Corporate Law and Tax Compliances

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ABOUT THE UNIVERSITY

Founded in 1943, Utkal University is the 17^{th} University of the country and the first of Odisha. It is the result of the efforts of Pandit Nilakantha Dash. Maharaja Krushna Chandra Gajapati, Pandit Godavarish Mishra and many others who envisioned a progressive education system for modern Odisha.

The University started functioning on 27 November 1943, at Ravenshaw College, Cuttack. It originated as an affiliating and examining body but shifted to its present campus spread over 400 acres of land at Vanivihar in Bhubaneswar, in 1962.

A number of Postgraduate Departments and other centres were established in the University campus. There are presently more than two hundred general affiliated colleges under the University. It has eleven autonomous colleges under its jurisdiction, twenty-eight constituent postgraduate departments, 2 constituent law colleges and a Directorate of Distance & Continuing Education. It boasts of a centre for Population Studies, a School of Women's Studies, an Academic Staff College, a pre-school and a high school. The University also offers a number of self-financing courses.

NAAC accredited since 2003, with B++ status and a score little over 80%. Utkal University is recognized by the UGC. It is a member of the Indian Association of Universities and the Commonwealth Association of Universities.

CORPORATE LAW AND TAX COMPLIANCES

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UNIT 1: INCORPORATION OF COMPANY

Structure

1.0 OBJECTIVE

After going through this unit, you will be able to:

- Understand the concept of India's Companies Act, 2013
- Understand various amendments in the Companies Act, 1956.
- Describe salient features of Companies Act, 2013.
- Define formation of Joint Stock Company
- Discuss document for Incorporation

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1.1 INTRODUCTION TO INDIAN COMPANY LAW AND ITS DEVELOPMENT

Company Law in India is the cherished child of the English parents. Our various Companies Acts have been modeled on the English Acts. Following the enactment of the Joint Stock Companies Act, 1844 in England - believed to be the first in the world, the first Companies Act was passed in India in 1850. It was the British who pioneered company legislation in India. Like in England, companies were established in India by a royal Charter, like the East India Company, or by a Special Act of Parliament, like the various Reserve Bank of India, Unit Trust of India or Indian Railways.

The different phases of the development of company legislation in India are as follows:

1. **Joint Stock Companies Act, 1850:** The first company legislation in India was enacted in 1850 on the pattern of the company legislation of 1844 in England. Under the provisions of this Act, companies with unlimited liability could be incorporated in the country. For the first time, the Act provided the facility for the companies to be registered. The registration of companies could be done through the High Courts of Bombay, Calcutta and Madras. The Act also provided for the transfer of shares by the shareholders, but the liability of the shareholders, like in a partnership concern, was not limited to their share in the company.
2. **Joint Stock Companies Act, 1857:** This Act is of special importance in the history of company legislation in India because, for the first time, the law recognized the concept of' limited liability' of the shareholders of a company. Banking and insurance companies were, however, not covered by the provisions of the Act. It was made specifically clear in the Act that the liability of the shareholders in a limited company shall be limited to the extent of their share in the capital invested in the company. This Act also made it possible for non-limited companies to be registered.
3. **Joint Stock Companies Act, 1860:** Under the provisions of this Act, banking and insurance companies were also permitted to be established with limited liability of the shareholders. This Act was on the pattern of the Company Legislation, 1856, of England.
4. **Joint Stock Companies Act, 1866:** This Act was based on the legislation enacted in England in 1866. The Act cancelled all the previous legislations and defined the laws governing the incorporation, regulation and winding up of companies.
5. **Joint Stock Companies Act, 1882:** Modeled on the lines of the Companies Act, 1880, of England, this Act elaborated the provisions of the Indian Companies Act, 1866. Besides, three other Acts—Companies Memorandum of Association Act, 1895; Companies Branch Register Act, 1900 and Companies Act, 1910— were enacted to fill the loopholes and remove the shortcomings of the Act.

Indian Companies Act 1913

In 1913, a consolidated act called the Indian Companies Act was enacted in India on the pattern of the British Companies Act, 1908. This act had 288 sections and 4 schedules. The Act defined the laws governing the functioning of companies and other commercial organizations; and the institution of' Private Company' was for the first time recognized by law. Various amendments were made to the Indian Companies Act, 1913 from time to time, and the Act remained in force till it was replaced by the Indian Companies Act, 1956.

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Indian Companies Amendment Act, 1936: There were many shortfalls in the Indian Companies Act, 1913; and various amendments to the Act were made in 1914,1915,1920,1926, 1930 and 1932 in an attempt to remove these shortfalls. The last important amendment was made in 1936, which was on the lines of the British Companies Act, 1929, and it came to be accepted as the Indian Companies Act, 1936. The Amendment Act introduced various provisions relating to the functioning of the directors and managing agents, investigation of any fraudulent activity by the company, and guaranteeing the security and payment of provident fund to its employees. Later, from 1937 to 1951, amendments to the Act were made almost every year to keep up with the changing scenario.

