP Agreement.The second step is to file Form 3 with the Registrar within 30 days of the amendment in the agreement.

The Documents to be attached to the Form 3 shall include the following

(a) Initial LLP Agreement

(b) Supplementary/ Altered agreement

(c) Optional attachments if any

Change in Partner /Designated Partner

If the change in LLP agreement is due to change in partner(s)/ designated partner(s), Form 4 is alsorequiredto be filed along with Form 3.

Documents to be attached with Form 4

- Consent of the partner
- Evidence of cessation
- Affidavit or any proof of change of name
- If the partner or a designated partner is a company, copy of resolution of the company to become partnerin LLP
- Copy of resolution/ authorization letter mentioning name and address of individual nominated asrepresentative nominee/ partner.

WINDING UP AND DISSOLUTION

Winding up of an LLP may be either **voluntary** or by an **order of Tribunal**.

An LLP may be wound up in the following circumstances:	**(a)** If LLP decides it should be wound up;
	(b) If the number partners of LLP is reduced below 2 for a period of more than 6 months;
	(c) If LLP is unable to pay debts;
	(d) If LLP has acted against the sovereignty and integrity of India;
	(e) If LLP has made default in filing financial disclosure for five consecutive 5 financial years and
	(f) If Tribunal is of opinion that it should be wound up.

FOREIGN DIRECT INVESTMENT (FDI) IN LLPs

(a) FDI is allowed in LLPs.

(b) FDI in LLPs is allowed, through the government route only for LLPs operating in sectors/activities where 100%FDI is allowed through automatic route.

(c) LLPs with FDI is not eligible to make any downstream investments.

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(d) An Indian Company, having FDI is permitted to make downstream investment in an LLP only if both the company as well as LLP are operating in sectors where 100% FDI is allowed through the automatic route.

(e) LLP with FDI is not allowed to operate in agricultural/plantation activity, print media or real estate business.

(f) LLPs cannot avail External Commercial Borrowings.

(g) Conversion of a company with FDI, into an LLP, is allowed only if the conditions stipulated for LLP regarding FDI are complied with.

FOREIGN LIMITED LIABILITY PARTNERSHIP

As per rule 34 of the LLP Rules,2009 a foreign limited liability partnership shall, **within thirty days of establishing a place of business in India**, file with the **Registrar in Form 27 —**

(a) a copy of the certificate of incorporation or registration and other instrument(s) constituting or defining the constitution of the limited liability partnership;

(b) the full address of the registered or principal office of the limited liability partnership in the country of its incorporation;

(c) the full address of the office of the limited liability partnership in India which is to be deemed as its principal place of business in India; and

(d) list of partners and designated partners, if any, and the names and addresses of two or more persons resident in India, authorized to accept on behalf of the limited liability partnership, service of process and any notices or other documents required to be served on the limited liability partnership.

LLP vs. PARTNERSHIP vs. COMPANY—COMPARISON/ DISTINGUISHMENT

POINT OF COMPARISON	LIMITED LIABILITY PARTNERSHIP	PARTNERSHIP	COMPANY
1. Governance	The Limited Liability Partnership Act, 2008.	The Indian Partnership Act, 1932.	The Companies Act, 2013.
2. Regulation	Regulated by Registrar of LLPs.	Regulated by Registrar appointed by the respective State Government under the Partnership Act.	Regulated by Registrar of Companies.
3. Name	Name to end with LLP or Limited Liability Partnership.	The firm, which is registered, shall use the brackets and word.	Name can end with Limited / Private Limited.
4. Registration	Registration with Registrar of LLP mandatory.	Registration is optional	Registration with Registrar of Companies mandatory.
5. Body Corporate	It is a Body Corporate having a Separate Legal Entity capable of sueing and be sued in its own name.	A Partnership Firm does not have a Separate Legal Entity and it is not a Body Corporate.	It is a Body Corporate having a Separate Legal Entity capable of sueing and be sued in its own name.
6. Management	By Partners/Designated Partners.	By partners.	By Board of Directors.

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7. Limitation of Liability	Liability of a partner is limited to the extent of his capital contribution or as agreed as per the LLP Agreement. But no partner is liable on account of an independent action on part of any other partner.	Every Partner is liable jointly (with all the other partners) and severally, for all acts of the Firm done while he is a Partner.	Liability of shareholder is limited to the extent of total amount due on shares subscribed.
8. Conversion	The LLP Act and LLP Rules has provisions for conversion of any other form of business into LLP.	The Indian Partnership Act does not have any specific provisions for conversion of Partnership into any other form of business.	Conversion to an LLP is allowed.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Distinguish Between :----------
   (a) 'Limited liability partnership' and 'partnership firm'.
2. Descriptive Questions:----------
   (a) The salient features of the Indian partnership Act, 1932 will be applicable to limited liability partnership firm incorporated under the Limited liability Partnership Act, 2008, Comment.
   (b) What are the disqualifications of designated partner?
   (c) What are salient features of limited liability partnership (LLP)?
3. Practical Questions:----------
   (a) A limited liability partnership (LLP) was formed on 1st August, 2013 having Aman and Boman as Designated partners. Among them Boman was convicted in the year 2006 for an offence involving moral turpitude and sentenced for three months imprisonment. Explain the validity of LLP.
4. Comment on the following :----------
   (a) There are no shareholders in a limited liability partnership, instead there are partners.
   (b) A Limited Liability partnership registered Singapore is proposing to establish a place of business in Mumbai.

FROM ICSI MODULE

Answer the following

1. What do you mean by Limited Liability Partnership? State the salient features of Limited Liability Partnerships.
2. Who is a designated partner? Give the relevant provisions of the LLP Act 2008 with regard to designated partners.
3. Write short notes on:
   (i) LLP Agreement
   (ii) LLP for the professionals.
4. State the circumstances in which LLP may be wound up by the Tribunal.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

12

DIFFERENT FORMS OF BUSINESS ORGANISATION AND ITS REGISTRATION

Covering-

- Selection/ Choice of form of business organisation
- Sole Proprietorship
- Sole Proprietorship - Merit/ Advantages
- Sole Proprietorship - Limitation/ Disadvantages
- Procedure for Formation of Sole Proprietorship
- Partnership
- Partnership - Features
- Partnership - Types
- Partners - Types
- Partnership - Merits/ Advantages
- Partnership - Limitations/ Disadvantages
- Partnership Deed
- Procedure for formation of partnership firms
- Hindu Undivided Family (HUF)
- Joint Hindu Family Business - Meaning
- Joint Hindu Family Business - Characteristics
- HUF - Benefits
- Procedure for formation of HUF
- Multi State Co-Operative Society
- Multi State Co-Operative Society - Benefits
- Formation of Multi State Co-Operative Society
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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DIFFERENT FORMS OF BUSINESS ORGANISATION AND ITS REGISTRATION

SELECTION / CHOICE OF FORM OF BUSINESS ORGANISATION

One of the first decisions that is faced by an entrepreneur is how the business should be structured. All businesses must adopt some legal configuration that defines the rights and liabilities of participants. This decision will havelong-term implications, so he has to select the form of ownership that is right for him.

In making a choice, he will want to take into account the following:-

(a) his vision regarding the size and nature of the business.
(b) The level of control he wishes to have.
(c) The level of "structure" he is willing to deal with.
(d) The business's vulnerability to litigation.
(e) Tax implications of the different organizational structures.
(f) Expected profit (or loss) of the business.
(g) Whether or not he will need to re-invest earnings into the business.
(h) his need for access to cash out of the business for himself.

1. SOLE PROPRIETORSHIP

The vast majority of small businesses start out as sole proprietorships. The sole proprietorship is a form ofbusiness that is owned, managed and controlled by an individual. He has day-to-day responsibility for running the business. He has to arrange capital for the business and he alone is responsible for itsmanagement. He is therefore, entitled to the profits and has to bear the loss of business. In the eyes of the law and the public, the sole proprietor and the business are one and thesame.

SOLE PROPRIETORSHIP - MERIT/ ADVANTAGES

A sole proprietary organisation has the following advantages:-

(i) **Easy formation:** A sole proprietorship business is easy to form where no legal formality involved insetting up this type of organization. It is not governed by any specific law.

(ii) **Better Control:** In sole proprietary organisation, all the decisions relating to business operations aretaken by one person, which makes functioning of business simple and easy.

(iii) **Sole beneficiary of profits:** The sole proprietor is the only person to whom the profits belong. Thereis a direct relation between effort and reward.

(iv) **Benefits of small-scale operations:** The sole proprietorship is generally organized for small-scale business. such a business is also entitled to certain concessions from the government.

(v) **Inexpensive Management:** The sole proprietor does not appoint any specialists for various functions. He personally supervises various activities and can avoid wastage in the business.

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SOLE PROPRIETORSHIP - LIMITATION/ DISADVANTAGES

A sole proprietor generally suffers from the following limitations:

(i) **Limitation of management skills:** A sole proprietor may not be able to manage the business efficiently as he is not likely to have necessary skills regarding all aspects of the business.

(ii) **Limitation of Resources:** The sole proprietor of a business is generally at a disadvantage in raising sufficient capital. His own capital may be limited. This reduces the scope of business growth.

(iii) **Unlimited liability:** The sole proprietor is personally liable for all business obligations. For payment of business debts, his personal property can also be used if the business assets are insufficient.

(iv) **Lack of continuity:** A sole proprietary organisation suffers from lack of continuity. If the proprietor is ill, this may cause temporary closure of business. If he dies, the business may be permanently closed.

PROCEDURE FOR FORMATION OF SOLE PROPRIETORSHIP

Sole Proprietor is formed, managed and controlled by one individual. No deed or agreement is required to constitute a Sole Proprietorship.

However, in actual practice and keeping in mind the nature of business activity, registration may be required under the following enactments as prevailing in the respective States or of the Central Government, such as:-

(i)	Shops and Commercial Establishments Act (State specific)
(ii)	Law relating to Professional Tax (State specific)
(iii)	Registration under Micro, Small and Medium Enterprises Development Act, 2006.
(iv)	Registration as a Small Scale Industry (State specific)
(v)	GST registration (with the launch of GST, only GSTIN will be used for Import-Export Code Number)
(vi)	Intellectual Property laws.

2. PARTNERSHIP

Partnership is an association of persons who agree to combine their financial resources and managerial abilities to run a business and share profits in an agreed ratio.

The Indian Partnership Act defines partnership as "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. The persons who have agreed to join in partnership are individually called "Partners" and collectively a 'firm'.

A partnership firm can be formed with a minimum of two partners and it can have a maximum of fifty partners.

HOLDING OUT
SECTION 28

1. Anyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

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2. Where after a partners death the business is continued in the old firm name, the continued use ofthat name or of the deceased partners name as a part thereof shall not of itself make his legalrepresentative or his estate liable for any act of the firm done after his death.

DISSOLUTION OF A FIRM

SECTION 39

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm.

PARTNERSHIP - FEATURES

The features of partnership are as follows:-

(i) **Existence of an agreement:** Partnership is formed on the basis of an agreement between two or more persons to carry on business.

(ii) **Engagement in business:** A partnership can be formed only on the basis of a business activity. Itsbusiness may include any trade, industry or profession.

(iii) **Sharing of profits and losses:** In a partnership firm, partners are entitled to share in the profits andare also to bear the losses, if any.

(iv) **Agency relationship:** The partnership business may be carried on by all or any of the partners actingfor all. Thus, each partner is a principal and so can act in his own right. At the same time he can acton behalf of other partners as their agent. Thus, every partner can bind the firm by his acts.

(v) **Unlimited Liability:** The liability of partners is unlimited as in the case of sole proprietorship.

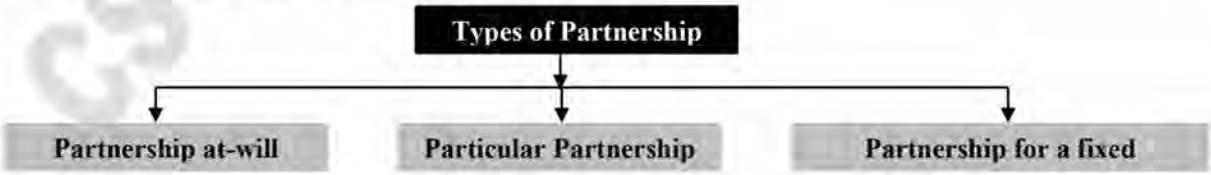
(vi) **Common Management:** Every partner has a right to take part in the running of the business. Even if partnership business is run by some partners, the consent of all otherpartners is necessary for taking important decisions.

(vii) **Restriction on transferability of share:** No partner can transfer his share in partnership to any otherperson. He may, however, do so with the consent of all other partners.

(viii) **Registration:** To form a partnership firm, it is not compulsory to register it. However, if the partnersso decide, it may be registered with the Registrar of Firms.

(ix) **Duration:** The partnership firm continues at the pleasure of the partners. Legally a partnershipcomes to an end if any partner dies, retires or becomes insolvent. However, if the remainingpartners agree to work together under the original firm's name, the firm will not be dissolved and willcontinue its business after settling the claim of the outgoing partner.

PARTNERSHIP - TYPES



According to the nature of agreement among partners, there can be three types of partnership as follows:

(i) **Partnership at-will:** Such a partnership exists on the will of the partners. That is, it can be brought toan end whenever any partner gives notice of his intention to do so. **(Section 7)**

(ii) **Particular partnership:** A particular partnership is formed for undertaking a particular venture. Itcomes to an end automatically with completion of the venture. **(Section8)**

(iii) **Partnership for a fixed duration:** Such partnership is for a fixed period of time say 2 years, 5 years orany other duration.

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PARTNERS - TYPES



The various types of partner found in partnership firms are as follows:

(i) **Active Partners**: Partners who take active part in the conduct of day-to-day business of the firm arecalled active partners. These partners carry on business on behalf of the other partners.

(ii) **Sleeping or dormant partners:** Sleeping or dormant partners are those who do not take active part inthe management of the business. Such partners only contribute capital in the firm and are bound bythe activities of other partners. However, they share in the profits and losses of the business.

(iii) **Others:** Active and sleeping partners are, as a matter of fact, the full-fledged partners i.e. they sharein profits and losses of the business and are liable for its dues. However, there are other types ofpartners also who may be associated with partnership directly or indirectly. They are not full-fledgedpartners, such partners may include the following:-

(a) **Nominal Partners:** Nominal partners are those who do not have interest in the business but lendtheir name to the firm. They do not make any capital contribution, and are not entitled to takepart in management, but are liable, like other partners, to third parties. Such partners generallyhave a pecuniary interest (like a share in the profits) in lending their name to a firm.

(b) **Partners by holding out:** If a person by his words or conduct holds out to another that he is apartner, he will be prevented from denying that he is not a partner.

Minor admitted into the benefits of partnership

A minor is a person who has not attained the age of 18 years. Since a minor is not capable of entering into a valid agreement, he cannot become partner of a firm. He may, however, be admitted to the benefits of anexisting partnership.

PARTNERSHIP - MERITS/ADVANTAGES

A partnership form of organisation offers the following advantages:-

(i) **Ease in formation:** A partnership is very easy to form. All that is required is an agreement among thepartners.

(ii) **Pooling of financial resources**: A partnership commands more financial resources compared to soleproprietorship.

(iii) **Pooling of managerial stalls:** A partnership facilitates pooling of managerial skills of all its partners.This leads to greater efficiency in business operations.

(iv) **Balanced business decisions:** In a partnership firm, decisions are taken unanimously afterconsidering all the major aspects of a problem.

(v) **Sharing of risks:** Unlike sole proprietary organisation, the risks of partnership business are shared by partners on a predetermined basis.

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PARTNERSHIP - LIMITATIONS/ DISADVANTAGES

A partnership form of organisation suffers from the following major limitations:-

(i) **Uncertainty of existence:** The existence of a partnership firm is very uncertain. The retirement,death, bankruptcy or lunacy of any partner can put an end to the partnership.

(ii) **Risks of implied authority:** It is true that like the sole proprietor each partner has unlimited liability.But his liability may arise not only from his own acts but also from the acts and mistakes of copartnersover whom he has no control.

(iii) **Risks of disharmony:** In partnership, since decisions are taken unanimously, it is essential that allpartners reconcile their views for the common good of the organisation.Lack of harmony may paralyse the business and cause conflict andmutual bickering.

(iv) **Difficulty in withdrawal from the firm:** Investment in a partnership can be easily made but cannot beeasily withdrawn. This is so because the withdrawal of a partner's share requires the consent of allother partners.

(vi) **Difficulties of expansion:** It is difficult for a partnership firm to undertake modernization of expansion of its operations. This is because of its inability to raise adequate funds for the purpose.

PARTNERSHIP DEED

Partnership deed, also known as a partnership agreement, is a document that outlines in detail the rights andresponsibilities of all parties to a business operation. It has the force of law and is designed to guide the partners in the conduct of the business. It is helpful in preventing disputes and disagreements over the roleof each partner in the business and the benefits which are due to them.

The key ingredients of a Partnership Deed are given below:-

1. **Definitions and vital information**
   The partnership deed normally carries the name of the business, the address of its principal place ofbusiness and a short summary of the nature of business the partners intend to operate.

2. **Investment**
   The deed gives important financial details of the partnership, such as the amount of capital to be invested byeach partner, the Profit /Loss sharing of each partner , the salaries to be paid to each partner and themethod of distributing the business income.

3. **Accounting**
   The partnership deed provides for the accepted method of accounting for the business;

4. **Duties, powers and obligations of the partners**
   The duties, powers and obligations of each partner may also be spelt out in the Partnership Deed.

5. **Withdrawals**
   The document must also provide for actions to be taken in case of the voluntary withdrawal or death of a partner.

6. **Expulsion**
   If a partner is proving to be a hindrance or detriment to the business, or loses legal rights in a bankruptcy orother court action, the other partners must have a method of modifying the partnership rights of or expellinghim.

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7. **Dissolution**
   The partnership deed should also describe the methods by which the partnership and business will bedissolved, if desired, and how the accounts among the partners would be settled at the termination of thebusiness.

8. **Arbitration**
   As in all business contracts, a partnership deed must provide for the means of arbitration of disputes.

PROCEDURE FOR FORMATION OF PARTNERSHIP FIRMS

Partnership firms in India are governed by the Indian Partnership Act, 1932. While it is not compulsory to register youpartnership firm as there are no penalties for non-registration, it is advisable since the following/ rights are denied to an unregistered firm:-

(a) A partner cannot file a suit in any court against the firm or other partners for the enforcement of anyright arising from a contract or right conferred by the Partnership Act.
(b) A right arising from a contract cannot be enforced in any Court by or on behalf of your firm against any third party.
(c) Further, the firm or any of its partners cannot claim a set off (i.e. mutual adjustment of debts owned by the disputant parties to one another) or other proceedings in a dispute with a third party.

Registration Procedure:

A partnership firm can be registered whether at the time of its formation or even subsequently. You need tofile an application with the **Registrar of Firms** of the area in which your business is located.

(i) Application for partnership registration should include the following information, namely, name of your firm, name of the place where business is carried on , names of any other place where business is carried on , date of partners joining the firm, full name and permanent address of partners and duration of the firm. The Application should be duly signed by all the partners of the firm or by their duly authorized agents.

(ii) Every partner needs to verify and sign the application.

(iii) Ensure that the following documents and prescribed fees are enclosed with the registration application:-

(a) Application for Registration in the prescribed Form -1.
(b) Duly filled Affidavit.
(c) Certified copy of the Partnership deed(The deed so created by the partners should be on astamp paper in accordance with the Indian Stamp Act/ stamp paper as applicable in the State where the Partnership Deed is executed)
(d) Proof of ownership of the place of business or the rental/lease agreement thereof.

As per **section 71** of Indian Partnership Act, states are authorized to make their own regulations with respect to prescribe the fee structure for registration or incorporation of partnership.

It may be also be noted that the name of the partnership firm should not contain any words which may express or imply the approval or patronage of the government except where the government has given its written consent for the use of such words as part of the firm's name.

Once the Registrar of Firms is satisfied that the application procedure has been duly complied with, he shall record an entry of the statement in the Register of Firms and issue a Certificate of Registration.

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Registration under Income Tax

It should be noted that registration with the Registrar of Firms is different from registration with the Income Taxation Department. It is mandatory for all firms to apply for registration with the Income Tax Department and have a PAN Card. After obtaining a PAN Card, the partnership firm is required to open a CurrentAccount in the name of the partnership firm and to operate all its operations through this bank account.

3. HINDU UNDIVIDED FAMILY (HUF)

JOINT HINDU FAMILY BUSINESS - MEANING

The Joint Hindu Family Business is a distinct form of organisation peculiar to India. Joint Hindu Family Firm is created by the operation of law. It does not have any separate and distinct legal entity from that of its members. The laws that govern HUFs are not codified and are read along with the Hindu Succession Act and the Income-tax Act.

The business of Joint Hindu Family is controlled under the Hindu Law instead of Partnership Act.

JOINT HINDU FAMILY BUSINESS -CHARACTERISTICS

1. **Governed by Hindu Law:**

   The business of the Joint Hindu Family is controlled and managed under the Hindu law.
   There are two schools of Hindu law:-
   (i) Dayabhaga, and
   (ii) Mitakshara.

2. **Management:**

   All the affairs of a Joint Hindu Family are controlled and managed by one person who is known as 'Karta' or 'Manager'. The members of the family have full faith and confidence in Karta. Only Karta is entitled to deal without siders.

3. **Membership by Birth:**

   The membership of the family can be acquired only by birth. As soon as a male child is born in family, he becomes a member. Membership requires no consent or agreement.

4. **Liability:**

   Except the Karta, the liability of all other members is limited to their shares in the business. The Karta liablity is unlimited.

5. **Permanent Existence:**

   The death, lunacy or insolvency of any member of the family does not affect the existence of the business of Joint Hindu Family. The family goes on doing its business.

6. **Implied Authority of Karta:**

   In a joint family firm, only Karta has the implied authority to contract debts and pledge the credit and property of the firm for the ordinary purpose of the businesses of the firm.

7. **Minor also a Partner:**

   In a partnership, minor cannot become co-partner though he may be admitted to the benefit of partnership. Ina Joint Hindu Family firm minor is a partner.

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8. **Dissolution:**

The Joint Hindu Family Business can be dissolved only at the will of all the members of the family. Any single member has no right to get the business dissolved.

HUF - BENEFITS

1. **Easy to Start:**
It is very easy to start the Joint Hindu Family Business. No legal formalities are required to be faced, such asregistration.

2. **Efficient Management:**
The management of Joint Hindu Family Business is centralised in the hands of Karta of family. No other member interferes in his management.

3. **Secrecy:**
In Joint Hindu Family Business, 'Karta' is in a position to keep all the affairs to himself and maintains perfect secrecy in all matters.

4. **Prompt Decision:**
The Karta is the only person who exercises control and direction over the business. This ensures prompt or quick decisions.

7. **Natural Love between Members:**
In Joint Hindu Family Business, it is the natural love and affection which the members are having for eachother. It helps to run the business more efficiently and smoothly.

8. **Freedom regarding Selection of Business:**
The Karta is at freedom to select any business of his choice. He has not to depend on others.

PROCEDURE FOR FORMATION OF HUF

(i) Create a HUF Deed.

You have to prepare a deed on stamp paper declaring the formation of the HUF. It should have allthe details, including the name of karta, co-parceners, address and source of funds in the corpus. Creating a HUF Deed is not mandatory. However it is always beneficial to have a HUF Deed.

Key issues to be noted in preparation of a HUF Deed are:-

(a) A HUF deed is a written formal document on a stamp paper specifying the name of Karta and Coparceners of HUF.

(b) The eldest male member of HUF becomes Karta of HUF.

(c) The name of HUF is usually the name of the Karta followed by the word HUF e.g. Ram Kumar HUF.

(d) HUF Deed also states the capital with which the HUF has been initiated.

(e) A declaration is also provided by each member of family where they declare the name of Kartaand also state that—

(i) Karta has the authority of the accounts vested in his hand

(ii) Karta holds the right to govern all the transactions of the HUF accounts on behalf of the members.

(f) Further, a rubber stamp of HUF will also be prepared.

(ii) Register the Deed

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(iii) Obtain PAN.

(iv) Open bank account

After you are allotted a PAN, open a bank account in the name of the HUF.

While there are **tax advantages** of forming an HUF, **the following matters merit consideration:-**

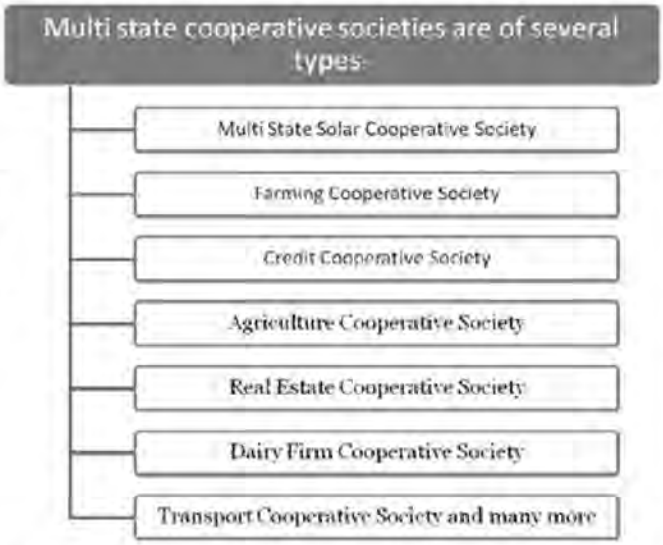
(a) One person cannot form HUF. An HUF is formed by a family.
(b) An HUF is automatically created at the time of marriage.
(c) Hindus, Buddhists, Jains and Sikhs can form HUFs.

Key Points in creation of HUF and format of Deed for creation of HUF:-

(a) Under the Income Tax Act, an HUF is a separate entity for the purpose of income tax return.
(b) The same tax slabs are applicable to HUF as to individual assessee.
(c) If you have ancestral property and earning some income from this property, then it is better to transferthis asset to HUF and save tax up to exemption limit applicable to individual.
(d) Any gifts received by the members of HUF (birthday, marriage, etc.) can be treated as assets of HUF.
(e) The HUF is taxable as separate person under income tax hence one can save tax from basicexemption of ₹2.5 lakh. HUF will also gain from the tax slab structure of computing income tax.
(f) Apart from basic exemption of ₹2.50 lakh, section 80C deduction up to ₹1.50 lakh is alsoavailable.

4. MULTI STATE CO-OPERATIVE SOCIETY

The Multi-State Cooperative Societies (MSCS) Act, enacted in 1984, was modified in 2002, in keeping withthe spirit of the Model Cooperatives Act. Unlike the State Laws, which remained as a parallel legislation toco-exist with the earlier laws, the MSCS Act, 2002 replaced the earlier Act of 1984. The Act and the Rulesthereunder facilitates the incorporation of cooperative societies whose objects and functions spread over toseveral states.



Their main objects shall be serving the interests of members in more than one state and their by-laws shallprovide for social and economic betterment of their members through self-help and mutual aid in accordancewith co-operative principles (Sec. 7). Otherwise, they are ineligible for registration. Under Section 9 of thesaid Act, A multi-state co-operative society is a body corporate with limited liability.

Any application for the registration of a multi-state cooperative society, of which all the members areindividuals, should be signed by at least fifty persons from each of the states concerned.

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MULTI STATE CO-OPERATIVE SOCIETY - BENEFITS

1.	MSCS provides loans at reasonable rates of interest to the poor. This benefits them, as they do not haveto go to financiers who lend at high interest rates.
2.	MSCS can function pan India as they can start branches in different districts and states.
3.	As regulatory requirements of filing, etc, is minimum, MSCS have low compliance costs.
4.	A Multi State Co-operative Credit Society belongs to its members, who are at the same time the ownersand the customers of their Society. This creates a sense of belonging and ownership among the members.

The application for registration of the Multi- State Cooperative Society shall be disposed of by the CentralRegistrar within a period of four months from the date of receipt thereof by him and the Central Registrar shall issue the registrationcertificate in accordance with the rules made thereunder which shall be conclusive evidence that the societyis registered under the MSCS Act, 2002.

MULTI STATE CO-OPERATIVE SOCIETY - FORMATION

An application in **Form -1** should be filed with the Central Registrar of Cooperative Societies, New Delhi along with the following enclosures:-

1.	A certificate from the bank stating credit balance there in favour of the proposed multi-state cooperative society.
2.	A scheme explaining how the proposed multi state co-operative society has reasonable prospectsof becoming a viable unit.
3.	Four copies of bye-laws in original.
4.	Proposed area of operation for registration shall initially be permitted for two contagious states only.
5.	List of at least 50 members from each state.
6.	Contact number and e-mail address of the Chief Promoter or Society on cover page.

All documents to be submitted in original with the signatures of the Chief Promoter/ Promoters on each page.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

13

FINANCIAL SERVICES ORGANISATION AND ITS REGISTRATION

Covering-

- Financial Services Organisation
- Non Banking Financial Company
- NBFC's - Types/Categories
- Benefits of Incorporating an NBFC
- NBFC's - Incorporation
- Registration Process with Reserve Bank of India
- Procedure for filing Application with Reserve Bank of India
- Housing Finance Companies
- Housing Finance Company - Registration Process
- Asset Reconstruction Company(ARC)
- Foreign Investment in ARC
- Micro Finance Institutions (MFI)
- Micro Finance Institution - Characteristics
- MFI - Incorporation
- Nidhi Companies
- Payment Banks
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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FINANCIAL SERVICES ORGANISATION AND ITS REGISTRATION

FINANCIAL SERVICES ORGANISATION

India has a diversified financial sector undergoing rapid expansion, both in terms of strong growth of existing financial services firms and new entities entering the market. The sector comprises commercial banks, insurance companies, non-banking financial companies, co-operatives, co-operatives,pension funds, mutual funds,Housing Finance Companies (HFC's) Assets Reconstruction Companies (ARC's), Micro Finance Institutions (MFI's), and Nidhi Companies and other smaller financial entities.

Payment Bank has also emerged as a new model of banks conceptualized by the Reserve Bank of India (RBI).

NON BANKING FINANCIAL COMPANY

A Non–Banking financial Company (NBFC)is a company registered under the Companies Act,2013 engaed in the business of loans andadvances, acquisition of shares/ stocks/ bonds/ debentures/ securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase , insurance business, chit business **but does not include** any instituton whose principal business is that of agriculture activity, industrial activity, purchase or sale of any good (other than securities) or providing any services and sale/ purchase /construction of immovable property.

NBFCs lend and make investments and hence their activities are same to that of **banks**: **however there are a few differences as given below:-**

(a)	NBFC cannot accept demand deposits:
(b)	NBFCs do not form part of the payment and settlement system and cannot issue cheques drawn on itself:
(c)	Deposit insurance facility of Deposit Insurance and Credit Guarantee Corporation is not available to depositors of NBFCs, unlike in case of banks.

NBFC'S - TYPES/ CATEGORIES

(a) Asset finance Company (AFC):

An AFC is a company which is a financial institution carrying on as its principal business the financing of physical assets supporting productive/ economic activity, such as automobiles ,tractors, machines, generator sets, earth moving and material material handling equipments, moving on own power and general purpose industrial machines.

Principal business for this purpose is defined as aggregate of financing real/physical assets supporting economic activity and income arising there from is not less than 60% of its total assets and income respectively.

(b) Investment company (IC) :

IC means any company which is a financial institution carrying on its principal business the acquisition of securities,

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(c) Loan Company (LC):

LC means any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans, or advances or otherwise for any activity than its own but does not include an Asset Finance Company .

(d) Infrastructure Finance Company (IFC):

IFC is a non-banking finance company

(a)	which deploys at least 75 per cent of its total assets in infrastructure loans,
(b)	b)has a minimum Net Owned Funds of 300 crore,
(c)	c)has a minimum credit rating 'A'or equivalent d) and a CRAR of 15%.

