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SUGGESTED SOLUTION

FINAL MAY 2019 EXAM

SUBJECT - LAW

Test Code – FNJ 7092

BRANCH - () (Date :)

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Answer 1:

- (a) According to Section 152(6) of the Companies Act, 2013, **unless the articles provide for the retirement of all directors at every annual general meeting, not less than two – thirds of the total number of directors** of a public company shall be persons whose period of office is liable to determination by retirement of directors by rotation.

Directors liable to retire by rotation : $11 * \frac{2}{3} = 7.3$ or 8

So, maximum number of persons, who can be appointed as directors not liable to retire by rotation : $11 - 8 = 3$. (2 marks)

- (b) According to **Section 152(6)(c) of the Companies Act, 2013, $\frac{1}{3}$ rd of such of the Directors for the time being as are liable to retire by rotation**, or their number is neither three nor a multiple of three, then, the number nearest to the $\frac{1}{3}$ rd shall retire from office. Therefore the Directors liable to retire by rotation are $11 * \frac{2}{3}$ i.e. 7.3 or 8.

No. of directors to retire at AGM : $8 * \frac{1}{3}$ i.e. 2.67. Hence nearest to $\frac{1}{3}$ rd is 3. (2 marks)

- (c) According to **Section 160** of the Companies Act, 2013, **a person who is not a retiring director in terms of Section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he has, not less than 14 days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director.**

In the instant case, one nomination was rejected by the directors as it was received after sending the notice of AGM and that too after the working hours of the last day on which nomination should have been received i.e. 14th day. Hence, the contention of the directors are valid. (2 marks)

- (d) According to **Section 149(1) of the Companies Act, 2013, if the company wants to appoint more than 15 directors, it can do so after passing a special resolution.** Hence, the Board of directors of Frontline Limited, before increasing the strength of directors from 11 to 18 by appointing additional directors, have to pass a special resolution.

But, these appointments cannot be done through single resolution. Each director shall be appointed by a separate resolution unless the meeting first agreed that the appointment shall be made by a single resolution and **no vote has been cast against such agreement.** A resolution moved in contravention of this provision **shall be void,** whether or not objection thereto was raised at the time it was so moved. [Section 162 of the Act]. (2 marks)

Answer 2:

(A)

As per **Section 203(3)** of the Companies Act, 2013, **a whole – time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.** (1 mark)

However, the above sub – Section(3), **shall not disentitle** a key managerial personnel from **being a director of any company with the permission of the Board.** (1 mark)

Provided also that a company may appoint or employ a person as its managing director, if he is the managing director or manager of one, and of not more than one, other company

and such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting and of which meeting, and of the resolution to be moved thereat, specific notice has been given to all the directors then in India. (1 mark)

In the given case, unanimous consensus of all the directors present at the meeting was lacking. **Hence, Mr. Amit cannot be appointed as a Managing Director of CHH Limited.** (1 mark)

(B)

As per Companies Act, 2013 the board of directors are bound to convey board meeting as per prescribed schedule u/s 173. **Where it is not possible to hold board meetings because the directors are busy elsewhere or the time for convening such a meeting is short, it is possible that the required resolution can be passed by way of circular resolution as provided in section 175 of the Companies Act 2013.** (1 mark)

However, under **section 179** of the Companies Act 2013, **certain powers** can be exercised by the Board of directors **by means of a resolution passed at meeting** convened for this purpose.

They are :

- (i) to make calls on shareholders in respect of money unpaid on their shares
- (ii) To authorize buy back of securities under section 68
- (iii) To issue securities, including debentures, whether in or outside India.
- (iv) To borrow monies
- (v) To invest the funds of the company and
- (vi) To grant loans or give guarantee or provide security in respect of loans
- (vii) To approve financial statements and the Board's report
- (viii) To diversify the business of the company
- (ix) To approve amalgamation, merger or reconstruction
- (x) To take over a company or acquire a controlling or substantial stake in another company.
- (xi) Any other matter as prescribed in Rule 8 of the Companies (Meetings of the Board and its Powers) Rules, 2014. (2 marks)

In view of the above, the Managing Director can go ahead and complete the joint venture agreement after obtaining the approval of the board by passing a circular resolution.

