

CHAPTER

5

DIRECTORS – POWERS OF THE BOARD OF DIRECTORS

Covering-

- Board's powers and restrictions thereon
- General powers of the board
- Certain powers to be exercise by board only at a board meeting
- Restricted power of board
- Company to contribute to bonafide and charitable funds
- Prohibitions and restrictions regarding political contributions
- Power of board to make contributions to national defence fund, etc.
- Related party transactions
- Disclosure of interest by director
- Loan to directors, etc.
- Related party transactions
- Omnibus approval for related party transactions on annual basis
- When prior approval of company by resolution required for related party transaction
- Register of contracts or arrangements in which directors are interested
- Payment to director for loss of office, etc. In connection with transfer of undertaking property or shares
- Compensation for loss if office of MD or whole time director or manager
- Self Test Questions
 - From Past CS Exams

**EXPECTED
MARKS COVERAGE
(1 to 5)**

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POWERS OF THE BOARD OF DIRECTORS

BOARD'S POWERS AND RESTRICTIONS THEREON

GENERAL POWERS OF THE BOARD

SECTION 179

Unless otherwise provided by Act, the Board of directors is entitled to exercise all such powers and to do all such acts and things as the company is authorised to exercise and do. The powers which are *vested in the Board*, can be exercised *only by the Board*. The shareholders cannot interfere in their exercise.

Thus if the general powers of management are vested in the directors, the shareholders cannot direct them to bring an action against a particular individual or to sell the assets of the company, or to declare a dividend. The true relationship of the Board with the general meeting is “**more of federation than of subordinate and superior.**”

However, in the following **exceptional cases**, the general body of shareholders is competent to act even in matters delegated to the Board, for the inherent residuary and ultimate powers of a company lie with the general body of shareholders:-

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| (a) Director acting mala fide:- The general body of shareholders can intervene when it is proved that the directors have acted for improper motive or arbitrarily. (<i>Satya Charan Lal v. Romeshwar Prasad Bajoria</i>). |
| (b) Incompetent Board:- The general body of shareholders may exercise the powers vested in the Board when the Board is incompetent to act, for instance, where all the directors are interested in the transaction or the Board is unwilling to act, or when there are no validly appointed directors functioning Here, the shareholders in general meeting appointed a director in casual vacancy, as there was no validity appointed director. (<i>Vishwnathan v. Tiffins B.A. and P.Ltd.</i>) |
| (c) Deadlock Board:- If the directors are unable to act, on account of deadlock, the shareholders have the inherent power to act. Here, the shareholder in general meeting appointed additional director, as the two existing directors were not on talking terms. (<i>Barron v. Potter</i>) |

NKJ-CLASSROOM PRACTICE



Q. 1. Comment on Powers of the directors of a company are co-extensive with those of the company. □

[June. 2015; 5 Marks]

CERTAIN POWERS TO BE EXERCISE BY BOARD ONLY AT A BOARD MEETING

SECTION 179 (3)

Section 179(3) of the Companies Act, 2013 provides that the Board of directors of a company shall exercise the following powers **only by means of resolution passed at the meetings** of the Board and not by circulation:-

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| (a) To make calls on shareholders in respect of money unpaid on their shares; |
| (b) To authorize buy-back of securities under section 68; |

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(c) To issue securities, including debentures, whether in or outside India;
(d) To borrow monies;
(e) To invest the funds of the company;
(f) To grant loans or given guarantee or provide security in respect of loans;
(g) To approve financial statement and the Board's report;
(h) To diversity the business of the company;
(i) To approve amalgamation, merger or reconstruction;
(j) To take over a company or acquire a controlling or substantial stake in another company;
(k) Any other matter which may be prescribed.

Provisions of clauses (d), (e) & (f) are **not applicable on a banking company**.

DELEGATION OF POWER

The Board may, **by a resolution passed at a meeting, delegate to**

any committee of directors,
the managing director,
the manager or
any other principal officer of the company or
in the case of branch office of the company, a principal officer of the branch office,

the powers specified in clauses (d), (e) and (f) to such an extent and on such conditions as the board may prescribe.

Section 179(4) empowers the company in **general meeting to impose restrictions and conditions on the exercise by the Board** of any of the powers specified in sub-section(3).

Other Powers to be exercised at Board Meeting:-

In addition to the powers specified under section 179(3), Companies (Meetings of Board and its Powers) Rules, 2014 the following powers shall also be exercised by the Board of Directors only by means of resolutions passed at meetings of the Board:-

(i) To make political contributions;
(ii) To appoint or remove key managerial personal (KMP);
(iii) To appoint internal auditors and secretarial auditor;

RESTRICTED POWER OF BOARD

SECTION 180

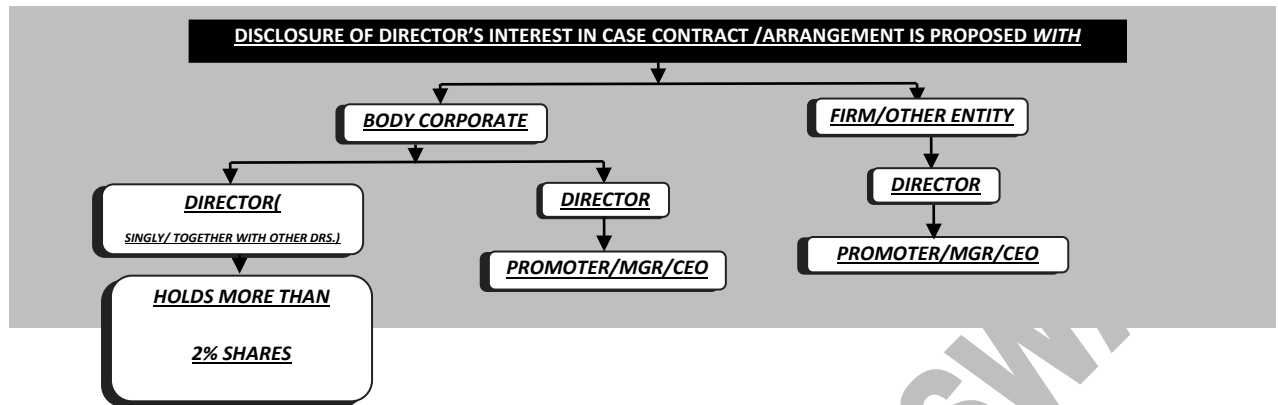
The Board of Directors of a company shall exercise the following powers **only with the consent of the company by a special resolution**, namely:-

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

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Explanation:- For the purposes of this clause:-

(i) “undertaking” shall mean an undertaking

in which **the investment of the company exceeds twenty percent of its net worth** as per the audited balance sheet of the preceding financial year or

an undertaking **which generates twenty percent of the total income** of the company during the previous financial year;

(ii) The expression “substantially the whole of the undertaking” in any financial year shall mean **twenty percent or more of the value of the undertaking** as per the audited balance sheet of the preceding financial year;

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

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

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

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

Nothing contained in clause (a) shall affect:-

(a) the title of a buyer or other person who buys or takes on lease any property, investment or undertaking as is referred to in that clause, **in good faith**; or

(b) the sale or lease of any property of the company where the ordinary business of the company consists of , or companies, **such selling or leasing**.

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

Provided that this sub-section shall not be deemed to authorize the company to effect any reduction in its capital except in accordance with the provisions contained in this Act.

Clause (c)

No debt incurred by the company **in excess of the limit** imposed by **clause (c) shall be valid** or effectual, **unless the lender proves** that he advanced the **loan in good faith** and **without knowledge** that the limit imposed by that clause had been exceeded.

However, Section 180 doesn’t apply to private company.

COMPANY TO CONTRIBUTE TO BONAFIDE AND CHARITABLE FUNDS

SECTION 181

The Board of Directors of a company may contribute to bona fide charitable and other funds. However, **prior permission of the company in general meeting** shall be required for such contribution in case any amount the aggregate of which, in any financial year, **exceed five per cent (5%) of its average net profits for the three** immediately preceding financial year.

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PROHIBITIONS AND RESTRICTIONS REGARDING POLITICAL CONTRIBUTIONS

SECTION 182

Government companies and

other companies, which have been in existence for less than 3 financial years,

cannot make any contribution to political party.

Other companies may make contributions, directly or indirectly, in any financial year, to any political party, any amount or amounts by passing a resolution authorizing the making of such contribution is **passed at a meeting of the Board of directors**, and such resolutions shall, subject to other provision of this section, **be deemed to be justification in law** for the making and the acceptance of the contribution authorized by it.

Any donation made to a person who is caring on any activity, **which can reasonable be regarded as likely to affect public support for a political party**, is deemed to be contribution under the law for political purpose.

Political contributions include the **amount of expenditure** incurred by a company, **on advertisement** in any publication, souvenir, brochure, pamphlet or the like on like on behalf of political party or for its advantage.

Such contributions are required to be **disclosed by every company in its profit and loss account**, giving particulars of the total amount contributed and the name of the party to whom such amount has been contributed.

POWER OF BOARD TO MAKE CONTRIBUTIONS TO NATIONAL DEFENCE FUND, ETC.

SECTION 183

Any donation made to a person who is caring on any activity, **which can reasonable be regarded as likely to affect public support for a political party**, is deemed to be contribution under the law for political purpose.

Every company **shall disclose in its profits and loss account** the total amount or amounts contributed by it to the fund during the financial year to which the amount relates.

Prime Minister's Relief Fund, Kargil Relief Fund, etc. are some notified funds u/s 183 of the Act.

RELATED PARTY TRANSACTIONS

DISCLOSURE OF INTEREST BY DIRECTOR

SECTION 184

Every **director shall**

at the first meeting of the Board in which he participates as a director as a director and

thereafter at the **first meeting of the Board in every financial year** or

whenever there is any change in the disclosures already made, then at the **first Board held after such change**

disclose his concern or interest in any company or companies or bodies corporate, firms, or other association of individuals which shall **include the shareholding** in such manner as may be prescribed.

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Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:-

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| (a) With a body corporate in which such director or director in association with any other director, holds more than two percent Shareholding of that body corporate or is a promoter, manager, Chief Executive Officer of that body corporate; or |
| (b) With a firm or other entity in which such director is a partner, owner or member, as the case may be, |

Shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting:-

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

A contract or arrangement entered into by the company without disclosure or with participation by a director who is concerned or interested in any way directly or indirectly in the contract or arrangement shall be **voidable at the option of the company**.