(e) Systemically Important Core Investment Company (CIC-ND-SI):

CIC–ND-SI is an NBFC carrying on the business of acquisition of shares and securities which satisfies the following conditions:-

(i)	It holds not less than 90% of its Total Assets in the form of investment in equity shares, preference shares, debt or loans in group companies:
(ii)	Its investment in the equity shares (including instruments compulsorily Convertible into equity shares within a period not exceeding 10 years from the Date of issue)in group companies constitutes not less than 60% of Total Assets:
(iii)	it does not trade in its investments in shares, debt or loans in group companies except through block sale for the purpose of dilution or disinvestment;
(iv)	It does not carry on other financial activity referred to in Section 451(c) and 451 (f) of the RBI act, 1934 except investment in bank deposits ,money market instruments, government securities, loans to and investments in debt issuances of group companies or guarantees issued on behalf of group companies.
(v)	Its asset size is 100 crore or above and It accepts public funds

(f) Infrastructure Debt fund: Non-Banking Financial Company (IDF-NBFC):

IDF-NBFC is a company registered as NBFC to facilitate the flow of long term debt into infrasture projects. IDF-NBFC raise resources through issue of Rupee or Dollar denominated bonds of minimum 5 year maturity. Only Infrastructure Finance Companies (IFC) can sponsor IDFNBCs.

(g) Non –Banking Financial Company –Micro Finance Institution (NBFC-MFI):

NBFC-MFI is a non-deposit taking NBFC having not less than 85% its assets in the nature of qualifying assets which satisfy the following criteria:

1.	Loan disbursed by an NBFC-MFI to a borrower with a household annual income not exceeding 1,00,000 or urban and semi-urban household income not exceeding 1,60,000;
2.	loan amount does not exceed 50,000 in the first cycle and 1,00,000 in subsequent cycles;
3.	total indebtedness of the borrower does not exceed 1,00,000;
4.	tenure of the loan not to be less than 24 months for loan amount excess of 30,000 with prepaymentwithout penalty;
5.	loan to be extended without collateral;
6.	aggregate amount of loans, given for income generation, is less than 50 per cent of the total loans given by the MFIs;
7.	loan is repayable on weekly, fortnightly or monthly installments at the choice the borrower

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(h)Non –Banking Financial Financial Company-Factors (NBFC-Factors):

NBFC-Factor is a no-deposit taking NBFC engaged in the principal business of factoring. The financial assets in the factoring business should constitute at least 50 percent of its total assets and its income derived from factoring business should not be than 50 percent of its gross income.

(i) Mortgage Guarantee Companies (MGC)-

MGC are financial institution for which at least 90% of the business turnover is mortgage guarantee business or at least 90% of the gross income is mortgage guarantee business and net owned fund is 100 crore.

(j) NBFC-Non Operative Financial Hooding Company

(NOFHC) is financial through which promoter/promoter groups will be permitted to set up a new bank It 's a wholly–owned Non –Operative Financial Holding Company (NOFHC) which will hold the bank as well as other Financial services companies regulated by RBI or other financial sector regulators, to the extent permissible under the applicable regulatory prescriptions.

BENEFITS OF INCORPORATING AN NBFC

1. COMPETITIVE INCORPORATING RATES

Rate of interest is one of the main the main aspects of all types of loans. Non –Banking Financial Sectors have brought down the interest rates rates to either equal to bank lending rates or at times even lower to bank rates.

2. QUICK PROCESSING

At banks, it is very important that the applicant should fulfill the eligibility criteria but NBFC are lenient in this aspect. This makes loan approval easier, smoother process and quicker.

3. LESS RULES AND REGULATIONS

As NBFC are incorporated under the Companies Act,(though regulated by the Reserve Bank of India), the rules and regulations for lending are not as stringent as bank. This helps borrowers to get loans easily . NBFC's do not have statutory reserve ratios and can open branches at will.

4. LOAN AVAILABLE FOR INDIVIDUALS WITH POOR CREDIT RATING

Individuals with poor credit rating generally will not get loans from banks. Unless the credit score is above 600-650 it is difficult to get a loan sanctioned from banks. On the other hand ,loans will be offered to individuals with low credit score by NBFCs but most of the time the interest rates for such fo borrowers will be higher than market rates.

NBFC'S - INCORPORATION

The procedure for incorporating a Non Banking Finance Company (NBFC) is the same as any other company.After incorporation of the company, the NBFC must obtain certificate of registration from RBI.

Since the Net Owned Funds of the entity should not be less than ₹ Two Crore, it must be ensured that the Authorized Share Capital of the NBFC is not less than ₹ Two Crore.

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REGISTRATION PROCESS WITH RESERVE BANK OF INDIA

After incorporation of the company, the NBFC must obtain certificate of registration. Before applying forregistration, the company should ensure the following:-

(a) It should have minimum one director from NBFC background or senior Bankers as full-time directorin the company
(b) Clean CIBIL records
(c) Understanding of NBFC / Finance business

In terms of Section 45-IA of the RBI Act, 1934, a Non-banking Financial company can commence or carry on business of a non-banking financial institution only after

(a) Obtaining a certificate of registration from the Reserve Bank of India and
(b) Having a Net Owned Funds of Rs. Two Crore.

However, Certain categories of NBFCs which are regulated by other regulators are exempted from the requirement of registration with RBI, viz.

(a) Venture Capital Fund/Merchant Banking companies/Stock broking companies registered withSEBI,
(b) Insurance Company holding a valid Certificate of Registration issued by IRDA,
(c) Nidhi companies as notified under the Companies Act,
(d) Chit companies as defined in clause (b) of Section 2 of the Chit Funds Act, 1982,
(e) Housing Finance Companies regulated by National Housing Bank,
(f) Stock Exchange or a Mutual Benefit company.

PROCEDURE FOR FILING APPLICATION WITH RESERVE BANK OF INDIA

(1) The applicant company is required to apply online and submit a physical copy of the application along with the necessary documents to the Regional Office of the Reserve Bankof India.

(2) The application can be submitted online by accessing RBI's secured website https://cosmos.rbi.org.in.

(3) The company can click on "CLICK" for Company Registration on the login page of the COSMOS ***(Open Source Managed Operating System)*** Application. The company can then download suitable application form (i.e. NBFCor SC/RC) from the above website, key in the data and upload the application form.

(4) The company may note to indicate the correct name of the Regional Office in the field "C-8".The company wouldthen get a Company Application Reference Number (CARN) for the application filedon-line.

(5) Thereafter, the company has to submit the hard copy of the application form (indicating theonline Company Application Reference Number) along with the supporting documents, tothe concerned Regional Office.

(6) The company can then check the status of the application from the above mentioned secureaddress, by keying in the acknowledgement number.

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HOUSING FINANCE COMPANIES

Housing Finance Company (HFC) is a type of non-banking financial institution which is primarily engagedin the business of providing home loans and other related products. Unlike other Non-Banking FinancialCompanies which are governed under the regulatory framework of RBI, HFCs are regulated by the **National Housing Bank (NHB).**

A Housing Finance Company (HFC) is a company registered under the Companies Act, 2013 or any earlier enactment which primarily transacts or has as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly.

An HFC also requires registration with National Housing Bank(NHB) for commencing or carrying on the business of housing finance. The National Housing Bank was set up under the National Housing BankAct, 1987. Housing Finance Companies are governed by the said Act and by Circulars, Guidelines, Notifications and Directions issued by National Housing Bank.

In terms of Section 29A of the National Housing Bank Act, 1987, no Housing Finance Company shallcommence or carry on the business of a housing finance institution without –

(a) Obtaining a certificate of registration from National Housing Bank issued under Chapter V of the said Act, and
(b) Having the net owned fund of ₹10 Crore or such other higher amount, as the National Housing Bank may, by notification, specify.

HOUSING FINANCE COMPANY- REGISTRATION PROCESS

The procedure for incorporating a Housing Finance Company (HFC) is the same as any other company.A company registered underthe Companies Act and desirous of commencing business of a housing finance institution, should complywith the following-

(a) either it should primarily transacts or has as one of its principal objects of transacting the business of providing finance for housing, whether directly or indirectly; and
(b) it should have a minimum net owned fund of Rs. 10 crore.

NHB after satisfying itself on the fulfillment of following conditions provided under sub-section (4) ofSection29A of the National Housing Bank Act, 1987 may grant a Certificate of Registration\

ASSET RECONSTRUCTION COMPANY (ARC)

ACRE MAKING ASSETS WORK — ASSETS CARE & RECONSTRUCTION ENTERPRISE LTD

Alchemist Asset Reconstruction Company Ltd

Arcil Premier ARC

PEGASUS

ASREC (India) Limited

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➢ *ARC - MEANING*

Reconstruction company means a company incorporated under provisions of companies Act 1956 for purpose of assets reconstruction.

The main objective of asset reconstruction company (ARC) is to act as agent for any bank or financial institution for the purpose of recovering their dues from the borrowers on payment of fees or charges to act as manager of the borrower's asset taken over by banks, or financial institution and to carry on such ancillary or incidental business with the prior approval of Reserve Bank wherever necessary.

The problem of non performing loans created due to systematic banking crisis world over has become acute. The buying of impaired assets from banks or financial institutions by ARCs will make their balance sheets cleaner and they will be able to use their time, energy and funds for development of their business.

FUNCTIONS OF SECURITISATION OR RECONSTRUCTION COMPANY

(a) Act as agent for any bank or financial institution for the purpose of recovering their dues from the borrower on payment of such fees or charges as may be manually agree upon between the parties;

(b) Act as a manager referred to in clause (c) of sub-section (4) of Section 13 on such fee as may be mutually agreed upon between the parties;

(c) Act as receiver if appointed by any court or Tribunal.

➢ *ARC- REGISTRATION*

Section 3 of the Securitization Act provides for registration of Securitization or reconstruction companies with RBI.

Securitization or reconstruction companies or applicant shall make an application to the RBI in the forms prescribed by RBI. The applicant should have net owned funds of **at least ₹ 2 Cores** or such other amount as the Reserve Bank may, by notification specify.

The RBI shall for the purpose of considering the application for registration shall conduct the inspection of the books and records of the company to satisfy itself about the compliance with the terms laid down in the Act. The registration to the Securitization company shall be granted on such terms and conditions as RBI may dream fit .The RBI may reject the application after giving the applicant a reasonable opportunity of being heard.

Prior RBI approval for substantial change

Every Securitization company or reconstruction company is required to obtain prior approval of the Reserve Bank for any substantial change in its management **or** change of location of its registered office **or** change in its name. The decision of the Reserve Bank shall be final.

The expression *"Substantial change in management"* means the change in the management by way of transfer of shares of amalgamation of transfer of the business of the company.

➢ *ARC- CANCELLATION OF CERTIFICATE OF REGISTRATION*

RBI is entitled to exercise its power to cancel the certificate of registration issued by it to any asset reconstruction company under Section 4 of the SARFESI Act, 2002.

The Grounds for cancellation of certificate of registration are as under:-

(a) If the company ceases to receive or hold any investment from qualified institutional buyer or ceases to carry on asset reconstruction business.

(b) If the company fails to comply with the conditions of registration or fails to comply with the direction by RBI.

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(c) If the company fail to maintain its accounts or it does not submit documents on inspection by RBI.

Reserve Bank of India should give an opportunity to such company before cancelling the registration of such company.

Appeal against Rejection or Cancellation

ASecuritization company or reconstruction company aggrieved by the order of rejection a cancellation of certificate of registration may refer an appeal to the Central Government, within a period of 30 days from the date on which such order of rejection or cancellation is communicated to it.

FOREIGN INVESTMENT IN ARC

(a)	ARC buys bad loans from banks.
(b)	ARC arrange money from QUIBs to buy bad loans from banks.
(c)	Indian QIBs do not invest much in ARCs.
(d)	Therefore ARC's capacity to buy NPA is very low.
(e)	And bank themselves don't have enough expertise or manpower to dispose those NPAs quickly.
(f)	Previously foreign investors could invest only upto 49% in ARC.
(g)	Now, Government also increased foreign investment limit to 74% in ARCs. This would attract more investment in ARCs and help in quicker purchase and disposal of NPAs.

MICRO FINANCE INSTITUONS (MFI)

A microfinance institution is an organization that offers financial services to low income populations. Almost all give loans to their members, and many offer insurance, deposit and other services. An increasing number of microfinance institutions (MFIs) are seeking non-banking finance company (NBFC) status from RBI to get wide access to funding, including bank finance.

NABARD has defined microfinance as "provision of thrift, credit and other financial services and products of very small amounts to the poor in rural, semi-urban and urban areas provided to customers to meet their financial needs; with only qualification that (1) transactions value is small and (2) customers are poor."

MICRO FINANCE INSTITUTION - CHARACTERISTICS

(i)	The size of the loan given by the MFI is small.
(ii)	The repayment period is short.
(iii)	MFI can mobilise resources both from internal and external sources.
(iv)	No collateral for loan is required.
(v)	the purpose of end use of loan is flexible.
(vi)	loans given are mostly group loans, trickling down to individuals.
(vii)	Transaction cost is low, due to group lending.

MFI - INCORPORATION

Firstly, a company has to be incorporated under the Companies Act, 2013. The company may be a private company or a public company.

Secondly, after incorporation, the company has to register itself with the Reserve Bank of India, since a Micro Finance Institution (hereinafter referred to as MFI) is regulated by the Reserve Bank of India.

The list of documents to be filed with RBI for registration are given below:-

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(1)	Certified copies of Certificate of Incorporation.
(2)	Certified copies of extract of only the main object clause in the MOA relating to the financial business.
(3)	Board resolution stating that:the company is not carrying on any NBFC activity/stopped NBFC activity
(4)	For companies already in existence, the Audited balance sheet and Profit & Loss account alongwith directors & auditors report or for the entire period the company is in existence, or for last three yeare, whichever is less ,should be submitted.
(5)	Copy of the certificate of highest educational and professional qualification in respect of all the directors.
(6)	Copy of experience certificate, if any, in the Financial Services Sector (including Banking Sector) in respect of all the directors.

PAYMENT BANKS

Payments banks is a new model of banks conceptualized by the Reserve Bank of India(RBI). TheseBanks can accept a restricted deposit, which is currently limited to Rs. 1 lakh per customer and may be increased further.

They can pay interest on these deposits just like savings bank account. Both current account andsavings accounts can be operated by such banks. Payments banks can issue services like ATM cards, debit cards, net-banking, third party transfers and mobile-banking and offer remittance services, These banks cannot grant loans or issue credit cards.

The main objective of payments bank is to widen the spread of payment and financial services to small business, low-income households, migrant labour workforce in secured technology-driven environment.

Regulations

Payment Banks are regulated by the Reserve Bank of India. It released Guidelines for Licensing of Payment Banks on November 27, 2014 and Operating Guidelines for Payment Banks on October 6, 2016.

An application has to be filed with Reserve Bank of Indian Form III under Section 22 of the Banking Regulation Act, 1949 for a licence to commence banking business by a company incorporated in India and desiring to commence banking business

Key issues which requires compliance by an applicant company are summarised below:-

(1)	The minimum capital requirement is ₹100 crore. For the first five years, the stake of the promoter should remain at least 40%.
(2)	Foreign share holding will be allowed in these banks as per the rules for FDI in private banks inIndia.
(3)	The majority of the bank's board of directors should consist of independent directors, appointed according to RBI guidelines.
(4)	The bank should be fully networked from the beginning. The bank can acceptutility bills. It cannot form subsidiaries to undertake non-banking activities.
(5)	Initially, the deposits will be capped at ₹ 100,000 per customer, but it may be raised by the RBI based on the performance of the bank.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Payment Bank is a new model of banks conceptualized by reserve Bank of India. Elucidate. **[Dec. 2018; 4 Marks]**

SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

14

STARTUPS AND ITS REGISTRATION

Covering-

- Startups
- Startup India Policy
- Eligibility to become start up
- Process of Recognition of Startup
- Start-ups - Benefits
- Indian States with startup policies
- Exemptions for Startups
- Tax Exemptions for the Startups, Effective from 2017-18
- Exemptions to Start-ups under Companies Act, 2013
- Registration Steps for Start-ups
- Financing Options Available for Startup Companies
- Seed Capital
- Equity Financing
- Debt Financing
- Unconventionsal Modes of Financing Options
- Mudra Banks
- Procedure for Loan
- Mudra Card
- Self Test Questions

EXPECTED MARKS COVERAGE (1 to 5)

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STARTUPS AND ITS REGISTRATION

STARTUPS

(a) A startup company (startup or start-up) is an entrepreneurial venture which is typically an emerging, fast growing business that aims to solve an unmet need by developing a viable business model around an innovative product, service, processor a platform.

(b) A startup is usually a company designed to effectively develop and validate a scalable business model.

(c) Start-ups may have high rates of failure, but the minority of successes includes companies that havebecome large and influential.

Evolution

Startup companies can come in all forms and sizes. Some of the critical tasks are to build a co-founding team to secure key or complementary skills, know-how, financial resources, and other elements to build the product for the target market.

Business models for startups are generally found via a "bottom-up" or "top-down" approach. A company may cease to be a startup as it passes various mile stones, such as becoming publicly traded on the stock market in an Initial Public Offering (IPO), or ceasing to exist as an independent entity via a merger or acquisition.

STARTUP INDIA POLICY

Startup India campaign is based on an action plan aimed at promoting bank financing for start-up ventures to boost entrepreneurship and encourage start ups with jobs creation. The campaign was first announced by Prime Minister Narendra Modi in his 15 August 2015 address from the Red Fort.

(a) Start-ups policies;
(b) Government initiatives
(c) Exemptions for Start-ups
(d) Tax benefits
(e) Cooling period for start ups

ELIGIBILITY TO BECOME START UP

To bring uniformity in the identified enterprises, **an entity** shall be considered as a 'startup'-

(a) Up to five years from the date of its incorporation/registration,
(b) If its turnover for any of the financial years has not exceeded Rupees 25 crore, and
(c) It is working towards innovation, development, deployment or commercialization of new products,processes or services driven by technology or intellectual property;

The words ***"entity "means a private limited company as defined in the Companies Act, 2013, or a registered partnership firm registered under section 59 of the Partnership Act, 1932 or a limited liability partnership under the Limited Liability Partnership Act,2002.***

However, Any such entity formed by splitting up or reconstruction of a business already in existence shall not be considered a 'startup'.

Further, in order to obtain tax benefits a startup so identified under the above definition shall be required to obtain a certificate of an eligible business from the Inter-Ministerial Board of Certification.

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An entity is considered to be *working towards towards innovation, development, deployment, or commercialization of new processes or services* driven by technology or intellectual property if it aims to develop and commercialize:

(a) a new product or service or process, or
(b) a significantly improved existing product or service or process, or process, that will create or ass value for customers or workflow.

END OF START-UP

An entity shall cease to be a startup on completion of five years from the date of its incorporation/ registration or if its turnover for any previous year exceeds Rupees 25 crore

PROCESS OF RECOGNITION OF STARTUP

The process of recognition as a 'startup 'shall be through mobile app /portal of the Department ofIndustrial Policy and Promotion .

Startups will be required to submit a simple application with any of following documents:

(a) a recommendation (with regard to innovative nature of business), in a format specified by Department of Industrial Policy and Promotion, from any Incubator established in a post-graduate college in India: or
(b) a letter of support by any incubator which is funded (in relation to project)from Government of India or any State Government as part of any specified scheme to promote innovation :or
(c) a recommendation (with regard to innovative nature of business), in a format specified by Department of Industrial Policy and Promotion, from any Incubator recognized by Government of India:
(d) a letter of funding of not less than 20per cent in equity by any Incubation Fund /Accelerator/Angel Network duly registered with Securities and Exchange Board of India that endorses innovative nature of the business. Or
(e) a letter of funding by Government of India or any State Government as part of any specified scheme to promote innovation ; or
(f) a patent filed and published in the Journal by Indian Patent office in areas affiliated with the nature of business being promoted .

Once such application with relevant document is uploaded, a real-time recognition number will be issued to the startup.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. 'Start up India' initiative has been started by Government of India for creating conducive environment for start-up in India. Explain the pre-conditions for determining an entity as a start up venture. **[Dec. 2018; 4 Marks]**

START-UPS - BENEFITS

(a) SINGLE WINDOW Clearance even with the help of a application
(b) 10.000 crore fund of funds
(c) Reduction in patent registration fee
(d) Modified and more friendly Bankruptcy Code to ensure 90-day exit window
(e) Freedom from mystifying inspections for 3years
(f) Freedom from Capital Gain Tax for 3 years
(g) Freedom from tax in profits for 3 years
(h) Self –certification compliance

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(i)	Starting with 5 lakh schools to target 10 lakh children for innovation programmed
(j)	New schemes to provide IPR protection to start –ups and firms
(k)	Encourage entrepreneurship.
(l)	Stand India across the world as a start –up hub.

NKJ–CLASSROOM PRACTICE



Q. 1. Amar is a young entrepreneur willing to establish an incubator set up in the space of IT, software development, cloud computing or hardware /software maintenance. Advice Amar regarding the benefits available to entrepreneurs in establishing start-ups. **[Dec. 2018; 5 Marks]**

INDIAN STATES WITH STARTUP POLICIES

Few State Governments have also taken initiatives and launched startups policies for their states. A few of these states include:

WEST BENGAL:

West Bengal launched its policies relating to startups in January 2016. It aims to nurture and help startups in various ways. They have launched by the name of startup Bengal. In an effort get all the stakeholders in that community on a single platform.

UTTAR PRADESH:

The Government in this State is working to get more IT investment into the state and promoting upcoming startups in this particular in this particular segment.

ODISHA:

The government of Odisha has launched its policy with a vision of making Odisha one of the top three investment in India. To achieve their goal they havecome up with a 10–year plan, which will work till 2035.

RAJASTHAN:

Rajasthan its plans in October, 2015. The Government plans to help set up around 500 startups within the next five years. For this purpose, they have allocated funding and also plan plan to set up around 50 incubators across the state.

KARNATAKA:

Karnataka has a setup a 5-yers plan with very specific and targets which they hope to achieve by the end of the plan. They want to have at least 25 technology related startups that aim to solve the social problems faced by the state. With their policies, they are aiming to create 18 lakh jobs in thestate itself.

GUJARAT:

They have a threefold strategy which involves the innovators the Institutions ,and the government committee. These three form a chain wherein the innovators come up with the idea which will be facilitated by the institutions and approved and then approved and financed by the government committee.

JHARKHAND:

Jharkhand is the most recent entrant in Indian states with startup policy. The state government has facilitated $1.5 Mn (INR 10 Cr) for Incubation Centers in different part of states.

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EXEMPTIONS FOR STARTUPS

1. **Simple process**

   Government of India has launched a mobile app and website foe registration for startups. Anyone interested in a startup can fill up a simple form on the website and upload certain documents. The entire process is completely inline.

2. **Reduction in cost**

   The government also provides lists of facilitates of patents and trademarks. They will proved high quality Intellectual property Right Services Including fast examination of patents at lower fees. The government will bear all facilitator fees and the startup will bear only the statutory fees.

3. **Easy access to Funds**

   A 10,000 crore rupees fund is set-up by government to funds to the startups as venture capital . The government is also giving guarantee to the lenders to encourage narks and other financial institutions for providing venture capital.

4. **Tax holiday for 3 years**

   Startups will be exempted from income tax for 3 years provided they get a certification from Inter-Ministerial Board (IMB).

5. **R&D facilities**

   Seven new Research Parks be up to provide facilities to startups in the R&D sector.

6. **No time –consuming compliances**

   Various compliances have been simplified for startups to save time and money. Startups shall be allowed to self –certify compliance (through the Startup mobile app) with 9 labour and 3 environment laws.

7. **Tax saving for investor**

   People investing their capital in the venture funds setup by government will get exemption from capital gains. This will help startups to attract more investors

8. **Easy exit**

   In case of exit, start up close its business within 90 days from the date of application of winding up

TAX EXEMPTIONS FOR THE STARTUPS, EFFECTIVE FROM 2017-18

(a)	Under Section 80-IAC, the Startup incorporated after April 1,2016 is eligible for getting 100% tax rebate on profit for three years. The start-ups recognize under the Startup India policy can now claim tax benefits in three out of first seven years under Section 80-IAC of the Income –tax Act, 1961 ,Also the annual turnover must not exceed Rs. 25 Cores in any financial year up to March 2021.
(b)	The start –ups have to pay, Minimum Alternate Tax [MAT]at 18.5% along with the applicable surcharge and cuss . The FM has assured to provide MAT exemptions for the first 5 years in case the startup fails to make profit.
(c)	The domestic companies who hold turnover less than INR 5 Crore in the FY 2014-15 will be liable for 29% tax along with surcharge and other cess. It will be covered under the chapter VI-A.

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EXEMPTIONS TO START-UPS UNDER COMPANIES ACT, 2013

(a)	The provisions of clauses (a) to (e) of Section 73 of the Act shall not apply to a start –up company for are five years from the date of its incorporation.
(b)	Start –ups are allowed to issue Employee Stock Options to promoters working as employees;
(c)	The limits with reheard to sweat equity that can be issued by a start-up company from 25% of paid up capital to 50% of paid up capital ;
(d)	The annual return of a start –up company may be sined by the company secretary, or where there is no company secretary, by the director of the company.
(e)	For start-ups, convening at least one meeting of the board of directors in each half of is calendar year with the gap between the two meetings of not less than Ninety (90) days is sufficient to meet the requirement of Section 173 (5) of the Act.

REGISTRATION STEPS FOR START–UPS

1. **Choose the right legal structure for your startup:**

   Choosing an appropriate legal structure is of the most crucial decisions for any startup. The decision should be taken based on individual circumstances and a host of factors such as nature/sector of business operating ,business , regulatory and tax considerations ,costs of formation and formation and ongoing administration, regulatory capital requirement etc. Preferred entity structures for startups in India are limited liability partnership and private limited company.

2. **Registration and business licenses:**

   Post incorporation of a business entity in India, some necessary registrations are required and mandated by law. TAN,GST registration etc. Business licenses are permits issued by government authority that allow startups to start/continue to operate a particular business.

3. **Founder Equity–Split and Vesting:**

   Founder equity should be split amongst founders based on the nature of role played by each founder along with their time, effort and capital contribution to the startup.

4. **Intellectual Property Protection:**

   Intellectual Property Rights are a very important asset class for a startup. It is essential to obtain trademark registration for the business name/trade name under the Trademarks Act.

5. **Founder agreements:**

   The founders agreement is the most valuable tool to establish the relationship between the founders of a Startup.

6. **Employment contracts:**

   Startups must ensure to enter into clear employment contracts detailing terms and conditions of employment with their employees.

7. **Third Party Agreements:**

   Prior to entering into a third-party agreement and while negotiating the terms, it is advisable to execute a non-disclosure agreement.

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9. **Investment structuring:**

One of the most challenging and time consuming aspects of operating a startup is to raise capital for working capital requirement and growth. In India, Investors (HNIs/Angels/Funds) invest in early and growth stage companies in different structures and on varied terms.

10. **Compliance management:**

Compliance and its importance is often overlooked by many startups. There are multiple laws applicable to specific entity structures under which separate event based and annual compliance is mandated.The consequences of non-compliance can be levy of punitive fines on the startup.

FINANCING OPTIONS AVAILE FOR STARTUP COMPANIES

SEED CAPITAL

Startup business needs the nurturing of finance to explore and grow. The funding done at the nascent (early) stage is called seed funding and the capital is known as a seed capital.

Technically, seed capital is initial capital used at the time of starting the business. this capital can come from the founders, families or friends.

Financing is generally of three types i.e. (1) equity financing: or (2) debt-financing (3) Unconventional Modes Of Financing Options

1. EQUITY FINANCING

Startups are usually equity financed/funded by way of a venture capital /private equity investors and /or angel investors.

VENTURE CAPITALIST/PRIVATE EQUITY

Venture capital ('v c ")/Private Equity ("P E ") is often the first large investment a startup can expect to receive. Convertible instruments are usually the preferred option and most commonly used securities for VC/PE investment which includes compulsory convertible preference shares and compulsory convertible debentures.

ANGEL INVESTORS

Angel investors are usually individuals or a group of industry professionals who are willing to fund the venture in return for an equity stake.

SERIES FUNDING

After Seed funding Round or Angel Funding Round Series Funding Round will start like or early stage round by a portfolio company to the venture capital investor. Series preferred stock is often convertible into common stock in certain cases such as an Initial public offering (IPO) or the sale of the company.

Things to Know When Raising a -SERIES A ROUND-:

1. **Be Series A Ready**

If you are looking to raise a Series A, it might be a good idea to get familiar with what venture funds looks for to ascertain if your company is Series A ready . Promising unit economics, revenue, proof of business model, systems ready to support efficient scaling , product/market fit, customer acquisition strategy and success, quality of team are some key factors that are taken generally taken generally taken into consideration.

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2. **Start Early**

Fundraising in the current environment is a time consuming process –be realistic about the timeframe. Make sure you the process at least 7-8 months prior to when you want to raise a series A financing .

3. **Leverage your Network**

Seed funding is more plentiful and easier to raise as compared to Series A. Leveraging your network and building genuine relationships before start your Series A. fundraiseR will make it easier for you to get potential meetings with investors.

4. **Practice your "Pitch"**

The key is to take as many meetings as possible. Speak to other founders who have successfully raised Series A and take their inputs for your pitch. Meet the low priority investors on your list first

5. **Create a Fundraise Momentum**

Approaching multiple venture funds at the same time is a good idea to get a competitive dynamic into the process. Process. Try keeping your conversations with interested investors moving along at as close to the same pace as possible.

6. **Know the "standard market practice"**

Keep yourself up to date with the commonly offered feel terms for a Series A.

2. DEBT FINANCING

LOAN FROM BANKS & NBFCS:

Loans from banks and NBFCs help for finance the purchase of inventory and equipment, besides securing porting capital and funds for ownership in your venture. However, there are several drawbacks of such funding option. Not only do you pay interest on loan but it also has to be done on time irrespective of how your business is faring. They require substantial collateral and a good track record, besides the fulfillment of other terms and conditions and a lot of documentation as follows:

(a) Application for loan sanction by borrowers:
(b) Issue of sanction letter by the Bank:
(c) Agreement of Loan:
(d) Security/collateral documentation, such as Deed of Mortgage etc.

EXTERNAL COMMERCIAL BORROWINGS:

External commercial Borrowings (ECB) in form of bank leans, buyers ' credit ,suppliers' credit securitized instruments (e.g. on-convertible, optionally convertible or partially convertible preference shares, floating rate notes and fixed rate bonds) can also be availed from non-resident two routes to fund the business requirement of a company . ECB can be accessed under two routes, viz., (i) Automatic Route: and (ii) Approval Route

CGTMSE LOANS:

Under the Credit Guarantee Trust for Micro and Small Enterprises scheme launched by Ministry of Micro,Small & Medium Enterprises (MSME), Government of India to encourage entrepreneurs, one can get loans of up to 1 crore without collateral or surety.

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3. UNCONVENTIONAL MODES OF FINANCING OPTIONS

CROWD FUNDING

This is recent phenomena being practiced For getting seed funding through small amounts collected from a large number of people (crowd), Usually through the Internet. Now we have companies existing in India which are specializing in "Crowd Funding ".

The entrepreneur can get money for his venture by showcasing his idea before a large group of people and trying to convince people of its utility and success.

INCUBATORS

These set-ups precede the seed sfunding stage and help the entrepreneur develop a business idea or make a prototype by providing resources and services in exchange for an equity stake ranging from a prototype by providing resources and services in exchange for an equity stake ranging from from 2-10% .Incubators offer office space, administrative support ,legal compliances, management training ,mentoring and access to industry experts as well as to funding through angel investors or VCs.

These are usual government –supported institutes like the IIMs or IITs, technical institutes or private business incubators run by industry veterans or companies .The incubation period can be 2-3 years and admission is rigorous . Some of the top options in India include IIM–Bangalore NSRCEL, Microsoft Accelerator and IIT –Kanpur ,SIIC and the Sriram College of Commerce (SRCC).

MUDRA BANKS

Micro Units Development and Refinance Agency Bank (or MUDRA Bank) is a public sector financial institution in India. It provides loans at low rates to micro –finance institutions and non-banking financial institutions which then provide credit to MSMEs. It was launched by prime Minister Narendra Modi on 8 April 2015.

The bank will classify its clients into three categories and the maximum allowedloan sums will be based on the category

(a) Shishu : Allowed loans up to ₹ 50,000 (US$780)
(b) Kishore: Allwed loans up to ₹ 5 lakh (US$7,800)
(c) Tarun: Allowed loans up to ₹ 10 lakh (US$16,000)

ELIGIBLE BORROWER FROM MUDRA BANK

1.	Small manufacturing unit
2.	Shopkeepers
3.	Fruit and vegetable vendorss
4.	Artisans

The basic criteria of age should be 18 years old. Loan under the the scheme of the Pradhan Mantri Mudras Bank Loan will be available if and only if it is for commercial and business purposes and not for personal purposes.