(1 mark)

For this purpose, the proposed resolution has to be circulated in draft along with the other necessary papers, if any, to all the directors in India at their usual residential addresses.

(1 mark)

The resolution will become valid if the same is approved by majority of the directors and who are entitled to vote on the resolution. There after the resolution as passed by way of circulation will be entered in the minutes book of the Board of Directors and is enough compliance of the provisions of Companies Act, 2013 in this regard. (1 mark)

Answer 3:

(A)

Failure to maintain proper books of accounts [Section 338(1) of the Companies Act, 2013]

- Where a company is being wound up, if it is shown that **proper books of account were not kept by the company throughout the period of two years** immediately preceding the commencement of the winding up,
- **Every officer of the company who is in default** shall, unless he shows that he **acted honestly** and that in the circumstances in which the business of the company was carried on, the default was excusable,
- Be **punishable with imprisonment** for a term which shall be **not less than one year but which may extend to three years** and with **fine** which shall **not be less than 1 lakh rupees but which may extend to three lakh rupees.** (2 marks)

Conditions when it shall be deemed that proper books of account have not been kept [Section 338(2) of the Act] : For the purposes of sub – Section (1), it shall be deemed that proper books of account have not been kept in the case of any company, -

- Where the business of the company has involved dealings in goods, statements of the annual stock takings and, **except in the case of goods sold by way of ordinary retail trade,** of all goods sold and purchased, have not been kept. (1 mark)

In the instant case, no proper statements of all goods sold and purchased by the company engaged in ordinary retail trade is kept. It shall be deemed that proper books of account have been kept as ordinary retail trade is an exception under sub – Section (2). Thus, **opinion of CFO is correct.** (1 mark)

If the company is engaged in **wholesale trade** instead of ordinary retail trade, then it is deemed that proper statements of all goods sold and purchased by the company engaged in wholesale retail trade is not kept for more than 3 years period immediately prior to the date of winding up application. Hence, **in this case, the CFO opinion will not hold good and will be punishable.** (2 marks)

(B)

According to section 2(42) of the Companies Act, 2013, “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. (2 marks)

According to the Companies (Registration of Foreign Companies) Rules, 2014, **“electronic mode” means carrying out electronically based, whether main server is installed in India or not, including,** but not limited to –

- (a) business to business and business to consumer transactions, data interchange and other digital supply transactions;
- (b) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities in India or from citizens of India;

- (c) financial settlements, web based marketing, advisory and transactional services, data base services and products, supply chain management ;
- (d) online services such as telemarketing, telecommuting, telemedicine, education and information research; and
- (e) all related data communication services whether conducted by e – mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise. **(3 marks)**

Looking to the above description, it can be said that being involved in business activity through telemarketing, Robertson Ltd., will be treated as foreign company. **(1 mark)**

Answer 4:

(A)

According to **Section 413(1)** of the Companies Act, 2013, the **President and every other Member of the Tribunal shall hold office for a term of five years** from the date on which he enters upon his office and shall be **eligible for re-appointment** for another term of five years. **(1 mark)**

Under **section 413 (2)**, a Member of the Tribunal shall hold office as such until he attains, -

- (1) in the case of the President, the age of sixty – seven years;
- (2) in the case of any other Member, the age of Sixty – five years. **(1 mark)**

In the instant case, Mr.D was appointed as a technical Member of the NCLT on 1st July, 2012 for a period of 5 years. He will be completing 62 years on 30th June, 2017. He can also be re – appointed after his initial term of five years is over. But since he shall be attaining the age of 65 years as on 30th June, 2020, he will have to step down from the post on his attaining the age of 65 years i.e. on 30th June, 2020. **(2 marks)**

(B)

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.
- (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. **(2 marks)**

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.** **(1 mark)**

As regards obtaining relief from Tribunal, continuous losses cannot, by itself, be regarded as oppression (Ashok Betelnut Co. P. Ltd. vs. M.K. Chandrakanth). **(1 mark)**

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.). **(1 mark)**

Thus, the shareholders may not succeed in getting any relief from Tribunal. **(1 mark)**

Answer 5:

(1 mark x 10 = 10 marks)

- 1) True
- 2) 1
- 3) FC 1
- 4) True
- 5) STK 2
- 6) True
- 7) Ten
- 8) 100000/-
- 9) C
- 10) True