Rule 9 of Companies (Meeting of Board and its powers) Rules, 2014 provides that every director shall disclose his concern or interest by giving a notice in writing in **Form MBP 1**.

Nothing in this section:-

- | |
|--|
| (a) Shall be taken to prejudice the operation of any rule of law restricting a director of a company from having any concern or interest in any contract or arrangement with the company; |
| (b) shall apply to any contract or arrangement entered into or to be entered into between two companies or between one or more companies and one or more bodies corporate where any of the directors of the one company or body corporate or two or more of them together holds or hold <u>not more than two per cent. of the paid-up share capital in the other company or the body corporate.</u> |

LOAN TO DIRECTORS, ETC.

SECTION 185

(1) **No company** shall, directly or indirectly, advance any loan, including any loan represented by a book debt to, or give any guarantee or provide any security in connection with any loan taken by,—

- | |
|---|
| (a) any director of company, or of a company which is its holding company or any partner or relative of any such director ; or |
| (b) any firm in which any such director or relative is a partner. |

(2) A company **may advance any loan** including any loan represented by a book debt, or give any guarantee or provide any security in connection with any loan taken **by any person in whom any of the director of the company is interested**, subject to the condition that—

- (a) a **special resolution** is passed by the company in general meeting:

Provided that the **explanatory statement** to the notice for the relevant general meeting shall disclose the **full particulars of the loans given**, or guarantee given or security provided and the **purpose for which the loan or guarantee or security is proposed to be utilised** by the recipient of the loan or guarantee or security and any other relevant fact; and

- (b) the loans are utilised by the **borrowing company** for its principal business activities.

Explanation.—For the purposes of this sub-section, the expression "**ANY PERSON IN WHOM ANY OF THE DIRECTOR OF THE COMPANY IS INTERESTED**" means—

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(a) any private company of which any such director is a director or member;
(b) any body corporate at a general meeting of which not less than twenty-five per cent. of the total voting power may be exercised or controlled by any <u>such director, or by two or more such directors, together;</u> or
(c) any body corporate , the Board of directors, managing director or manager, where of is accustomed to act in accordance with the directions or instructions of the Board, or of any director or directors, of the lending company.

(3) **Nothing contained** in sub-sections (1) and (2) shall apply to—

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

(i) as a part of the conditions of service extended by the company to all its employees; or
(ii) pursuant to any scheme approved by the members by a special resolution ; or

(b) a company which in the **ordinary course of its business** provides loans or gives guarantees or securities for the due repayment of any loan and in respect of such loans an **interest is charged at a rate not less than the rate of prevailing yield** of one year, three years, five years or ten years Government security closest to the tenor of the loan; or

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

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

Provided that the loans made under clauses (c) and (d) are utilised by the subsidiary company for its principal business activities.

(4) If any loan is advanced or a guarantee or security is given or provided or utilised in contravention of the provisions of this section,—

(i) the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees ;
(ii) every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees ; and
(iii) the director or the other person to whom any loan is advanced or guarantee or security is given or provided in connection with any loan taken by him or the other person, shall be punishable with imprisonment which may extend to six months or with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees , or with both .’

EXEMPTION TO PRIVATE COMPANY

If private limited company fulfill the following three conditions, then provisions of Section 185 shall not applicable on such Private Limited Company. They can freely give Loan/ Guarantee/ Security by complying with provisions of Section 186 and any other provisions of Companies Act, 2013.

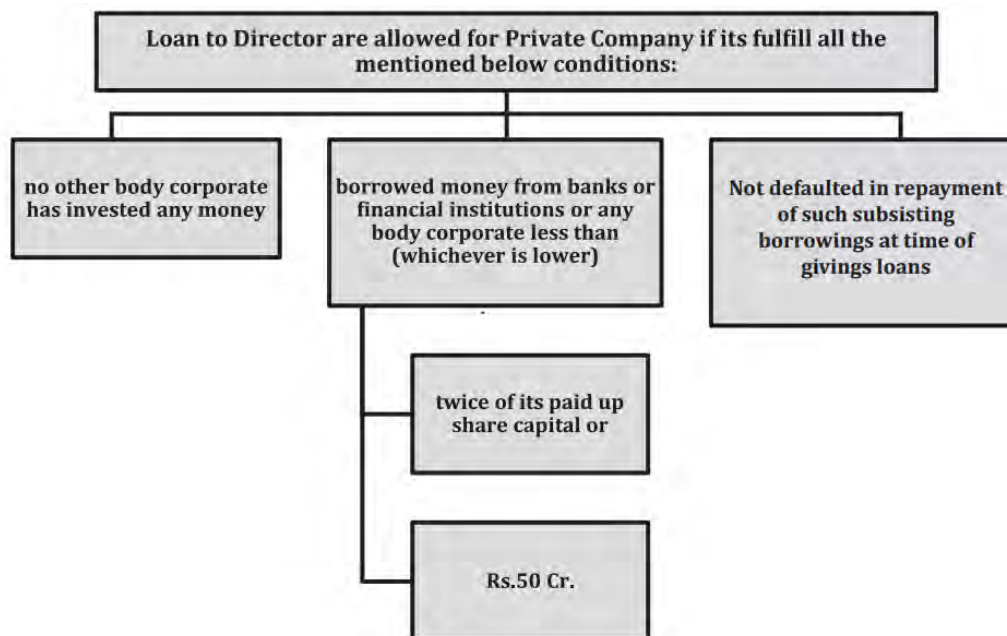
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RELATED PARTY TRANSACTIONS

SECTION 188

- (1) **Except with the consent of the Board of directors** given by a resolution **at a meeting** of the Board and subject to such conditions as may be prescribed, **no company shall enter into any contract or arrangement** with a related party with respect to:-

(a) Sale, purchase or supply of any goods or materials;
(b) Selling or otherwise disposing of, or buying, property of any kind;
(c) Leasing of property of any kind;
(d) Availing or rendering of any services;
(e) Appointment of any agent for purchase or sale of goods, materials, services or property;
(f) Such related party's appointment to any office or place of profit in the company, its subsidiary company or associate company; and
(g) Underwriting the subscription of any securities or derivatives thereof, of the company

Provided that no contract or arrangement in, the case of a company having a paid-up share capital of not less than such amount, or transactions not exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by **resolutions**.

Provided further that no member of the company **shall vote** on such resolutions, to approve any contact or arrangement which may be entered into by the company, **if such member is a related party**.

Provided also that nothing contained in the second proviso shall apply to a company **in which ninety per cent. or more members, in number, are relatives of promoters or are related parties**".

Provided also that nothing in this sub- section shall apply to any transactions entered into by the company in its **ordinary course of business** other than transactions which are not on an arm's length basis.

Note;-

First and Second proviso to Section 188 (1) **shall not apply to –**

- (a) A **Government company** in respect of contracts or arrangements entered into by it with any other Government company, or with Central Government or any State Government or any combination thereof;

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(b) A **Government company, other than a listed company**, in respect of contracts or arrangements other than those referred to in clause (a), in case such company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the company, or, as the case may be, the State Government before entering into such contract or arrangement.

Explanation:-

(a) The expression “office or place of profit” means any office or place:-

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

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

(b) The expression **“arm’s length transaction”** means a transaction between two related parties that is conducted as **if they were unrelated, so that there is no conflict of interest**. The phrase ‘on an arm’s length basis’ is in fact ‘at arm’s length’ or ‘an arm’s length relationship’ which means **avoiding intimacy or close contact**. The phrase ‘at arm’s length’ in relation to dealings between two parties is used to refer to dealings **when neither party is controlled by the other**

(2) Every contract or arrangement entered into under sub-section(1) shall be referred to in the **Board’s report** to the shareholders along with the justification for entering into such contract or arrangement.

(3) Where any contract or arrangement is entered into by a director or any other employee, **without obtaining the consent** of the **Board** or approval by a **resolution** in the general meeting under sub-section (1) and **if it is not ratified by the Board or, as the case may be, by the shareholders** at a meeting **within three months** from the date on which such contract or arrangement was entered into, such contract or arrangement shall be **voidable at the option of the Board or as the case may be, the shareholders** and if the contract or arrangement is with a related party to any director or is authorized by any other director, **the directors concerned shall indemnify the company against any loss incurred by it**.

(4) Without prejudice to anything contained in sub-section (3), it **shall be open to the company to proceed against a director or any other employee** who had entered into such contract or arrangement in contravention of the provisions of this section for **recovery of any loss sustained by it as a result of such contract or arrangement**.

(5) Any director or any other employee of a company, who had entered into or authorized the contract or arrangement in violation of the provisions of this section shall:-

(1) In case of listed company, be punishable with imprisonment for a term which may extend to **one year** or with fine which shall not be less than **twenty-five thousand rupees** but which may extend to **five lakh rupees**, or with both; and

(2) In case of any other company, be punishable with which shall not be less than **twenty-five thousand rupees** but which may extend to **five lakh rupees**.

OMNIBUS APPROVAL FOR RELATED PARTY TRANSACTIONS ON ANNUAL BASIS

Rule 6A of Companies (Meetings of Board and its Powers) Rules, 2014

All related party transactions shall require approval of the Audit Committee and the Audit Committee may make omnibus approval for related party transactions proposed to be entered into by the company subject to the following conditions namely:-

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- (1) The **Audit Committee shall**, after obtaining approval of the Board of Directors, **specify the criteria for making the omnibus approval** which *shall include the following*, namely:-

(a) maximum value of the transactions, in aggregate, which can be allowed under the omnibus route in a year;
(b) the maximum value per transaction which can be allowed;
(c) extent and manner of disclosures to be made to the Audit the time of seeking omnibus approval;
(d) review, at such intervals as the Audit Committee may deem fit.

- (2) The Audit Committee shall consider the **following factors** while specifying the criteria for making omnibus approval, namely: -

(a) repetitiveness of the transactions (in past or in future);
(b) justification for the need of omnibus approval.

- (3) The Audit Committee shall **satisfy itself on the need for omnibus approval** for transactions of repetitive nature and that and that such approval is in the interest of the company.