MUDRA CARD

After the loan has been sanctioned under MUDRA Yojana, the candidate will get a MUDRA Card, a card like the credit card which the candidate can use to buy business raw material, etc. Madras Card will have a limit of the business loan (subject to ₹10,000 maximum).

SELF TEST QUESTIONS

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FROM ICSI MODULE 

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

15

JOINT VENTURES COLLABORATION AND SPECIAL PURPOSE VEHICLES

Covering-

- Joint Venture
- Joint Venture - Definition
- Joint Venture - Advantages
- Joint Venture - Disadvantages
- Strategies of Joint Venture
- Formation of Joint Ventures
  (1) Equity Joint Venture
  (2) Contractual Joint Venture
- Restrictions under FDI Policy of Government of India
- Documents for Joint Ventures
- Special Purpose Vehicle (SPV)

EXPECTED MARKS COVERAGE (1 to 5)

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JOINT VENTURES COLLABORATION AND SPECIAL PURPOSE VEHICLES

JOINT VENTURE

A simply dictionary meaning of the word 'joint venture 'is a commercial enterprise undertaken jointly by two or more parties which otherwise retain their distinct identities.

JOINT VENTURE - DEFINITION

Joint ventures can be defined as "an enterprise in which two or more investors share ownership and control over property rights and operation". The venture can be for one specific project only, or a continuing business relationship.

Alternatively, we can define a joint venture is an association of two or more individuals or business entities who combine and pool their respective expertise, financial resources, skills, experience, and knowledge in the furtherance of a particular project or undertaking.

Examples of joint Venture Companies in India

(a)	Indian Oil Skytanking Ltd. (between Holders -Ruchi Soya and Indian Oil),
(b)	Ratnagiri Gas & Power Private Limited (between NTPC Ltd and GAIL India Ltd.)
(c)	Mahanagar Gas Ltd. (BG Group of U.K. and GAIL India Ltd.) and
(d)	Petronet LNG Ltd. (between PSU's, namely, BPCL, GAIL India Ltd., ONGC and IOCL)

JOINT VENTURE-ADVANTAGES

1.	**Risk Sharing**: Risk sharing is one of the biggest advantage of forming a Joint Venture, particularly, in those industries where the cost of product development and likelihood of failure of any particular product is very high.
2.	**Economies of Scale**: Another advantage of forming JV is for the industries which has high fixed costs, a JV with a larger company can provide the economies of scale necessary to compete locally or globally and can be an effective way by which two companies can pool resources and achieve critical mass.
3.	**Market Access**: For companies that lack a basic understanding of customers and the relationship/ infrastructure to distribute their products to customers, forming a JV with the right partner can provide instant access to established, efficient and effective distribution channels and receptive customer bases.
4.	**Exploring the Global Market**: Formation of JV can be advantageous to those companies, which are foreseeing an attractive business opportunity in a foreign market. Partnering with foreign company would provide an ease to that Company for penetrating a foreign market
5.	**Cost Efficiency**: For a small-scale company/ entity, sometimes it is difficult to set up theinfrastructure and the machinery required product development. In the moment of need, jointventure is the perfect solution.
6.	**Flexible nature**: The joint venture enterprises provide flexibility, each participant has the freedom to continue with their individual businesses.

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JOINT VENTURE- DISADVANTAGES

A. **Lack of equal involvement**: An equal involvement from all the Joint Venture partners may not be possible.
B. **Cultural Differences**: Different cultures and management styles may result in poor co-operation and integration. People with different beliefs, tastes, and preferences can get in the way big time if left unchecked.
C. **Extensive Research and planning required**: Joint venture can result in a frustrating experience and ultimately a failure if it lacks adequate planning and research.
D. **Lack of clear communication**: joint venture involves different companies from different horizons with different goals, there is often a severe lack of communication between partners.
E. **Unreliable partners**: Because of the separate nature of a joint venture, it is possible that the partners do not devote 100% of their attention to the project and become unreliable.

STRATEGIES OF JOINT VENTURE

(a) Identification of prospective Joint Venture Partner(s):

The prospective partner should be strong in terms of business, technology and resources. One partner must be able to compliment the other partner specially in those areas where it lacks.

(b) Equal Contribution:

Joint Venture Partners must make sure that all the partners have equal contribution in the Joint Venture entity in terms of skills, intellectual resources, marketing resources, capital, and so on.

(c) Written Agreement:

The agreement between two or more parties always be written and must clearly define all the terms, relates to rights and responsibilities of each partner. The language of the agreement must be simple and there should be no ambiguity, also there should be no clashing of interest.

(d) Limiting the scope of Joint Venture:

It is essential that limits and scope of the venture should be defined in the beginning itself.

(e) Establishment of Exit Routes:

JV Partners much establish clear protocols in the beginning itself for amending or unwinding the relation if it fails to meet the expectations or in case there arises any dispute.

FORMATION OF JOINT VENTURES

Joint Ventures can be formed via two modes:-

(a) Equity Joint Venture
(b) Contractual Joint Venture

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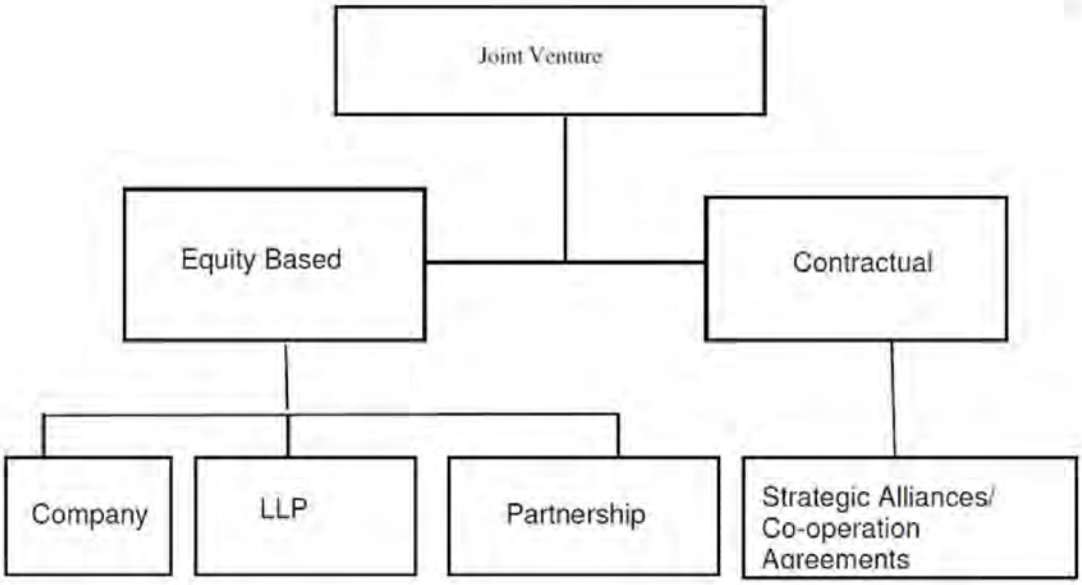

1. Equity Joint Venture

The key characteristics-

(a) The equity joint venture is an arrangement whereby a separate legal entity is created in accordance with the agreement of two or more parties.

(b) The parties undertake to provide money or other resources as their contribution to the assets or other capital of that legal entity. The entity is generally established as a limited liability company and is distinct from either of the parties which participate in its creation.

(c) The newly created company, thus, becomes the owner of the resources contributed by the parties to the joint of the parties which participate in its creation.

(d) Each of the parties in turn becomes the owner of the company having equity in the company.

(e) The parties to a joint venture agreement agree on purposes and functions of the newly created entity, theproportion of capital contribution by each party and the share of each party in the profits of the company and on other matters such as its management, operation, duration and termination.

Every equity based joint venture can be in following ways:

1.	**Company**– A limited liability company is the most preferred structure for joint venture entities in India. Government also encourages investment being in the form of equity capital of a company incorporated in India.
2.	**Limited Liability Partnership (LLP) Firm**– LLP Firm structure is regulated in India by The Limited Liability Partnership Act, 2008.
3.	**Trusts** – A foreign company is not allowed to use Trust as a form of a joint venture entity in India.
4.	**Investment Vehicle** – SEBI has introduced regulations for some funds like Real Estate Investments Trusts, Infrastructure Investment Funds, Alternative Investment Funds. Such funds are now permitted to receive foreign investment from a person resident outside India.
5.	**Other Entities** – Foreign companies are not allowed to use any structures other than those mentioned above for the purpose of equity based joint venture entities.

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2. Contractual Joint Venture

The key characteristics-

1.	The contractual joint venture might be used where the establishment of a separate legal entity is not needed or the creation of such a separate legal entity is not feasible in view of one or the other reasons.
2.	The two parties do not share ownership of the business entity but each of the two parties exercises some elements of or the creation of such a separate legal entity
3.	The contractual joint venture agreement can be entered into in situations where the project involves a narrow task or a limited activity or is for a limited term or where the laws of the host country do not permit the ownership of property by foreign citizens.
4.	For the purposes of contractual joint venture, the relationship between parties is set forth in the contract or agreement concluded between them.
5.	The licensing agreement, know-how agreement, technical services or technical assistance agreement,franchise agreement aremain joint venture agreement.

RESTRICTIONS UNDER FDI POLICY OF GOVERNMENT OF INDIA

Generally speaking, any non-resident entity can set up an equity based joint venture in India. However, some entities face restrictions under FDI Policy of Government of India. The restrictions are as follows:

(1) Citizen or entity of Pakistan can invest only after approval of Government of India. They cannotinvest in defiance, space, atomic energy and sectors prohibited for foreign investment.

(2) Citizen or entity of Bangladesh can invest only after approval of Government of India. However,there are no barred areas as in the case of entities from Pakistan.

(3) NRI residents in Nepal and Bhutan as well as citizens of Nepal and Bhutan can invest onrepatriation basis subject to investment coming in free foreign exchange (USD or EURO) throughnormal banking channels.

(4) A Foreign Venture Capital Investor (FVCI) duly registered in India may contribute up to 100% ofthe capital of an Indian Company under the automatic route and may also set up a domestic assetmanagement company to manage the fund. Such investments are subject to the relevant regulations and FDI policy including sectoral caps, etc.

(5) Foreign Institutional Investor (FII) can invest only under the Portfolio Investment Scheme which limits the individual holding of an FII to 10% of the capital of the company and the aggregate limit for FII investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap / statutory ceiling, as applicable, by the Indian Company concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Bodyand subject to prior intimation to Reserve Bank of India

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Global Education Networks ,Pakistan based Education Company wants to set up equity based joint venture in India .As a professional in India ,Company seeks your advice about various restrictions under Foreign Direct Investment (FDI) of government of India that a foreign entity may face . Advice. **[Dec. 2018; 4 Marks]**

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DOCUMENTS FOR JOINT VENTURES

1. Indian companies wish to have a Memorandum of Understanding (MOU) to define the relationship atthe initial stage. The MOU is a brief document without much legal jargon. The MOU states the dutiesof both parties and lays down a road map for the future.
2. During the engagement phase, a Contractual Joint Venture may be envisaged. The parties areputting in relatively higher amount of resources at this stage. Hence, it is customary to have well-drafted legally binding contracts.

Essential Features of a Shareholders' Agreement (SHA)/ Joint Venture Agreement/ LLP Partnership Agreement (PA)

Some of the key issues which must be kept in mind while drafting the SHA/PA are summarized below:

(a) The business of the new company/ LLP
(b) Manner and extent to which resources (financial, manpower, technology, etc) will be brought in.
(c) Provisions relating to allotment and transfer of shares
(d) Constitution of the Board of Directors/Designated Partners.
(e) Manner in which decision making will take place (majority vote or consensus?)
(f) Decision regarding the Chairman and Managing Director of the entity; their rights, duties and responsibilities.
(g) Persons responsible for managing finances, marketing, production, etc.
(h) Dividend distribution policy
(i) Term of office of the nominated directors, the manner of their appointment and changes among them.
(j) valuation of the company at the time of separation
(k) Dispute resolution mechanism.

SPECLAL PURPOSE VEHICLE (SPV)

(a) A special Purpose Vehicle (SPV) or Special Purpose Entities (SPE) are generally formed for a special purpose.
(b) Scope of these kind of companies or entities are limited only to those activities which are required to be performed to attain that specific purpose. These companies/entities close their operations once the purpose is attained.
(c) The operations of these entities are limited to the acquisition and financing of specificassets. SPVs are generally a subsidiary company whose obligations are secured even if the parent company goes bankrupt.
(d) A SPVs/SPEs may be formed through limited partnerships, trusts, corporations, limited liability corporations or other entities.
(e) An SPV/SPE may be designed for independent ownership, management and funding of a company or as protection of a project from operational or insolvency issues. SPVs help companies securitize assets, create joint ventures, isolate corporate assets or perform other financial transactions.

Benefits of Special Purpose vehicle

(a) **Ownership of Assets –** An SPV allows the ownership of a single asset often by multiple parties and allows for ease of transfer between parties.

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(b) **Minimum Statutory Requirement –** Depending on the choice of jurisdiction, it is relatively cheap and easy to set up an SPV.

(c) **Clarity of documentation –** It is easy to limit certain activities or to prohibit unauthorized transactions within the SPV documentation.

(d) **Tax benefits –** SPVs are often used to make a transaction tax efficient by choosing the most favorable tax residence for the vehicle. SPVs are method of financial engineering schemes which have as their main goal, the avoidance of tax. Some countries have different tax rates for capital gains and gains from property sales

(e) **Legal protection –** By structuring the SPV appropriately, the sponsor may limit legal liability in the event that the underlying project fails.

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SELF TEST QUESTIONS

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Answer to Question No. 2:-

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CHAPTER

16

SETTING UP OF BUSINESS OUTSIDE INDIA AND ISSUES RELATING THERETO

Covering-

- Introduction
- Foreign Exchange Management Act, 1999
- Eligibility (Entities are Referred to as "Indian Party")
- Prohibitions
- Automatic Route
- Investments abroad by certain firms in India
- Method of Funding
- Issues in choosing Location outside India

EXPECTED MARKS COVERAGE (1 to 5)

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SETTING UP OF BUSINESS OUTSIDE INDIA

INTRODUCTION

The year 1991 was the golden year for Indian Economy. The foreign investment policies of the country changed and opened gates for foreign investments to enter Indian territory. This also made Indians eligible to set up business abroad or make an investment abroad as the case may be.

The policy on Indian investments overseas was first liberalized in 1992. Under this policy, an AutomaticRoute for overseas investments was introduced and cash remittances were allowed for the first time withRestriction on the total value.

The introduction of FEMA (Foreign Exchange Management Act) in the year 2000 changed the entireperspective on foreign exchange particularly those relating to investment abroad. This new change broughtin more of 'management' of Foreign Exchange and not "Regulation" unlike the earlier Act.

This Act aimed of to facilitate external trade and payments as well as to promote an orderlydevelopment and maintenance foreign exchange market in India.

FOREIGN EXCHANGE MANAGEMENT ACT, 1999

Overseas Investment (or financial commitment) can be made under two routes viz.

1.	Automatic Route
2.	Approval Route

ELIGIBILITY (ENTITIES ARE REFERRED TO AS "INDIAN PARTY")

Legal Entities permitted to make investments:

1.	Company incorporated in India or a body created under an Act of Parliament
2.	Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008
3.	Partnership firm registered under the Indian Partnership Act, 1932,
4.	Any other entity in India as may be notified by the Reserve Bank:

PROHIBITIONS

(a) Indian Parties are prohibited from making investment (or financial commitment) in a foreign entityengaged in real estate (meaning buying and selling of real estate or trading in TransferableDevelopment Rights (TDRs) but does not include development of townships, construction ofresidential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.

(b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offerfinancial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency,rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of theReserve Bank. Any incidence of such product facilitation would be treated as a contravention of theextant FEMA regulations and would consequently attract action under the relevantprovisions of FEMA, 1999.

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AUTOMATIC ROUTE

DIRECT INVESTMENT OUTSIDE INDIA IN J/V, WHOLLY OWNED SUBSIDIARY

AUTOMATIC ROUTE

An Indian party has been Permitted to Make Investment in Overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS) subject to following conditions:-

(a)	The total financial commitment of the Indian party should not exceed 400 per cent of the net worth of the Indian party (corporate) as on the date of the last audited balance sheet.
(b)	The Indian Party is required to report such acquisition in form ODI to the AD Bank for report to Reserve Bank within a period of 30 days from the date of the transaction.
(c)	The direct investment is made in overseas JV/WOS engaged in bonafide business activity.
(d)	The Indian party is not on RBI's caution list or under investigation of enforcement directorate.
(e)	The automatic route facility is not available for investment in Pakistan.
(f)	For every Joint venture and wholly owned subsidiary RBI allots the **unique identification number**.

GENERAL PERMISSION IN CERTAIN CASES

Residents are permitted to acquire a foreign security, if it represent: -

1. **Qualification shares**

   Qualification shares for becoming a director of a company outside India provided it does not exceed I per cent of the paid upcapital of the overseas company.

2. **Rights shares**

   Rights shares provided that the rights shares are being issued by virtue of holding shares in accordance with the provisions of law for the time being in force;

3. **Investment in equity of company registered overseas**

   Listed Indian co., mutual fund and individuals can invest in equity shares ,rated bonds/fixed income securities of companies listed in foreign stock exchange Investment of Indian listed co. shall not exceed 50% of its net worth as per last investment of Indian listed co. Mutual funds can invest up to extent of us $ 5 billion.

INVESTMENT ABROAD BY CERTAIN FIRMS IN INDIA

1. **FIRM REGISTERED UNDER INDIAN PARTNERSHIP ACT 1932**

   An Indian firm registered under Indian partnership Act 1932 and engaged in providing specified professional services can make investment in foreign concerns engaged engaged in similar activities by way of remittance from India or capitalization fee or other entitlements due to it from such go reign concern.

2. **OVERSEAS INVESTMENT BY REGISTERD TRUST /SOCIETY**

   Registered Trusts and Societies engaged in manufacturing/ educational sector are allowed to make investment in the same sector (s) in a Joint Venture or Wholly owned Subsidiary outside India, with the **prior approval of the Reserve bank.**

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3. ELIGIBILITY CRITERIA FOR TRUST/SOCIETY

1.	The Trust/society should be registered under their respective Acts;
2.	The Trust deed/society permits the proposed investment overseas;
3.	The proposed investment should be approved by the trustee/s /office bearer of society;
4.	The Trust//society has been in existence at least for period of three years;
5.	The trust/Society has not come under the adverse notice of any Regulatory/ Enforcement agency like the Directorate of Enforcement, CBI etc.

METHOD OF FUNDING

Investment (or financial commitment) in an overseas JV / WOS may be funded out of one or more of the following sources:-

(a)	Drawal of foreign exchange from an AD bank in India;capitalisation of exports;
(b)	Swap of shares (valuation as mentioned in Para B.1 (e) above);
(c)	Proceeds of External Commercial Borrowings (ECBs)/ Foreign Currency Convertible Bonds(FCCBs);
(d)	In exchange of ADRs/GDRs issued in accordance with the Scheme for issue of Foreign Currency
(e)	Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993,and the guidelines issued there under from time to time by the Government of India;
(f)	Balances held in EEFC account of the Indian Party and
(g)	Proceeds of foreign currency funds raised through ADR/ GDR issues.

INVESTMEBTS NOT UNDER AUTOMATIC ROUTE AND THAT REQUIRE APPROVAL OF THE RESERVE BANK

1.	Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad. For this purpose, application together with necessary documentsshould be submitted in Form ODI through their Authorized Dealer Category – I banks.
2.	The designated AD before forwarding the proposal should submit the Form ODI in the on-line application under approval route and the transaction number generated by the application should be mentioned in the letter.
3.	In case the proposal is approved, the AD bank should effect the remittance under advice to Reserve Bank so that the UIN (Unique Identification Number) is allotted.

Some proposals which require prior approval of Reserve Bank of India are:s

(a)	Overseas Investments in the energy and natural resources sector exceeding the prescribed limit of the net worth of the Indian companies as on the date of the last audited balance sheet;
(b)	Investments in Overseas Unincorporated entities in the oil sector by resident corporate exceeding the prescribed limit of their net worth as on the date of the last audited balance sheet, provided theproposal has been approved by the competent authority and is duly supported by a certified copy ofthe Board Resolution approving such investment. However, Navaratna Public Sector Undertakings,ONGC Videsh Ltd and Oil India Ltd are allowed to invest in overseas unincorporated / incorporatedentities in oil sector (i.e. for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route;
(c)	Overseas Investments by proprietorship concerns and unregistered partnership firms satisfying certain eligibility criteria;

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(d)	Investments by Registered Trusts / Societies (satisfying certain eligibility criteria) engaged in the Manufacturing / educational / hospital sector in the same sector in a JV / WOS outside India;
(e)	Capitalization of export proceeds remaining unrealized beyond the prescribed period of realization will require the prior approval of the Reserve Bank; and
(f)	Proposals from the Indian party for undertaking financial commitment without equity contribution in JV / WOS may be considered by the Reserve Bank under the approval route .

Reserve Bank would, inter alia, take into account the following factors while considering such applications:

(a)	Prima facie viability of the JV / WOS outside India;
(b)	Contribution to external trade and other benefits which will accrue to India through such investment(or financial commitment);
(c)	Financial position and business track record of the Indian Party and the foreign entity; and
(d)	Expertise and experience of the Indian Party in the same or related line of activity as of the JV/WOSoutside India.

ISSUES IN CHOOSING LOCATION OUTSIDE INDIA

1. **Geographical Location of the business**
   - **(a)** Infrastructure
   - **(b)** Access (transportation of goods, materials and personnel)
   - **(c)** Relevance to supply-chain : raw material sourcing, processing, dispatch of finished produce)
2. **Economic aspects**
   - **(a)** Ease of doing business.
   - **(b)** Cost of doing business.
   - **(c)** Laws relating to taxation.
3. **Political Aspects**
   - **(a)** Friendly country.
   - **(b)** Their relations with nearing countries and neighbors and your country.
4. **Social Aspects**
   - **(a)** Trade bodies, interaction between commercial entities of both nations.

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SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

17

DORMANT COMPANY

Covering-

- Section Charts
- Dormant Company
- Obtaining Dormant Status
- Procedure for Obtaining Status of Dormant Company
- Application Seeking status of an active company
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (1 to 5)

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N.K.J - SECTION CHART

Section	Short Description
Section 2(42)	Definition of Foreign Companies
Section 2(45)	Definition of Government Company
Section 2(62)	Definition of One Person Company
Section 2(68)	Definition of Private Company
Section 2(71)	Definition of Public Company
Section 2(77)	Definition of Relative
Section 2(85)	Definition of Small Company
Section 2(87)	Definition of Holding / Subsidiary Company
Section 8	Definition of Not for Profit Companies/Charitable Companies
Section 379	Application of Act to Foreign Companies
Section 394	Annual Report on Government Companies
Section 395	Annual Reports where one or more State Governments are members of companies
Section 406	Power to modify Act in its application to Nidhis / Nidhi Companies
Section 455	Definition of Dormant Companies
Section 462	Power to exempt class or classes of companies from provisions of this Act.
Rule	Companies (Specification of definition details) Rules, 2014
Rule	Companies (Incorporation) Rules, 2014

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DORMANT COMPANY

DORMANT COMPANY/ INACTIVE COMPANY

SECTION 455

Section 455(1) of the Act defines that when a company is formed and registered under this act for a future project or to hold an asset or intellectual property and has no significant accounting transaction.

Such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed in form no. **MSC-1**. The Registrar shall, after considering the application filed in Form **MSC-1**, issue a certificate in Form **MSC-2** allowing the status of a Dormant Company to the applicant.

The Companies Act, 2013 has recognised a new set of companies called as dormant companies. As per Section 455(1) where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

Explanation appended to section 455(1) says that for the purpose of this section

"Inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

"**Significant accounting transaction"** means any transaction other than

(a) payment of fees by a company to the Registrar;
(b) payments made by company to fulfil the requirements of this Act or any other law;
(c) allotment of shares to fulfil the requirements of this Act; and
(d) payments for maintenance of its office and records.

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Explain the term "Significant Accounting Transaction" while determining status of a company as a dormant company under the Companies Act, 2013.
[Dec. 2018; 3 Marks]

OBTAINING DORMANT STATUS

A Company can obtain status as Dormant Company by Suo moto or ROC can declare a company as Dormant.

***Suo-Moto* application:** A company which meets the above criteria can apply suo-moto to Registrar of Companies (ROC) for the status of a "Dormant company" in Form MSC-1 along with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 after complying with the provision of Rule 3 of The companies (Miscellaneous) Rules, 2014.

Dormant by ROC: In case of a company which has not filed financial statements or annual returns two financial years consecutively, the Registrar may issue a notice to such company and enter the name of such company in the register maintained for dormant companies.

Conditions for obtaining status of dormant company

(a) No, inspection or investigation has been ordered or taken up or carried out against the company.
(b) No prosecution has been initiated and pending against the company under any law.

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(c) The company is neither have any public deposits which are outstanding nor is the company in default I payment thereof or interest thereon.

(d) The company is not having any outstanding loan, whether secured or unsecured. If there is any outstanding unsecured loan, the company may apply after obtaining concurrence of the lender and enclosing the same with Form MSC-1.

(e) The company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government of any State Government or local authorities etc.

(f) The company has not defaulted in the payment of workmen's dues.

(g) The securities of the company are not listed on any stock exchange within or outside India.

PROCEDURE FOR OBTAINING STATUS OF DORMANT COMPANY

Step – 1	A company may make an application in **Form MSC-1** along with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of section 455 after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).
Step – 2	The Registrar shall, after considering the application filed in **Form MSC-1**, issue a certificate in **Form MSC-2** allowing the status of a Dormant Company to the applicant.
Step – 3	The Register maintained under the portal maintained by the Ministry of Corporate Affairs on its *web-site www.mca.gov.in* or any other website notified by the Central Government, shall be the register for dormant companies.
Step – 4	A dormant company shall have a minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company. The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.

The following points relating to dormant companies may be noted:

1. A dormant company shall have a minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company.
2. The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.
3. The financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement.
4. A Dormant Company may hold one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings is not less than ninety days, which will be treated as compliance of section 173 of the Companies Act, 2013.
5. If a company has not obtained the status of a dormant company under section 455 or has not made any application for it and has not been carrying on any business or operation for a period of two immediately preceding financial years, the Registrar may remove the name of the company from the Register of Companies under Section 248 of the Act. [Section 248(1)]

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APPLICATION SEEKING STATUS OF AN ACTIVE COMPANY

Step – 1	An application, under section 455, for obtaining the status of an active company shall be made in Form MSC-4 along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by a return in Form MSC-3 in respect of the financial year in which the application for obtaining the status of an active company is being filed.
Step – 2	The Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of consecutive five years.
Step – 3	The Registrar shall, after considering the application filed, issue a certificate in Form MSC-5 allowing the status of an active company to the applicant.
Step – 4	When a dormant company does or omits to do any act mentioned in the Grounds of application in Form MSC-1 submitted to Registrar for obtaining the status of dormant company, affecting its status of dormant 610 PP-ACL&P company, the directors shall within seven days from such event, file an application, for obtaining the status of an active company.
Step – 5	When the Registrar has reasonable cause to believe that any company registered as 'Dormant Company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company

NKJ–CLASSROOM PRACTICE

SCANNER

Q. 1. Anshul Gold Farm Ltd. has obtained the status of dormant company on 15th December, 2018. Enumerate the various exemptions which the company shall be entitled to under the Companies Act, 2013. **[Dec. 2018; 3 Marks]**

Ans. Benefits / Exemptions Provided to a Dormant Company

A the Anshul Gold Farm Ltd has obtained the status of Dormant Company, they are eligible to enjoy the following exemptions:

(a) Dormant Company shall hold only two board meetings in a year with a gap of 90 days in between the two meetings.

(b) Dormant Company is not required to prepare the statement of cash flow in its financial statement.

(c) The provision of rotation of auditors is not applicable in case of a dormant company.

(d) Dormant companies enjoy the advantages of lower statutory compliances cost as there are few statutory compliances application to a dormant company as compared to active company.

(e) Dormant status is an advantage to promoters who want to hold intellectual property or an asset under the corporate shield for its usage at a later stage.

(f) Companies can enjoy the status of a dormant company for a period of 5 consecutive years.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

18

STRIKING OFF AND RESTORATION OF NAME OF THE COMPANY

Covering-

- Section Charts
- Meaning of 'STRIKING OFF'
- Defunct company – Meaning
- Procedure for striking off defunct company by ROC
- Categories of companies which shall not be removed
- Appeal to tribunal for restoration of the name of company
- List of SKT Forms
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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STRIKING OFF NAMES OF COMPANIES

MEANING OF 'STRIKING OFF'

'Striking-off' implies removal of name of company by ROC from the 'Register of Companies'.

Section 248 of the companies Act, 2013 contains provisions for striking defunct companies off the register, which is an alternative to winding-up of a company. **It is a mode of dissolution of a company without winding up**, the only statutory criterion being that there should be a reasonable cause to believe that the company is not carrying on business or is not in operation (i.e. defunct company).

DEFUNCT COMPANY – MEANING

The expression "defunct company", means a company which is:-	**(a)**	no longer in effect or use;
	(b)	not operating or functioning;
	(c)	not carrying on any business or in operation.

It may be noted that a company which is in the **course of being wound-up voluntarily is deemed 'still in operation'**. A company, although not carrying on business, may be in operation. A company if it is operating as a company for doing something in relation to its past obligations or to avoid future pecuniary liability, it will be deemed to be in operation.

PROCEDURE FOR STRIKING OFF COMPANY

SECTION 248

1. POWER OF REGISTRAR TO REMOVE NAME OF COMPANY FROM REGISTER OF COMPANIES SUO MOTO

Section 248 provides that Where the Registrar has reasonable cause to believe that—

(a) a company has failed to commence its business within one year of its incorporation

(b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under.

(c) The subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within one hundred and eighty days of its incorporation under subsection (1) of section 10A; or

(d) The company is not carrying on any business or operations, as revealed after the physical verification carried out under sub-section (9) of section 12.

The Register of Companies shall send a notice to the company and all the directors of the company to remove the name of the company from the register of companies and requesting them to send their representations along with copies of the relevant documents within a period of **thirty days** from the date of the notice.

At the expiry of the time mentioned in the notice, the Registrar may, unless cause to the contrary is shown by the company, strike off its name from the register of companies, and shall publish notice thereof in the Official Gazette in **Form STK 7**, and on the publication in the Official Gazette of this notice, the company shall stand dissolved.

Nothing in this section apply to a company registered under section 8.

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2. POWER OF REGISTRAR TO REMOVE NAME OF COMPANY FROM REGISTER OF COMPANIES ON APPLICATION OF COMPANY

A company may, after extinguishing all its liabilities, by a **special resolution** file an application in the prescribed manner **(Form STK-2)**to the Registrar for removing the name of the company from the register of companies on all or any of the grounds specified above.

Provided that no application in Form No. STK-2 shall be filed by a company unless it has filed overdue returns in Form No. AOC-4 (Financial Statement) or AOC-4XBRL, as the case may be, and Form No. MGT-7 (Annual Return), up to the end of the financial year in which the company ceased to carry its business operations:

The application in Form STK 2 shall be accompanied by –

(i) indemnity bond duly notarised by every director in Form STK3;
(ii) A statement of accounts in Form No. STK-8 containing assets and liabilities of the company
(iii) An affidavit in Form STK4 by every director of thecompany;
(iv) A copy of the special resolution duly certified by each of the directors of the company
(v) A statement regarding pending litigations, if any, involving the company.

The Registrar shall on receipt of application serve a public notice. In the case of a company regulated under a special Act, approval of the regulatory body constituted or established under that Act shall also be obtained and enclosed with the application. A notice issued shall be published in the prescribed manner and also in the Official Gazette for the information of the general public.

Restrictions on Making Application under Section 248 in Certain Situations

Section 249 provides that An application shall not be filed on behalf of a Company if, at any time in the previous **three months**, the company—

(a) has changed its name or shifted its registered office from one State to another;
(b) has made a disposal for value of property or rights held by it, immediately before cesser of trade
(c) has made an application to the Tribunal for the sanctioning of a compromise or arrangement and the matter has not been finally concluded;
(d) is being wound up under Chapter XX of this Act or under the Insolvency and Bankruptcy Code, 2016.

