FINAL CA – May 2018

Company Law

Test Code – F2

Branch: MULUND Date: 03.12.2017

(50 Marks)

Note: All questions are compulsory.

Question 1 (4 marks)

Section 125 of the Companies Act, 2013 deals with the provisions related to the Investor Education and Protection Fund (IEPF). Sections provides that the Central Government shall establish a Fund to be called the Investor Education and Protection Fund. The fund is established solely to protect and safeguard the interests of investors. (1 mark)

Fund shall be utilised for the following purposes —

i. To refund in respect of unclaimed dividends, matured deposits, matured debentures, the application money due for refund and interest thereon;(1 mark)
ii. For promotion of investors' education, awareness and protection; (1/2 mark)
iii. For distribution of any disgorged amount among eligible and identifiable applicants for shares or debentures, shareholders, debenture-holders or depositors who have suffered losses due to wrong actions by any person, in accordance with the orders made by the Court which had ordered disgorgement; (1/2 mark)
iv. For reimbursement of legal expenses incurred in pursuing class action suits under sections 37 and 245 by members, debenture-holders or depositors as may be sanctioned by the Tribunal; and(1/2 mark)
v. For any other purpose incidental thereto, in accordance with such rules as prescribed under the Investor Education and Protection Fund Authority (Accounting, Audit, Transfer and Refund) Rules, 2016. (1/2 mark)

Question 2 (8 marks)

Section 165 of the Companies Act, 2013 provides for the maximum permissible number of directorships that a person can hold. According to this section: (4 marks)

i) No person, shall hold office as director, including any alternate directorship, in more than 20 companies at the same time. [Section 165(1)]
ii) Provided that out of the limit of 20, the maximum number of public companies in which a person can be appointed as a director shall not exceed 10. [Proviso to section 165(1)]
iii) Private companies that is either holding or subsidiary company of a public company shall be included in reckoning the limit of public companies in which a person can be appointed as a director.

The MCA vide Notification dated 5th June, 2015, has clarified that section 165(1) of the Companies Act, 2013, shall not apply to section 8 companies.

Based on the above provisions, we can advise Mr. Fortune as following: (4 marks)

1. 6 Public companies. Since the maximum number of public companies in which one can be a director is 10 only.
2. No more private company. Since his total holding has already reached the maximum permissible 20 companies (All inclusive of public and private companies)

3. 2 more companies registered under section 8 of the companies Act, 2013. Since there is no restriction on the number of directorship, a person can hold in the companies registered under section 8 of the Companies Act, 2013.

Question 3 (4 marks)

"Resolved that pursuant to the Articles of Association of the company and section 161(1) of the Companies Act, 2013, Mr. More is appointed as an Additional Director of the Luxury Limited with effect from 1st October, 2016 to hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier. (2 Marks)

Resolved further that Mr. More will enjoy the same powers and rights as other directors. (1 Mark)

Resolved further that Mr._____ Secretary of Luxury Limited be and is hereby authorized to electronically file necessary returns with the Registrar of Companies and to do all other necessary things required under the Act." (1 Mark)

Question 4 (8 marks) (2 marks for each sub-question)

Section 135 read with *Companies (Corporate Social Responsibility Policy) Rules, 2014* of the Companies Act, 2013 deals with the provisions related to the Corporate Social Responsibility.

As per the given facts, following are the answers in the given situations-

(i) Amount that Company has to spend towards CSR:

According to section 135 of the Companies Act, 2013, the Board of every company shall ensure that the company spends, in every financial year, at least two per cent of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its CSR Policy.

Accordingly, net profits of Super Real Estate Ltd. for three immediately preceding financial years is 150 crores (30+70+50) and 2% of the average net profits of the company made during these three immediately preceding financial years will constitute 1 crore, can be spent towards CSR in financial year 2016-2017.

(ii) Composition of CSR Committee:

(a) In the case of listed company, the CSR Committee shall consist of three or more directors, out of which at least one director shall be an independent director.