- (4) The omnibus approval shall contain or indicate the following: -

(a) name of the related parties;
(b) nature and duration of the transaction;
(c) maximum amount of transaction that can be entered into;
(d) the indicative base price or current contracted price and the formula for variation in the price, if any; and
(e) any other information relevant or important for the Audit Committee to take a decision on the proposed transaction:

Provided that where the **need for related party transaction cannot be foreseen** and aforesaid details are not available, audit committee may make omnibus approval for such transactions subject to their value not exceeding **rupees one crore per transaction**.

- (5) Omnibus approval **shall be valid for a period not exceeding one financial year** and shall require fresh approval after the expiry of such financial year.
- (6) Omnibus approval **shall not be made for transactions disposing of the undertaking** of the company.
- (7) Any other conditions as the Audit Committee may deem fit.

WHEN PRIOR APPROVAL OF COMPANY BY RESOLUTION REQUIRED FOR RELATED PARTY TRANSACTION

[Rule 15 of companies (Meeting of Board and its Powers) Rules, 2014]:-

“For the purposes of first proviso to sub-section (1) of section 188, except with the prior approval of the company by a **resolution**, a company shall not enter into a transaction or transactions, where the transaction or transactions to be entered into,—

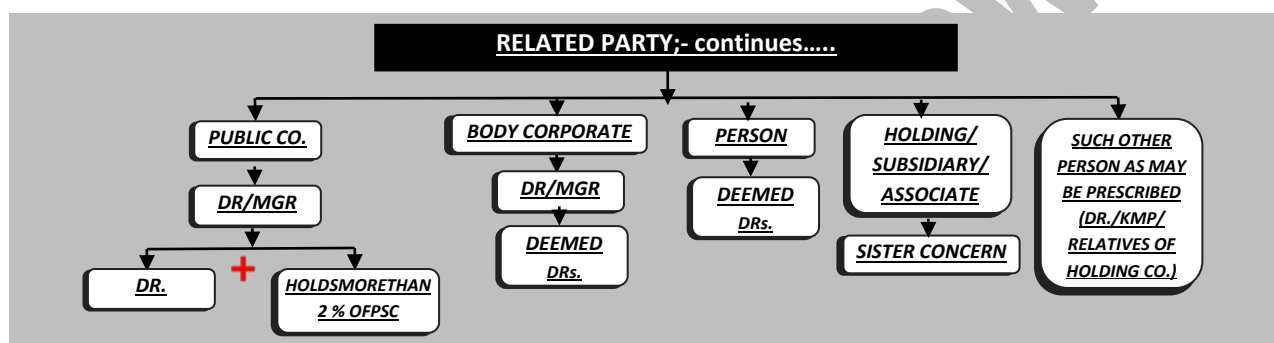
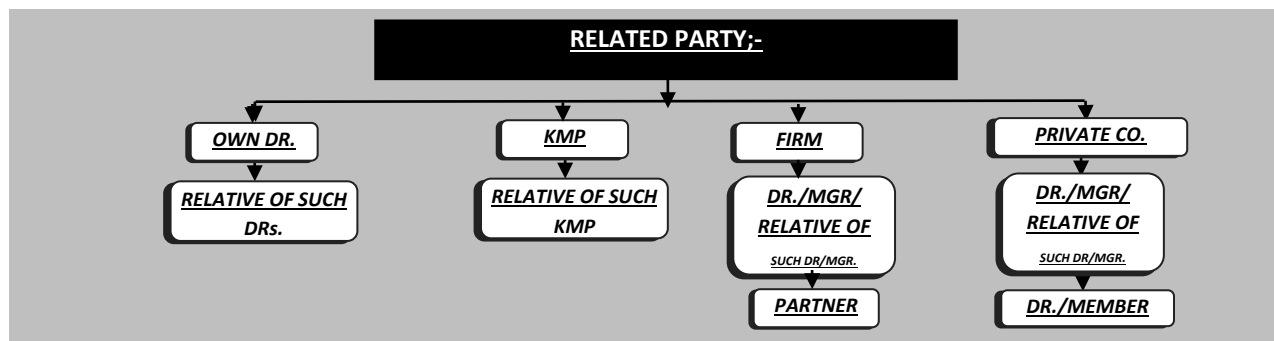
- (a) as contracts or arrangements with respect to clauses (a) to (e) of sub-section (1) of section 188, with criteria as mentioned below –

PARTICULAR	THRESHOLD
Sale, purchase or supply of any goods or materials, directly or through appointment of agent	Transaction value \geq 10% of annual turnover
Selling or otherwise disposing of, or buying, property of any kind, directly or through appointment of agent	Transaction value \geq 10% of net worth

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Leasing of property of any kind	Transaction value \geq 10% of annual turnover
Availing or rendering of any services, directly or through appointment of agent	Transaction value \geq 10% of annual turnover
appointment to any office or place of profit in the company, its subsidiary company or associate company ¹¹¹	Monthly remuneration > Rs. 2.50 lakh
Remuneration for underwriting the subscription of any securities or derivatives thereof	Transaction value > 1% of net worth

Explanation.-

- (1) The Turnover or Net Worth referred in the above sub-rules shall be computed on the basis of the Audited Financial Statement of the preceding Financial year.
- (2) In case of a wholly owned subsidiary, the special resolution passed by the holding company shall be sufficient for the purpose of entering into the transactions between the wholly owned subsidiary and the holding company.
- (3) The **explanatory statement** to be annexed to the notice of a general meeting convened pursuant to section 101 shall contain the following particulars, namely:—

(a) name of the related party ;
(b) name of the director or key managerial personnel who is related, if any;
(c) nature of relationship;
(d) nature, material terms, monetary value and particulars of the contract or arrangement;
(e) any other information relevant or important for the members to take a decision on the proposed resolution.”

However, the aforesaid requirements of Rule shall not apply to:-

- (a) A **govt. company** in respect of contracts or arrangement entered into by it with any other government company.
- (b) A **govt. company, other than a listed company** in respect of contract not covered in clause(a) above, if such company obtains approval from incharge ministry/department of c/g or s/g as the case may be.

Meaning of ‘Related Party’:-

According to Section 2(76), “related party”, with reference to a company, means:-

(i) A director or his relative .
(ii) A key managerial personnel or his relative ;
(iii) A firm, in which a director, manager or his relative is a partner;
(iv) A private company in which a director or manager or his relative is a member or director;
(v) A public company in which a director or manager is a director and holds along with his relatives, more than two per cent of its paid- up share capital;
(vi) Anybody corporate whose Board of Directors, managing director or manager is accustomed to act in accordance with the advice, directions or instructions of a director or manager;
(vii) <u>Any person on whose advice, directions or instructions a director or manager is accustomed to act:-</u>
Provided that nothing in sub-section (vi) and (vii) shall apply to the advice, directions or instructions given in a professional capacity ;
(viii) <u>Any company which is:-</u>

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(a) A holding, subsidiary or an associate company of such company; or
(b) A subsidiary of a holding company to which it is also a subsidiary; or
(c) an investing company or the venturer of the company.

Explanation—For the purpose of this clause, “the **investing company or the venturer of a company**” means a body corporate whose investment in the company would result in the company *becoming an associate company of the body corporate*

(ix) Such other person as may be prescribed.

It may be noted that **for the purpose of sub-clause (ix) of section 2(76)** a director (**other than an independent director**) or key managerial person of the holding company or his relative with reference to a company, shall be deemed to be a related party.

Meaning of ‘Related’/relative:-According to Section 2(77), a person shall be deemed to a relative of another if, and only if:-

(a) They are the members of HUF;
(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 definitions details) Rules, 2014.

As per foresaid Rule 4 , a person shall be deemed to be the relative of another, if he or she is related to another in the following manner, namely:-	(i) Father (includes step-father);
	(ii) Mother (includes step-mother);
	(iii) Son (includes step-son);
	(iv) Son’s wife
	(v) Daughter;
	(vi) Daughter’s husband;
	(vii) Brother (includes step-brother);
	(viii) Sister (includes step-sister);

REGISTER OF CONTRACTS OR ARRANGEMENTS IN WHICH DIRECTORS ARE INTERESTED

SECTION 189

Every company is required to keep one or more registers in **Form MBP 4** giving separately the particulars of all contracts arrangements to which Section 184 or Section 188 applies.

Such register is required to be placed before the next meeting of the Board, whenever a new entry is made in this Register, and shall be signed by all the directors presents at the meeting. Every director within thirty days of his appointment or relinquishment is required to disclose his concern or interest in other associations, which are required to be included in the register.

- (i) The register be kept at the company and also open for inspection during business hours. The company shall provide extracts from such register to a member of the company on his request, within seven days from the date on which such request is made upon the payment of such fee as may be specified in the articles of the company but not exceeding ten rupees per page.

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" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. The Board of directors of XYZ Ltd. wants to delegate all or any of their powers to any of the directors of the company or any person even not in the employment of the company for transfer of securities. Referring to the provisions of the Companies Act, 2013 advise in the matter. **[Dec. 2018; 5 Marks]**

Ans. There is no restriction on delegation of powers of the Board of Directors of the company except as provided in first provision to Section 179(3) Companies Act, 2013. It provides that The Board may delegate power to borrow money, to invest the fund of the company and to grant loan or give guarantee or provide security in respect of loans, by way of resolution to any committee of directors, the managing director, manager or any other principal officer, or principal officer of a branch of the company. Apart from this the Board of Directors may delegate all or any of its powers to any person including a person not in employment of the company if the Articles of Association so provides.

Appropriately, in the given case the Board of Directors of XYZ Ltd. may delegate the powers relating to transfer of securities only when the Articles of Association allows delegation of the powers to any of the directors of the company or any person not in employment of the company.

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Q. 1. Charjee Biotech Private Limited is a two year old company. The Board of Directors of the company wants to contribute 2.8% of its average net profits of the last years to the Prime Minister's National Relief Fund. Referring to the provisions of the Companies Act, 2013, advise the board. **[June. 2017]**

Ans. Section 181 of the companies Act, 2013 states that the Board of directors of a company may contribute to bona fide charitable and other funds, provided that prior permission of the company in general meeting shall be required for such contribution in case any amount the aggregate of which, in any financial year, exceed five per cent of its average net profits for the three immediately preceding financial years.