CATEGORIES OF COMPANIES WHICH SHALL NOT BE REMOVED

The following categories of companies shall not be removed from the register of companies –

(i)	listed companies;
(ii)	companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
(iii)	vanishing companies;
(iv)	companies where inspection or investigation is ordered and being carried out or actions on such order are yet to be taken up
(v)	companies where notices have been issued by the Registrar or Inspector and reply thereto is pending
(vi)	companies against which any prosecution for an offence is pending in any court;
(vii)	companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;

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(viii)	companies, which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;
(ix)	companies having charges which are pending for satisfaction; and
(x)	companies registered under section 8 of the Act.

Explanation.-

*the expression **"vanishing company"** means a company, registered under the Act and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.*

APPEAL TO TRIBUNAL FOR RESTORATION OF THE NAME OF COMPANY

Section 252 provides that any person aggrieved by an order of the Registrar, notifying a company as dissolved may file an appeal to the Tribunal within a **period of three years** from the date of the order of the Registrar and if the Tribunal is of the opinion that the removal of the name of the company from the register of companies is not justified in view of the absence of any of the grounds on which the order was passed by the Registrar, it may order restoration of the name of the company in the register of companies.

A copy of the order passed by the Tribunal shall be filed by the company with the Registrar within thirty days from the date of the order and on receipt of the order, the Registrar shall cause the name of the company to be restored in the register of companies and shall issue a fresh certificate of incorporation.

If a company, or any member or creditor or workman thereof feels aggrieved by the company having its name struck off from the register of companies, the Tribunal on an application made by the company, member, creditor or workman **before the expiry of twenty years** from the publication in the Official Gazette of the notice may, if satisfied that the company was, at the time of its name being struck off, carrying on business or in operation or otherwise it is just that the name of the company be restored to the register of companies, order the name of the company to be restored to the register of companies, and the Tribunal may, by the order, give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

LIST OF SKT FORMS

Purpose	Form Name
Notice by Registrar for removal of name of company from the register of Companies	Form STK-1
Application by company to ROC for removing its name from register of Companies	Form STK-2
Indemnity Bond (to be given individually or collective by every director)	Form STK-3
Affidavit (to be given individually by every director)	Form STK-4
Public Notice	Form STK-5
Public Notice	Form STK-5A
Public Notice	Form STK-6
Notice of Striking Off and Dissolution	Form STK-7

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Q. 1. Spectacular Ltd. wants to make an application to Registrar of Companies (ROC) for removal of its name under section 248(2) of the Companies Act, 2013 from register. It is understood that the application, inter-alia, shall be accompanied by an 'affidavit' by every director of the company. You are a practicing Company Secretary. The company has approached you to draft such an affidavit. Help the company.

[June. 2018; 8 Marks]

Ans.

FORM No. STK - 4

AFFIDAVIT

(to be given individually by every Director)

[Pursuant to Sub Section (2) of Section 248 read with clause (iii) of Sub-rule (3) of Rule 4]

1. I/We .....Directors of .....(hereinafter called "the Company"), incorporated on.....under the Companies Act, 2013 having its registered office at .....and having CIN.....do solemnly affirm and state as under:
   (i) I/We .....S/o / D/o Shri/Smt .....Holder of DIN/Income Tax PAN/Passport number ..... (Copy of Income Tax PAN/Passport duly attested by a Gazetted Officer or a whole time Practicing Professional viz Chartered Accountant/Company Secretary/Cost Accountant) an Director of the Company stated above since ..... (Mention date of appointment).
   (ii) My present residential address is ..... (Copy of documentary evidence duly attested by a Gazetted Officer or a whole time Practicing Professional viz Chartered Accountant/Company Secretary/Cost Accountant) is enclosed (Alternatively, an affidavit sworn before Magistrate may be enclosed).
   (iii) My permanent address is .....(Copy of documentary evidence duly attested by a Gazetted Officer or a whole time Practicing Professional viz Chartered Accountant/Company Secretary/Cost Accountant) is enclosed (Alternatively, an affidavit sworn before Magistrate may be enclosed).\
   (iv) The Company does not maintain any bank account as on date.
   (v) The Company ..... (Mention name of the Company) does not have any assets and liabilities as on date.
   (vi) The Company has. been inoperative from the date of its incorporation/The Company commenced business / operations/commercial activity after incorporation but has been inoperative tor the past ..... year(s) due to following reasons ..... (Give the reasons here).
   (vii) As on date, the Company does not have any dues towards Income Tax/Banks and Financial Institutions; and other Central or State Government Departments/Authorities or any Local Authorities.
2. I further affirm that –
   (i) No inquiry, technical scrutiny, inspection or investigation is ordered or pending against the company;
   (ii) No prosecution or any compounding application for any offence under the Act or under any of the other Acts is pending against the company or against the undersigned;
   (iii) The Company is neither listed nor delisted for non-compliance listing agreement;
   (iv) The Company is not a company incorporated for charitable purposes under Section 8 of the Companies Act, 2013

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	(v) The Company does not have any management disputes or there is no litigation pending with regard to management or shareholding of the company; (vi) No order is in operation staying filing of the documents by a Court or Tribunal or any other Competent Authority; (vii) The Company is not prevented from making the applications for strike off I solemnly state that the contents of this affidavit are true to the best of my knowledge and belief and that it conceals nothing and that no part of it is false. Signature: ……..(Deponent) Verification: - I verify that the contents of this affidavit are true to the best of my knowledge and belief. Signature: ……..(Deponent) Place: Date:

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Q. 1. Spectacular Ltd. wants to make an application to Registrar of companies (ROS) for removal of its name under section 248(2) of the Companies Act, 2013 from register. It is understood that the application, inter-alia, shall be accompanied by an 'affidavit' by every Director of the company. You are a practicing Company Secretary. The company has approached you to draft such an affidavit. Help the Company. [June 2018, 8 Marks]

Ans.

FORM NO. STK-4

AFFIDAVIT

(To be given individually by every director)

[Pursuant to sub section (2) of section 248 read with clause (iii) of sub–rule (3) of Rule4]

1. I/We …… Director of …… hereinafter called "the company"). Incorporated on …….. under the companies Act, 2013 or the Companies Act, 1956 having its registered office at ……and having CIN…… do solemnly affirm and state as under:

(i) I/We ……S/o D/o Shri/Smt…… Holder of DIN/ Income Tax PAN/ Passport number …… (copy of income Tax PAN/ Passport duly attested by a Gazettes officer or a whole time practicing professional viz Chartered Accountant/ Company Secretary/ Cost Accountant) am Director of the Company stated above since ……(mention date of appointment).

(ii) My present residential address is ……(copy of documentary evidence duly attested by a Gazettes Officer or a whole time practicing professional viz Chartered Accountant/ Company Secretary/ Cost Accountant) is enclosed (Alternatively, an affidavit sworn before Magistrate may be enclosed).

(iii) My permanent address is ……. (copy of documentary evidence duly attested by a Gazetted Officer or a whole time practicing professional viz Chartered Accountant/ Company Secretary/ Cost Accountant) is enclosed (Alternatively, an affidavit sworn before Magistrate may be enclosed).

(iv) The Company does not maintain any bank account as on date.

(v) The Company …… (mention name of the Company) does not have any assets and liabilities as on date.

(vi) The Company has been inoperative from the date of its incorporation/ The Company commenced business/ operations/ commercial activity after incorporation but has been inoperative for the past …….. year (s) due to following reasons …….. (give the reasons here).

(vii) As on date, the Company does not have any dues towards Income Tax/ Sales Tax/ Central Excises/ Banks and Financial institutions; and other Central and State Government Departments/ Authorities or any Local Authorities.

2. I further affirm that –

(i) No inquiry, technical scrutiny, inspection or investigation is ordered or pending against the company;

(ii) No prosecution or any compounding application for any offence under the Act or under any of the other Acts is pending against the company or against the undersigned;

(iii) The company is neither listed nor delisted for non-compliance of against agreement;

(iv) The company is not a company incorporated for charitable purposes under section 8 of the Companies Act, 2013 or section 25 of the Companies Act, 1956;

(v) The company does not have any management disputes or there is no litigation pending with regard to management or shareholding of the company;

(vi) No order is in operation staying filing of the documents by a court or tribunal or any other competent authority;

(vii) The company is not prevented from making the applications for strike off as mentioned in section 249 of the Act.

I solemnly state that the contents of this affidavit are true to the best of my knowledge and belief and that it conceals nothing and that no part of it is false.

Signature----------(Deponent)

Verification :- I verify that the contents of this affidavit are true to the best of my knowledge and belief.

Place:

Signature----------(Deponent)

Date:

SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

CS NITESH KR. JAISWAL

Q. 1.

Answer to Question No. 1:-

CS NITESH KR. JAISWAL

Q. 2.

Answer to Question No. 2:-

CS NITESH KR. JAISWAL

CHAPTER

19

STRIKING OFF THE LIMITED LIABILITY PARTNERSHIP

Covering-

- Section Charts
- Striking of the name of LLP
- Striking Off by ROC SUO MOTU
- Striking Off by way of filing an application by the LLP
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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STRIKING OFF THE LLP

STRIKING OFF THE NAME OF LLP

Similar to the provision of section 248 to 252 of the Companies Act, 2013 read with Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 dealing with the provision for Removal of Names of Companies from the Register of Companies, Section 75 of the Limited Liability Partnership Act,2008 read with Rule 37 deals with the provision for the striking off the name of the Limited Liability Partnership from the register of limited liability partnerships.

The Ministry of Corporate Affairs has recently amended Limited Liability Partnership Rules, 2009 by introducing the Limited Liability Partnership (Amendment) Rules, 2017 with effect from 20th May, 2017. With this amendment, LLP Form 24 has been introduced by the MCA to allow easily close a LLP by making an application to the Registrar for striking off name of LLP.

Legal Framework dealing with the provision of Striking off:

In case of an existing LLP which is not carrying on any business or operation for a period of one year or more can make an application in Form 24 to the Registrar, with the consent of all partners of the limited liability partnership for striking off its name from the register. Similarly, where the Registrar has reasonable cause to believe that a limited liability partnership is not carrying on business or its operation, in accordance with the provisions of this Act for a period of two years or more, the name of limited liability partnership maybe struck off from the register of limited liability partnerships by ROC by taking suomotu action for striking off the name of the LLP. However before striking off the name of the LLP, the registrar shall give reasonable opportunity of being heard.

STRIKE OFF BY ROC SUO MOTU:

Subject to the provisions of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of Limited Liability Partnership Rules, 2009 as amended from time to time, the Registrar can suomotu remove the name of the LLP from the Register in case a limited liability partnership is not carrying on any business or operation for a period of two years or more and the Registrar has reasonable cause to believe the same. In such a case the Registrar can suomotu take the action for striking off the name of the LLP.

Procedure to be followed by ROC for striking of the name of the LLP on suomotu basis:

1. **Serve of notice:** Before striking off the name of the LLP, the registrar is required to send a notice to the LLP and all the partners of the LLP of his intention to remove the name of the LLP from the register of partnership. Such a notice shall contain the reasons for which the name of the LLP is to be removed from the register.
2. **Reply to Notice:** On receipt of such a notice the LLP and all the partners of the LLP are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the LLP should not be removed from the register. Such are presentation should be given within a period of one month from the date of the notice.
3. **Consideration of the representation made**: The Registrar will consider the representation made. If the Registrar is not satisfied with the representation made by the LLP and its partners, it may proceed to strike off the name of LLP.

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4. **Publication of Notice:** Notice shall be placed on the website of the Ministry of Corporate Affairs for the information of the general public for the period of one month. Such publication is required to begiven for the information of the general public in order to enable the general public to give their objections, if any, to the proposed striking off of name of the LLP from the register and requiring them to send their objection to Registrar within one month from the date of publication of the notice.
5. **Striking off of the name of the LLP:** After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the Registrar can proceed to strike off the name of the LLP from the Register of partnership.
6. **Provision for realisation of amount due:** The Registrar before passing an order for striking off of the name of the LLP should satisfy that the sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. Registrar can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership.
7. **Notice of dissolution of the LLP:** After the expiry of the time mentioned in the notice, the Registrar can strike off the name of the LLP from the Register. The notice of striking off the name of the LLP from the register and its dissolution should be published in the Official Gazette. The LLP shall stand dissolved on the publication of this notice in the Official Gazette.

STRIKE OFF BY WAY OF FILING AN APPLICATION BY THE LLP

Subject to the provision of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37, wherea limited liability partnership is not carrying on any business or operation for a period of one year, such a LLPcan make an application for purpose of suomotu striking off the name of the LLP.

Procedure of striking off of the name of the LLP by way of an application to ROC:

1. Calling and holding the meeting of the partners of LLP making an application for the striking off ofthe name of the LLP and authorizing the partner to make the application to Registrar. The consentof all partners of the limited liability partnership should be obtained before making an application tothe Registrar for striking off of the name of the LLP.
2. All the pending filing including the Annual Filing of form 8 and 11 up to the end of the financial year in which the limited liability partnership ceased to carry on its business or commercial operations should be completed before making of an application for striking off of the name of the LLP.
3. Approval of concerned authorities should be obtained in case of a LLP regulated by any Special Law.
4. All the Designated Partners of the LLP must execute an affidavit, either jointly or severally, that the Limited Liability Partnership ceased to carry on commercial activity from (Date) or has not commenced business and also declare that the LLP has no liabilities and indemnify any liability that may arise even after striking off its name from the Register. The liability of the Partners would not be extinguished even after closure of a LLP while using Form LLP 24.
5. Thereafter, an application for striking of the name of the LLP shall be made in Form 24 along with fees as prescribed and along with following documents:
   (a) a statement of account disclosing nil assets and nil liabilities, certified by a Chartered Accountant in practice made up to a date not earlier than thirty days of the date of filing of Form24.
   (b) Copy of acknowledgement of latest Income tax return- Self Explanatory

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(c) Copy of the initial limited liability partnership agreement, if entered into and not filed, along with changes thereof

(d) an affidavit signed by the designated partners, either jointly or severally, to the effect,—

(i) that the Limited Liability Partnership has not commenced business or where it commenced business, it ceased to carry on such business from .....(dd/mm/yyyy);

(ii) that the limited liability partnership has no liabilities and indemnifying any liability that may arise even after striking off its name from the Register;

(iii) that the Limited Liability Partnership has not opened any Bank Account and where it had opened, the said bank account has since been closed together with certificate(s) or statement from the respective bank demonstrating closure of Bank Account;

(iv) that the Limited Liability Partnership has not filed any Income-tax return where it has not carried on any business since its incorporation, if applicable.

(e) Copy of Detailed Application- Mention full details of LLP plus reasons for closure

(f) Copy of Authority to Make the Application- Duly signed by all the Partners.

6. **Publication of Notice:** Notice shall be placed on the website of the Ministry of Corporate Affairs for the information of the general public for the period of one month.

7. **Striking off of the name of the LLP:** After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the Registrar can proceed to strike off the name of the LLP from the Register of partnership.

8. **Provision for realisation of amount due:** The Registrar before passing an order for striking off of the name of the LLP should satisfy that the sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. Registrar can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership.

9. **Notice of dissolution of the LLP:** After the expiry of the time mentioned in the notice, the Registrar can strike off the name of the company LLP from the Register. The notice of striking off the name of the LLP from the register and its dissolution should be published in the Official Gazette. The company shall stand dissolved on the publication of this notice in the Official Gazette.

10. **Striking off of the name of the LLP:** On processing the application, if found acceptable, the concerned Registrar will strike off the name of the LLP from the Register of the Partnership.

Liabilities of Partners to be continue after Striking Off

The liability of all designated partners of the limited liability partnership would continue and may be enforced as if the limited liability partnership had not been dissolved.

Restoration of the LLP

If an LLP, or any partner or creditor thereof, feels aggrieved by the LLP having been struck off the register, the Tribunal, on an application made by the

- LLP
- Partner or
- Creditor

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before the expiry of five years from the publication in the Official Gazette of the notice aforesaid, may, if satisfied that the LLP was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the LLP be restored to the register, order the name of the LLP to be restored to the register; and the Tribunal may, by order, give such directions and make such provisions as seem just for placing the LLP and all other partners in the same position as nearly as may be as if the name of the LLP had not been struck off.

Procedure for making an application to NCLT:

1. An application is to be filed before Hon'ble bench of NCLT where the registered office of the LLP is situated, in form NCLT 9. Such an application should be accompanied by various documents proving that the LLP is active LLP and that the name of the LLP should be restored in the Register.
2. A copy of application or appeal is required to be send to Registrar concerned.
3. Registrar may send his report to NCLT as to his comments and views on the restoration of the name of the LLP.
4. NCLT after hearing all the parties shall pass an appropriate for restoration of the name of the LLP in the register.

NKJ–CLASSROOM PRACTICE

Q. 1. The Registrar has suo moto struck off the name of M/s A2Z Solutions, a LLP from the register as Registrar has a reasonable cause to believe that the LLP is not carrying on any business for last two years. Being aggrieved by the order of Registrar, the LLP wants to file an appeal before National Company Law Tribunal (NCLT) for restoration of the name of the LLP in the Registrar of Partnership maintained by the Registrar. Referring to the provisions of the Limited Liability Partnership Act, 2008, advise the company on the procedure to be followed for making an application to NCLT. **[Dec. 2018; 5 Marks]**

Ans. According to Section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of Limited Liability Partnership Rules, 2009 provides for the procedure, powers of striking off the name of the LLP and restoration thereof in case of unjustified removal of the name of LLP.

Rule 37 of the Limited Liability Partnership Rules, 2009 provides that if an LLP, or any partner or creditor thereof, feels aggrieved by the LLP having been struck off the register, the National Company Law Tribunal (NCLT), on an application made by the

- LLP
- Partner or
- Creditor

before the expiry of five years from the publication in the Official Gazette of the notice aforesaid, may, if satisfied that the LLP was, at the time of the striking off, carrying on business or in operation or otherwise that it is just that the LLP be restored to the register, order the name of the LLP to. be restored to .the register; and the NCLT may, by order, give such directions and make such provisions as seem just for placing the LLP and all other partners in the same position as nearly as may be as if the name of the LLP had not been struck off.

SCANNER

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	Procedure for making application to NCLT: 1. An application is to be filed before Hon'ble bench of NCLT where the registered office of the LLP is situated, in form NCLT 9. Such an application should be accompanied by various documents proving that the LLP is active LLP and that the name of the LLP should be restored in the Register. 2. A copy of application or appeal is required to be send to Registrar concerned. 3. Registrar may send his report to NCLT as to his comments and views on the restoration of the name of the LLP. 4. NCLT after hearing all the parties shall pass an appropriate order for restoration of the name of the LLP in the register. Therefore, it is clarified that M/s A2Z Solutions can make an application to NCLT since 5 years has not been lapsed and still eligible to the file same.

CS NITESH KR. JAISWAL

SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE 

CS NITESH KR. JAISWAL

Q. 1.

Answer to Question No. 1:-

CS NITESH KR. JAISWAL

Q. 2.

Answer to Question No. 2:-

CS NITESH KR. JAISWAL

CHAPTER

20

WINDING UP

Covering-

- Sections Chart
- Winding up – Meaning
- Purpose of winding up
- Important differences
- Modes of winding up
- Compulsory winding up / winding up by NCLT
- Dissolution of the company by Tribunal
- Power of the NCLT to Declare Dissolution of the company Void
- Duties of the company secretary in respect of compulsory winding up
- Advance Your Knowledge
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module

EXPECTED MARKS COVERAGE (10 to 15)

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N.K.J - SECTION CHART

Section	Short Description
Section 4	Memorandum of Association
Section 5	Article of Association
Section 6	Act to override memorandum/article of association
Rule	Companies (Incorporation) Rules, 2014

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WINDING UP

WINDING UP -MEANING

Winding up of a Company is defined ***as a process by which the life of a company is brought to an end and its property administered for the benefit of its members and creditors.***

An administrator called the liquidator is appointed and he takes control of the company, collects its assets, pays debts and finally distributes any surplus among the members in accordance with their rights.

PURPOSE OF WINDING UP

The main purpose of winding up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law. However, the purpose must not be exploited for the benefit or advantage of any class or person entitled to submit petition for winding up of a company.

EFFECT OF WINDING UP

At the end of winding up, the company will have no assets or liabilities. When the affairs of a Company are completely wound up, the dissolution of the company takes place. On dissolution, the company's name is struck off the register of companies and its legal personality as a corporation comes to an end.

It may be noted that on winding up, the company does not cease to exist as such except when it is dissolved. The administrative machinery of the company gets changed as the administration is transferred in the hands of the liquidator. Even after commencement of the winding-up, the property and assets of the company belong to the company until dissolution takes place.

On dissolution the company ceases to exist as a separate entity and becomes incapable of keeping property, suing or being sued. Thus in between the winding up and dissolution, the legal status of the company continues and it can be sued in the court of law.

IMPORTANT DIFFERENCES

- **WINDING UP AND INSOLVENCY**

  Following are some of the differences between the effects of insolvency of an individual or a firm and winding up of a company:-

  (a) In the case of insolvency, the whole of the insolvent property is taken out of his hands and rests in the court or the official Assignee in winding upon the other hand the property remain vested in the name of company.

  (b) In insolvency an insolvent individual can obtain his discharge and continue living and working free from the burden of these debts, whereas, a company in liquidation cannot obtain its discharge and continue free from the burden of its debts.

  (c) in the case of an individual the administration of his property by the official assignee the official receiver occurs only if he is declared an insolvent the court, but he assumption of the director's powers by the liquidator occurs even if the company is fully solvent liquidation **or** winding up even of a solvent company can be proceeded without the aid of the court as in voluntary winding up.

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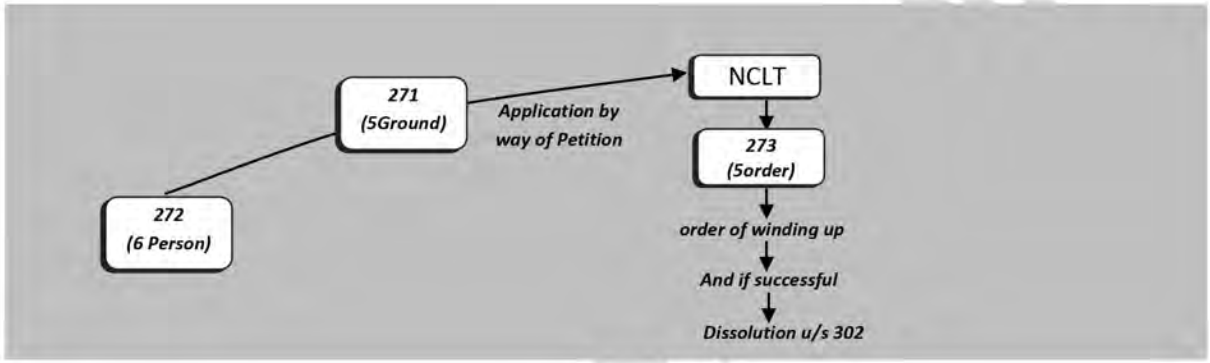

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- **WINDING UP AND DISSOLUTION**

Following are some of the differences between winding- up and dissolution of a company:-

(a) The entire procedure for bringing about a lawful end to the life of a company is divided into two stages – 'winding up' and 'dissolution'. Winding up is the first stage in the process whereby assets are realised, liabilities are paid off and the surplus, if any, distributed among its members. Dissolution is the final stage whereby the existence of the company is withdrawn by the law.

(b) The liquidator appointed by the company or the court carries out the winding up proceedings but the order for dissolution can be passed by the court only.

(c) creditors can prove their debts in the winding up but not on the dissolution of the company.

(d) Winding up in all cases does not end in dissolution. Even after paying all the creditors there may still be a surplus; company may earn profits during the course of beneficial winding up; there may be a scheme of compromise with creditors while company is in winding up and in all such events the company will in all probability come out of winding up and hand over back to shareholders/old management. Dissolution is an act which puts an end to the life of the company.

MODES OF WINDING UP

A company registered under the Companies Act, 2013 may be wound up in any of the following modes:-

Mode of winding up	Applicable laws
1. Compulsory Winding Up **Or** Winding Up by the NCLT	**Chapter XX of Companies Act, 2013**
2. Voluntary winding up	**Chapter V of Part II of Insolvency and Bankruptcy Code, 2016**

COMPULSORY WINDING UP/ WINDING UP BY NCLT

Winding up by the tribunal or compulsory winding up is initiated by an application by way of petition to the NCLT for a winding up order.

WHO MAY PETITION FOR THE WINDING UP

SECTION 272

An application for the winding up of a company has to be made by way of petition to the Tribunal. A petition may be presented under Section 272 by any of the following persons:-

(a) The Company.

Here the directors shall make a petition in the name of the company with the sanction of general meeting by way of special resolution.

(b) Any contributory or contributories.

A contributory is entitled to present a winding up petition, if the shares in respect of which he is a contributory or some of them:

(i) were originally allotted to him; or

(ii) have been held by him and registered in his name for at least 6 months during the 18 months immediately before the commencement of winding up; or

(iii) have devolved upon him through the death of a former holder.

A transfer of shares had been executed, stamped and dated in June, 1967. The company did not register it until October, 1968. The shareholder presented a petition for the winding up of the company in December, 1968. It was held that the petition did not lie, as the petitioner did not hold her shares for 6 months in her name. **[Re, Gattapardo Ltd.]**

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The legal representative of a deceased shareholder is a contributory for the purpose of this section. He can also file a petition for winding up though his name is not there in the register of members.

(c) All or any of the persons specified above in clauses (a) and (b).

(d) The Registrar of Companies.

Registrar of Companies is entitled to present a petition for winding up of a company except ground specified in clauses (a) of Section 271. It is obligatory on the part of the Registrar to obtain prior sanction of the Central Government before presentation of the petition. Before granting the permission, the Central Government shall give a reasonable opportunity of making representations to the Company.

(e) Any person authorized by the Central Government for making the petition for winding up.

(f) In a case falling under Section 271(b), by the Central Government or a State Government.

A copy of the petition made under this section shall also be filed with the Registrar and the Registrar shall submit his views to the Tribunal within sixty days of receipt of such petition.

Petition **presented by the company** for winding up before the Tribunal shall be admitted only if accompanied by a **Statement of Affairs** in such form and in such manner as may be prescribed.

In ***Mumbai Labour Union v. Indo French Time Industries,*** it was held that a trade union cannot file winding up petition for unpaid wages of workmen/employees. They are disentitled as other legitimate and efficacious remedy under labour laws is available. In such case, filing winding up petition is abuse of law.

Though the workers have no right to present a winding up petition, the workers may still be entitled to appear and be heard in support of or in opposition to the winding up petition. That would depend upon whether their interest is likely to be affected by any order, which may be made on the winding up petition.***(National Textile Workers' Union v. P. R. Ramakrishnan)***

GROUNDS ON WHICH A COMPANY MAY BE WOUND UP BY THE COURT

SECTION 271

A company under Section 271 may be wound up by the Court if:-	**(a)**	the company has passed a special resolution of its being wound up by theTribunal ;
	(b)	if the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;
	(c)	if on an application made by the Registrar or any other person authorised by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;
	(d)	if the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years;
	(e)	if the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

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POWERS OF NATIONAL COMPANY LAW TRIBUNAL

SECTION 273

(1) The Tribunal may, on receipt of a petition for winding up under section 272 pass any of the following orders, namely:-

(a) Dismiss it, with or without costs;

(b) Make any interim order as it thinks fit;

(c) Appoint a provisional liquidator of the company till the making of a winding up order;

(d) Make an order for the winding up of the company with or without costs; or

(e) Any other order as it thinks fit:

Provided that an order under this sub-section shall be made within ninety days from the date of presentation of the petition:

Provided further that before appointing a provisional liquidator under clause (c), the Tribunal shall give notice to the company and afford a reasonable opportunity to it to make its representations, if any, unless for special reasons to be recorded in writing, the Tribunal thinks fit to dispense with such notice:

Provided also that the Tribunal shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged for an amount equal to or in excess of those assets, or that the company has no assets.

(2) Where a petition is presented on the ground that it is just and equitable that the company should be wound up, the Tribunal may refuse to make an order of winding up, if it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing the other remedy.

COMMENCEMENT OF WINDING UP BY TRIBUNAL

SECTION 357

Section 357 provides that the winding up of a company by the Tribunal shall be deemed to commence at the time of presentation of petition for the winding up.

Unless the Tribunal otherwise orders, any disposition of the company's property including actionable claims; and the transfer of shares, made after the commencement of the winding up, is void.

DISSOLUTION OF THE COMPANY BY TRIBUNAL

SECTION 302

The Tribunal shall make a dissolution order in the following circumstances:	**(1)** When the affairs of the company have been completely wound up.
	(2) When the Court is of the opinion that the Liquidator cannot proceed with the winding up of a company for want of funds and assets.
	(3) When for any other reason, whatsoever, it is just and reasonable to dissolve the company.

A company in liquidation continues to exist as a legal person till an order of dissolution is passed by the Tribunal. An order of dissolution puts an end to the existence of the company and no action can be brought in its name thereafter. A copy of the dissolution order shall be forwarded by the Company Liquidator to the Registrar of Companies within 30 days from the date of the order that shall make in his books a minute of the dissolution of the company.

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POWER OF THE NCLT TO DECLARE DISSOLUTION OF THE COMPANY VOID

SECTION 356

Section 356 empowers the Tribunal to make an order at any time within 2 years of the date of dissolution, declaring the dissolution to be void in appropriate cases.

The person who obtains the order avoiding the dissolution shall file a certified copy of the order of the Tribunal with the Registrar of Companies, within 30 days of the order or within such further time as the Tribunal may allow.

DUTIES OF THE COMPANY SECRETARY IN RESPECT OF COMPULSORY WINDING UP

The duties of the Secretary in respect of compulsory winding up, the Secretary should help the directors in drawing up the petition.

(a) If the company itself makes the petition for compulsory winding up, the Secretary should help the directors in drawing up the petition.

(b) He should see thata copy of winding up order, when passes by the NCLT is filed with the Registrar within 30 days of the, making of the order.

(c) He should help in preparation of the statement of affairs of the company in the prescribed form for submission to the Official Liquidator. He should see that it is properly verified by an affidavit.

(d) He should give all necessary information to the NCLT, when called upon by it during the course of the winding up.

(e) He should see that all documents, correspondence etc., issued by the company during the period of winding up contain a statement that the company is being wound up.

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Q. 1. The Mumbai Bench of National Company Law Tribunal has received a petitions for winding up of presentable Commodities Ltd. Pramod Manager (Human Resource) of the company wants to know from you, Secretary of the company, what orders can be passed by the Tribunal in this regard. Advise Pramod, under the relevant provision of the Companies Act, 2013. **[June 2018]**

Ans. According to section 273(1) of the Company Act,2013 the Tribunal may, on receipt of a petition for winding up may pass any of the following orders:-

(a) Dismiss it, with or without costs,

(b) Make any interim order as it thinks fit ,

(c) Appoint a provisional liquidator of the company till the making of a winding up order:

(d) Make an order for the winding up of the company with or without costs, or

(e) Any other order as it thinks fit:

CS NITESH KR. JAISWAL

SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Distinguish between:----------
   (a) 'Members' voluntary winding –up and creditors' voluntary winding –up'.
   (b) 'Insolvency of an individual /firm 'winding – up of company'
2. Descriptive Questions:----------
   (a) Discuss in detail the powers of the Court to intervene in the Voluntary winding –up of a company.
   (b) Briefly explain the various modes of winding-up of company.
3. Comment on the following:----------
   (a) In case of a company, the terms 'winding-up and dissolution' convey the same meaning.
   (b) Winding –up is only a process while dissolution puts an end to the existence of a company.
4. Who may petition for winding –up of a company/ what are the procedures for winding - up of unregistered company?

FROM ICSI MODULE

Answer the following:

1. What are the various modes of winding up?
2. What is compulsory winding up? Who are entitled to make a petition to the Court?
3. Distinguish between winding up and dissolution.
4. Distinguish between Members' and Creditors' voluntary winding up.
5. What are the different modes of winding up provided under Companies Act 2013?
6. What are the circumstances under which a company may be wound up by National Company Law Tribunal?
7. What are the circumstances under which a Company may be wound up voluntarily?