(b) Whereas in case of an unlisted public company or a private company, is not required to appoint an independent director and shall have its CSR Committee without such director. A private company having only two directors on its Board shall constitute its CSR Committee with two such directors.

(iii) In case of failure to incur expenditure for CSR: If the company fails to provide such amount or incur expenditure for CSR, the Board shall, in its report, under section 134 of the Companies Act, 2013 specify the reasons for not spending the amount.

As no quantum of punishment is given under section 135, section 450 of the Companies Act, 2013 says that, the company and every officer of the company or any other person who is in default or contravenes in compliances with section 135 shall be punishable with fine which may extend to ` 10,000. In case of continuation of contravention with further fine extending to ` 1000 for every day after the first during which the contravention continues.

(iv) Activities not to be considered as CSR Activities: The *Companies (CSR Policy) Rules, 2014* provides for some activities which are not considered as CSR activities:

(1) The CSR projects or programs or activities undertaken outside India.

(2) The CSR projects or programs or activities that benefit only the employees of the company and their families.

(3) Contribution of any amount directly or indirectly to any political party under section 182 of the Act.

(4) Expenses incurred by companies for the fulfillment of any Act/ Statute of regulations (such as Labour Laws, Land Acquisition Act etc.) would not count as CSR expenditure under the Companies Act.

Question 5 (4 marks)

Under Section II of Part II of Schedule V to the Companies Act, 2013, the remuneration payable to a managerial personnel is linked to the effective capital of the company. Where in any financial year during the currency of tenure of a managerial person, a company has no profits or its profits are inadequate, it may, without Central Government approval, pay remuneration to the managerial person not exceeding * ` 120 Lakhs in the year in case the effective capital of the company is between ` 100 crores to 250 crores. The limit will be doubled if approved by the members by special resolution and further if the appointment is for a part of the financial year the remuneration will be pro-rated. (2 marks)

From the foregoing provisions contained in schedule V to the Companies Act, 2013 the payment of ` 50 Lacs in the year as remuneration to Mr. Boss is valid in case he accepts it, as under the said schedule he is entitled to a remuneration of *` 120 Lakhs in the year and his terms of appointment provide for payment of the remuneration as per schedule V. (2 marks)

[* Note: As per the amendment in Schedule V by the Ministry of Corporate Affairs vide Notification S.O. 2922(E) dated 12th September 2016, part II, for Section II of Schedule V has been revised.]

Question 6 (4 marks)

Initiation of corporate insolvency resolution process by financial creditor.

Section 7 of the Insolvency and Bankruptcy Code, 2016 state the manner of initiation of corporate insolvency resolution process by financial creditor. According to the provision, a financial creditor either by itself or jointly with other financial creditors may file an application against a corporate debtor before the Adjudicating Authority (Tribunal) when a default has occurred.

The financial creditor shall, along with the application furnish the following informations—

(a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;

(b) the name of the resolution professional proposed to act as an interim resolution professional; and

(c) any other information as may be specified by the Board.

The Adjudicating Authority shall, within fourteen days of the receipt of the application, 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 if, satisfied that a default has occurred and complying with other requirements of the section, it may, by order, admit such application; or if, default has not occurred, it may, by order, reject such application. (3 marks)

Commencement of corporate insolvency resolution process: The corporate insolvency resolution process shall commence from the date of admission of the application. The Adjudicating Authority shall communicate— the order to the financial creditor within seven days of admission or rejection of such application and to the corporate debtor. (1 mark)

Question 7 (4 marks)

Offences to be non-cognizable: Section 439 of the Companies Act, 2013 provides for offences to be non-cognizable. According to this section:

(i) Notwithstanding anything in the Code of Criminal Procedure, 1973, every offence under this Act except the offences referred to in sub-section (6) of section 212 shall be deemed to be non-cognizable within the meaning of the said Code. (1/2 mark)

(ii) No court shall take cognizance of any offence under this Act which is alleged to have been committed by any company or any officer thereof, except on the complaint in writing of the Registrar, a shareholder of the company, or of a person authorised by the Central Government in that behalf.