In the given case, Charjee biotech Private Limited wants to contribute 2.8% of its net profits of the last two years, as it has been in existence for the last two years only.

Prime Minister's national Relief Fund is a bona fide charitable fund. As the rate of contribution does not exceed 5% of the average net profits, prior permission of members in general meeting is not required. A resolution passed by the Board of Directors shall suffice for making the said contribution.

Q. 2. Serious Ltd. is having three factories in Chennai. The company wants to sell one of the factory. Can the company sell its factory? Further, assuming that the company has also borrowed credit facilities from the bank, explain the statutory provisions under the companies Act, 2013. **[June. 2018]**

Ans. According to sub-section (1)(a) of section 180 of Company Act, 2013, the Board of Directors of a company may sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertaking only, with the consent of the company by a special resolution.

Accordingly the company may sell any of its factories with the consent of the company by a special resolution.

Where the company has or edits facility on charge on such undertaking the company may be required to obtain a no-objection-certificate from the bank as per contractual obligation and shall modify the charge accordingly.

SELF TEST QUESTIONS

FROM PAST CS EXAMS



FROM ICSI MODULE



4. Descriptive Questions:-----

- (c) The board of directors of a company met thrice in the year 2012 and the fourth meeting was not held for want of quorum. As a company Secretary, examine the provisions of the Companies Act, 2013 and decide with reasons whether the company has complied with the requirement of minimum number of meetings to be held in a calendar year or violated the requirement thereof?
- (d) "The power to borrow includes the power to give security" comment.
5. State the provisions of the Companies Act, 2013 relating to loans to directors.
6. Can the Board of directors of a company delegate any of its powers to others? Discuss.

Q. 1.

Answer to Question No. 1:-

CS NITESH KR. JAISWAL

Q. 2.

Answer to Question No. 2:-

CS NITESH KR. JAISWAL

CHAPTER

6

DIRECTORS – TRANSPARENCY AND DISCLOSURES

Covering-

- Disclosures under Section 134 of the Companies Act, 2013
- Other disclosures under the Companies Act, 2013
- Disclosures under various rules made under the companies act
- Disclosures pursuant to the listing agreement of stock exchanges
- Signing and dating of the board's report
- Self Test Questions
 - From Past CS Exams
 - From ICSI Module

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TRANSPARENCY AND DISCLOSURES

ANNUAL REPORT

The annual report is a comprehensive report provided by most public companies to disclose their corporate activities over the past year. The report is typically issued to shareholders and other stakeholders .

Annual report **contains the following**

1. Audited financial statements
2. Audited consolidated financial statements
3. Cash flow statements
4. Directors Report / board report
5. Management discussion and analysis report - either as a part of directors report or addition thereto
6. For the top one thousand listed entities based on market capitalization, a business responsibility report describing the initiatives taken by the listed entity from an environmental, social and governance perspective

BOARD REPORT

Attaching Board's report to every balance sheet is mandatory.

Apart from giving a **complete review of performance of company** for the year under report, **it highlights various disclosures having impact on business.** It also highlights the **future strategy of the company.**

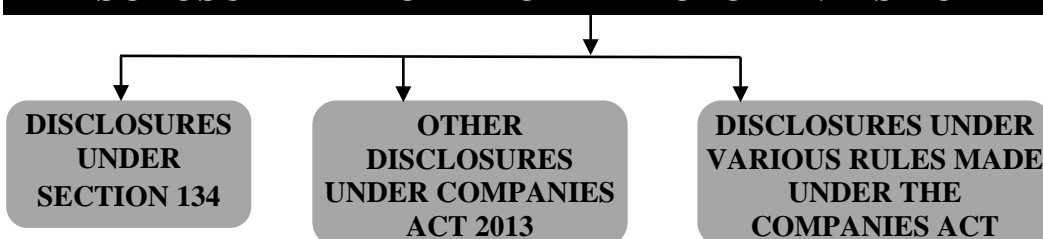
The matters to be included in Board's Report should be under the provisions of **Companies Act, Listing Agreements, SEBI Guidelines and RBI directions.**

DISCLOSURES BY BOARD

- | |
|---|
| 1. Disclosures under the Companies Act, 2013 and Rules made thereunder; |
| 2. SEBI (LODR) Regulations, 2015 and other regulations applicable for Listed Companies; |
| 3. Secretarial Standard on Board's Report-SS4 (Recommendatory); |
4. Disclosure under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 and rules made thereunder;
 5. Disclosures under other applicable Acts.

1. DISCLOSURES UNDER COMPANIES ACT

DISCLOSURE BY BOARD OF DIRECTOR IN ITS BOARD REPORT



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Disclosures under Section 134(3)	Issue of Equity Shares with differential rights under Section 43 r\w Rule 4 of the Companies (Share Capital & Debentures) Rules, 2014	Issue of Sweat Equity Shares under Section 54 r\w Rule 8 of the Companies (Share Capital & Debentures) Rules, 2014
Details of Employees Stock Option Scheme – Section 62(1) (b) r\w Rule 12(9) of the Companies (Share Capital & Debentures) Rules, 2014	Restrictions on purchase by company or giving of loans by it for under Section 67 r\w Rule 16 of the Companies (Share Capital & Debentures) Rules, 2014	Disclosures pertaining to Consolidated Financial Statements under Section 129
Voluntary revision of Financial Statements or Board's Report – Section 131(1)	Corporate Social Responsibility – Section 135	Appointment/ Re-Appointments of an Independent Director – Section 149(10)
Resignation of Director – Section 168(1)	Composition of Audit Committee – Section 177(8)	Details of Vigil Mechanism – Section 177(10)
Policy relating to the remuneration for the directors, key managerial personnel and other employees – Section 178(4)	Related party transactions – Section 188(2)	Disclosures pertaining to remuneration of directors and employees – Section 197(12)
Remuneration received by MD and WTD from holding or subsidiary companies – Section 197(14)	Secretarial Audit Report – Section 204(1)	

DISCLOSURES UNDER SECTION 134 OF THE COMPANIES ACT, 2013

Section 134(3) Provides that there shall be attached to statements laid before a company in general meeting, a report by its Board of Directors, which shall include—

(a) the extract of the annual return as provided under <i>Section 92(3)</i> .
(b) number of meetings of the Board;
(c) Directors' Responsibility Statement
(d) a statement on declaration given by independent directors under section 149(6)
(e) company's policy on directors' appointment and remuneration including criteria for determining qualifications, positive attributes, independence of a director.
(f) explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made—
(i) by the auditor in his report; and
(ii) by the company secretary in practice in his secretarial audit report.
(g) particulars of loans, guarantees or investments under section 186.
(h) particulars of contracts or arrangements with related parties referred.
(i) the state of the company's affairs.
(j) the amounts, if any, which it proposes to carry to any reserves.
(k) the amount, if any, which it recommends should be paid by way of dividend.

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(l) material changes and commitments, if any, affecting the financial position of the company.
(m) the conservation of energy, technology absorption, foreign exchange earnings and outgo, in such manner as may be prescribed.
(n) a statement indicating development and implementation of a risk management policy.
(o) the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year.
(p) in case of a listed company and every other public company having such paid-up share capital as may be prescribed, a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors;
(q) such other matters as may be prescribed.

The Directors' Responsibility Statement

Section 134(5) referred to in clause (c) section 134(3) shall state that—	(a) in the preparation of the annual accounts, the applicable accounting standards had been followed along with proper explanation relating to material departures;
	(b) the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit and loss of the company for that period;
	(c) the directors had taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities ;
	(d) the directors had prepared the annual accounts on a going concern basis ; and
	(e) the directors, in the case of a listed company , had laid down internal financial controls to be followed by the company and that such internal financial controls are adequate and were operating effectively .
	(f) the directors had devised proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively .

OTHER DISCLOSURES UNDER THE COMPANIES ACT, 2013

(a) Appointment of independent director
(b) Disclosure about the composition of audit committee under section 177(8) and also the recommendation of audit committee
(c) Details of establishment of vigil mechanism [section 177(9)]
(d) Policies by the nomination and remuneration committee
(e) Secretarial report given by a company secretary in practice.
As per provisions of Section 204(1) of Companies Act, 2013 , every listed company or every other prescribed company shall annex with its Board's Report, a Secretarial audit report, given by a company secretary in practice in Form MR-3 .
Regulation 24A of the SEBI (LODR) Regulations, 2015 states that every listed entity and its material unlisted subsidiaries incorporated in India shall undertake secretarial audit and shall annex a secretarial audit report

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DISCLOSURES UNDER VARIOUS RULES MADE UNDER THE COMPANIES ACT

I. Matters to be included in Board's report [Rule 8 of Companies (Accounts) Rules 2014].-

As per Rule 8 of Companies(Accounts)Rules 2014 following matters to be disclose in the Board's Report:-

- (1) The Board's Report shall be prepared based on the **stand alone financial statements** of the company and the report shall contain a separate section wherein **a report on the performance and financial position of each of the subsidiaries, associates and joint venture companies** included in the consolidated financial statement is presented.
- (2) The Report of the Board shall contain the particulars of **contracts or arrangements with related parties** referred to in sub-section (1) of section 188 in the Form AOC-2.
- (3) The report of the Board shall contain the following information and details, namely:-

(A) *Conservation of energy-*

(B) *Technology absorption-*

(C) *Foreign exchange earnings and Outgo-*

- (4) Every **listed company and every other public company having a paid up share capital of twenty five crore rupees or more** in the report by its Board of directors, a statement indicating the manner in which formal **annual evaluation has been made by the Board of its own performance and that of its committees and individual directors.**
- (5) In addition to the information and details specified in sub-rule (4), the report of the Board shall also contain –

(i) the financial summary or highlights;

(ii) the change in the nature of business, if any;

(iii) the details of directors or key managerial personnel who were appointed or have resigned during the year;

(iiia) a statement regarding opinion of the Board with regard to integrity, expertise and experience (including the proficiency) of the independent directors appointed during the year”.

(iv) the names of companies which have become or ceased to be its Subsidiaries, joint ventures or associate companies during the year;

(v) the details relating to deposits.