CS NITESH KR. JAISWAL

Q. 1.

Answer to Question No. 1:-

Q. 2.

Answer to Question No. 2:-

CHAPTER

21

INSOLVENCY

Covering-

- Concept of Insolvency, Bankruptcy and Liquidation
- Historical developments of insolvency laws in India
- The insolvency and bankruptcy code, 2016 – Introduction
- Structure/ framework of the code
- Pillars of insolvency and bankruptcy code, 2016 / scheme of the code
- Advance Your Knowledge

EXPECTED MARKS COVERAGE (1 to 5)

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INSOLVENCY

CONCEPT OF INSOLVENCY, BANKRUPTCY AND LIQUIDATION

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term **"insolvency"** notes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word **"bankruptcy"** the condition of insolvency. It is a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's assets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion.

The term insolvency is used for individuals as well as organisations/ corporates. If insolvency is not resolved, it leads to bankruptcy in case of individuals and liquidation in case of corporates.

Section 79(4) of the Insolvency and Bankruptcy Code, 2016 defines the term **"bankruptcy"** as the state of being bankrupt.

According to Section 79(3) of the Code, **"bankrupt"** means

(a)	a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126;
(b)	each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or
(c)	any person adjudged as an undischarged insolvent.

Liquidation, on the other hand, in its general sense, means closure or winding up of an corporation or an incorporated entity through legal process on account of its inability to meet its obligations or to pay its debts.

In order to clear the indebtedness, the assets are sold at the most reasonable rates by a competent liquidator appointed in this regard.

HISTORICAL DEVELOPMENTS OF INSOLVENCY LAWS IN INDIA

The law of Insolvency in India owes its origin to English law. India being a colony of the United Kingdom, followed the English insolvency system.

Before the enactment of the Insolvency and Bankruptcy Code, 2016, the provisions relating to insolvency and bankruptcy were fragmented and there was no single law to deal with insolvency and bankruptcy in India. Before the enactment of the Insolvency and Bankruptcy Code, 2016 the following Acts dealt with insolvency and Bankruptcy in India

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(a)	The Presidency Towns Insolvency Act, 1909
(b)	Provisional Insolvency Act, 1920
(c)	Indian Partnership Act, 1932
(d)	The Companies Act, 1956
(e)	The Sick Industrial Companies (Special Provisions) Act, 1985 (SICA)
(f)	The Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI Act)
(g)	The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFESI Act, 2002)
(h)	The Companies Act, 2013

Under the Constitution of India 'Bankruptcy & Insolvency' is provided in Entry 9 of List III (Concurrent List) in the Seventh Schedule to the Constitution. Hence both the Centre and State Governments are authorised to make laws on the subject.

THE INSOLVENCY AND BANKRUPTCY CODE, 2016 – INTRODUCTION

The Insolvency and Bankruptcy Code, 2016 extends to the whole of India. However, Part III of the Code does not extend to the State of Jammu and Kashmir.

Section 2 of the Insolvency and Bankruptcy Code, 2016 as amended vide the **Insolvency and Bankruptcy Code (Amendment) Act, 2018** provides that the provisions of the Code shall apply to –

(a)	any company incorporated under the Companies Act, 2013 or under any previous company law,
(b)	any other company governed by any special Act for the time being in force,
(c)	any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,
(d)	such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,
(e)	personal guarantors to corporate debtors,
(f)	partnership firms and proprietorship firms; and
(g)	individuals, other than persons referred to in clause (e)
in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.	

KEY OBJECTIVES OF THE INSOLVENCY AND BANKRUPTCY CODE, 2016

The objects clause of the Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals
2. To provide for a time bound insolvency resolution mechanism
3. To ensure maximisation of value of assets,
4. To promote entrepreneurship,
5. To increase availability of credit
6. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues and
7. To establish an Insolvency and Bankruptcy Board of India as a regulatory body
8. To provide procedure for connected and incidental matters.

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STRUCTURE/ FRAMEWORK OF THE CODE

The code is divided into following five parts & eleven Schedules:

INSOLVENCY & BANKRUTCY CODE, 2016

5 PARTS		11 SCHEDULES	
PART – I SECTION 1 TO 3	Preliminary	**SCHEDULE – I**	Amendment to the Indian Partnership Act, 1932
PART – II SECTION 4 TO 77	Insolvency Resolution and Liquidation for Corporate Persons	**SCHEDULE – II**	Amendment to the Central Excise Act, 1944
		SCHEDULE – III	Amendment to the Income-Tax Act, 1961
PART – III SECTION 78 TO 187	Insolvency Resolution and Bankruptcy for Individuals and Partnership Firms	**SCHEDULE – IV**	Amendment to the Customs Act, 1962
		SCHEDULE – V	Amendment to the Recovery of Debts due to Banks and Financial Instruments Act, 1993
PART – IV SECTION 188 TO 223	Regulation of Insolvency Professionals, Insolvency Professional Agencies and Information Utilities	**SCHEDULE – VI**	Amendment to the Finance Act, 1994
		SCHEDULE – VII	Amendment to the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 1994
PART – V SECTION 224 TO 255	Miscellaneous	**SCHEDULE – VIII**	Amendment to the Sick Industrial Companies (Special Provisions) Repeal Act, 2003
		SCHEDULE – IX	Amendment to the Payment of Settlement Systems Act, 2007
		SCHEDULE – X	Amendment to the Limited Liability Partnership Act, 2008
		SCHEDULE – XI	Amendment to the Companies Act, 2013

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PILLARS OF INSOLVENCY AND BANKRUPTCY CODE, 2016 / SCHEME OF THE CODE

1. INSOLVENCY AND BANKRUPTCY BOARD OF INDIA ('IBBI' OR 'BOARD')

The Code provides for establishment of the **Insolvency and Bankruptcy Board of India** (Board) by the Central Government. This Board is a body corporate, having perpetual succession, common seal, can enter into contracts, can sue or be sued and can hold property in its own name. The head office of the Insolvency and Bankruptcy Board of India has been set up in New Delhi.

COMPOSITION OF BOARD

The Board shall consist of the following members, who shall be appointed by the Central Government:

1.	Chairperson
2.	Three members amongst the officers of the Central Government not below the rank of Joint Secretary or equivalent, one of each to represent the Ministry of Finance, the Ministry of Corporate Affairs and Ministry of Law, ex officio.
3.	One member nominated by the Reserve Bank of India, ex officio
4.	Five other members to be nominated by the Central Government, out of which three shall be the whole-time members.

QUALIFICATION

The Chairperson and the other members shall be persons of ability, integrity and standing, who have shown capacity in dealing with problems relating to insolvency or bankruptcy and have special knowledge and experience in the field of law, finance, economics, accountancy or administration.

The Board has been established on 1st October, 2016. CS Madhusudan Sahoo has been appointed as the first Chairperson of IBBI.

REMOVAL OF MEMBER FROM OFFICE

Section 190 empowers the Central Government to remove a member from office if he –

(a) is an undischarged bankrupt as defined under Part III;

(b) has become physically or mentally incapable of acting as a member;

(c) has been convicted of an offence, which in the opinion of the Central Government involves moral turpitude;

(d) has, so abused his position as to render his continuation in office detrimental to the public interest.

Section 190 mandates that no member shall be removed under clause (d) unless he has been given a reasonable opportunity of being heard in the matter.

POWERS OF THE BOARD

The Board has the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely:—

(i) The discovery and production of books of account and other documents, at such place and such time as may be specified by the Board;

(ii) Summoning and enforcing the attendance of persons and examining them on oath;

(iii) Inspection of any books, registers and other documents of any person at any place;

(iv) Issuing of commissions for the examination of witnesses or documents.

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Function/ ROLE OF THE BOARD

1. Regulating all matters related to insolvency and bankruptcy process.
2. Register insolvency professional agencies, insolvency professionals and information utilities and renew, withdraw, suspend or cancel such registrations.
3. promote the development of, and regulate, the working and practices of, insolvency professionals, insolvency professional agencies and information utilities and other institutions, in furtherance of the purposes of this Code.
4. . Setting out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.
5. Regulating entry, registration and exit of insolvency intermediaries.
6. Making model bye laws for Insolvency Professional Agencies.
7. Setting out regulatory standards for Insolvency Professionals.
8. Specifying the manners in which Information Utilities can collect and store data.

MODEL BYE-LAWS

Code further provides that the Board may make model bye-laws to be to adopted by **insolvency professional agencies** which may provide for:

(a) The minimum standards of professional competence of the members of insolvency professional agencies.
(b) The standards for professional and ethical conduct of the members of insolvency professional agencies.
(c) Requirements for enrolment of persons as members of insolvency professional agencies which shall be non-discriminatory.
(d) The manner of granting membership.
(e) Setting up of a governing board for internal governance and management of insolvency professional agency in accordance with the regulations specified by the Board.
(f) The information required to be submitted by members including the form and the time for submitting such information.
(g) The specific classes of persons to whom services shall be provided at concessional rates or for no remuneration by members.
(h) The grounds on which penalties may be levied upon the members of insolvency professional agencies and the manner thereof.

2. INSOLVENCY PROFESSIONAL AGENCY ('AGENCIES')

The Code provides for establishment of Insolvency Professional Agencies (Agencies). Such Agencies shall be required to register with the Board and obtain a certificate of registration to be able to carry on its activity as an Agency. IBBI (Insolvency Professional Agency) Regulations, 2016 make provision for registration of Insolvency Professional Agency. There can be more than one such Agencies registered with the Board.

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(i) Agency should be incorporated as Section 8 Company.
(ii) It should have minimum net worth of Rupees Ten Crores and Paid-up Capital of Rupees Five Crores.
(iii) It should not be a subsidiary of company.
(iv) The Board shall specify model bye laws regulating such Agencies. Model Bye-Laws of Insolvency Professional Agency and provisions relating to Governing Board of Insolvency.
(v) Professional Agency has been specified in IBBI (Model Bye-Laws and Governing Board of Insolvency Professional Agency) Regulations, 2016.

At present the following few Insolvency Professional Agencies are registered under section 8 of the Companies Act, 2013 and registered with Insolvency and Bankruptcy Board of India.

1. **ICSI Institute of Insolvency Professionals.**
2. **Insolvency Professional Agency of Institute of Cost Accountants of India.**
3. **Indian Institute of Insolvency Professionals of ICAI.**

FUNCTIONS

The Agencies shall have the following functions:

(a) Grant membership to persons, as Insolvency Professional, who fulfill all requirements or suspend or cancel membership;
(b) Lay down standards of professional conduct for its members and monitor their performance;
(c) Safeguard the rights, interests and privileges of insolvency professionals; and
(d) Redress consumer grievances.

3. INSOLVENCY PROFESSIONALS

Section 3(19) provides that 'Insolvency Professional' means a person enrolled under Section 206 of Insolvency Code, 2016 with an Insolvency Professional agency as its member and registered with the Board(IBBI) as an insolvency professional under Section 207 of Insolvency Code, 2016.

The Insolvency and Bankruptcy Code, 2016 envisages a very big role for insolvency professionals. It is envisaged that most of work relating .to insolvency and bankruptcy will be handled by Insolvency professionals. First-tier control over Insolvency Professionals will be of Insolvency Professional Agency. Final control will be of Board (IBBI).

Code of Conduct for Insolvency Professionals has been prescribed in First Schedule to IBBI (Insolvency Professionals) Regulations, 2016.

ENROLMENT AND REGISTRATION OF INSOLVENCY PROFESSIONALS

Section 206 lays down that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

Section 207(1) further lays down that every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.

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FUNCTIONS OF INSOLVENCY PROFESSIONALS

Section 208(1) of the Code provides that where any insolvency resolution, fresh start, liquidation or bankruptcy process has been initiated, it shall be the function of an insolvency professional to take such actions as may be necessary, in the following matters, namely:–

(a) a fresh start order process under Chapter II of Part III;
(b) individual insolvency resolution process under Chapter III of Part III;
(c) corporate insolvency resolution process under Chapter II of Part II;
(d) individual bankruptcy process under Chapter IV of Part III; and (e) liquidation of a corporate debtor firm under Chapter III of Part II.

CODE OF CONDUCT:–

Section 208(2) mandates that every insolvency professional shall abide by the following code of conduct:–

(a) To take reasonable care and diligence while performing his duties.
(b) To comply with all requirements and terms and conditions specified in the bye laws of the Insolvency professional agency of which he is a member.
(c) To allow the insolvency professional agency to inspect his records.
(d) To submit a copy of the records of every proceedings before the adjudicating authority to the board as well as to the Insolvency professional agency of which he is a member.
(e) To perform his function in such manner and subject to such conditions as may be prescribed.

Therefore, The Code provides for insolvency professionals as intermediaries who would play a key role in efficient working of the bankruptcy process. The Code contemplates insolvency professionals as a class of regulated but private professionals having minimum standards of professional and ethical conduct.

4. INFORMATION UTILITY

Section 3(19) provides that **'Information Utility'** means a person who is registered with the IBBI as an Information Utility under Section 210 of the Code.

The Information Utility shall provide services as may be specified by IBBI. Information Utility will collect, collates, authenticate and disseminate financial information to be used in insolvency, liquidation and bankruptcy proceedings.

With all information required in decision making being available with the Information Utility and accessible by the stakeholders, either on a need basis or in public domain, in effect creates a level playing field and remove all information asymmetry.

OBLIGATIONS OF INFORMATION UTILITY

(a) Collect, collate, authenticate and disseminate financial information of debtors in a universally accessible format with in a centralised electronic databases.
(b) Get the information received from various persons authenticated by all concerned parties before storing such information.
(c) Provide access to the financial information stored by it to any person who intends to access such information.
(d) Have the ability to operate with other information utilities

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WHO CAN BE INFORMATION UTILITY- ELIGIBILITY FOR REGISTRATION

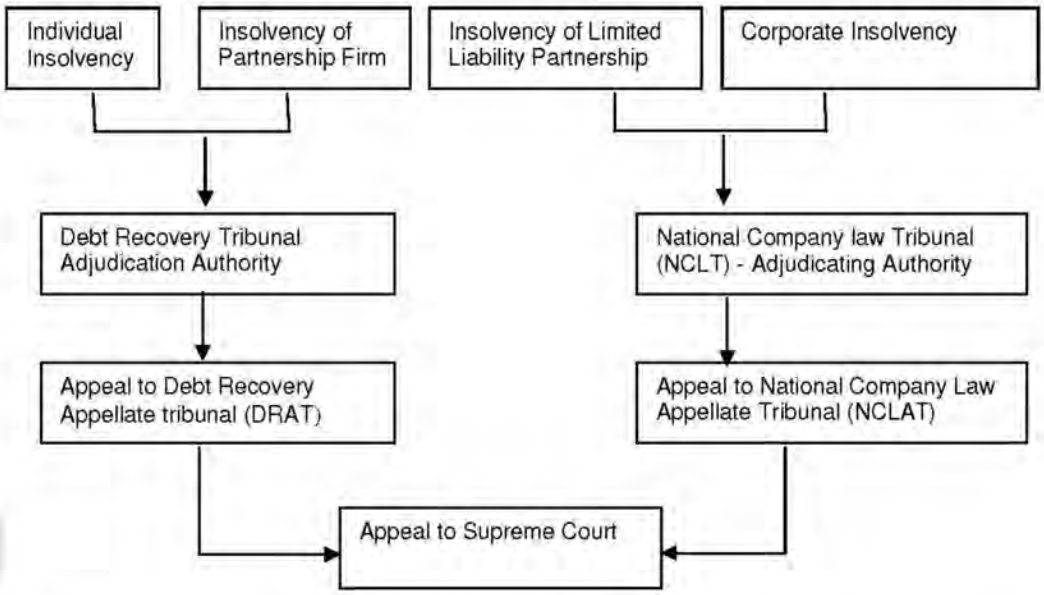
No person shall be eligible to be registered as an information utility **unless it is a public company** and

(a) its sole object is to provide core services and other services under these Regulations, and discharge such functions as may be necessary for providing these services;
(b) its shareholding and governance is in accordance with Chapter III;
(c) its bye-laws are in accordance with Chapter IV;
(d) it has a minimum net worth of fifty crore rupees;
(g) the person itself, its promoters, its directors, its key managerial personnel, and persons holding more than 5%, directly or indirectly, of its paid-up equity share capital or its total voting power, are fit and proper persons:

5. ADJUDICATING AUTHORITIES

The code provides for the following adjudicating authorities:

a. **Debt Recovery Tribunal (DRT)** dealing with insolvency and bankruptcy of individuals and partnership firms. Appeal from orders of DRT shall lie with the Debt Recovery Appellate Tribunal (DRAT);
b. **NCLT** dealing with insolvency, bankruptcy, winding up of companies, LLP, corporate debtors. Appeals from orders of NCLT lie with the NCLAT;
c. Appeals from orders of the **Board** pertaining to Insolvency Professional Agencies, Insolvency Professionals and Information Utilities shall lie with the NCLAT.



As per Section 63, jurisdiction of Civil Courts has been barred. However, writ jurisdiction of High Court and Special Leave Petition (SLP) powers of Supreme Court, granted under Constitution of India, remain unaffected.

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DEFINITIONS IN SECTION 3 OF THE CODE

Section 3 states that unless the context otherwise requires,

1. "Board" means the Insolvency and Bankruptcy Board of India established under sub-section (1) of section 188 [Section 3(1)].
2. "Bench" means a bench of the Adjudicating Authority [Section 3(2)].
3. "Bye-laws" mean the bye-laws made by the insolvency professional agency under section 205 [Section 3(3)].
4. "Charge" means an interest or lien created on the property or assets of any person or any of its undertakings or both, as the case may be, as security and includes a mortgage [Section 3(4)].
5. "Claim" means –
   (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured or unsecured;
   (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured [Section 3(6)].
6. "Corporate Person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider [Section 3(7)].
7. "Corporate Debtor" means a corporate person who owes a debt to any person [Section 3(8)].
8. "Core Services" means services rendered by an information utility for – (a) accepting electronic submission of financial information in such form and manner as may be specified;(b) safe and accurate recording of financial information;(c) authenticating and verifying the financial information submitted by a person; and(d) providing access to information stored with the information utility to persons as may be specified [Section 3(9)].
9. "Creditor" means any person to whom a debt is owed and includes a financial creditor, an operational creditor, a secured creditor, an unsecured creditor and a decree holder [Section 3(10)].
10. "Debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt [Section 3(11)].
11. "Default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not [paid] by the debtor or the corporate debtor, as the case may be [Section 3(12)].

    Section 3(12) of the Code was amended by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.** The aforesaid amendment substituted the word "repaid" with the word "paid" in section.
12. "Financial Information", in relation to a person, means one or more of the following categories of information, namely:–
    (a) records of the debt of the person;
    (b) records of liabilities when the person is solvent;
    (c) records of assets of person over which security interest has been created;
    (d) records, if any, of instances of default by the person against any debt;

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(e) records of the balance sheet and cash-flow statements of the person; and

(f) such other information as may be specified [Section 3(13)].

13. "Financial Institution" means –

(a) a scheduled bank;

(b) financial institution as defined in section 45-I of the Reserve Bank of India Act, 1934;

(c) public financial institution as defined in clause (72) of section 2 of the Companies Act, 2013; and

(d) such other institution as the Central Government may by notification specify as a financial institution [Section 3(14)].

14. "Financial Product" means securities, contracts of insurance, deposits, credit arrangements including loans and advances by banks and financial institutions, retirement benefit plans, small savings instruments, foreign currency contracts other than contracts to exchange one currency (whether Indian or not) for another which are to be settled immediately, or any other instrument as may be prescribed [Section 3(15)].

15. "Financial Service" includes any of the following services, namely:–

(a) accepting of deposits;

(b) safeguarding and administering assets consisting of financial products, belonging to another person, or agreeing to do so;

(c) effecting contracts of insurance;

(d) offering, managing or agreeing to manage assets consisting of financial products belonging to another person;

(e) rendering or agreeing, for consideration, to render advice on or soliciting for the purposes of –

(i) buying, selling, or subscribing to, a financial product;

(ii) availing a financial service; or

(iii) exercising any right associated with a financial product or financial service;

(f) establishing or operating an investment scheme;

(g) maintaining or transferring records of ownership of a financial product;

(h) underwriting the issuance or subscription of a financial product; or

(i) selling, providing, or issuing stored value or payment instruments or providing payment services [Section 3(16)].

16. "Financial Service Provider" means a person engaged in the business of providing financial services in terms of authorisation issued or registration granted by a financial sector regulator [Section 3(17)].

17. "Financial Sector Regulator" means an authority or body constituted under any law for the time being in force to regulate services or transactions of financial sector and includes the Reserve Bank of India, the Securities and Exchange Board of India, the Insurance Regulatory and Development Authority of India, the Pension Fund Regulatory Authority and such other regulatory authorities as may be notified by the Central Government [Section 3(18)].

18. "Insolvency Professional" means a person enrolled under section 206 with an insolvency profession agency as its member and registered with the Board as an insolvency professional under section 207 [Section 3(19)].

19. "Insolvency Professional Agency" means any person registered with the Board under section 201 as an insolvency professional agency [Section 3(20)].

20. "Information Utility" means a person who is registered with the Board as an information utility under section 210 [Section 3(21)].

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21. "Person" includes –
- **(a)** an individual;
- **(b)** a Hindu Undivided Family;
- **(c)** a company;
- **(d)** a trust;
- **(e)** a partnership;
- **(f)** a limited liability partnership; and
- **(g)** any other entity established under a statute, and includes a person resident outside India [Section 3(23)].

22. "Property" includes money, goods, actionable claims, land and every description of property situated in India or outside India and every description of interest including present or future or vested or contingent interest arising out of, or incidental to, property [Section 3(27)].

23. "Secured Creditor" means a creditor in favour of whom security interest is created [Section 3(30)].

24. "Security Interest" means right, title or interest or a claim to property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person: Provided that security interest shall not include a performance guarantee; [Section 3(31)].

25. "Transaction" includes an agreement or arrangement in writing for the transfer of assets, or funds, goods or services, from or to the corporate debtor [Section 3(33)].

26. "Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien [Section 3(34)].

27. "Transfer of Property" means transfer of any property and includes a transfer of any interest in the property and creation of any charge upon such property [Section 3(35)].

DEFINITIONS IN SECTION 5 OF THE CODE

Section 5 belongs to Part II of the Code which lays down procedure for insolvency resolution and liquidation to be followed in case of **corporate persons.** Section 5 states that unless the context otherwise requires:

1. **"Adjudicating Authority",** for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013 [Section 5(1)].
2. **"Constitutional Document",**in relation to a corporate person, includes articles of association, memorandum of association of a company and incorporation document of a Limited Liability Partnership [Section 5(4)].
3. **"Corporate Applicant"** means –
   - **(a)** corporate debtor; or
   - **(b)** a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
   - **(c)** an individual who is in charge of managing the operations and resources of the corporate debtor; or
   - **(d)** a person who has the control and supervision over the financial affairs of the corporate debtor c.
4. "Corporate Guarantor" means a corporate person who is the surety in a contract of guarantee to a corporate debtor [Section 5(5A)]."Corporate Guarantor" was not defined in the original Code. This definition was added by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.**

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5. **"Dispute"** includes a suit or arbitration proceedings relating to – (a) the existence of the amount of debt; (b) the quality of goods or service; or (c) the breach of a representation or warranty [Section 5(6)].

6. **"Financial Creditor"** means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to [Section 5(7)].

7. **"Financial Debt"** means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –
   (a) money borrowed against the payment of interest;
   (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
   (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
   (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
   (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;
   (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

   Explanation – For the purposes of this sub-clause,
   (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
   (ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016.

   [The above Explanation to clause (f) of Section 5(8) was added vide the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.**
   (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
   (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
   (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause [Section 5(8)].

8. **"Financial Position",** in relation to any person, means the financial information of a person as on a certain date [Section 5(9)].

9. **"Information Memorandum"** means a memorandum prepared by resolution professional under sub-section (1) of section 29 [Section 5(10)].

10. **"Initiation Date"** means the date on which a financial creditor, corporate applicant or operational creditor, as the case may be, makes an application to the Adjudicating Authority for initiating corporate insolvency resolution process [Section 5(11)].

11. **"Insolvency Commencement Date"** means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be [Provided that where the interim resolution professional is not appointed in the order admitting application under section 7, 9 or 10, the insolvency commencement date shall be the date on which such interim resolution professional is appointed by the Adjudicating Authority] [Section 5(12)].[The above proviso was added vide the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018.**

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12. **"Insolvency Resolution Process Costs"** means –

    (a) the amount of any interim finance and the costs incurred in raising such finance;
    (b) the fees payable to any person acting as a resolution professional;
    (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;
    (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and
    (e) any other costs as may be specified by the Board [Section 5(13)].

13. **"Insolvency Resolution Process Period"** means the period of one hundred and eighty days beginning from the insolvency commencement date and ending on one hundred and eightieth day [Section 5(14)].

14. **"Interim Finance"** means any financial debt raised by the resolution professional during the insolvency resolution process period [Section 5(15)].

15. **"Liquidation Cost"** means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board [Section 5(16)].

16. **"Liquidation Commencement Date"** means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be [Section 5(17)].

17. **"Liquidator"** means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be [Section 5(18)].

18. **"Operational Creditor"** means a person to whom an operational debt is owed and includes any person to whom such debt has been legally assigned or transferred [Section 5(20)].

19. **"Operational Debt"** means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority [Section 5(21)].

    The **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** substituted the word "repayment" with "payment" in Section 5(21) of the Code.

20. **"Personal Guarantor"** means an individual who is the surety in a contract of guarantee to a corporate debtor [Section 5(22)].

21. **"Personnel"** includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor [Section 5(23)].

22. **"Related Party", in relation to a corporate debtor**, means –

    (a) a director or partner of the corporate debtor or a relative of a director or partner of the corporate debtor;
    (b) a key managerial personnel of the corporate debtor or a relative of a key managerial personnel of the corporate debtor;
    (c) a limited liability partnership or a partnership firm in which a director, partner, or manager of the corporate debtor or his relative is a partner;
    (d) a private company in which a director, partner or manager of the corporate debtor is a director and holds along with his relatives, more than two per cent. of its share capital;
    (e) a public company in which a director, partner or manager of the corporate debtor is a director and holds along with relatives, more than two per cent. of its paid-up share capital;
    (f) anybody corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

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(g) any limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, acts on the advice, directions or instructions of a director, partner or manager of the corporate debtor;

(h) any person on whose advice, directions or instructions, a director, partner or manager of the corporate debtor is accustomed to act;

(i) a body corporate which is a holding, subsidiary or an associate company of the corporate debtor, or a subsidiary of a holding company to which the corporate debtor is a subsidiary;

(j) any person who controls more than twenty per cent. of voting rights in the corporate debtor on account of ownership or a voting agreement;

(k) any person in whom the corporate debtor controls more than twenty per cent. of voting rights on account of ownership or a voting agreement;

(l) any person who can control the composition of the board of directors or corresponding governing body of the corporate debtor;

(m) any person who is associated with the corporate debtor on account of –

(i) participation in policy making processes of the corporate debtor; or

(ii) having more than two directors in common between the corporate debtor and such person; or

(iii) interchange of managerial personnel between the corporate debtor and such person; or

(iv) provision of essential technical information to, or from, the corporate debtor [Section 5(24)].

23. "Related Party", in relation to an individual, means –

(a) a person who is a relative of the individual or a relative of the spouse of the individual;

(b) a partner of a limited liability partnership, or a limited liability partnership or a partnership firm, in which the individual is a partner;

(c) a person who is a trustee of a trust in which the beneficiary of the trust includes the individual, or the terms of the trust confers a power on the trustee which may be exercised for the benefit of the individual;

(d) a private company in which the individual is a director and holds along with his relatives, more than two per cent. of its share capital;

(e) a public company in which the individual is a director and holds along with relatives, more than two per cent. of its paid-up share capital;

(f) a body corporate whose board of directors, managing director or manager, in the ordinary course of business, acts on the advice, directions or instructions of the individual;

(g) a limited liability partnership or a partnership firm whose partners or employees in the ordinary course of business, act on the advice, directions or instructions of the individual;

(h) a person on whose advice, directions or instructions, the individual is accustomed to act;

(i) a company, where the individual or the individual along with its related party, own more than fifty per cent. of the share capital of the company or controls the appointment of the board of directors of the company.

Explanation. For the purposes of this clause, –

(i) "relative", with reference to any person, means anyone who is related to another, in the following manner, namely: –

(i) members of a Hindu Undivided Family,

(ii) husband,

(iii) wife,

(iv) father,

(v) mother,

(vi) son,

(vii) daughter,

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(viii) son's daughter and son,
(ix) daughter's daughter and son,
(x) grandson's daughter and son,
(xi) granddaughter's daughter and son,
(xii) brother,
(xiii) sister,
(xiv) brother's son and daughter,
(xv) sister's son and daughter,
(xvi) father's father and mother,
(xvii) mother's father and mother,
(xviii) father's brother and sister,
(xix) mother's brother and sister; and

(ii) wherever the relation is that of a son, daughter, sister or brother, their spouses shall also be included **[Section 5(24A) added by the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018].**

24. **"Resolution Applicant"** means a person, who individually or jointly with any other person, submits a resolution plan to the resolution professional pursuant to the invitation made under clause (h) of sub-section (2) of section 25 [Section 5(25)].The above definition of "Resolution applicant" was provided by **the Insolvency and Bankruptcy Code (Amendment) Act, 2018.** Originally, the definition of "resolution Applicant" was as follows:"Resolution Applicant" means any person who submits a resolution plan to the resolution professional.

25. **"Resolution Plan"** means a plan proposed by **resolution applicant** for insolvency resolution of the corporate debtor as a going concern in accordance with Part II [Section 5(26)].

26. **"Resolution Professional"**, for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional [Section 5(27)].

27. **"Voting Share"** means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor [Section 5(28)].

DEFINITIONS IN SECTION 79 OF THE CODE

Section 79 belongs to Part III of the Code which lays down procedure for insolvency resolution and bankruptcy for **individuals and partnership firms.** Section 79 states that unless the context otherwise requires:

(1) **"Adjudicating Authority"** means the Debt Recovery Tribunal constituted under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 [Section 79(1)].

(2) **"Associate"** of the debtor means –

(a) a person who belongs to the immediate family of the debtor;
(b) a person who is a relative of the debtor or a relative of the spouse of the debtor;
(c) a person who is in partnership with the debtor;
(d) a person who is a spouse or a relative of any person with whom the debtor is in partnership;
(e) a person who is employer of the debtor or employee of the debtor;
(f) a person who is a trustee of a trust in which the beneficiaries of the trust include a debtor, or the terms of the trust confer a power on the trustee which may be exercised for the benefit of the debtor; and

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(g) a company, where the debtor or the debtor along with his associates, own more than fifty per cent. of the share capital of the company or control the appointment of the board of directors of the company.

Explanation – For the purposes of this sub-section, "relative", with reference to any person, means anyone who is related to another, if –

(i) they are members of a Hindu Undivided Family;

(ii) one person is related to the other in such manner as may be prescribed [Section 79(2)].

(3) **"Bankrupt"** means –

(a) a debtor who has been adjudged as bankrupt by a bankruptcy order under section 126; (b) each of the partners of a firm, where a bankruptcy order under section 126 has been made against a firm; or (c) any person adjudged as an undischarged insolvent [Section 79(3)].

(4) **"Bankruptcy"** means the state of being bankrupt [Section 79(4)].

(5) **"Bankruptcy Debt"**, in relation to a bankrupt, means – (a) any debt owed by him as on the bankruptcy commencement date; (b) any debt for which he may become liable after bankruptcy commencement date but before hisdischarge by reason of any transaction entered into before the bankruptcy commencement date; and (c) any interest which is a part of the debt under section 171 [Section 79(5)].

(6) **"Bankruptcy Commencement Date"** means the date on which a bankruptcy order is passed by the Adjudicating Authority under section 126 [Section 79(6)].

(7) **"Bankruptcy Order"** means an order passed by an Adjudicating Authority under section 126 [Section 79(7)].

(8) **"Bankruptcy Process"** means a process against a debtor under Chapters IV and V of this Part [Section 79(8)].

(9) **"Bankruptcy Trustee"** means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125 [Section 79(9)].

(10) **"Committee of Creditors"** means a committee constituted under section 134; [Section 79(11)].

(11) **"Debtor"** includes a judgment-debtor [Section 79(12)].

(12) **"Discharge Order"** means an order passed by the Adjudicating Authority discharging the debtor under sections 92, 119 and section 138, as the case may be [Section 79(13)].