Whereas in case of a government companies, court shall take cognizance of an offence under this Act which is alleged to have been committed by any company or any officer thereof on the complaint in writing of a person authorized by the Central Government in that behalf. (1 mark)

(iii) The court may take cognizance of offences relating to issue and transfer of securities and non-payment of dividend, on a complaint in writing, by a person authorised by the Securities and Exchange Board of India. (1/2 mark)

(iv) Nothing in this sub-section shall apply to a prosecution by a company of any of its officers. (1/2 mark)

(v) Where the complainant is the Registrar or a person authorised by the Central Government, the presence of such officer before the Court trying the offences shall not be necessary unless the court requires his personal attendance at the trial. (1/2 mark)

(vi) The above provisions shall not apply to any action taken by the liquidator of a company in respect of any offence alleged to have been committed in respect of any of the matters in Chapter XX or in any other provision of this Act relating to winding up of companies. (1/2 mark)

(vii) The liquidator of a company shall not be deemed to be an officer of the company. (1/2 mark)

Question 8 (4 marks)

The Companies Act, 2013 vide section 380 requires every foreign company is required to deliver to the Registrar for registration, within 30 days of the establishment of office in India, documents which have been specified therein. According to *the Companies (Registration of Foreign Companies) Rules, 2014*, any document which any foreign company is required to deliver to the Registrar shall be delivered to the Registrar having jurisdiction over New Delhi.

Question 9 (5 marks)

Section 244 of the Companies Act, 2013 provides the right to apply to the Tribunal for relief against oppression and mis-management. This right is available only when the petitioners hold the prescribed limit of shares as indicated below:

(i) In the case of company having a share capital, not less than 100 members of the Company or not less than one tenth of the total number of its members whichever is less or any member or members holding not less than one tenth of the issued share

capital of the company, provided that the applicant(s) have paid all calls and other dues on the shares. (2 marks)

(ii) In the case of company not having share capital, not less than one-fifth of the total number of its members.

Since the group of shareholders do not number 100 or hold 1/10th of the issued share capital or constitute 1/10th of the total number of members, they have no right to approach the Tribunal for relief.

However, the Tribunal may, on an application made to it waive all or any of the requirements specified in (i) or (ii) so as to enable the members to apply under section 241.

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (*Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth*).

Similarly, failure to declare dividends or payment of low dividends also does not amount to oppression. (*Thomas Veddon V.J. (v) Kuttanad Robber Co. Ltd*).

Thus the shareholders may not succeed in getting any relief from Tribunal. (3 marks)

Question 10 (6 marks)

The provision of Section 218 of the Companies Act, 2013 states that, the company shall require to take approval of the tribunal before taking action against the employee if there is any pendency of any proceedings against any person concerned in the conduct and management of the affairs of company.

The company shall require approval in the following circumstances:

- discharge or suspension of an employee; or
- punishment to an employee by dismissal, removal, reduction in rank or otherwise; or
- change in the terms of employment to the disadvantage of employee(s);

The Tribunal shall notify its objection to the action proposed in writing.

In case, the company other body corporate or person concerned does not receive the approval of the Tribunal within 30 days of making the application, it may proceed to take the action proposed against the employee. That means it can be considered as a deemed approval by the tribunal. (2 marks)

Appeal to the Appellate Tribunal

If the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of 30 days of the receipt of the notice of the objection, refer an appeal to the Appellate Tribunal in such manner and on payment of fees of Rupees 1,000 as per the schedule of Fees.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned. (1 mark)

- Yes, the termination of Mr. Amrit made by the company is totally valid in law and company can do so by considering deemed approval of tribunal. (1 mark)
- In this scenario, Mr. Amrit has not any remedy available. As per the provision of the law appeal to the appellate tribunal can be made only if the person is dissatisfied with the objection raised by the tribunal. Hence, in this case the tribunal has not replied Mr. Amrit cannot refer an appeal to Appellate Tribunal. (1 mark)
- In this case, Mr. Amrit can refer and appeal to appellate tribunal within 30 days of the receiving letter of objection raised by the tribunal and with payment of Fees on ` 1,000 as per schedule of Fees. (1 mark)

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