(vi) the details of significant and material orders passed by the regulators or courts or tribunals impacting the going concern status and company's operations in future;

(vii) the details in respect of adequacy of internal financial controls with reference to the Financial Statements.

II. Disclosure under Companies (Share Capital and Debenture) Rules, 2014

(a) Disclosure in pursuit to issue of shares with Differential rights

(b) Disclosure in pursuit to Issue of Sweat Equity Shares

(c) Disclosure pursuant to Employee Stock Option and Employee Stock Purchase Schemes

III. Rule 5 of Companies (Appointment & Remuneration of Managerial Personnel) Rules 2014:-

Companies (Appointment & Remuneration) Rules,2014 made under Chapter IV provides the following disclosure by the listed companies in the Board's Report:-

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- (i) the **ratio of the remuneration of each director**
- (ii) the **percentage increase in remuneration** of each director, Chief Financial Officer, Chief Executive Officer, Company Secretary or Manager, if any, in the financial year;
- (iii) the number of **permanent employees** on the rolls of company;
- (iv) **comparison of the remuneration** of the Key Managerial Personnel against the performance of the company;
- (v) **variations in the market capitalisation** of the company, price earnings ratio as at the closing date of the current financial year and previous financial year;
- (vi) **average percentile increase already made in the salaries of employees other than the managerial personnel;**
- (i) the **ratio of the remuneration of the highest paid director** to that of the **employees who are not directors but receive remuneration in excess of the highest paid director** during the year; and
- (ii) the **names of the top ten employees** in terms of remuneration drawn and the name of **every employee, who-**

- | |
|--|
| (i) if employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than one crore and two lakh rupees; |
| (ii) if employed for a part of the financial year, was in receipt of remuneration for any part of that year, at a rate which, in the aggregate, was not less than eight lakh and fifty thousand rupees per month; |
| (iii) if employed throughout the financial year or part thereof, was in receipt of remuneration in that year which, in the aggregate, or as the case may be, at a rate which, in the aggregate, is in excess of that drawn by the managing director or whole-time director or manager <u>and</u> holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company." |

IV. **Rule 8 of Companies (Corporate Social Responsibility) Rules, 2014**

Section 135(2) provides that the Board's report under sub-section (3) of section 134 shall disclose the composition of the **Corporate Social Responsibility Committee**.

The Board's Report of a company under these rules pertaining to a financial year commencing on or after 1st day of April, 2014 shall include an **Annual Report on CSR**

2. DISCLOSURES PURSUANT TO THE SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015

As per **SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015**, the Annual Report of the company shall have the following disclosures in addition to the disclosures specified in Companies Act, 2013:-

I. **Management Discussion and Analysis Report**

As a part of the directors' report or as an addition thereto, a Management Discussion and Analysis Report (MDAR) should form part of the Annual Report to the shareholders. This Management Discussion & Analysis should include discussion on the following matters with in the limits set by the company's competitive position:

- | |
|--|
| 1. Industry structure and developments. |
| 2. Opportunities and Threats. |
| 3. Segment-wise or product-wise performance. |

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4. Outlook.
5. Risks and concerns.
6. Internal control systems and their adequacy.
7. Discussion on financial performance with respect to operational performance.
8. Material developments in Human Resources / Industrial Relations front, including number of people employed.

II. Corporate Governance Report

There shall be a **separate section on Corporate Governance in the Annual Reports** of company, with a detailed compliance report on Corporate Governance. Non-compliance of any mandatory requirement of this clause with reasons thereof and the extent to which the non-mandatory requirements have been adopted should be specifically highlighted.

III. Code of Conduct

The Board shall lay down a code of conduct for **all Board members and senior management** of the company. The code of conduct shall be posted on the website of the company. The clause further provides that all Board members and senior management personnel shall **affirm compliance with the code on an annual basis**. The Annual Report of the company shall contain a **declaration to this effect signed by the CEO**. Unless it is reported elsewhere, this information should be furnished in Board's Report.

IV. Business Responsibility Report

For the **top 1000 listed entities** based on market capitalization (calculated as on March 31 of every financial year), Business Responsibility Report describing the initiatives taken by them from an **environmental, social and governance perspective**.

3. DISCLOSURE REGARDING COMPLIANCE WITH SECRETARIAL STANDARDS

SS-4 provides that, the **Board's Report shall include a statement on compliance of**

applicable Secretarial Standards and

other Secretarial Standards voluntarily adopted by the company

4. DISCLOSURE REQUIREMENT UNDER THE SEXUAL HARASSMENT OF WOMEN AT WORKPLACE (PREVENTION, PROHIBITION AND REDRESSAL) ACT, 2013

Section 21 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 mandates that **Internal Committee shall prepare an Annual Report**.

Rule 14 of Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Rules, 2013 provides that the annual report which the Complaints Committee is required to prepare under Section 21 of the Sexual Harassment of Women at Workplace (Prevention, Prohibition & Redressal) Act, 2013 **shall contain the following details:**

a. Number of complaints of sexual harassment received in the year;
b. Number of complaints disposed off during the year;
c. Number of cases pending for more than 90 days;
d. Number of workshops or awareness programme against sexual harassment carried out;
e. Number of action taken by employer or district officer

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SIGNING AND DATING OF THE BOARD'S REPORT

The Board's report and any annexures thereto under section 134(3) shall be signed by its

chairperson of the company if he is authorised by the Board and

where he is not so authorised, shall be signed by **at least two directors**, one of whom shall be a managing director, or

by the director where there is one director.

CS NITESH KR. JAISWAL

SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. Short Notes:-----

- (a) Directors' Responsibility Statement
- (b) Signing of the Board's report.

FROM ICSI MODULE



Answer the following:

- 1. State the disclosures in Board's Report under listing agreement.
- 2. State the provisions for signing and dating of Board's Report.
- 3. What is the need and scope of Compliance Certificate.
- 4. Discuss Management Discussion Analysis Report.
- 5. Enumerate the liability for mis-statement.

Q. 1.

Answer to Question No. 1:-

CS NITESH KR. JAISWAL

Q. 2.

Answer to Question No. 2:-

CS NITESH KR. JAISWAL

CHAPTER

7

DIRECTORS – APPOINTMENT & REMUNERATION OF KEY MANAGERIAL PERSONNEL

Covering-

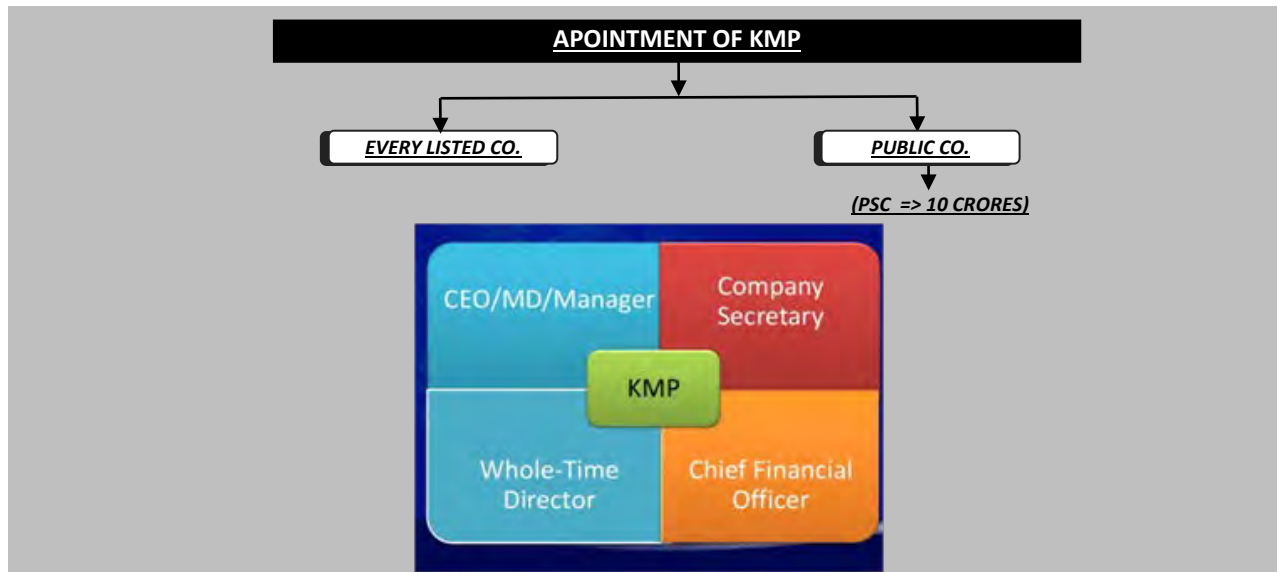
- Appointment of key managerial personnel
- Key managerial personnel (KMP)- definition
- Appointment of managing director, whole-time director or manager
- Remuneration to managerial personnel
- Managerial remuneration under “Schedule V (PART II)”
- Self Test Questions
 - From Past CS Exams
 - From ICSI Module

**EXPECTED
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(5 to 10)**

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APPOINTMENT & REMUNERATION OF KEY MANAGERIAL PERSONNEL

The executive management of a company is responsible for the day to day management of a company. The companies Act, 2013 has used the term Key Managerial Personnel (KMP) to define the **executive management**, the key managerial personnel are the **point of first contact between the company and its stakeholders**. While the Board of Directors are responsible for providing the oversight, it is the key managerial personnel who are responsible for not just laying down the strategies as well as its implementation.