(13) **"Excluded Assets"** for the purposes of this part includes – (a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation, (b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family; (c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage; (d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and (e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed [Section 79(14)].

(14) **"Excluded Debt"** means – (a) liability to pay fine imposed by a court or tribunal; (b) liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other legal obligation; (c) liability to pay maintenance to any person under any law for the time being in force; (d) liability in relation to a student loan; and (e) any other debt as may be prescribed [Section 79(15)].

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(15) **"Firm"** means a body of individuals carrying on business in partnership whether or not registered under section 59 of the Indian Partnership Act, 1932 [Section 79(16)].

(16) **"Immediate Family"** of the debtor means his spouse, dependent children and dependent parents [Section 79(17)].

(17) **"Partnership Debt"** means a debt for which all the partners in a firm are jointly liable [Section 79(18)].

(18) **"Qualifying Debt"** means amount due, which includes interest or any other sum due in respect of the amounts owed under any contract, by the debtor for a liquidated sum either immediately or at certain future time and does not include– (a) an excluded debt; (b) a debt to the extent it is secured; and (c) any debt which has been incurred three months prior to the date of the application for fresh start process [Section 79(19)].

(19) **"Repayment Plan"** means a plan prepared by the debtor in consultation with the resolution professional under section 105 containing a proposal to the committee of creditors for restructuring of his debts or affairs [Section 79(20)].

(20) **"Resolution Professional"** means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process [Section 79(21)].

(21) **"Undischarged Bankrupt"** means a bankrupt who has not received a discharge order under section 138 [Section 79(22)].

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Humble Appeal to:

COC, RP, NCLAT, IBBI AND NCLT

From: ADMITTED OPERATIONAL CREDITORS (NOT RELATED TO PROMOTERS) OVER RUPEES 1 CRORE

In the matter of: ESSAR STEEL

This is further to our Appeal dated 20.3.2019 which can be downloaded from

https://drive.google.com/file/d/1Bs_NAfjgBzK'Tb4j8fUSJjwdXliVNV3cp/view?ths=true&fbclid=IwAR3GVoYxPe6GtVxGy13fzyjTI4KPaE0Z38dZSClvTU9v0rWnVxTTHctFWPA

If IBC Code 2016 is followed in "letter and spirit", then interests of all stakeholders are sought to be balanced and not only almost entirely of COC which is monopolized by Financial Creditors (FCs). COC has no doubt been empowered in IBC, yet there are caveats and guidelines(sort of checks and balances),which are implied, pertinent and corollaries, accompanying the responsibility and authority provided to COC. Notwithstanding, COC is also expected to respect the fundamentals of "noblesse oblige", which is a key sacrosanct principle which comes with the privilege and honour of being granted empowerment. COC also has a responsibility to treat say all Admitted Operational Creditors (AOCs) "not related to promoters of Essar Steel" similarly.

For instance, COC cannot arbitrarily, whimsically and blatantly discriminate between such AOCs 'under' Rs 1cr and AOCs 'over' Rs 1cr. How has COC decided the cut-off figure of Rs 1cr between the same class of AOCs ? Has this figure "come out of a Hat" or was it like in roulette, the dice threw a cut-off figure of Rs1cr? That AOCs under Rs 1cr will get 97% (approx) of their claims and AOCs over Rs 1cr zero (Re 1/- each) !Where is logic in all this? Is this a lottery? Such behaviour of COC is clearly not in line with the 'letter and spirit' of the larger objective of IBC. Such blatant discrimination is also an insult to 'equality' enshrined in The Indian Constitution.

COC is interpreting IBC in the narrowest, totally self-serving and one-sided un-balanced manner and consequently arrogated draconian powers for itself for unilaterally maximizing the proceeds almost entirely for FCs, leaving nothing for AOCs over Rs1 cr. COC has assumed so much arrogance that COC have not even paid any heed to the just, balanced and sagacious suggestions of NCLT, which were subsequently also supported by NCLAT.

COC has in it's Resolution Plan given 92% (Approx.) of the dues (Principal + interest) of FCs, Nil to AOCs "over" Rs 1cr and 97% (approx) of dues to AOCs "under" Rs 1cr. Subsequently, as reported, paying merely "lip service" to the suggestions of NCLT (duly supported by NCLAT), COC wish to offer a paltry sum of Rs1000 cr to AOCs over Rs 1 cr. This effectively means as follows:

a) Paying only 21% (Approx.) of the dues of the AOCs over Rs 1 cr, which implies 79% (Approx) haircut to AOCs over Rs 1cr on their principal amount

b) Paying 97% (approx) of the dues of AOCs under Rs 1 cr

c) Paying 90% (Approx.) of dues of FCs (where FCs recover not only the entire principal amounts but also significant part of interest thereon)

Such is the greed and hubris of COC that COC is almost totally ignoring the principles and spirit of fairness and balance as also indicated by NCLT/NCLAT that:

i. AOCs are an oppressed lot

ii. There can be no discrimination as all AOCs are similarly placed and equal

iii. COC must implement NCLT Ahmedabad suggestions in letter and spirit

AOCs over Rs 1cr (not related to promoters) are extremely nervous, feeling devastated and traumatized. COC is not treating similar AOCs equally by splitting otherwise similar AOCs based on arbitrary, discriminatory, illogical and self-serving mischievous cut-off figure of Rs 1 cr.

COC is obviously being most cunning. Dues of AOCs under Rs 1cr are very meagre (approx. Rs 200 cr) and total dues of AOCs over Rs 1cr amount to approx. Rs 4900 cr (which includes AOCs related to promoters; neither we are privy to the actual amount nor do we hold any brief for AOCs related to promoters).

So our humble request only pertains to AOCs that are not related to promoters. Therefore it appears that the admitted claims of AOCs over Rs 1cr, excluding those related to promoters (if any) may be substantially lower. Therefore it is extremely simple to treat such AOCs over Rs 1cr (not related to promoters) similar to AOCs under Rs 1cr.

On the contrary, COC wants to pay 97% (approx) of the small amount of AOCs under Rs 1cr and a blatantly unfair, illogical and unreasonable as well as miserly, only 21% (Approx.) for AOCs over Rs 1cr.

COC has again arbitrarily pulled a figure of Rs 1000 cr "out of a hat" without any logic. COC continues mockery by treating AOCs over Rs 1cr as if AOCs over Rs 1cr are in a "lottery" or at a roulette table. COC should not be so avaricious that they grossly misuse the responsibility, faith and trust reposed in them.

By even a token adjustment in the interest component on the principal amounts of FCs, COC will save many thousands of AOCs from deep distress and quite a few of them even from shutting down. NCLT too had suggested that a sacrifice in the interest component on the part of the financial lenders will help AOCs in a reasonable and fair manner.

We are left with no option but to appeal in the public domain as almost entire proceedings before NCLT/ NCLAT was monopolised by design or otherwise by high profile influential lawyers of COC and others. Relatively, AOCs over Rs 1cr (not related to promoters) have effectively not been able to receive sufficient hearings in the proceedings due to reasons of logistics and the pressure of 270 days of resolution time prescribed. So everyone is in a sort of "rush and hurry" which risks, for instance, fair and judicious treatment of faultless AOCs (not related to promoters) over Rs 1cr.

Our humble appeal is that AOCs over Rs 1cr (not related to promoters) be treated similarly to AOCs under Rs 1cr.

Forum of Admitted Operational Creditors over Rs 1cr (not related to Promoters) of Essar Steel.
Email ID: credit.op33@gmail.com

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FORM G

INVITATION FOR EXPRESSION OF INTEREST

(Under Regulation 36A (1) of the Insolvency and Bankruptcy (Insolvency Resolution Process for Corporate Persons) Regulations, 2016)

RELEVANT PARTICULARS

1	Name of the Corporate Debtor	**DIVINE ALLOYS & POWER CO. LIMITED**
2	Date of Incorporation of Corporate Debtor	06.09.2004
3	Authority under which Corporate Debtor is incorporated / registered	Registrar of Companies, Kolkata
4	Corporate identity number / limited liability identification number of Corporate Debtor	U27102WB2004PLC099681
5	Address of the Registered Office and Principal Office (if any) of Corporate Debtor	**Registered Office :** Block A,139, Regent Estate, 17/614/139 Rajpur Road, Kolkata- 700092, West Bengal **Principal Office :** Divine House, Club Road, Ranchi-834001, Jharkhand.
6	Insolvency commencement date of the Corporate Debtor	7th March, 2019 vide order passed by Hon'ble NCLT, Kolkata Bench
7	Date of Invitation of Expression of Interest	13th May, 2019
8	Eligibility for Resolution Applicants under section 25(2) (h) of the Code is available at	www.divinealloysandpower.in
9	Norms of ineligibility applicable under section 29A are available at	www.divinealloysandpower.in
10	Last date for receipt of expression of interest	4th June, 2019
11	Date of issue of provisional list of prospective Resolution Applicants	10th June, 2019
12	Last date for submission of objections to provisional list	15th June, 2019
13	Date of issue of final list of prospective Resolution Applicants	17th June, 2019
14	Date of issue of information memorandum, evaluation matrix and request for Resolution Plans to prospective Resolution Applicants	18th June, 2019
15	Manner of obtaining request for resolution plan, evaluation matrix, information memorandum and further information	Shall be shared with all prospective resolution applicants eligible to receive under regulation 36B (1) of IBBI (IRPCP) Regulations, 2016
16	Last date for submission of Resolution Plans	11th July, 2019
17	Manner of submitting Resolution Plans to Resolution Professional	Details shall be provided in the RFRP documents
18	Estimated date for submission of Resolution Plan to the Adjudicating Authority for approval	16th August, 2019
19	Name and registration number of the Resolution Professional	Rajesh Kumar Agrawal IBBI/IPA-001/IP-P01023/2017-2018/11722
20	Name, Address and e-mail of the Resolution Professional, as registered with the Board	Rajesh Kumar Agrawal 1, Ganesh Chandra Avenue, R No. 301, 3rd Floor, Kolkata-700013, rajesh821@yahoo.com
21	Address and email to be used for and correspondence with the Resolution Professional	Rajesh Kumar Agrawal 1, Ganesh Chandra Avenue, R No. 301, 3rd Floor, Kolkata-700013, cirp.divine@gmail.com
22	Further Details are available at or with	www.divinealloysandpower.in Can also be obtained by sending a request at email ID as mentioned in para 20 and 21 above
23	Date of publication of Form G	13th May, 2019

Rajesh Kumar Agrawal, Resolution Professional
For DIVINE ALLOYS & POWER CO. LIMITED
IBBI/IPA-001/IP-P01023/2017-2018/11722
1, Ganesh Chandra Avenue, R No. 301, Kolkata 700 013

Date : 13th May, 2019
Place : Kolkata

FERRO ALLOYS CORPORATION LIMITED

(Under Corporate Insolvency Resolution Process)

INVITATION FOR RESOLUTION PLAN

Proposals are invited from potential investors/ consortium of investors having adequate financial and technical capabilities to submit resolution plan for M/s Ferro Alloys Corporation Limited (FACOR) for which Corporate Insolvency Resolution Process was initiated by NCLT Kolkata in respect of Company Petition (I.B.) No. 251/KB/2017.

FACOR is producer and exporter of Ferro Chrome, an essential ingredient of special steel and stainless steel. The Company, through its Subsidiary,Facor Power Limited, has a Captive Power Plant with a capacity of 100 MW. Company's net sales were Rs. 427.73 crore (excluding interunit sales) and profit before tax was Rs. 41.08 crore for the nine months ended on 31st December, 2018. The Company is listed on BSE.

Interested applicants may refer to the 'Expression of Interest for submission of Resolution Plan' document uploaded on the Company's website (**www.facorgroup.in**). More detailed information about the company will be provided to the interested parties upon signing of the confidentiality agreement, format of which is included in the EOI, uploaded on the said website.

Last date for submission of the Expression of Interest is 14th March, 2019 (by 5 PM).

Interested applicants to contact:

K.G. Somani
IBBI/IPA-001/IP-P00300/2017-18/10544
Resolution Professional
Email: **kgsomani@gmail.com**
Registered Address of IP with IBBI
K.G. Somani & Co.,
3/15, 4th Floor, Asaf Ali Road New Delhi- 110002

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PUBLIC ANNOUNCEMENT

FOR THE ATTENTION OF THE CREDITORS OF THE BELOW LISTED IL&FS GROUP ENTITIES

Pursuant to the "Third Progress Report – Proposed Resolution Framework for the IL&FS Group" dated 17 December, 2018 and the "Addendum to the Third Progress Report – Proposed Resolution Framework for IL&FS Group" dated January 15, 2019 ("Resolution Framework Report") submitted by Infrastructure Leasing & Financial Services Limited ("IL&FS") to the Ministry of Corporate Affairs, Government of India which, in turn, was filed with the Hon'ble National Company Law Appellate Tribunal ("NCLAT"), the creditors of the below listed IL&FS Group entities are invited to submit their claims with proof on or before **5 June, 2019** to **Grant Thornton India LLP**, the Claims Management Advisor appointed in respect of the below listed IL&FS Group entities.

Name of the Company	Date of Incorporation	Corporate Identity No./Limited Liability Identification No	Address of the Registered Office
Infrastructure Leasing & Financial Services Ltd	01/09/1987	U65990MH1987PLC044571	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Education & Technology Services Ltd	13/12/1997	U80220MH1997PLC112535	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Cluster Development Initiative Ltd	14/09/2006	U70109DL2006PLC153767	D-114, Okhla Industrial Area, Phase -I, New Delhi-110020, India
IL&FS Skills Development Corporation Ltd	28/01/2011	U80904DL2011PLC213135	D-114, Okhla Industrial Area, Phase -I, New Delhi-110020, India
Skill Training Assessment Management Partner Ltd	23/11/2006	U80903MH2006PLC284821	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Energy Development Company Ltd	21/05/2007	U40300DL2007PLC163679	4th Floor, Dr. Gopaldas Bhawan, 28 Barakhamba Road, Connaught Place New Delhi-110001, India
IL&FS Tamil Nadu Power Company Ltd	26/09/2006	U65929GJ2007PLC051160	4th Floor, KPR Tower, Old No 21, New No 7, 1st street, Subba Rao Avenue, College Road, Chennai-600006, Tamil Nadu, India
IL&FS Wind Energy Ltd	21/08/2012	U40106GJ2013PLC077520	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Elesian Urja Ltd	08/08/2011	U40107MH2011PLC226573	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Solar Power Ltd	26/08/2010	U40300MH2010PLC207073	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Wind Power Services Ltd	23/04/2013	U74120MH2013PLC242327	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Kaze Energy Ltd	25/03/2013	U40300MH2013PLC241321	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Khandke Wind Energy Private Ltd	21/08/2012	U40300MH2012PTC234746	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Lalpur Wind Energy Private Ltd	30/09/2011	U40300MH2011PTC222565	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Mahidad Wind Energy Ltd	04/07/2014	U74999MH2014PTC255870	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Rateli Wind Power Private Ltd	30/11/2007	U40102MH2007PTC176369	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Sipla Wind Energy Ltd	21/07/2011	U40300MH2011PLC220004	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Tadas Wind Energy Private Ltd	27/07/2011	U40300MH2011PTC220233	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Wind Urja India Private Ltd	21/08/2012	U40104MH2012PTC234709	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Financial Services Ltd	29/09/1995	U65990MH1995PLC093241	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Investment Managers Ltd	10/02/1998	L65999MH1988PLC147981	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Andhra Pradesh Urban Infrastructure Asset Management Ltd	15/07/2015	U65999AP2015PLC103683	"C/o. Amravati Metro Rail Corporation Ltd. 40-3-8,1st Floor, Kaushalya, Gummadi, Gopal Rao Street, Labbipet, Vijayvada-520010, Andhra Pradesh, India"
IIML Asset Advisors Ltd	28/12/2005	U74140MH2005PLC159416	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IIML Milestone Realty Advisors Private Ltd	23/07/2007	U74140MH2007PTC172569	402, Hallmark Business Plaza, Sant Dnyaneshwar Marg, Opp. Guru Nanak Hospital, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Asian Infrastructure Managers Ltd	27/04/2006	U66020MH2006PLC161439	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Infra AMC trustee Ltd	04/12/2012	U67190MH2012PLC236473	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Infra Asset Management Ltd	08/01/2013	U65191MH2013PLC239438	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Securities Services Ltd	27/07/2006	U74992MH2006PLC163337	"IL&FS House, Raheja Vihar, Chandivli, Andheri (East), Mumbai - 400072, Maharashtra, India"
IL&FS Urban Infrastructure Managers Ltd	24/05/2006	U67190MH2006PLC162433	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
ISSL Settlement and Transaction Services Ltd	03/12/2010	U67190MH2010PLC210582	"IL&FS House, Raheja Vihar, Chandivli, Andheri (East), Mumbai - 400072, Maharashtra, India"
IL&FS Maritime Infrastructure Company Ltd	27/11/2006	U45201MH2006PLC165803	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Porto Novo Maritime Ltd	19/03/2012	U74999MH2012PLC228437	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Gujarat Integrated Maritime Complex Pvt Ltd	27/03/1996	U63012GJ1996PTC029173	Unit No. 402, Shivalik – 2, 132 Feet Ring Road Near Shivranjani Cross Road, Ahmedabad-380015, Gujarat, India
Hill County Properties Ltd	20/05/2005	U45200AP2005PLC046307	Hill County, Bachupally, Nizampet Road, After Kesineni Bus Depot, Hyderabad-500090, Telangana, India
IL&FS Technologies Ltd	09/02/1993	U74999MH1993PLC070724	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Bhopal e-Governance Ltd	15/02/2013	U72200HR2013PLC048356	3rd Floor, Ambience Corporate Tower, Ambience Mall, Ambience Island, NH#8, Gurgaon-122002, Haryana, India
LIVIA India Ltd	01/04/2009	U72900MH2009PLC191389	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India

Name of the Company	Date of Incorporation	Corporate Identity No./Limited Liability Identification No	Address of the Registered Office
IL&FS Transportation Networks India Ltd	29/11/2000	L45203MH2000PLC129790	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Amravati Chikhli Expressway Ltd	25/08/2015	U45201MH2015PLC267727	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Baleshwar Kharagpur Expressway Ltd	22/05/2012	U45400MH2012PLC228590	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Barwa Adda Expressway Ltd	23/04/2013	U45400MH2013PLC242336	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Chenani Nashri Tunnelway Ltd	02/09/2010	U45400MH2010PLC203614	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
East Hyderabad Expressway Ltd	05/07/2007	U45203MH2007PLC172133	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Elsamex Maintenance Services Ltd	12/09/2013	U45201MH2013PLC265659	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Fagne Songadh Expressway Ltd	25/08/2015	U45201MH2015PLC267730	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
GRICL Rail Bridge Development Company Ltd	24/02/2014	U45203GJ2014PLC078880	Unit-1, 25th Floor, GIFT One Tower, Block-56, Road 5C, Zone-5, GIFT City Gandhinagar-382355, Gujarat, India
Hazaribagh Ranchi Expressway Ltd	19/03/2008	U45203MH2008PLC181070	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Jharkhand Infrastructure Implementation Company Ltd	04/08/2009	U45201JH2015PLC003025	443 A, Road #5, Ashok Nagar, Ranchi-834002, Jharkhand, India
Jharkhand Road Projects Implementation Company Ltd	08/07/2015	U45200JH2009PLC013693	443 A, Road #5, Ashok Nagar, Ranchi-834002, Jharkhand, India
Jorabat Shillong Expressway Ltd	18/06/2010	U45203MH2010PLC204456	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Karyavattom Sports Facilities Ltd	04/11/2011	U79102MH2011PLC223656	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Khed Sinnar Expressway Ltd	19/04/2013	U45209MH2013PLC242133	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Kiratpur Ner Chowk Expressway Ltd	12/02/2012	U45203MH2012PLC228792	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Moradabad Bareily Expressway Ltd	11/01/2010	U45206MH2010PLC198737	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
North Karnataka Expressway Ltd	15/10/2001	U45203MH2001PLC163992	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Pune Sholapur Road Development Company Ltd	21/08/2009	U45203MH2009PLC195154	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Road Infrastructure Development Company of Rajasthan Ltd	29/10/2004	U45203RJ2004PLC019650	LIC New Investment Building, 1st Floor, Hall #2, Near Ambedkar Circle, Bhawani Singh Road, Jaipur-302005, Rajasthan, India
Sikar Bikaner Highway Ltd	13/04/2012	U45203MH2012PLC229812	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Srinagar Sonamarg Tunnelway Ltd	09/04/2013	U45400MH2013PLC241828	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Thiruvanthapuram Road Development Company Ltd	01/03/2004	U45203MH2004PLC144789	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
West Gujarat Expressway Ltd	14/03/2005	U60200MH2005PLC151958	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Gujarat International Finance Tec-City Ltd	21/08/2007	U65929GJ2007PLC051160	Office No 1, 28th Floor, GIFT One Tower, Building 56A Block No. 56, Road-5C, Zone -5, GIFT City, Gandhinagar-382355, Gujarat, India
Mangalore SEZ Ltd	24/02/2006	U45209KA2006PLC038590	3rd floor, MUDA building, Urwa Stores, Ashok Nagar, DK Dist., Mangalore-575006, Karnataka, India
Sabarmati Capital One Ltd	13/10/2011	U70102MH2011PLC222987	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
Sabarmati Capital Two Ltd	08/10/2011	U70102MH2011PLC222809	The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India
IL&FS Environment Infrastructure & Services Ltd	08/02/2007	U90001DL2007PLC166554	217-A, Okhla Industrial Area, Phase-III, New Delhi-110020, Indi
Dakshin Dilli Swachh Initiative Ltd	11/09/2015	U74900DL2015PLC287308	217-A, Okhla Industrial Area, Phase-III, New Delhi-110020, India
East Delhi Waste Processing Company Ltd	20/04/2005	U37100DL2005PLC135148	217-A, Okhla Industrial Area, Phase-III, New Delhi-110020, India
Swayam Swachhta Initiative Ltd	22/08/2016	U74110DL2016PLC304699	217-A, Okhla Industrial Area, Phase-III, New Delhi-110020, India
IL&FS Paradip Refinery Water Ltd	06/11/2009	U41000TN2009PLC073439	A5, Navin's Presidium, 105, Nelson Manickam Road, Aminjikarai, Chennai-600029, Tamil Nadu, India

The creditors of the above listed IL&FS Group entities are hereby called upon to submit their claims with proof on or before **5 June, 2019** in respect of liabilities due up to and including **15 October, 2019**. The financial creditors shall submit their claims with proof by electronic means only. All other creditors may submit their claims with proof in person, by post or by electronic means.

If a creditor other than a financial creditor chooses to submit their claim with proof by post or email, they may access and download the relevant claim forms from the link mentioned below. The physical claim forms with proof shall be posted to **"Claims Management Adviser"**, The IL&FS Financial Centre, Plot C 22, G Block, Bandra Kurla Complex, Bandra (East), Mumbai-400051, Maharashtra, India only. In order to file a claim electronically please select the following **link: https://www.ilfsindia.com/**

Please note that if you are a debenture holder in a class of creditors where there is an appointed Trustee in respect of such debentures, you should submit your claim only via your Trustee.

Please note that if you are an existing or past employee, you should submit your claim via the HR department of IL&FS by email (see above link for details).

Please note that if you are a creditor in a class, as understood in the context of section 21 5(A) (b) of the Insolvency and Bankruptcy Code, 2016, the concerned IL&FS group entity may facilitate the appointment of a representative for such class of creditors for the purpose of any committee of creditors constituted for that IL&FS group entity and shall communicate accordingly.

Date and Place : 22 May 2019, Mumbai

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SELF TEST QUESTIONS

FROM PAST CS EXAMS 

FROM ICSI MODULE

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CHAPTER

22

ROLE, FUNCTIONS AND DUTIES OF INSOLVENCY PROF., INTERIM RESOLUTION PROF. AND RESOLUTION PROFESSIONAL

Covering-

- Role of Insolvency Professional
- Enrolment and registration of insolvency professionals
- The Insolvency and bankruptcy board of India (Insolvency Professionals) regulations, 2016
- Code of Conduct for Insolvency Professionals

EXPECTED MARKS COVERAGE (1 to 5)

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ROLE, FUNCTIONS AND DUTIES OF INSOLVENCY PROF., INTERIM RESOLUTION PROF. AND RESOLUTION PROFESSIONAL

ROLE OF INSOLVENCY PROFESSIONAL

An Insolvency Professional (IP) plays a very important role under the Insolvency and Bankruptcy Code, 2016. He is a significant actor in the corporate insolvency resolution process.

Definitions in the Insolvency and Bankruptcy Code, 2016:

Section 3(19)]: "Insolvency Professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.

Section 5(18): "Liquidator" means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be. **Section 5(27):** "Resolution Professional", for the purposes of this Part, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim-resolution professional.

Section 79(9): "Bankruptcy Trustee" means the insolvency professional appointed as a trustee for the estate of the bankrupt under section 125.

Section 79(21): "Resolution Professional" means an insolvency professional appointed under this part as a resolution professional for conducting the fresh start process or insolvency resolution process.

ENROLMENT AND REGISTRATION OF INSOLVENCY PROFESSIONALS

Section 206 of the Insolvency and Bankruptcy Code lays down that no person shall render his services as insolvency professional under this Code without being enrolled as a member of an insolvency professional agency and registered with the Board.

Section 207(1) further lays down that every insolvency professional shall, after obtaining the membership of any insolvency professional agency, register himself with the Board within such time, in such manner and on payment of such fee, as may be specified by regulations.

The Insolvency and Bankruptcy Board of India has made the **Insolvency and Bankruptcy Board of India (Insolvency Professional) Regulations, 2016** to regulate the working of Insolvency Professionals. These regulations are amended from time to time by the Insolvency and Bankruptcy Board of India.

THE INSOLVENCY AND BANKRUPTCY BOARD OF INDIA (INSOLVENCY PROFESSIONALS) REGULATIONS, 2016

The IBBI (Insolvency Professionals) Regulations, 2016 makes provisions for the examination and registration of Insolvency Professionals with the Bankruptcy and Insolvency Board of India.

These regulations also make provisions for the disciplinary proceedings against the insolvency professional as well as prescribes a code of conduct for insolvency professionals.

According to **Regulation 4**, no individual shall be eligible to be registered as an insolvency professional if he -

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(a) is a **minor;**

(b) is not a person **resident** in India;

(c) does not have the **qualification and experience** specified in regulations 5 and 9 of the IBBI (Insolvency Professionals) Regulations, 2016;

(d) has been convicted by any competent court for an offence punishable with imprisonment **for a term exceeding six months** or for an offence involving **moral turpitude,** and a period of **five years** has not elapsed from the date of expiry of the sentence. Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

(e) he is an **undischarged** insolvent, or has applied to be adjudicated as an insolvent;

(f) he has been declared to be of **unsound mind;** or

(g) he is not a fit and proper person. **First Schedule** to the aforesaid regulations prescribes **a code of conduct** for insolvency professionals. According to **Regulation 7(2)(h),** the registration of an insolvency professional shall be subject to the condition that he shall abide by the following Code of Conduct specified in the First Schedule to the Regulations:

CODE OF CONDUCT FOR INSOLVENCY PROFESSIONALS

Integrity and objectivity

1. An insolvency professional must maintain integrity by being honest, straightforward, and forthright in all professional relationships.
2. An insolvency professional must not misrepresent any facts or situations and should refrain from being involved in any action that would bring disrepute to the profession.

Independence and impartiality

3. An insolvency professional must maintain complete independence in his professional relationships and should conduct the insolvency resolution, liquidation or bankruptcy process, as the case may be, independent of external influences.
4. An insolvency professional shall disclose as to whether he was an employee of or has been in the panel of any financial creditor of the corporate debtor, to the committee of creditors and to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

Professional competence.

5. An insolvency professional must maintain and upgrade his professional knowledge and skills to render competent professional service.

Representation of correct facts and correcting misapprehensions

6. An insolvency professional must inform such persons under the Code as may be required, of a misapprehension or wrongful consideration of a fact of which he becomes aware, as soon as may be practicable.
7. An insolvency professional must not conceal any material information or knowingly make a misleading statement to the Board, the Adjudicating Authority or any stakeholder, as applicable.

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Timeliness

8. An insolvency professional must adhere to the time limits prescribed in the Code and the rules, regulations and guidelines there under for insolvency resolution, liquidation or bankruptcy process, as the case may be, and must carefully plan his actions, and promptly communicate with all stakeholders involved for the timely discharge of his duties.

Confidentiality

9. An insolvency professional must ensure that confidentiality of the information relating to the insolvency resolution process, liquidation or bankruptcy process, as the case may be, is maintained at all times. However, this shall not prevent him from disclosing any information with the consent of the relevant parties or required by law.

Occupation, employability and restrictions

10. An insolvency professional must refrain from accepting too many assignments, if he is unlikely to be able to devote adequate time to each of his assignments.

11. An insolvency professional must not engage in any employment, except when he has temporarily surrendered his certificate of membership with the insolvency professional agency with which he is registered.

Remuneration and costs

12. An insolvency professional must provide services for remuneration which is charged in a transparent manner, is a reasonable reflection of the work necessarily and properly undertaken, and is not inconsistent with the applicable regulations.

13. An insolvency professional shall disclose the fee payable to him, the fee payable to the insolvency professional entity, and the fee payable to professionals engaged by him to the insolvency professional agency of which he is a professional member and the agency shall publish such disclosure on its website.

Gifts and hospitality

14. An insolvency professional, or his relative must not accept gifts or hospitality which undermines or affects his independence as an insolvency professional.

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CHAPTER

23

PETITION FOR CORPORATE INSOLVENCY RESOLUTION PROCESS

Covering-

- Introduction
- Persons who may initiate corporate insolvency resolution process
- Initiation of corporate insolvency resolution process by financial creditor
- Initiation of corporate insolvency resolution process by operational creditor
- Initiation of corporate insolvency resolution process by corporate applicant
- Persons not entitled to make an application to initiation corporate insolvency resolution process
- Withdrawal of application admitted under section 7, 9 or 10.
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module
- Advance Your Knowledge

EXPECTED MARKS COVERAGE (1 to 5)

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PETITION FOR CORPORATE INSOLVENCY RESOLUTION PROCESS

INTRODUCTION

Part II of the Insolvency and Bankruptcy Code, 2016 deals with the insolvency resolution and liquidation for corporate persons. Section 4 of the Insolvency and Bankruptcy Code, 2016 provides that Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is **one lakh rupees.** The proviso to section 4 empowers the Central Government to specify, by notification, the minimum amount of default of higher value but it shall not be more than **one crore rupees.**

Part II of the Insolvency and Bankruptcy Code, 2016 lays down the following two independent stages:

(i) Corporate Insolvency Resolution Process [Sections 4 and 6 to 32] and

(ii) Liquidation [Sections 33 to 54 and Section 59]

Chapter II of Part II deals with corporate insolvency resolution process while Chapter III together with Chapter V of Part II govern the liquidation process for corporate persons.

PERSONS WHO MAY INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS

Section 6 of the Insolvency and Bankruptcy Code, 2016 provides that where any corporate debtor commits a default ,the following people are entitled to initiate a corporate insolvency resolution process:

(i) a financial creditor,
(ii) an operational creditor or
(iii) the corporate debtor itself.

The term **"default"** means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor or the corporate debtor, as the case may be [Section 3(12)].

According to section 3(8), a **"corporate debtor"** means a corporate person who owes a debt to any person.

"financial creditor" means any person to whom a financial debt is owed and an "operational creditor" means a person to whom an operational debt is owed and both these expressions also include persons to whom such debts have been legally assigned or transferred.

According to section 5(8), a **financial debt** includes –

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

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(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause.

Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 *added an Explanation in sub clause (f) of section 5(8). The Explanation clarifies that for the purposes of sub-clause (f) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing.*

The ***Explanation*** *further clarifies that the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned in section 2 of the Real Estate (Regulation and Development) Act, 2016.*

The expression **"operational debt"** as defined in section 5(21) of the Code means a **claim** in respect of the provision of goods or services including employment or a **debt** in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority. In simple terms, an Operational Creditor means a creditor in respect of **goods and services**

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY FINANCIAL CREDITOR

SECTION 7

a.	A financial creditor can initiate action himself or jointly with other financial creditors against a corporate debtor when a default occurs.
b.	The financial creditor shall make application by itself or jointly against a corporate debtor in **Form 1** before NCLT as contained in **Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016**.
c.	Copy of application shall be forwarded to registered office of corporate debtor by registered post or speed post.
d.	Application should give details of record of default and name of resolution professional proposed to be appointed as interim resolution professional.