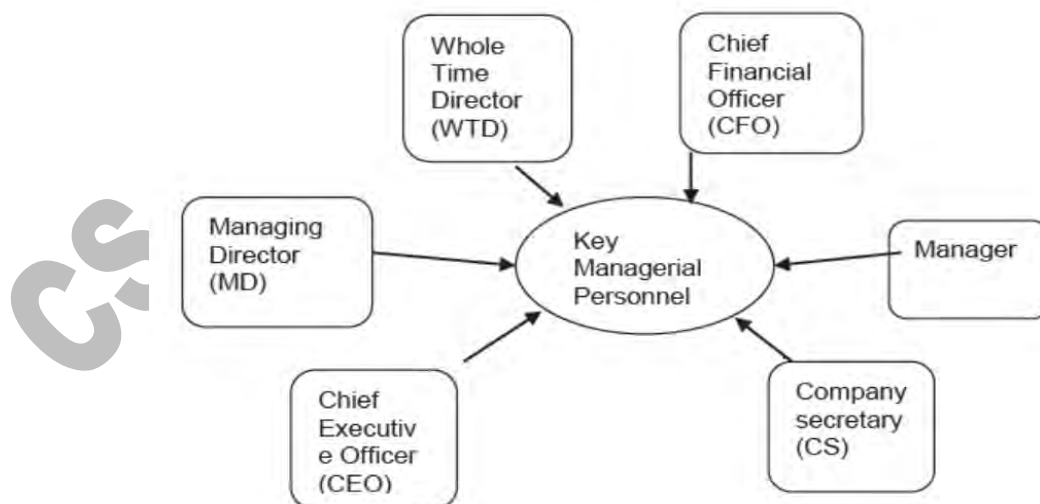
Chapter XIII of the Companies Act, 2013 read with **Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014** deal with legal and procedural aspects of appointment of key Managerial Personnel including Managing Director, Whole-time Director or Manager, managerial remuneration, secretarial audit, etc.

APPOINTMENT OF KEY MANAGERIAL PERSONNEL

Section 203 of the Companies Act, 2013 read with Rule 8 mandates the appointment of Key Managerial Personnel and makes it obligatory for a **listed company** and **every other public company having a paid-up share capital of rupees ten crores or more**, to appoint following whole-time key managerial personnel:

- | |
|---|
| (i) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director; |
| (ii) company secretary; and |
| (iii) Chief Financial Officer: |

Every whole-time key managerial personnel of a company shall be appointed by means of a resolution of the Board containing the terms and conditions of the appointment including the remuneration.



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KEY MANAGERIAL PERSONNEL (KMP) – DEFINITION

According to Section 2(51) “key managerial personnel” in relation to a company, means:-	(i) The Chief Executive Officer or the managing director or the manager;
	(ii) The company secretary;
	(iii) The whole-time director;
	(iv) The Chief Financial Officer;
	(v) such other officer, not more than one level below the directors who is in whole-time employment, designated as key managerial personnel by the Board; and
	(vi) Such other officer as may be prescribed.

1. **CHIEF EXECUTIVE OFFICER**

According to **Section 2(18)** “Chief Executive Officer” means an officer of a company, who has been designated as such by it.

2. **MANAGING DIRECTOR**

According to **Section 2(54)** ‘Managing Director’ means a director who is entrusted with substantial powers of management. The substantial powers of management can be entrusted to a managing director of a company in any of the following four ways:-

(i) By way of an agreement with the company;
(ii) By board resolution;
(iii) By general meeting resolutions; and
(iv) By articles of association.

The expression Managing Director shall also include a director occupying the position of a managing director, by whatever name called. For instance, president, Chief Executive Officer, Chief Operating Officer, etc. in the case of multinational companies shall be considered as the managing director for the purpose of companies Act, although they are not designed as such.

A person has to be a director before he can be appointed managing director. A company may have more than one managing director.

3. **WHOLE-TIME DIRECTOR**

According to **Section 2(94)** a “whole-time director” includes a director in the whole-time employment of a company. A whole-time director is in **whole-time employment of a company**. Whole-time directors devote **their entire time and attention to the business and affairs of the company**. They cannot accept the office of whole-time director in any other company, They may however, accept ordinary directorships within the limits prescribed by Section 165 of the companies Act, 2013. They are designated by various names viz., Executive director, technical Director, finance Director, Whole—time director, etc.

4. **MANAGER**

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

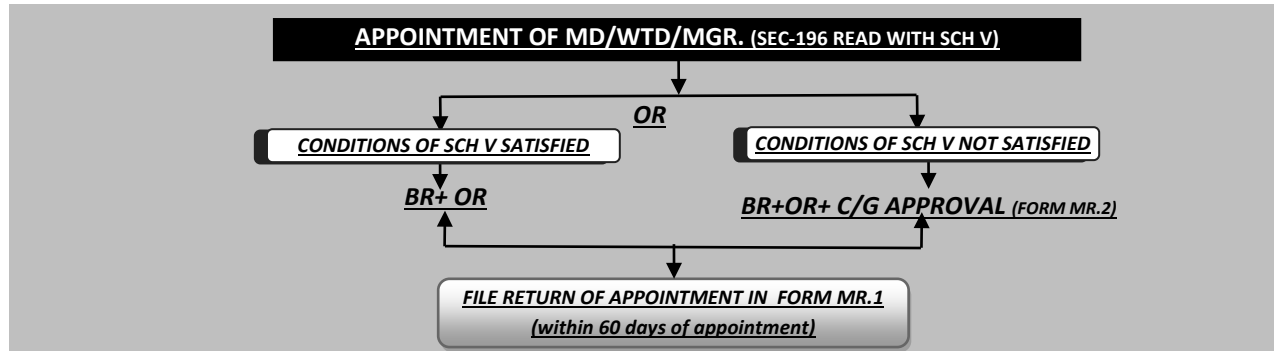
Further, manager of a company need not be a director of that company. He may be a director as well as the manager or simply the manager of a company. Since a manager has the management of the whole of the affairs of a company, a company can have only one manager at a time.

However, according to provisions of **section 196**, a company shall not have both Managing Director and Manager at the same time.

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5. COMPANY SECRETARY

According to **Section 2(24)** “Secretary” means a company secretary as defined in clause (c) of sub-section (1) of section 2 of the company Secretaries Act, 1980 who is appointed by a company to perform the functions of a company secretary under this Act.

6. CHIEF FINANCIAL OFFICER

According to **Section 2(19)** “Chief Financial Officer” means a person appointed as the Chief Financial Officer of a company.

APPOINTMENT OF MANAGING DIRECTOR, WHOLE-TIME DIRECTOR OR MANAGER

SECTION 196

1. No company shall appoint or employ at the same time a managing director and a manager.
2. No company shall appoint or re-appoint any person as its managing director, whole- time director or manager for a term exceeding **five years** at a time:-

Provided that no re-appointment shall be made earlier than one year before the expiry of his terms.

3. No Company shall appoint or continue the employment of any person as managing director, whole-time director or manager who :-

- (a) Is below the age of twenty-one years or has attained the age of seventy years.

Provided that appointment of a person who has attained the age of seventy years may be made by passing a **special resolution** in which case the explanatory statement annexed to the notice for such motion shall indicate the justification for appointing such person;

“Provided further that where no such special resolution is passed but votes cast in favour of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made”.

- (b) Is an undischarged insolvent or has at any time been adjudged as an insolvent;
 - (c) Has at any time suspended payment to his creditors or makes, or has at any time made, a compositions with them; or
 - (d) Has at any time been convicted by a court of an offence and sentenced for a period of more than six months.
4. Subject to provisions of **section 197 and Schedule V**, a managing director, whole- time director or manager shall be appointed by the terms and conditions of such appointment and remuneration payable be approved by the **Board of Directors at a meeting which shall be subject to approval by a resolutions at the next general meeting of the company and by the Central Government in case such appointment is at variance to the conditions specified in that Schedule**

Provided that a notice convening Board or general meeting for considering such appointment shall included the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointment, if any:

Provided further that a return in the prescribed form shall be filed within **sixty days** of such appointment with the Registrar.

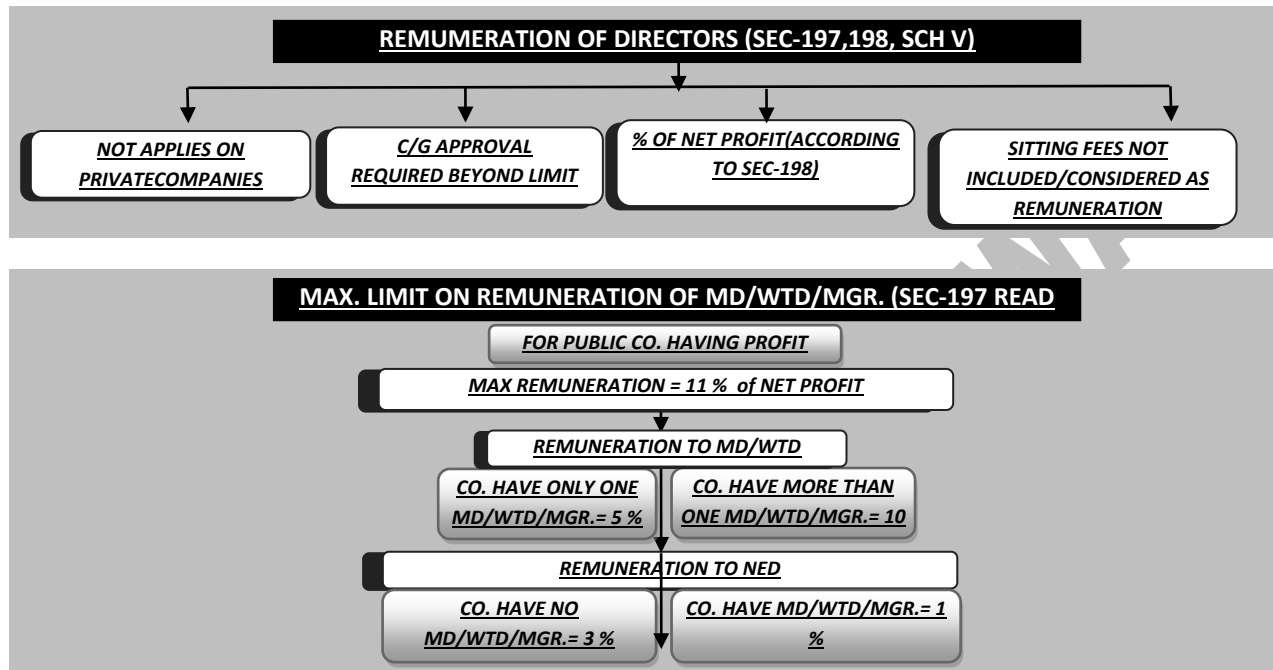
5. Subject to the provisions of this Act, where an appointment of a managing director, whole- time director or manager is **not approved by the company at a general meeting**, any act done by him before such approval **shall not be deemed to be invalid**.

However, section 196(4) and 196(5) doesn't apply on private companies.

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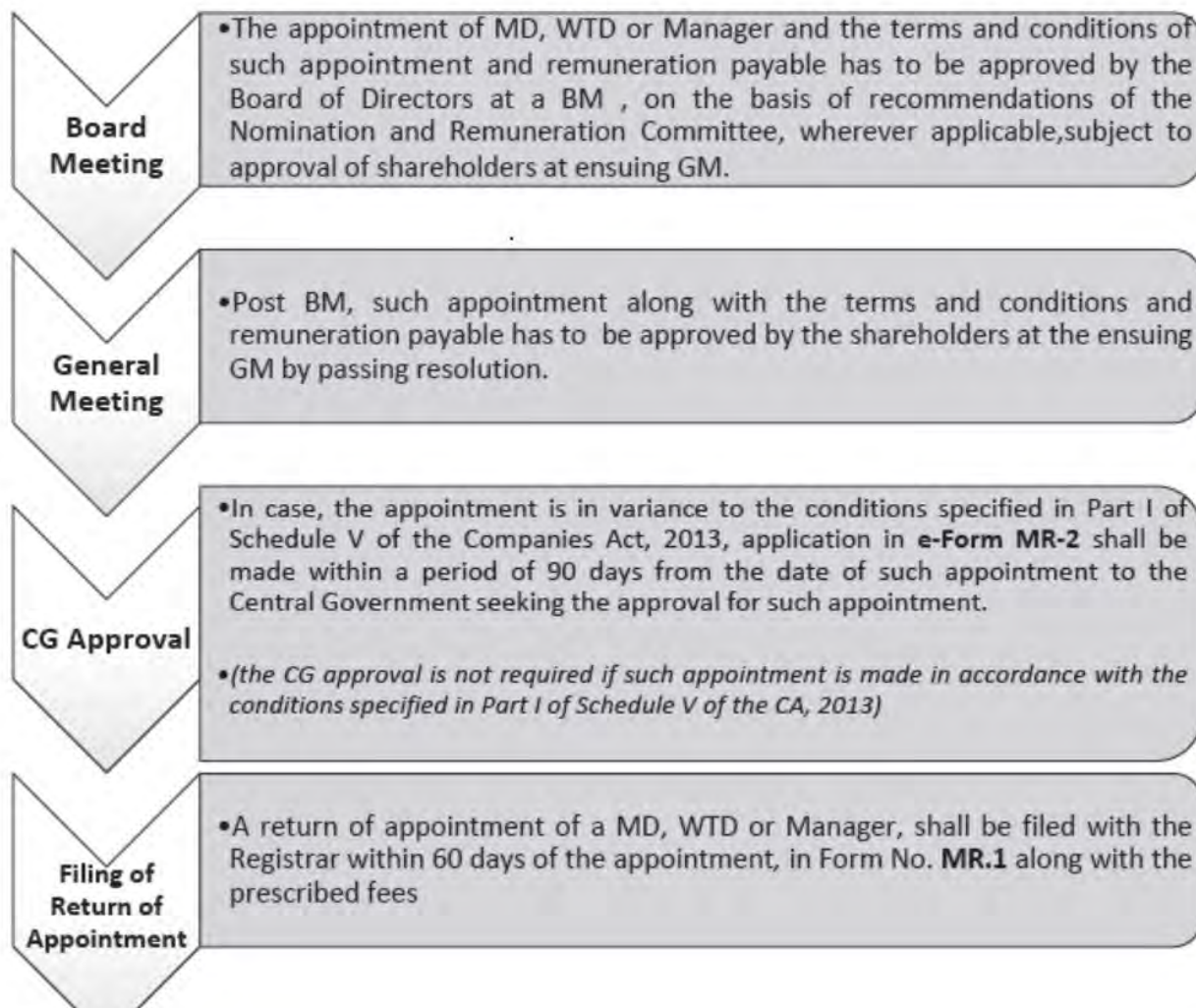
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Form No. MR.1

According to **rule 3 of companies (appointment & remuneration of managerial personnel) rules, 2014**, a company shall file a return of appointment of Managing Director, whole Time Director or Manager within **sixty days of the appointment**, with the Registrar in **Form No. MR.1** along with such fee as prescribed under Companies (Registration Offices and Fees) Rules, 2014.



SCHEDULE V CONDITIONS

Conditions to be fulfilled for the Appointment of Managing or Whole-Time Director or a Manager **without the approval of the Central Government** appointments as Per Schedule V of the Companies Act, 2013

No person shall be eligible for appointment as a managing or whole-time director or a manager (hereinafter referred to as managerial person) of a company **unless he satisfies the following conditions, namely:—**

- | |
|---|
| (a) The person had not been sentenced to imprisonment for any period , or to a fine exceeding one thousand rupees, for the conviction of an offence under any of the Acts as specified under Schedule V of the Companies Act, 2013 |
| (b) The person had not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 |
| (c) The person is resident of India |

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Procedure for appointment of Managing Director/Whole-time Director/Manager

Board Meeting

- The appointment of MD, WTD or Manager and the terms and conditions of such appointment and remuneration payable has to be approved by the Board of Directors at a Board Meeting, on the basis of recommendations of the Nomination and Remuneration Committee, wherever applicable, subject to approval of shareholders at ensuing GM.

General Meeting

- Post Board Meeting, such appointment along with the terms and conditions and remuneration payable has to be approved by the shareholders at the ensuing General Meeting by passing ordinary resolution.

CG Approval

- In case, the appointment is in variance to the conditions specified in Part I of Schedule V of the Companies Act, 2013, then the approval of Central Government is also required.

Filing of Return of Appointment

- A return of appointment of a MD, WTD or Manager, is required to be filed with the Registrar within 60 days of the appointment, in **Form No. MR.1** along with the prescribed fees.

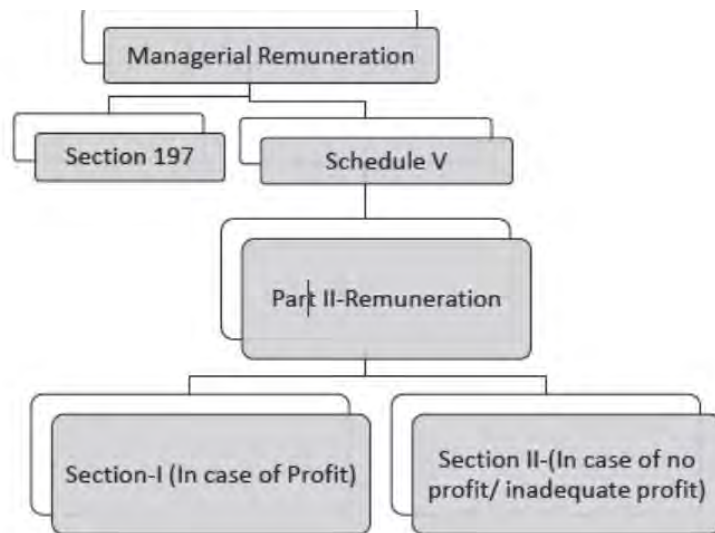
The notice convening Board Meeting or General Meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including interest, of a director or directors in such appointments, if any.

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REMUNERATION TO MANAGERIAL PERSONNEL



Overall managerial remuneration

Section 197 of the Companies Act, 2013 prescribed the maximum ceiling for payment of managerial remuneration by a public company to its managing director whole-time director and manager which shall not exceed **11% of the net profit** of the company in that financial year computed in accordance with section 198 except that the remuneration of the directors shall not be deducted from the gross profits.

The remuneration payable to any one managing director or whole- time director or manager shall not exceed **5% of the net profits** of the company and if there are more than one such director remuneration shall not exceed **10% of the net profits** to all such directors and manager taken together

The net profits for the purposes of this section shall be computed in the manner referred to in section 198.

Remuneration Exceeding 11%

Further, the **company in general meeting** may, authorise the payment of remuneration exceeding 11% of the net profits of the company, subject to the provisions of **Schedule V**.

"Provided that, where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, **the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company** before obtaining the approval in the general meeting.";

Remuneration to other directors

Except with the approval of the company in general meeting "by a special resolution", the remuneration payable to directors who are neither managing directors nor whole-time directors shall not exceed,—

- (a) **1% of the net profits** of the company, if there is a managing or whole-time director or manager;
- (b) **3% of the net profits** in any other case.

Remuneration payable to exclusive of sitting fees

The percentages aforesaid shall be exclusive of any fees payable to directors for attending the meeting of the board/committees or for such other purposes **as decided by the board**.

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REMUNERTION BY A COMPANY HAVING NO PROFIT OR INADEQUATE PROFIT

If, in any financial year, a company has no profits or its profits are inadequate, the company **shall not** pay to its directors, including managing or whole time director or manager, "or any other non-executive director, including an independent director" any **Remuneration except in accordance with the provisions of Schedule V**

OVERALL MANAGERIAL REMUNERATION-CHART

The overall managerial remuneration to the Directors including managing director, whole time director and manager is summarized as under:

S. No.	Persons entitled for remuneration	Maximum remuneration in any financial year	If remuneration exceeds maximum remuneration in any financial year as provided under column (b)
	(a)	(b)	(c)
(i)	Directors including managing director, whole time director and manager of public companies	11% of the net profits of the company for that financial year	Company in general meeting subject to provisions of Schedule V may pay remuneration in excess of 11% of the net profits of the company
(ii)	One Managing director/ Whole time director/ manager	5% of the net profits of the company for that year	With the approval by a special resolution of the company in general meeting this limit may be exceeded.
(iii)	More than one Managing director/ Whole time director/ manager	10% of the net profits to all such directors and manager taken together	With the approval by a special resolution of the company in general meeting this limit may be exceeded.
(iv)	Directors who are neither Managing director nor whole time directors	1% of the net profits of the company if there is a managing director or a whole time director	Approval by a special resolution of the company in general meeting is required.
(v)	Directors who are neither Managing director nor whole time directors	3% of the net profits of the company if there is no managing director or whole time director	Approval by a special resolution of the company in general meeting is required.