Adjudicating Authority (NCLT) shall ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor.

Adjudicating Authority may reject the application by issuing order, if it is satisfied that –

(a) default has not occurred; or

(b) the application is incomplete; or

(c) any disciplinary proceeding is pending against the proposed resolution professional.

However, if the Adjudicating Authority is satisfied that the default has occurred, it will admit the application. Order of admission will be sent to financial creditor and corporate debtor.

The corporate insolvency resolution process shall commence from the date of admission of the application under Section 7.

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However, if property has been mortgaged or otherwise borrowings are secured, it will be easier and quicker for Financial Creditor to take an action under section 14 of SARFAESI Act, without going through Insolvency Resolution Process.

Time frame for ascertaining the existence of default.– After the filing of the application, the National Company Law Tribunal shall ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor within **fourteen days** of the receipt of the application [Section 7(4)].

If the Adjudicating Authority has not ascertained the existence of default and (has not) passed an order under section 7(5) of Insolvency Code within 14 days, it shall record its reasons in writing for the same - proviso to section 7(4) of Insolvency Code, **inserted vide Insolvency and Bankruptcy Code (Amendment) Act, 2019**

Communication of Order.– The NCLT shall communicate, within **seven days** of admission or rejection of such application, as the case may be

(a) to the financial creditor and the corporate debtor where the application is accepted;

(b) to the financial creditor where the application is rejected.

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY OPERATIONAL CREDITOR
SECTION 8 & 9

• On the occurrence of default by the corporate debtor, the operational creditor shall serve demand notice in **Form 3**and copy of the Invoice in **Form 4** as contained in Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, demanding the payment.
• The demand notice and copy of invoice shall be sent to corporate debtor by post, by hand or by e-mail. Copy of demand notice and invoice shall also be forwarded to information utility.
• The corporate debtor is required to reply within ten days of receipt of demand notice and copy of the invoice.
• If he had repaid the unpaid operational debt, he will inform details of electronic transfer or encashment of cheque issued by corporate debtor to operational creditor.
• If no reply is received from within ten days from date of delivery of demand notice and copy of invoice, operational creditor can file application before Adjudication Authority (NCLT) for initiating a corporate insolvency resolution process.

The operational creditor shall make application against a corporate debtor in **Form 5**before NCLT as contained in Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016. Copy of application shall be sent to corporate debtor. He (operational creditor) may propose a resolution professional to act as an interim resolution professional.

Furnishing of information by operational creditor– Section 9(3) of the Code lays down that such application by the operational creditor shall be accompanied with:

(a) a copy of the invoice demanding payment or demand notice delivered by the operational creditor to the corporate debtor;

(b) an affidavit to the effect that there is no notice given by the corporate debtor relating to a dispute of the unpaid operational debt;

(c) a copy of the certificate from the financial institutions maintaining accounts of the operational creditor confirming that there is no payment of an unpaid operational debt by the corporate debtor, **if available;**

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(d) a copy of any record with information utility confirming that there is no payment of an unpaid operational debt by the corporate debtor, if available; and

(e) any other proof confirming that there is no payment of any unpaid operational debt by the corporate debtor or such other information, as may be prescribed.

The application will be admitted if ;-

(a) it is complete;

(b) unpaid operational debt has not been paid;

(c) demand notice was delivered;

(d) notice of dispute is not received from operational creditor; and

(e) no disciplinary proceeding is pending against the proposed resolution professional.

If any of these requirements is not fulfilled, application will be rejected.

It may be noted that the corporate insolvency resolution process shall commence from the date of admission of the application under Section 9.

INITIATION OF CORPORATE INSOLVENCY RESOLUTION PROCESS BY CORPORATE APPLICANT

SECTION 10

Where a corporate debtor has committed a default, a **corporate itself** may thereof file an application for initiating corporate insolvency resolution process with the Adjudicating Authority (NCLT).

1.	Application shall be made in **Form No. 6** as contained in Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016.
2.	The application should contain prescribed particulars. Along with application, the corporate applicant shall submit following : **(a)** its books of account and such other documents relating to such period as may be specified; and **(b)** the resolution professional proposed to be appointed as an interim resolution professional.

Corporate applicant– Section 10(1) of the Code uses the expression "corporate applicant" and not a "corporate debtor". According to section 5(5) of the Code, a **"corporate applicant"** means –

(a) corporate debtor; or

(b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or

(c) an individual who is in charge of managing the operations and resources of the corporate debtor; or

(d) a person who has the control, and supervision over the financial affairs of the corporate debtor

the Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 *provided for the requirement of special resolution passed by the shareholders of the corporate debtor or resolution passed by at least three-fourth of the total number of partners of the corporate debtor, as the case may be, for initiation of corporate insolvency resolution process by corporate applicant. The* ***(Second Amendment) Act, 2018*** *has also amended sub-section (4) to provide that the presence or absence of pending disciplinary proceedings against the proposed resolution professional shall be a ground for acceptance or rejection of application for corporate insolvency resolution process filed by the corporate applicant.*

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Application will be admitted by NCLT within fourteen days, if it is complete. It will be rejected, if it is not complete. Notice will be given, if application is proposed to be rejected, to rectify the defects.

It may be noted that the corporate insolvency resolution process shall commence from the date of admission of the application under Section 10.

PERSONS NOT ENTITLED TO MAKE AN APPLICATION TO INITIATION CORPORATE INSOLVENCY RESOLUTION PROCESS

SECTION 11

The following persons shall not be entitled to make an application to initiate Corporate Insolvency Resolution Process, namely:-

(a)	A corporate debtor undergoing a corporate insolvency resolution process;
(b)	A corporate debtor having completed corporate insolvency resolution process 12 months preceding the date of making of the application;
(c)	A corporate debtor or a financial creditor who has violated any of the terms of resolution plan which was approved 12 months before the date of making of an application for corporate insolvency resolution process; or
(d)	A corporate debtor in respect of whom a liquidation order has been made.

For the purposes of this section, *a* ***corporate debtor includes a corporate applicant in respect of such corporate debtor.***

WITHDRAWAL OF APPLICATION ADMITTED UNDER SECTION 7, 9 OR 10

The newly added section **12A** by **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018**provides that the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

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Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

24

CONDUCTING CIRP

Covering-

- Time limit for completion of CIRP
- Declaration of moratorium and public announcement
- Moratorium
- Public announcement of corporate insolvency resolution process
- Interim resolution professional
- Personnel to extend co-operation to interim resolution professional
- Management of operations of corporate debtor as going concern
- Committee of creditors
- Appointment of resolution professional
- Replacement of resolution professional by committee of creditors
- Eligibility for resolution professional
- Prior approval of committee of creditors for certain actions by resolution professional
- Preparation of information memorandum
- Self Test Questions
  - From Past CS Exams
  - From ICSI Module
- Advance Your Knowledge

EXPECTED MARKS COVERAGE (1 to 5)

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CONDUCTING CIRP

CONDUCTING CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

CHAPTER II OF PART II - SECTIONS 12 TO 32

TIME LIMIT FOR COMPLETION OF CIRP

SECTION 12

After commencement of corporate insolvency resolution process under Section 7, 9 or 10 of Insolvency Code, 2016, **further action** will commence before Adjudicating Authority (NCLT).

The process is required to be completed **within 180 days** from date of admission of the application by NCLT to initiate the corporate insolvency process.

This period can be extended, if the resolution professional files an application to Adjudicating Authority, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of **sixty-six per cent** of the voting shares. On receipt of such application, Adjudicating Authority (NCLT) can grant only one extension upto maximum 90 days.

"Voting share" means the share of the voting rights of a single financial creditor in the committee of creditors which is based on the proportion of the financial debt owed to such financial creditor in relation to the financial debt owed by the corporate debtor. [Section 5(28)]

Mandatory period for completion of CIRP is 330 days even including time of appeal, stay etc. - The corporate insolvency resolution process (CIRP) shall mandatorily be completed within a period of 330 days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under section 12 of Insolvency Code and the time taken in legal proceedings in relation to such resolution process of the corporate debtor - second proviso to section 12(3) of Insolvency Code, **inserted vide. Insolvency and Bankruptcy Code (Amendment) Act, 2019.**

DECLARATION OF MORATORIUM AND PUBLIC ANNOUNCEMENT

Section 13 of the Code lists the actions that the NCLT shall take after an application for initiating the corporate insolvency resolution process has been admitted.

After admitting the application under section 7 or section 9 or section 10, the NCLT shall, by an order:

(a) declare a **moratorium** for the purposes referred to in section 14,
(b) cause a **public announcement** of the initiation of corporate insolvency resolution process and call for the **submission of claims** under section 15, and
(c) appoint an **interim resolution professional** in the manner as laid down in section 16. [Section 13(1)]

MORATORIUM

ORDER DECLARING MORATORIUM

SECTION 14

*A **'moratorium'** is a delay or suspension of an activity or a law. In a legal context, it may refer to the temporary suspension of a law to allow a legal challenge to be carried out. It is legal authorization to debtors, to delay payments due.*

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On the insolvency commencement date, the Adjudicating Authority shall, by order, declare **moratorium** for prohibiting all of the following:

(a) The institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgement, decree or order in any court of law, tribunal, arbitration panel or other authority;
(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;
(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under the S ARFAESI ACT, 2002;
(d) The recovery of any property by an owner or less or where such property is occupied by or in the possession of the corporate debtor.

However, the **supply of essential goods or services** to the corporate debtor as may be specified under Regulations **shall not be terminated or suspended** or interrupted during the moratorium period.

"Insolvency commencement date" means the date of admission of an application for initiating corporate insolvency resolution process by the Adjudicating Authority under sections 7, 9 or section 10, as the case may be. [Section 5(12)]

Exclusion of certain acts– The provisions of section 14(1) shall not apply to –

(a) such transaction as may be notified by the Central Government in consultation with any financial regulator

(b) a surety in a contract of guarantee to a corporate debtor. [Section 14(3)]

Further, Moratorium shall not apply to such transactions as may be notified by the Central Government in consultation with any Financial Sector Regulator.

Section 14(3) of the Code was substituted by the **Insolvency and Bankruptcy Code (Second Amendment) Act, 2018**to provide that the moratorium shall not apply to a surety in a contract of guarantee to a corporate debtor.

Effect of order of moratorium–

The moratorium will continue to be in effect till the completion of the corporate insolvency resolution process or the approval of a resolution plan by the adjudicating authority or the resolution of the committee of creditors to liquidate the corporate debtor, whichever is earlier.

Declaration of moratorium serves the following purposes:

(a) Ensures that multiple proceedings are not taking place simultaneously and thus avoids the possibility of potentially conflicting outcomes of related proceedings.

(b) Keeps the corporate debtor's assets together during the insolvency resolution process and facilitates orderly completion of the process,

(c) Ensures that the company may continue as a going concern while the creditors assess the options for resolution of default.

(d) Prohibition on disposal of the corporate debtor's assets ensure that the corporate debtor/management does not transfer its assets, thereby stripping the corporate debtor of value during the corporate insolvency resolution process.

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PUBLIC ANNOUNCEMENT OF CORPORATE INSOLVENCY RESOLUTION PROCESS

SECTION 15

The public announcement shall be made immediately after the appointment of the interim resolution professional under Section 16.

The public announcement of the corporate insolvency resolution process shall contain information as specified in section **15** of Insolvency Code, 2016 and will be made in manner prescribed. The requirements of public announcement are specified in **Regulation 6** of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. The public announcement shall be in **Form A** as specified in Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.

It should be published in **one English and one regional language** newspaper. It should also be put on website of corporate debtor and Board (IBBI).

Section 15 provides that the public announcement of the corporate insolvency resolution process shall contain the following information:

(a) Name and address of the corporate debtor under the corporate insolvency resolution process,

(b) Name of the authority with which the corporate debtor is incorporated or registered,

(c) Last date for submission of claims, as may be specified,

(d) details of the interim resolution professional who shall be vested with the management of the corporate debtor and be responsible for receiving claims,

(e) penalties for false or misleading claims, and

(f) date on which the corporate insolvency resolution process shall close, which shall be the one hundred and eightieth day from the date of the admission of the application under sections 7, 9 or section 10, as the case may be. [Section 15]

INTERIM RESOLUTION PROFESSIONAL

SECTIONS 16, 17 &18

Appointment and Tenure of Interim Resolution Professional

[SECTION 16]

The Adjudication Authority (NCLT) shall appoint an interim resolution professional within fourteen days from the insolvency commencement date.

Tenure of Interim Resolution Professional–

As per **The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018** the term of the interim resolution professional continues till the date of appointment of the resolution professional under section 22 of the Code.

Management of affairs of corporate debtor by Interim Resolution Professional

[SECTION 17]

From the date of appointment of the interim resolution professional, the management of the affairs of the corporate debtor **shall vest in the interim resolution professional**. The powers of the Board of directors or the partners of the corporate debtor, as the case may be, shall stand suspended and be exercised by the interim resolution professional.

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The officers and managers of the corporate debtor shall report to the interim resolution professional and provide access to such documents and records of the corporate debtor as may be required by the interim resolution professional.

The financial institutions maintaining accounts of the corporate debtor shall act on the instructions of the interim resolution professional in relation to such accounts and furnish all information relation to the corporate debtor available with them to the interim resolution professional.

The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 provide that the interim resolution professional shall be responsible for complying with the statutory requirements under applicable laws while managing the affairs of the corporate debtor.

Duties of Interim Resolution Professional

[SECTION 16]

The interim resolution professional shall perform the following duties:

(a)	Collect all information relating to the assets, finances and operations of the corporate debtor for determining the financial position of the corporate debtor;
(b)	Receive and collate all the claims submitted by creditors to him, pursuant to the public announcement made;
(c)	Constitute a committee of creditors;
(d)	Monitor the assets of the corporate debtor and manage its operations until a resolution professional is appointed by the committee of creditors;
(e)	File information collected with the information utility, if necessary;
(f)	Take control and custody of any asset which the corporate debtor has ownership rights; and
(g)	Perform such other duties as may be specified by the Board (IBBI).

Section 18 also specifies **the assets that cannot be taken over.** The Explanation appended to section 18 provides that for the purposes of this section, the term "assets" shall not include the following:

(a) assets owned by a third party in possession of the corporate debtor held under trust or under contractual arrangements including bailment;

(b) assets of any Indian or foreign subsidiary of the corporate debtor; and

(c) such other assets as may be notified by the Central Government in consultation with any financial sector regulator.

PERSONNEL TO EXTEND CO-OPERATION TO INTERIM RESOLUTION PROFESSIONAL

Section 19 imposes an obligation on the personnel and promoters of the corporate debtor to extend all assistance and cooperation required by the Interim Resolution Professional in the management of the affairs of the corporate debtor. Where the personnel of the corporate debtor or any other person required to co-operate with the interim resolution professional do not extend cooperation or assistance to the interim resolution professional, the interim resolution professional may apply to the adjudicating authority for an order. The adjudicating authority may, by order, direct the person to comply with the instructions of the interim resolution professional or to provide information to the interim resolution professional.

"Personnel" includes the directors, managers, key managerial personnel, designated partners and employees, if any, of the corporate debtor. [Section 5(23)]

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MANAGEMENT OF OPERATIONS OF CORPORATE DEBTOR AS GOING CONCERN

Manage operations of corporate debtor as a going concern – The interim resolution professional shall make every endeavour to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern. [Section 20(1)]

Authority of Interim Resolution Professional – In order to protect and preserve the value of the property of the corporate debtor and manage the operations of the corporate debtor as a going concern, the Interim Resolution Professional shall have the following authority:

(a) to appoint accountants, legal or other professionals,

(b) to enter into contracts on behalf of the corporate debtor or to amend or modify the contracts or transactions which were entered into before the commencement of corporate insolvency resolution process,

(c) to raise **interim finance** provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property,

(d) to issue instructions to personnel of the corporate debtor as may be necessary for keeping the corporate debtor as a going concern, and

(e) to take all such actions as are necessary to keep the corporate debtor as a going concern. [Section 20(1)]

Interim Finance – The Interim Resolution Professional has the power to raise interim finance as well as to enter into, amend or modify contracts on behalf of the corporate debtor. Clause (c) of sub-section (2) to section 20 provides that the Interim Resolution Professional shall have the authority to raise interim finance provided that no security interest shall be created over any encumbered property of the corporate debtor without the prior consent of the creditors whose debt is secured over such encumbered property. Thus, any interim finance raised by providing security of an encumbered property of the corporate debtor will require prior permission of the concerned creditor.

COMMITTEE OF CREDITORS

SECTION 21

The interim resolution professional shall after collation of all claim received against the corporate debtor and determination of the financial position of the corporate debtor, constitute a committee of creditors. The committee of creditors shall comprise all financial creditors of the corporate debtor.

Where the corporate debtor owes financial debts to two or more financial creditors as part of a consortium or agreement, each such financial creditor shall be part of the committee of creditors and their voting share shall be determined on the basis of the financial debts owed to them.

However, related party to whom a corporate debtor owes a financial debt shall not have any right of representation, participation or voting in a meeting of the committee of creditors.

The first meeting of the committee of creditors shall be held within seven days of the constitution of the committee of creditors.

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APPOINTMENT OF RESOLUTION PROFESSIONAL

SECTIONS 22 & 23

The committee of creditors, may, in the first meeting, by a majority vote of not less than **sixty-six per cent of the voting share** of the financial creditors, either resolve to appoint the interim resolution professional as a resolution professional or to replace the interim resolution professional by another resolution professional.

If they decide to continue interim resolution professional, they will inform its decision to the interim resolution professional, the corporate debtor and the Adjudicating Authority. However, if they decide to replace the interim resolution professional, the resolution professional can be appointed only with approval of the Board (IBBI). Till then, the interim resolution professional will continue to act as resolution professional.

The resolution professional shall conduct the entire corporate insolvency resolution process and manage the operations of the corporate debtor during the corporate insolvency resolution process period, under the supervision of Committee of Creditors and Board (IBBI).

The resolution professional shall exercise powers and perform duties as are vested or conferred on the interim resolution professional.

REPLACEMENT OF RESOLUTION PROFESSIONAL BY COMMITTEE OF CREDITORS

Section 27 of the Code reads as follows:

"(1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

ELIGIBILITY FOR RESOLUTION PROFESSIONAL

Regulation 3 of **the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** lays down the following eligibility criteria for a resolution professional:

(1) An insolvency professional shall be eligible to be appointed as a resolution professional for a corporate insolvency resolution process of a corporate debtor if he, and all partners and directors of the insolvency professional entity of which he is a partner or director, are independent of the corporate debtor.

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A person shall be considered independent of the corporate debtor, if he:

(a) is eligible to be appointed as an independent director on the board of the corporate debtor under section 149 of the Companies Act, 2013, where the corporate debtor is a company;

(b) is not a related party of the corporate debtor; or

(c) is not an employee or proprietor or a partner:

(i) of a firm of auditors or secretarial auditors in practice or cost auditors of the corporate debtor; or

(ii) of a legal or a consulting firm, that has or had any transaction with the corporate debtor amounting to five per cent or more of the gross turnover of such firm, in the last three financial years.

(1A) Where the committee decides to appoint the interim resolution professional as resolution professional or replace the interim resolution professional under section 22 or replace the resolution professional under section 27, it shall obtain the written consent of the proposed resolution professional in Form AA of the Schedule.

(2) A resolution professional shall make disclosures at the time of his appointment and thereafter in accordance with the Code of Conduct.

(3) A resolution professional, who is a director or a partner of an insolvency professional entity, shall not continue as a resolution professional in a corporate insolvency resolution process if the insolvency professional entity or any other partner or director of such insolvency professional entity represents any of the other stakeholders in the same corporate insolvency resolution process.

PRIOR APPROVAL OF COMMITTEE OF CREDITORS FOR CERTAIN ACTIONS BY RESOLUTION PROFESSIONAL

SECTION 28

In the following cases, resolution professional can take action only with prior approval of committee of creditors, with **66%** voting in favour :-

(a) Raise any interim finance in excess of the amount as may be decided by the committee creditors in their meeting;
(b) Create any security interest over the assets of the corporate debtor;
(c) Change the capital structure of the corporate debtor;
(d) Record any change in the ownership interest of the corporate debtor;
(e) Give instructions to financial institutions maintaining accounts of the corporate debtor for a debit transaction from any such accounts in excess of the amount as may be decided by the committee of creditors in their meeting;
(f) Undertake any related party transaction;
(g) Amend any constitutional documents of the corporate debtor;
(h) Delegate its authority to any other person;
(i) Dispose of or permit the disposal of shares of any shareholder of the corporate debtor or their nominees to third parties;
(j) Make any change in the management of the corporate debtor or its subsidiary;
(k) Transfer rights or financial debts or operational dents under material contracts otherwise than in the ordinary course of business;
(l) Make changes in the appointment or terms of contract of such personnel as specified by the committee of creditors; and
(m) Make changes in the appointment or terms of contract of statutory auditors of the corporate debtor.

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PREPARATION OF INFORMATION MEMORANDUM

Section 29 read with **regulation 36 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016** lays down the preparation of an information memorandum as one of the main functions of the resolution professional. An information memorandum is envisaged to be prepared in order for the resolution applicants (market participants) to provide solutions for resolving the insolvency of the corporate debtor.

Section 29(1) provides that the resolution professional shall prepare an information memorandum in such form and manner containing such relevant information as may be specified by the Board for formulating a resolution plan.

The Explanation appended to Section 29 clarifies that for the purposes of this section, **"relevant information"** means the information required by the resolution applicant to make the resolution plan for the corporate debtor, which shall include the financial position of the corporate debtor, all information related to disputes by or against the corporate debtor and any other matter pertaining to the corporate debtor as may be specified.

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Q. 1. Write Short note on waterfall Arrangement. **[Dec. 2018; 8 Marks]**

Ans. Waterfall arrangement:

Section 53 of the IBC provides for the manner of distribution of assets in case of liquidation and order of priority of distribution. It is pertinent to note that this order of priority is notwithstanding anything contrary which is contained in any other Central or State law. This order of priority is also known as the "waterfall arrangement" since each of category of persons comes in priority after the previous one.

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified:

(i) Insolvency resolution process costs and liquidation costs paid in full

(ii) Following debts shall rank equally between and among the following:

  (i) Workmen's dues for the period of 24 months preceding the liquidation commencement date.

  (ii) Debts owed to secured creditor in the event such secured creditor has relinquished security under section 52.

(iii) Wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date.

(iv) Financial debts owed to unsecured creditors.

(v) Following dues shall rank equally between and among the following:

  (i) Any amount due to the Central/State Government including amount to be received on account of Consolidated Fund of India and Consolidated Fund of a State, if any, in respect of whole or any part of the period of two years preceding the liquidation commencement date.

  (ii) Debts owed to a secured creditor for any amount unpaid following enforcement of security interest.

(vi) Any remaining debts and dues.

(vii) Preference shareholders, if any; and.

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	(viii) Equity shareholders or partners, as the case may be. Any contractual arrangements between recipients above with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator. The fees payable to the liquidator shall be deducted proportionately from proceeds payable to each class of recipients and proceeds to the relevant recipient shall be distributed after such deduction.

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Q. 1.

Answer to Question No. 1:-

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Q. 2.

Answer to Question No. 2:-

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CHAPTER

25

NATIONAL COMPANY LAW TRIBUNAL

EXPECTED MARKS COVERAGE (1 to 5)

Covering-

- Section Chart
- Introduction of NCLT
- Section 408 to Section 433 Deals with administration of NCLT and NCLAT
- Constitution of NCLT
- Qualification (President/Member of NCLT)
- Constitution of Appellate Tribunal
- Qualification (Chairperson of NCLAT)
- Section of Members
- Term of office JQF President, Chairperson and Other Members
- Salary, Allowances and other terms and conditions of service of members
- Acting President and Chairperson of Tribunal or Appellate Tribunal
- Registration of Members
- Removal of Members
- Staff of Tribunal and Appellate Tribunal
- Benches of Tribunal
- Orders of Tribunal
- Appeal from orders of Tribunal
- Expeditious disposal by tribunal and Appellate Tribunal
- Appeal to Supreme Court
- Procedure before Tribunal and Appellate Tribunal
- Power to Punish for Contempt
- Delegation of Powers
- Members, Officers, Etc., to be Public Servants
- Protection of Action taken in good faith
- Power to seek assistance of chief metropolitan Magistrate, etc.
- NCLT Rule 2016

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Sections, Rules, Regulations, forms - CHART

Section	Short Description
Section 408	Constitution of (NCLT)
Section 409	Qualification (President/Member of NCLT)
Section 410	Constitution of appellate tribunal
Section 411	Qualification: (Chairman/Member of NCLAT)
Section 412	Selection of Members
Section 413	Term of office of president, chairperson and other members
Section 414	Salary and allowances
Section 415	Acting President and Chairperson of Tribunal or Appellate Tribunal.
Section 416	Resignation of Members.
Section 417	Removal of Members.
Section 418	Staff of Tribunal and Appellate Tribunal.
Section 419	Benches of Tribunal.
Section 420	Orders of Tribunal.
Section 421	Appeal from Orders of Tribunal.
Section 422	Expeditious disposal by Tribunal and Appellate Tribunal.
Section 423	Appeal to Supreme Court.
Section 424	Procedure before Tribunal and Appellate Tribunal.
Section 425	Power to punish for contempt.
Section 426	Delegation of powers.
Section 427	Members, officers, etc., to be public servants.
Section 428	Protection of action taken in good faith.
Section 429	Power to seek assistance of Chief Metropolitan Magistrate, etc.
Section 430	Civil court not to have jurisdiction.
Section 431	Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings.
Section 432	Right to legal representation.
Section 433	Limitation.
Section 434	Transfer of Certain Pending Proceedings
Section 441	Compounding of Offence
Section 446	Dissolution of Company Law Board and Consequential Provisions
Rule	NCLT Rules, 2016

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NATIONAL COMPANY LAW TRIBUNAL

The Ministry of Corporate Affairs has issued notification for constitution of the National Company Law Tribunal (NCLT) and National Company Law Appellate Tribunal (NCLAT) with effect from 1st Jun 2016.

Chairperson **(NCLAT)**	Hon'ble Justice S.J. Mukhopadhaya, Judge (Retd.), Supreme Court of India
President **(NCLT)**	Hon'ble Justice M. M. Kumar, Judge (Retd.)

Company Law Board (CLB) stands dissolved w.e.f. **1st June, 2016.**

BENCHES OF NCLT: Initially NCLT will have eleven Benches.

S. No.	PLACE	No. OF BENCHES
1.	New Delhi	2
2.	Mumbai	1
3.	Chennai	1
4.	Kolkata	1
5.	Bengluru	1
6.	Ahmedabad	1
7.	Hyderabad	1
8.	Guwhati	1
9.	Chandigarh	1
10.	Allahabad	1

NCLT can be considered as biggest Tribunal till date. Because NCLT will CONSOLIDATE the corporate jurisdiction of the followings:

(a) Company Law Board/ BIFR/AAEFR
(b) Jurisdiction and powers relating to winding up restructuring and other such provisions, vested in the high courts.

ADVANTAGE OF NCLT & NCLAT

(a) It shall avoid multiplicity of litigation before various. Forums (High Courts CLB, BIFR AAIFR,
(b) There shall be at least 11 benches of the NCLT, thereby providing justice almost at one doorstep.
(c) This tribunal shall comprise of technical experts who will provide more concrete and precise decision.
(d) There will be mixture of judicial and equitable jurisdiction while deciding matters
(e) There shall be reduction in period of winding up from 20-25 years to 2 years.

SOMF MAJOR CHANGES AFTER CONSTITUTION OF NCLT/NCLAT

Winding up: The National Company Law Tribunal has also been empowered to pass an order for winding up of a company. Therefore Practicing Company Secretaries may represent the winding up case before the Tribunal.

Compromise and Arrangement: With the establishment of NCLT, a whole new area of practice will open up for Company Secretary in Practice with respect to advising and assisting corporate sector on merger, amalgamation, demerger reverse merger, compromise and other arrangements right from the conceptual to implementation level. Company Secretaries in practice will be able to render services in preparing schemes, appearing before NCLT/NCLAT for approval of schemes and post merger Formalities.

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SECTION 408 TO SECTION 433 DEALS WITH ADMINISTRATION OF NCLT AND NCLAT

Section 408	Constitution of (NCLT)
Section 409	Qualification: (President/Member of NCLT)
Section 410	Constitution of appellate tribunal
Section 411	Qualification: (Chairman/Member of NCLAT)
Section 412	Selection of Members
Section 413	Term of office of president, chairperson and other members
Section 414	Salary and allowances
Section 415	Acting President and Chairperson of Tribunal or Appellate Tribunal.
Section 416	Resignation of Members.
Section 417	Removal of Members.
Section 418	Staff of Tribunal and Appellate Tribunal.
Section 419	Benches of Tribunal.
Section 420	Orders of Tribunal.
Section 421	Appeal from Orders of Tribunal.
Section 422	Expeditious disposal by Tribunal and Appellate Tribunal.
Section 423	Appeal to Supreme Court.
Section 424	Procedure before Tribunal and Appellate Tribunal.
Section 425	Power to punish for contempt.
Section 426	Delegation of powers.
Section 427	President, Members, officers, etc., to be public servants.
Section 428	Protection of action taken in good faith.
Section 429	Power to seek assistance of Chief Metropolitan Magistrate, etc.
Section 430	Civil court not to have jurisdiction.
Section 431	Vacancy in Tribunal or Appellate Tribunal not to invalidate acts or proceedings.
Section 432	Right to legal representation.
Section 433	Limitation.

CONSTITUTION OF (NCLT)

SECTION 408

The Central Government shall, by notification, constitute, with effect from **(1st JUNE 2016)** a Tribunal to be known as the **National Company Law Tribunal** consisting of a President and such number of Judicial and Technical members, as the Central Government may deem necessary, to be appointed by it by notification, to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force.

QUALIFICATION (PRESIDENT/MEMBER OF NCLT)

SECTION 409

PRESIDENT

Is/has been Judge of High Court > 5 years

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JUDICIAL MEMBER

Is/has been Judge of High Court (any period)

Is/has been District Judge at least 5 years

Has been Advocate of court OR held a judicial office or as member of a tribunal at least 10 years

TECHNICAL MEMBER

Has Member of Indian Corporate Law Service /Indian Legal Service ≥15 years (out of 15 years at least 3 years to be in the pay scale of Joint Secretary to GOI or equivalent post).
Is/has been Practicing Chartered Accountant at least 15 years
Is/has been Practicing Cost Accountant at least 15 years
Is/has been Practicing COMPANY SECRETARY at least 15 years
Person with proven ability, integrity and standing having special knowledge and experience ≥ 15 years (law, finance, management, accountancy investment, labour matters etc.
Presiding Officer of Labour Court/ Tribunal/ National Tribunal (under Industrial Disputes Act, 1947) at least 5 years

CONSTITUTION OF APPELLATE TRIBUNAL

SECTION 410

The Central Government shall, by notification, constitute, with effect from such date **(1 JUNE 2016)** an Appellate Tribunal to be known as the National Company Law Appellate Tribunal consisting of a chairperson and such number of Judicial and Technical Members, not exceeding eleven, as the Central Government may deem fit, to be appointed by it by notification, for hearing appeals against the orders of the Tribunal.

QUALIFICATION: (CHAIRMAN/MEMBER OF NCLAT)

SECTION 411

National Company Law Appellate Tribunal, constituting of a Chairperson and not exceeding eleven members for hearing appeals against the orders of the Tribunal.

PRESIDENT

Is/has been Judge of Supreme Court
Is/has been Chief Justice of High Court

JUDICIAL MEMBER

Is/has been Judge of High Court

Is a Judicial Member of Tribunal for at least 5 years

TECHNICAL MEMBER

Person with proven ability, integrity and standing having special knowledge and experience ≥ 25 years IN FOLLOWING FIELD (law, finance, management, accountancy investment, labour matters etc.

SELECTION OF MEMBERS

SECTION 412

PRESIDENT/CHAIRMAN

Shall be appointed after consultation with the Chief Justice of India.

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JUDICIAL MEMBERS OF THE APPELLATE TRIBUNAL

Shall be Appointed after consultation with the Chief Justice of India.