Remuneration to Directors in other Capacity [Section 197(4)]

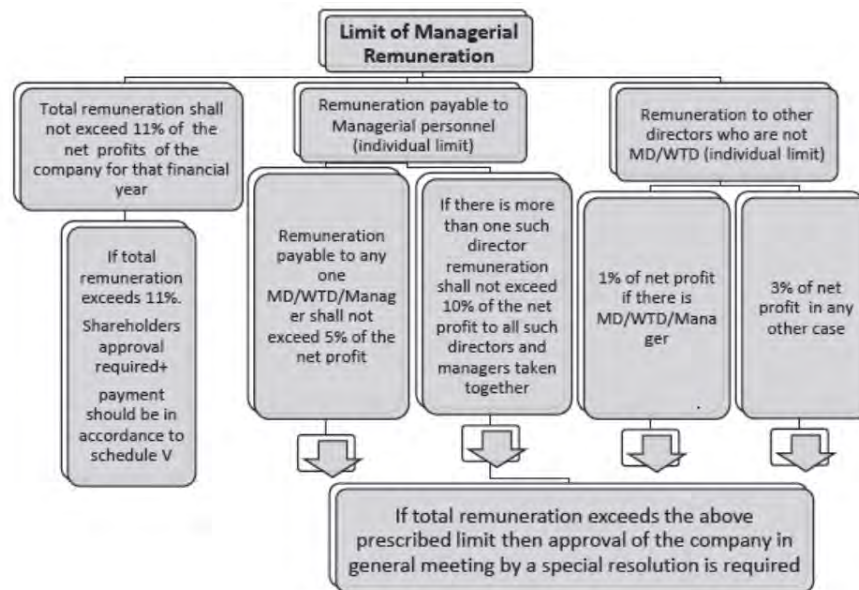
The remuneration payable to the directors including managing or whole-time director or manager shall be inclusive of the remuneration payable for the services rendered by him in any other capacity except the following:-

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

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SITTING FEES TO DIRECTORS FOR ATTENDING THE MEETINGS

SECTION 197(5)

A director may receive remuneration by way of fee for attending the Board/Committee meetings or for any other purpose **as may be decided by the Board**. Provided that the amount of such fees shall not exceed the amount as may be prescribed.

The Central Government through rules prescribed that the amount of sitting fees payable to a director for attending meetings of the Board or committees thereof may be such as may be decided by the Board of directors or the Remuneration Committee thereof which **shall not exceed the sum of rupees 1 lakh** per meeting of the Board or committee thereof.

The Board may decide different sitting fee payable to independent and non-independent directors other than whole-time directors.

Consequences of Remuneration Drawn in Excess of Prescribed Limit

SECTION 197(9)

If any director draws or receives, directly or indirectly, by way of remuneration any such sums in excess of the limit prescribed by this section or without approval required under this section, he shall refund such sums to the company, within two years or such lesser period as may be allowed by the company, and until such sum is refunded, hold it in trust for the company.";

The company shall not waive the recovery of any sum refundable to it under sub-section 9 mentioned above, unless approved by the company by special resolution within two years from the date the sum becomes refundable. **[Section 197 (10)]**

Provided that where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining approval of such waiver.";

Insurance Premium not part of Remuneration

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

However, if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration. **[Section 197(13)]**

However section 197 doesn't apply to govt. Companies.

MANAGERIAL REMUNERATION UNDER "SCHEDULE V (PART II)"

Section I : Remuneration by Companies having Profits

A company having profits in a financial year may pay remuneration to its **managerial person or persons(ED) or other director or directors (NED /ID)** in accordance with Section 197.

Section II: Remuneration by Companies having no profits or inadequate profits without Central Government approval

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Where in any financial year during the currency of tenure of a managerial person or persons or other director or directors, a company has no profits or its profits are inadequate, it, may, without Central Government approval, pay remuneration to the managerial person(ED) or persons or other director or directors(NED /ID) **not exceeding the higher of the limits under (A) and (B) below:**

(A):

<i>Where the effective capital (in rupees) is</i>	<i>Limit of yearly remuneration payable shall not exceed (in Rupees) in case of a managerial person</i>	<i>Limit of yearly remuneration payable shall not exceed (in rupees) in case of other director</i>
Negative or less than 5 crores.	60 lakhs	12 Lakhs
5 crores and above but less than 100 crores.	84 lakhs	17 Lakhs
100 crores and above but less than 250 crores.	120 lakhs	24 Lakhs
250 crores and above	120 lakhs plus 0.01% of the effective capital in excess of Rs.250 crores.	24 Lakhs plus 0.01% of the effective capital in excess of Rs.250 crores.

If a special resolution is passed by the shareholders, the above limits shall be doubled.

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

(B): In the case of managerial person who was not a shareholder, employee or a Director of the company at any time during the **two years** prior to his appointment as managerial person
- **2.5% of the current relevant profit.**

If a special resolution is passed by the shareholders, this limit shall be doubled.

Remuneration in Special Circumstances (Section III)

Section III of Schedule V provides special circumstances under which companies having no profit or inadequate profit can pay remuneration to its managerial personnel in excess of amount provided in Section II of Schedule V above, without Central Government's approval.

REGISTER OF DIRECTORS AND KEY MANAGERIAL PERSONNEL AND THEIR SHAREHOLDING

Section 170 makes it obligatory for every company to maintain a register containing the prescribed particulars of all its directors and key managerial personnel and their shareholding.

Register shall be maintained at registered office.

Register shall include details of securities held by each of them in the company or its holding, subsidiary, subsidiary of its holding companies or associate companies.

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" CASE LAW–CASE BASED " WRITING PRACTICE



Q. 1. SRM Ltd. has paid ₹15 lakh as an insurance premium on behalf of its Company Secretary and Managing Director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company. Can the company pay such insurance premium? Discuss referring to the provisions of the Companies Act, 2013.

[Dec. 2018; 4 Marks]

Ans. Under section 197(13) of Companies Act, 2013, where any insurance is taken by a company on behalf of its managing director, whole-time director, manager, Chief Executive Officer, Chief Financial Officer or Company Secretary for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, the premium paid on such insurance shall not be treated as part of the remuneration payable to any such personnel.

Further it has been provided that if such person is proved to be guilty, the premium paid on such insurance shall be treated as part of the remuneration. In accordance with above express provision **in the given case** the company can pay the insurance premium of ₹15.00 lakhs for company secretary and managing director for indemnifying any of them against any liability in respect of any negligence, default, misfeasance, breach of duty or breach of trust for which they may be guilty in relation to the company, and such shall not be treated as remuneration.

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Q. 1. Mrs. Beautiful, aged 40 years, is the Managing Director of Beauty Care Products Limited. She has received contribution to superannuation fund and leave encashment during her tenure with the company during the financial year ending 31st March, 2017. The Manager(Accounts) of the company is not very confident, if these perquisites are to be included in the computation of ceiling on remuneration specified in the Companies Act, 2013. Referring to the provisions of the Act, advise the Manager (Accounts). [June. 2017]

Ans. The matter given in the question needs to be solved in the light of the provisions as contained in section IV of Part II to Schedule V of the Companies Act, 2013. A managerial person shall be eligible for the following perquisites which shall not be included in the computation of the ceiling on remuneration specified in Section II and Section III:-

- (a) Contribution to provident fund, superannuation fund or annuity fund to the extent these either singly or put together are not taxable under the Income-tax Act, 1961:
- (b) Gratuity payable at a rate not exceeding half a month's salary for each completed year of service: and
- (c) Encashment of leave at the end of the tenure.

Therefore, applying the provisions as stated above, contribution to superannuation fund received by Mrs. Beautiful, Managing Director shall not be included in the computation of managerial remuneration ceiling. But she has received leave encashment during the tenure of her service and not at the end of her tenure and thus it should be included in the calculation of ceiling of managerial remuneration under the provisions of the Companies Act, 2013.

The Manager (Accounts) is accordingly advised.

Q. 2. Sand Ltd. wants to appoint River as Managing Director of the company for a period of three years with effect from 1st August, 2018. River has given a written statement to the company that he has paid rupees one thousand to the prescribed authorities for a conviction of an offence under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 on 30th June 2018. State whether River can be appointed as managing Director of the company under the Companies Act, 2013. [June. 2018]

Ans. According to Schedule V of Companies Act, 2013 no person shall be eligible for appointment as a managing or whole-time director or a manager of a company, if he has been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

In the present case Mr. River has only paid fine of ₹1000 to the prescribed authorities for a conviction of an offence under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974. Since it is only conviction and he was not detained, he can be appointed as Managing Director of the Company.

Q. 3. Distinguish between Chief Executive Officer and Redemption of debentured. [June. 2018]

Ans. Section 2 (18) of Companies Act, 2013 has defined "Chief Executive officer" so as to mean an officer of a company, who has been designated as such by it.

Section 2(54) of Companies Act, 2013, "Managing Director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes occupying the position of managing director by whatever name called.

SELF TEST QUESTIONS

FROM PAST CS EXAMS



1. **Short Notes:-----**
 - (a) Statutory duties of a Company Secretary under the Companies Act, 2013.
 - (b) Managerial remuneration
2. **Kapil is branch head of a limited company. The company proposes to elevate Kapil to the Board. Enumerate the steps involved in such a proposal.**

Ans. Kapil, the branch head is apparently a whole-time employee of the company. When the company proposes to appoint him as a director, he will be in the position of a whole time director of the company and the appointment would require the approval of the Central Government under Section 196 of the companies Act, 2013 if it is not in accordance with Schedule V to the Act. In that case, an application seeking approval to the appointment of whole-time director shall be made to the Central Government in e-Form No. Mr -2, within a period of 60 days of such appointment.

However, approval of the Central Government is not necessary if the appointment is made in accordance with the conditions specified in schedule V and a return in e-Form No. Mr -1 filed with Registrar within 60 days from the date of such appointment.

FROM ICSI MODULE



Answer the following:

1. Explain the term Key Managerial Personnel under the Companies Act, 2013. Is it necessary for every company to appoint a Key Managerial Personnel?
2. State the provisions of appointing a Key Managerial Personnel According to Companies Act 2013.
3. What are the provisions on punishment for the contravention of Section 203 of the companies Act 2013?

Q. 1.

Answer to Question No. 1:-

CS NITESH KR. JAISWAL

Q. 2.

Answer to Question No. 2:-

CS NITESH KR. JAISWAL