MEMBERS OF THE TRIBUNAL AND THE TECHNICAL MEMBJM OF THE APPELLATE TRIBUNAL

Shall be appointed on the recommendation of a Selection Committee.

TERM OF OFFICE JQF PRESIDENT, CHAIRPERSON AND OTHER MEMBERS

SECTION 413

TERM OF PRESIDENT AND OTHER MEMBERS – NCLT

The President and every other Member of the Tribunal shall hold office as such for a term of five years AND shall be eligible for re-appointment for another term of five years.

TIME OF VACATION OF OFFICE – NCLT

(a) In the case of the President, the age of sixty-seven years
(b) In the case of any other Member, the age of sixty-five years
Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member:

TERM OF CHAIRPERSON AND OTHER MEMBERS – NCLAT

The chairperson or a Member of the Appellate Tribunal shall hold office as such for a term of five years AND shall be eligible for re-appointment for another term of five years.

TIME OF VACATION OF OFFICE - NCLAT

(a) In the case of the Chairperson, the age of seventy years;
(b) In the case of any other Member, the age of sixty-seven years

Provided that a person who has not completed fifty years of age shall not be eligible for appointment as Member:

SALARY, ALLOWANCES AND OTHER TERMS AND CONDITIONS OF SERVICE OF MEMBERS

SECTION 414

The salary, allowances and other terms and conditions of service of the Members of the Tribunal and the Appellate Tribunal shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Members shall be varied to their disadvantage after their appointment

ACTING PRESIDENT AND CHAIRPERSON OF TRIBUNAL OR APPELLATE TRIBUNAL

SECTION 415

(1) In the event of the occurrence of any vacancy in the office of the President or the Chairperson by reason of his death, resignation or otherwise, the senior-most Member shall act as the President or the Chairperson, as the case may be, until the date on which a new President or Chairperson appointed in accordance with the provisions of this Act to fill such vacancy enters upon his office.

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(2) When the President or the Chairperson is unable to discharge his functions owing to abs illness or any other cause, the senior-most Member shall discharge the functions of the President or the Chairperson, as the case may be, until the date on which the President or the Chairperson resumes his duties.

RESIGNATION QF MEMBERS

SECTION 416

The President, the Chairperson or any Member may, by notice in writing under his hand addressed to the Central Government, resign from his office:

Provided that the President, the Chairperson, or the Member shall continue to hold office until the expiry of three months from the date of receipt of such notice by the Central Government or until a person duly appointed as his successor enters upon his office or until the expiry of his term of office, whichever is earliest.

REMOVAL OF MEMBERS

SECTION 417

The Central Government may, after consultation with the Chief Justice of India, remove from office the President, Chairperson or any Member, who

(a) has been adjudged an insolvent; or

(b) has been convicted of an offence which, in the opinion of the Central Government, involves moral turpitude; or

(c) has become physically or mentally incapable of acting as such President, the Chairperson, or Member; or

(d) has acquired such financial or other interest as is likely to affect prejudicially his functions as such President, the Chairperson or Member; or

(e) has so abused his position as to render his continuance in office prejudicial to the public interest:

Provided that the President, the Chairperson or the Member shall not be removed on any of the grounds specified in clauses (b) to (e) without giving him a reasonable opportunity of being heard.

STAFF OF TRIBUNAL AND APPELLATE TRIBUNAL

SECTION 418

(a) The Central Government shall, in consultation with the Tribunal and the Appellate Tribunal, provide the Tribunal and the Appellate Tribunal, as the case may be, with such officers and other employees as may be necessary for the exercise of the powers and discharge of the functions of the Tribunal and the Appellate Tribunal.

(b) The officers and other employees of the Tribunal and the Appellate Tribunal shall discharge their functions under the general superintendence and control of the President, or as the case may be, the Chairperson, or any other Member to whom powers for exercising such superintendence and control are delegated by him.

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BENCHES OF TRIBUNAL

SECTION 419

(a) There shall be constituted such number of Benches of the Tribunal, as may, by notification, be specified by the Central Government.

(b) The Principal Bench of the Tribunal shall be at New Delhi which shall be presided over by the President of the Tribunal.

(c) The powers of the Tribunal shall be exercisable by Benches consisting of two Members out of whom one shall be a Judicial Member and the other shall be a Technical Member:

(d) The Central Government shall, by notification, establish such number of benches of the Tribunal, as it may consider necessary, to exercise the jurisdiction, powers and authority of the Adjudicating Authority conferred on such Tribunal by or under Part II of the Insolvency and Bankruptcy Code, 2016

ORDERS OF TRIBUNAL

SECTION 420

(a) The Tribunal may, after giving the parties to any proceeding before it, a reasonable opportunity of feeing heard, pass such orders thereon as it thinks fit.

(b) The Tribunal may, at any time within two years from the date of the order, with a view to rectifying any mistake apparent from the record, amend any order passed by it, and shall make such amendment, if the mistake is brought to its notice by the parties

Provided that no such amendment shall be made in respect of any order against which an appeal has been preferred under this Act.

(b) The Tribunal shall send a copy of every order passed under this section to all the parties concerned.

APPEAL FROM ORDERS OF TRIBUNAL

SECTION 421

(a) Any person aggrieved by an order of the Tribunal may prefer an appeal to the Appellate Tribunal.

(b) No appeal shall lie to the Appellate Tribunal from an order made by the Tribunal with the consent of parties.

(c) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.

(d) On the receipt of an appeal under sub-section (1), the Appellate Tribunal shall, after giving the parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(e) The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to appeal.

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EXPEDITIOUS DISPOSAL BY TRIBUNAL AND APPELLATE TRIBUNAL

SECTION 422

(a) Every application or petition presented before the Tribunal and every appeal filed before the Appellate Tribunal shall be dealt with and disposed of by it as expeditiously as possible and every endeavour shall be made by the Tribunal or the Appellate Tribunal, as the case may be, for the disposal of such application or petition or appeal within three months from the date of its presentation before the Tribunal or the filing of the appeal before the Appellate Tribunal.

(b) Where any application or petition or appeal is not disposed of within the period specified in subsection (1), the Tribunal or, as the case may be, the Appellate Tribunal, shall record the reasons for not disposing of the application or petition or the appeal, as the case may be, within the period so specified; and the President or the Chairperson, as the case may be, may, after taking into account the reasons so recorded, extend the period referred to in sub-section (1) by such period not exceeding ninety days as he may consider necessary.

APPEAL TO SUPREME COURT

SECTION 423

Any person aggrieved by any order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of receipt of the order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

PROCEDURE BEFORE TRIBUNAL AND APPELLATE TRIBUNAL

SECTION 424

The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down in the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice or of the Insolvency and Bankruptcy Code, 2016, the Tribunal and the Appellate Tribunal shall have power to regulate their own procedure.

The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act or under the Insolvency and Bankruptcy Code, 2016, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 while trying a suit in respect of the following matters, namely.

(a) Summoning and enforcing the attendance of any person and examining him on oath
(b) Requiring the discovery and production of documents; (c) receiving evidence on affidavits
(c) Subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872, requisitioning any public record or document or a copy of such record or document from any office
(d) issuing commissions for the examination of witnesses or documents; (J) dismissing a representation for default or deciding it ex parte
(e) Setting aside any order of dismissal of any representation for default or any order passed by it ex parte
(f) Any other matter which may be prescribed

Any order made by the Tribunal or the Appellate Tribunal may be enforced by that Tribunal in the same manner as if it were a decree made by a court in a suit pending therein

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POWER TO PUNISH FOR CONTEMPT

SECTION 425

The Tribunal and the Appellate Tribunal shall have the same jurisdiction, powers and authority in respect of contempt of themselves as the High Court has and may exercise, for this purpose, the powers under the provisions of the Contempt of Courts Act, 1971, which shall have the effect subject to modifications that—

(a) The reference therein to a High Court shall be construed as including a reference to the Tribunal and the Appellate Tribunal; and

(b) The reference to Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officers as the Central Government may, specify in this behalf.

DELEGATION OF POWERS

SECTION 426

The Tribunal or the Appellate Tribunal may, by general or special order, direct, subject to such conditions, if any, as may be specified in the order, any of its officers or employees or any other person authorised by it to inquire into any matter connected with any proceeding or, as the case may be, appeal before it and to report to it in such manner as may be specified in the order.

MEMBERS, OFFICERS, ETC., TO BE PUBLIC SERVANTS

SECTION 427

The President, Members, officers and other employees of the Tribunal and the Chairperson, Members, officers and other employees of the Appellate Tribunal shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code

PROTECTION OF ACTION TAKEN IN GOOD FAITH

SECTION 428

No suit, prosecution or other legal proceeding shall lie against the Tribunal, the President, Member, officer or other employee, or against the Appellate Tribunal, the Chairperson, Member, officer or other employees thereof or liquidator or any other person authorised by the Tribunal or the Appellate Tribunal for the discharge of any function under this Act in respect of any loss or damage caused or likely to be caused by any act which is in good faith done or intended to be done in pursuance of this Act.

POWER TO SEEK ASSISTANCE OF CHIEF METROPOLITAN MAGISTRATE, ETC.

SECTION 429

The Tribunal may, in any proceedings for winding up of a company under this Act or in any proceedings under the Insolvency and Bankruptcy Code, 2016, in order to take into custody or under its control all property, books of account or other documents, request, in writing, the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector within whose jurisdiction any such property, books of account or other documents of such company under this Act or of corporate persons under the said Code, are situated or found, to take possession thereof, and the Chief Metropolitan Magistrate, Chief Judicial Magistrate or the District Collector, as the case may be, shall, on such request being made to him

(a) Take possession of such property, books of account or other documents

(b) Cause the same to be entrusted to the Tribunal or other person authorised by it.

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CIVIL COURT NOT TO HAVE JURISDICTION

SECTION 430

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Tribunal or the Appellate Tribunal is empowered to determine by or under this Act or any other law for the time being in force and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or any other law for the time being in force, by the Tribunal or the Appellate Tribunal.

VACANCY IN TRIBUNAL OR APPELLATE TRIBUNAL NOT TO INVALIDATE ACTS OR PROCEEDINGS

SECTION 431

No act or proceeding of the Tribunal or the Appellate Tribunal shall be questioned or shall be invalid merely on the ground of the existence of any vacancy or defect in the constitution of the Tribunal or the Appellate Tribunal, as the case may be

RIGHT TO LEGAL REPRESENTATION

SECTION 432

A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be

LIMITATION

SECTION 433

The provisions of the Limitation Act, 1963 shall, as far as may be, apply to proceedings or appeals before the Tribunal or the Appellate Tribunal, as the case may be.

TRANSFER OF CERTAIN PENDING PROCEEDINGS

SECTION 434

On such date as may be notified (1st June 2016) by the Central Government in this behalf

(a) All matters, proceedings or cases pending before the Company Law Board shall stand transferred to the Tribunal and the Tribunal shall dispose of such matters, proceedings or cases in accordance with the provisions of this Act

(b) All proceedings under the Companies Act, 1956, including proceedings relating to arbitration, compromise, arrangements and reconstruction and winding up of companies, pending immediately before such date before any District Court or High Court, shall stand transferred to the Tribunal and the Tribunal may proceed to deal with such proceedings from the stage before their transfer.

(c) Any appeal preferred to the Appellate Authority for Industrial and Financial Reconstruction or any reference made or inquiry pending to or before the Board of Industrial and Financial Reconstruction or any proceeding of whatever nature pending before the Appellate Authority for Industrial and Financial Reconstruction or the Board for Industrial and Financial Reconstruction under the Sick Industrial Companies (Special Provisions) Act, 1985 immediately before the commencement of this Act shall stand abated:

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(d) Provided that a company in respect of which such appeal or reference or inquiry stands abated under this clause may make a reference to the Tribunal under this Act within one hundred and eighty days from the commencement of this Act in accordance with the provisions of this Act. No fees shall be payable for making such reference under this Act by a company whose appeal or reference or inquiry stands abated under this clause.

COMPOUNDING OF OFFENCE

SECTION 441

Three kinds of offences are permitted to be compounded under this section:-

(a) An offence is punishable with fine only

(b) An offence is punishable with imprisonment or fine

(c) An offence which is punishable with imprisonment or fine or with both imprisonment

SPECIAL POINTS

1. An offence punishable with imprisonment only or with imprisonment and fine is not compoundable under this section.
2. The section empowers the NCLT to compound offences without any limit or where a maximum amount of fine which may be imposed by an offence does not exceed Rs. 5, 00,000 it may be compounded by the Regional Director.
3. Any offence covered under this section by any company or its officer shall not be compounded if the investigation against such company has been initiated or is pending under this Act.
4. The offences committed by a company or its officer within a period of three years from the date on which the similar offence was committed by it or him was compounded under this section, are not compoundable.
5. Every application for the compounding of an offence shall be made to the Registrar of Companies who shall forward the same, together with its comments thereon, to the Company Law Board or the Regional Director, as the case may be. Where any offence is compounded under this section, whether before or after the institution of any prosecution, an intimation thereof shall be given by the Company, to the Registrar of Companies, within 7 days from the date on which the offence is so compounded.
6. Where any offence is compounded before the institution of any prosecution, no prosecution shall be instituted in relation to such offence, either by the Registrar or by any shareholder of the company or by any person authorised by the Central Government against the offender in relation to whom the offence is so compounded.
7. Where the compounding of any offence is made after the institution of any prosecution, such compounding shall be brought by the Registrar in writing, to the notice of the court in which the prosecution is pending and on such notice of the compounding of the offence being given, the company or its officer in relation to whom the offence is so compounded shall be discharged.
8. Any offence which is punishable under this Act, with imprisonment or fine, or with imprisonment or fine or with both, shall be compoundable with the permission of the Special Court, in accordance with the procedure laid down in that Act for compounding of offences;
9. Any offence which is punishable under this Act with imprisonment only or with imprisonment and also with fine shall not be compoundable.

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DISSOLUTION OF COMPANY LAW BOARD AND CONSEQUENTIAL PROVISIONS

SECTION 466

Notwithstanding anything contained in section 465, Company Law Board shall stand dissolved on the constitution of the Tribunal and the Appellate Tribunal:

CLASS – ACTION

SECTION 245 (not for banking company)

Against whom a Class Action Suit can be filed? Section 245 (1)

Class action suit can be filed against the

(a) Company,

(b) Any of its directors

(c) Auditor, including audit firm

(d) Expert or advisor or consultant or any other person

Where Class Action Suit can be filed?

Before NCLT

WHAT KIND OF ORDER NCLT CAN GIVE ON CLASS ACTION SUIT

(a) To restrain the company from committing an act which is ultra vires the articles or memorandum of the company;

(b) To restrain the company from committing breach of any provision of the company's memorandum or articles;

(c) to declare a resolution altering the memorandum or articles of the company as void if the resolution was passed by suppression of material facts or obtained by misstatement to the members or depositors;

(d) To restrain the company and its directors from acting on such resolution;

(e) To restrain the company from doing an act which is contrary to the provisions of this Act or any other law for the time being in force;

(f) To restrain the company from taking action contrary to any resolution passed by the members;

(g) To claim damages or compensation or demand any other suitable action from or against—

(i) the company or its directors for any fraudulent, unlawful or wrongful act or omission or conduct or any likely act or omission or conduct on its or their part;

(ii) the auditor including audit firm of the company for any improper or misleading statement of particulars made in his audit report or for any fraudulent, unlawful or wrongful act or conduct; or

(iii) any expert or advisor or consultant or any other person for any incorrect or misleading statement made to the company or for any fraudulent, unlawful or wrongful act or conduct or any likely act or conduct on his part;-

(h) To seek any other remedy as the Tribunal may deem fit.

Where the members or depositors seek any damages or compensation or demand any other suitable action from or against an audit firm, the liability shall be of the firm as well as of each partner who was involved in making any improper or misleading statement of particulars in the audit report or who acted in a fraudulent, unlawful or wrongful manner.

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CAN FILE APPLICATION UNDER SECTION 245

SECTION 245 (3)

S. No.	Type of company	Members	Depositors
1	in the case of a company having a share capital	not less than one hundred members of the company or not less than 10% of the total number of its members whichever is less, or any member or members holding not less than 10% of the issued share capital of the company.	shall not be less than one hundred depositors or not less than 10% of the total number of depositors whichever is less, or any depositor or depositors to whom the company owes 10% of total deposits of the company
2	in the case of a company not having a share capital	Not less than one-fifth of the total number of its members.	shall not be less than one hundred depositors or not less than 10% of the total number of depositors whichever is less, or any depositor or depositors to whom the company owes 10% of total deposits of the company

(4) In considering an application under sub-section (i), the Tribunal shall take into account, in particular—

(a) Whether the member or depositor is acting in good faith in making the application for seeking an order

(b) Any evidence before it as to the views of the members or depositors of the company who have no personal interest, direct or indirect, in the matter being proceeded under this section;

(1) If an application filed under sub-section (1) is admitted, then the Tribunal shall have regard to the following, namely:

(a) Public notice shall be served on admission of the application to all the members or depositors of the class in such manner as may be prescribed;

(b) all similar applications prevalent in any jurisdiction should be consolidated into a single application and the class members or depositors should be allowed to choose the lead applicant and in the event the members or depositors of the class are unable to come to a consensus, the Tribunal shall have the power to appoint a lead applicant, who shall be in charge of the proceedings from the applicant's side;

(c) Two class action applications for the same cause of action shall not be allowed;

(d) The cost or expenses connected with the application for class action shall be defrayed by the company or any other person responsible, for any oppressive act.

(6) Any order passed by the Tribunal shall be binding on the company and all its members, depositors and auditor including audit firm or expert or consultant or advisor or any other person associated with the company.

(7) Any company which fails to comply with an order passed by the Tribunal under this section shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty- five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

(8) Where any application filed before the Tribunal is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing, reject the application and make an order that the applicant shall pay to the opposite party such cost, not exceeding one lakh rupees, as may be specified in the order.

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RIGHT TO APPLY UNDER SECTION 245

RULE 85

(1) An application under sub-section (1) of section 245, read with sub-section (3) of section 245 of the Act, shall be filled in Form NCLT-9.

(2) A copy of every application under sub-rule (1) shall be served on the company, other respondents and all such persons as the Tribunal may direct.

CONDUCTING A CLASS ACTION SUIT

RULE 85

(1) Without prejudice to the generality of the provisions of sub-section (4) of section 245 of the Act, the Tribunal may, while considering the admissibility of an application under the said section, in addition to the grounds specified therein, take into account the following:

- **(a)** whether the class has so many members that joining them individually would be impractical, making a class action desirable;
- **(b)** whether there are questions of law or fact common to the class;
- **(c)** whether the claims or defences of the representative parties are typical of the claims or defences of the class;
- **(d)** whether the representative parties will fairly and adequately protect the interests of the class.

RULE OF OPT-OUT

RULE 86

(1) A member of a class action under section 245 of the Act is entitled to opt-out of the proceedings at any time after the institution of the class action, with the permission of the Tribunal, as per Form No. NCLT-1

(2) A class member opting out shall not be precluded from pursuing a claim against the company on an individual basis under any other law, where a remedy may be available, subject to any conditions imposed by the Tribunal.

PUBLICATION OF NOTICE

RULE 87

1. For the purposes of clause (a) of sub section (5) of section 245 of the Act, on the admission of an application filed under sub-section (1) of section 245 of the Act, a public notice shall be issued by the Tribunal as per Form No. NCLT-13 to all the members of the class by-

- **(a)** publishing 'the same within seven days of admission of the Application by the Tribunal at least once in a vernacular newspaper in the principal vernacular language of the State in which the registered office of the company is situated and at least once in English in an English newspaper that is in circulation in that State;
- **(b)** requiring the company to place the public notice on the website of such company, if any, in addition to publication of such public notice in newspaper under sub-clause (a):

  Provided that such notice shall also be placed on the websites of the Tribunal and the Ministry of Corporate Affairs, the concerned Registrar of Companies and in respect of a listed company on the website of the concerned stock exchange where the company has any of its securities listed, until the application is disposed of by the Tribunal.

2. The cost or expenses connected with the publication of the public notice under this rule shall be borne by the applicant and shall be defrayed by the company or any other person responsible for any oppressive act in case order is passed in favour of the applicant.

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CHAPTER

26

NCLT AND NCLAT RULES 2016

Covering-

- Section chart
- NCLT Rules 2016
- NCLAT Rules 2016

EXPECTED MARKS COVERAGE (1 to 5)

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Sections, Rules, Regulations, forms - CHART

Section	Short Description
Rule	NCLT Rules 2016
Rule	NCLAT Rules 2016

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NCLT AND NCLAT RULES 2016

NCLT RULES 2016

(W.E.F 21st JULY, 2016)

SPECIAL NOTE: ONLY FEW RULES ARE GIVEN FOR DETAILS RULES REFER ADVANCE COMPANY LAW BOOK

DEFINITIONS

RULE 2

Act:- Means the Companies Act, 2013

Applicant:- Means a petitioner or an appellant or any other person or entity capable of making an application including an interlocutory application or a petition or an appeal under the Act;

Application:- Means any application or proceedings filed under the provisions of the Act, including any transferred application or transferred petition as defined under sub-rule (29) ;

Authorised representative:- Means a person authorised in writing by a party to present his case before the Tribunal as the representative of such party as provided under section 432 of the Act;

Central Registry:- Means the registry in which all the applications or petitions and documents are received by the Registrar for allocation to the concerned Bench of the Tribunal for disposal;

Creditor:- Means any person to whom a debt is owed;

Filer:- Means an authorised representative of that person or any party to the proceedings who files any document with the Tribunal in relation to a case filed under the Act, or any rules thereunder;

Filed:- Means filed in the office of the Registry of the Tribunal;

COMPUTATION OF TIME PERIOD

RULE 3

Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Tribunal is closed, that day and any succeeding days on which the Tribunal remains closed shall also be excluded.

SITTING HOURS

RULE 9

The sitting hours of the Tribunal shall ordinarily be from 10:30 AM to 1:00 PM and 2:00 P.M. to 4:30 PM, subject to any order made by the President.

WORKING HOURS

RULE 10

(a) Except on Saturdays, Sundays and other National Holiday, the office of the Tribunal shall remain open on all working days from 09.30 A.M. to 6.00 P.M.

(b) The Filing Counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.

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LISTING OF CASES

RULE 11

An urgent matter filed before 12 noon shall be listed before the Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for listing on the following day, with the specific permission of the Bench.

FUNCTIONS OF THE PRESIDENT

RULE 16

(a) preside over the consideration of cases by the Tribunal;
(b) direct the Registry in the performance of its functions;
(c) prepare an annual report on the activities of the Tribunal;
(d) transfer any case from one Bench to other Bench when the circumstances so warrant;
(e) to withdraw the work or case from the court of a member,
(f) perform the functions entrusted to the President under these rules and such other powers as my be relevant to carry out his duties as head of the Tribunal while exercising the general superintendence and control over the administrative functions of the Members, Registrar, Secretary and other staff of the Tribunal.

FUNCTIONS OF THE REGISTRAR

RULE 17

The Registrar shall have the following functions, namely:-
(a) registration of appeals, petitions and applications;
(b) receive applications for amendment of appeal or the petition or application or subsequent proceedings.
(c) receive applications for fresh summons or notices and regarding services thereof;
(d) receive applications for fresh summons or notices and for short date summons and notices;
(e) receive applications for substituted service of summons or notices;
(f) receive applications for seeking orders concerning the admission and inspection of documents;
(g) transmission of a direction or order to the civil court as directed by Tribunal with the prescribed certificates for execution etc., and
(h) Such other incidental or matters as the President may direct from time to time."

FUNCTIONS OF THE SECRETARY

RULE 18

(a) be in charge of the long term projects and initiatives of the Tribunal;
(b) supervise the divisions and sections of the Human Resources;
(c) prepare, monitor and manage budgetary allocations and financial managements of the Tribunal and the Benches;
(d) provide all necessary support in the day to day operations of the Tribunal;
(e) manage and supervise the facilities and administrative services of the Tribunal;
(f) manage and administer the public grievances mechanism of the Tribunal;
(g) coordinate with authorised representatives and other professionals in the smooth functioning of the Tribunal;
(h) oversee information and communication technology and other technological facilities in the Tribunal;
(i) manage and facilitate communication and services of the Tribunal;
(j) manage, monitor and administer the public affairs and public safety provisions within the premises of the Tribunal; and
(k) supervise library and research wings of the Tribunal.

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PROCEDURE

RULE 20

1. Every appeal or petition or application or caveat, petition or objection or counter presented to the Tribunal shall be in
2. English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type written, lithographed or printed in double spacing on one side of standard petition paper with an inner margin of about four centimeter width on top and with a right margin of 2.5. cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form;
3. The cause title shall state "Before the National Company Law Tribunal" and shall specify the Bench to which it is presented and also set out the proceedings or order of the authority against which it is preferred.
4. Appeal or petition or application or counter or objections shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point. Where Saka or other dates are used, corresponding dates of Gregorian calendar shall also be given.
5. Full name, parentage, age, description of each party and address and in case a party sues or being sued in a representative character, shall also be set out at the beginning of the appeal or petition or application and need not be repeated in the subsequent proceedings in the same appeal or petition or application.
6. The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party.
7. These numbers shall not be changed and in the event of the death of a party during the pendency of the appeal or petition or matter, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.
8. Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.
9. Every proceeding shall state immediately after the cause title the provision of law under which it is preferred.

GENERAL PROCEDURE

RULE 34

1. In a situation not provided for in these rules, the Tribunal may, for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.
2. The general heading in all proceedings before the Tribunal, in all advertisements and notices shall be in Form No. NCLT. 4.
3. Every petition or application or reference shall be filed in form as provided in Form No. NCLT. 1 with attachments thereto accompanied by Form No. NCLT.2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT. 1 accompanied by such attachments thereto along with Form No. NCLT.3
4. Every petition or application including interlocutory application shall be verified by an affidavit in Form No. NCLT.6. Notice to be issued by the Tribunal to the opposite party shall be in Form NCLT-5.

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ADVERTISEMENT DETAILING PETITION

RULE 35

1. Where any application, petition or reference is required to be advertised, it shall, unless the Tribunal otherwise orders, or these rules otherwise provide, be advertised in Form NCLT- 3A, not less than fourteen days before the date fixed for hearing, at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situate, and at least once in English language in an English newspaper circulating in that district.
2. such advertisement shall state;-
   (a) the date on which the application, petition or reference was presented;
   (b) the name and address of the applicant, petitioner and his authorised representative, if any;
   (c) the nature and substance of application, petition or reference;
   (d) the date fixed for hearing;
   (e) a statement to the effect that any person whose interest is likely to be affected by the proposed petition or who intends either to oppose or support the petition or reference at the hearing shall send a notice of his intention to the concerned Bench and the petitioner or his authorised representative, if any, indicating the nature of interest and grounds of opposition so as to reach him not later than two days previous to the day fixed for hearing.
3. Where the advertisement is being given by the company, then the same may also be placed on the website of the company, if any.
4. An affidavit shall be filed to the Tribunal, not less than three days before the date fixed for hearing, stating whether the petition has been advertised in accordance with this rule and whether the notices, if any, have been duly served upon the persons required to be served: Provided that the affidavit shall be accompanied with such proof of advertisement or of the service, as may be available.
5. Where the requirements of this rule or the direction of the Tribunal, as regards the advertisement and service of petition, are not complied with, the Tribunal may either dismiss the petition or give such further directions as it thinks fit.
6. The Tribunal may, if it thinks fit, and upon an application being made by the party, may dispense with any advertisement required to be published under this rule.

NOTICE TO OPPOSITE PARTY

RULE 37

(1) The Tribunal shall issue notice to the respondent to show cause against the application or petition on a date of hearing to be specified in the Notice. Such notice in **Form No. NCLT.5** shall be accompanied by a copy of the application with supporting documents.

(2) If the respondent does not appear on the date specified in the notice in **Form No. NCLT.5**, the Tribunal, after according reasonable opportunity to the respondent, shall forthwith proceed ex-parte to dispose of the application.

If the respondent contests to the notice received under sub-rule (1), it may, either in person or through an authorised representative, file a reply accompanied with an affidavit and along with copies of such documents on which it relies, with an advance service to the petitioner or applicant, to the Registry before the date of hearing and such reply and copies of documents shall form part of the record.

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COMPUTATION OF TIME PERIOD

RULE 3

Where a period is prescribed by the Act and these rules or under any other law or is fixed by the Appellate Tribunal for doing any act, in computing the time, the day from which the said period is to be reckoned shall be excluded, and if the last day expires on a day when the office of the Appellate Tribunal is closed, that day and any succeeding day on which the Appellate Tribunal remains closed shall also be excluded

SITTING HOURS OF THE APPELLATE TRIBUNAL

RULE 9

The sitting hours of the Appellate Tribunal shall ordinarily be from 09.30 AM. to 01.00 P.M. and from 2.15 P.M. to 5.00 P.M. subject to any order made by the Chairperson and this shall not prevent the Appellate Tribunal to extend its sitting as it deems fit.

WORKING HOURS OF OFFICE

RULE 10

1. The office of the Appellate Tribunal shall remain open on all working days from 09:30 A.M. to 6.00 P.M.
2. The filing counter of the Registry shall be open on all working days from 10.30 AM to 5.00 P.M.

LISTING OF CASES

RULE13

All urgent matters filed before 12 noon shall be listed before the Appellate Tribunal on the following working day, if it is complete in all respects as provided in these rules and in exceptional cases, it may be received after 12 noon but before 3.00 P.M. for listing on the following day, with the specific permission of the Appellate Tribunal or Chairperson.

POWER TO EXEMPT

RULE 14

The Appellate Tribunal may on sufficient cause being shown, exempt the parties from compliance with any requirement of these rules and may give such directions in matters of practice and procedure, as it may consider just and expedient on the application moved in this behalf to render substantial justice.

POWER TO EXTEND TIME

RULE 15

The Appellate Tribunal may extend the time appointed by these rules or fixed by any order, for doing any act or taking any proceeding, upon such terms, if any, as the justice of the case may require, and any enlargement may be ordered, although the application therefore is not made until after the expiration of the time appointed or allowed.

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POWER OF ADJOURNMENT

RULE 17

All adjournments shall normally be sought before the concerned Bench in court and in extraordinary circumstances, the Registrar may, if so directed by the Tribunal in chambers, at any time adjourn; any matter and lay the same before the Tribunal in chambers.

DELEGATION POWERS OF THE CHAIRPERSON

RULE 18

The Chairperson may assign or delegate to a Deputy Registrar or to any other suitable officer all or some of the functions required by these rules to be exercised by the Registrar.

PROCEDURE FOR PROCEEDINGS

RULE 19

(a) Every appeal to the Appellate Tribunal shall be in English and in case it is in some other Indian language, it shall be accompanied by a copy translated in English and shall be fairly and legibly type-written or printed in double spacing on one side of standard paper with an inner margin of about four centimeters width on top and with a right margin of 2.5 cm, and left margin of 5 cm, duly paginated, indexed and stitched together in paper book form.

(b) The cause title shall state "In the National Company Law Appellate Tribunal" and also set out the proceedings or order of the authority against which it is preferred.

(c) Appeal shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain as nearly as may be, a separate fact or allegation or point.

(d) Where Saka or other dates are used, corresponding dates of Gregorian calendar shall also be given.

(e) Full name, parentage, description of each party and address and in case a party sue or being sued in a representative character, shall also be set out at the beginning of the appeal and need not be repeated in the subsequent proceedings in the same appeal.

(f) The names of parties shall be numbered consecutively and a separate line should be allotted to the name and description of each party and these numbers shall not be changed and in the event of the death of a party during the pendency of the appeal, his legal heirs or representative, as the case may be, if more than one shall be shown by sub-numbers.

(g) Where fresh parties are brought in, they may be numbered consecutively in the particular category, in which they are brought in.

(h) Every proceeding shall state immediately after the cause title and the provision of law under which it is preferred.

PRESENTATION OF APPEAL

RULE 22

(a) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.

(b) Every appeal shall be accompanied by a certified copy of the impugned order.

(c) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.

(d) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.

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(e) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.

(f) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along With memorandum of appeal.

NUMBER OF COPIES TO BE FILED

RULE 23

The appellant or petitioner or applicant or respondent shall file three authenticated copies of appeal or counter or objections, as the case may be, and shall deliver one copy to each of the opposite party.

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