1.2 THE COMPANIES ACT, 1956

The Companies Act, 1956 was enacted with a view to consolidate and amend the earlier laws relating to companies and certain other associations. The Act came into force, on 1st April, 1956. This Companies Act was based largely on the recommendations of the Company Law Committee known as Bhabha Committee after its Chairman, C.H. Bhabha which submitted its report in March, 1952. This Act was the longest piece legislation ever passed by our Parliament. Amendments have been made in this Act periodically. The Companies Act, 1956 consisted of 658 Sections and 15 Schedules.

This Act extends to the whole of India provided that it shall apply to the State of Nagaland and Jammu and Kashmir and the Union Territory of Goa, Daman and Diu subject to such exceptions and modifications, if any, as the Central Government may, by notification in the Official Gazette, specify [Section 1(3), 620B and 620C].

Objectives

Following are the main objectives of the Indian Companies Act, 1956:

(a) To help in the establishment and management of companies on a healthy and honest basis.

(b) To ensure that the rights and interests of shareholders and creditors are recognized and respected by the management.

(c) To ensure that the shareholders have the maximum say in the management of company affairs,

(d) To ensure that the affairs of the company are managed by a consensus to the maximum degree,

(e) To help the government attain the ends of social and economic justice and establish a 'socialistic pattern of society'.

(f) To investigate the affairs of the company when they are not in order and can result in a loss to the shareholders or the public,

(g) The Act was not enacted only from the legalistic or 'calculative' or scientific point of view; rather it was based more on the social and economic needs of the country.

Full and fair disclosure of various matters in prospectus; detailed information of the financial affairs of company to be disclosed in its account; provision for intervention and investigation by the Government into the affairs of a company; restrictions on the powers of managerial personnel; enforcement of proper performance of their duties by company management; and protection of minority shareholders were some of the main features of the Companies Act, 1956 and it was based on social, and economic needs of the country.

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1.3 VARIOUS AMENDMENTS IN THE COMPANIES ACT, 1956

Despite the fact that extra-ordinary caution was exercised in the enactment of the Companies Act, 1956, it came under severe criticism within a year of its enactment. As a result, the Government of India appointed an Ad-hoc Committee in 1957 under the chairmanship of Shri A.V Vishwanath Shastri (ex-Judge of the Madras High-Court to review the Act and give its recommendations). The Committee submitted its report in November 1957 and, on the basis of its recommendations, the Act was amended in 1960. After this, many important amendments were made in the Act in 1962, 1963, 1965, 1966, 1967, 1969, 1971, 1972,1974,1977,1985 and 1988. Despite the above amendments, the Indian Companies Act, 1956 is still in force and is the largest of the Companies Acts in the world. The various amendments are briefly discussed as follows:

1. **The Companies Amendment Act, 1960:** Under this amendment, some restrictions were imposed on the management of companies, remuneration of managers and private companies. As many as 218 sections of the Act were amended in detail.
2. **The Companies Amendment Act, 1962:** This amendment added a new Section 293B to the Act under which companies were given the right to contribute such amount as they thought fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.
3. **The Companies Amendment Act, 1963:** The 1963 Amendment provided for setting up Companies Tribunal and Companies Law Board. It also provided for better management of company finance and security against fraud and other malpractices.
4. **The Companies Amendment Act, 1965**: Based on the recommendations of the Vivian Bose Commission, the Companies (Amendment) Act, 1965 introduced some major changes, such as clear definition of the main and subsidiary objects of a company in its Memorandum of Association; strengthening the provisions relating to investigation into the affairs of the company. This amendment made it mandatory for a company to add its subsidiary objectives to its main objective in the memorandum of association. It also provided for proper maintenance of books of account and their effective audit, blank transfer of shares, defined the authority of the inspectors and terminated the restriction on the age limit of company directors.
5. **The Companies Amendment Act, 1966**: There were two amendments in the Companies Act in 1966, and a total of four sections were altered. The main purpose of the alteration was to restrict the blank transfer of shares of a company.
6. **The Companies Amendment Act, 1967:** This amendment was made to establish company tribunals.
7. **The Companies Amendment Act, 1969**: Two important changes were introduced by the Companies (Amendment) Act, 1969. Firstly, the institutions of managing agents and secretaries and treasurers were abolished with effect from April 3, 1970. Secondly, contributions by companies to any political party or for any political purpose were prohibited.
8. **The Companies Amendment Act, 1971**: A new Section 193A was added to the Act by this amendment which allowed the directors of the company or the managers appointed by them to donate ₹ 25,000 or 5 per cent of the company's profits to the National Defence Fund or any other fund approved by the Central Government. It also made it mandatory for the company to get the proposal approved by a general meeting in case it wanted to donate more than ₹ 25,000 or 5 per cent of its profits.
9. **The Companies Amendment Act, 1972:** Under the amended Act of 1972, the Central Government was given the power to appoint as many directors as it deemed to be

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necessary for the proper management of company affairs. Amendments were also made with respect to investigating foreign companies in terms of their control and sharing and distribution of profits.

10. **The Companies Amendment Act, 1974:** The Companies (Amendment) Act, 1974 which came into force from February 11, 1975 had introduced some important and major changes in the Companies Act, 1956. The object of the Amendment Act was to inject an element of public interest in the working of the corporate sector. Under this amendment, various provisions were made to curb mismanagement, fraud and other malpractices on the part of companies, the word 'group' was projected with a new interpretation. The definition of private companies which were deemed public companies was made more elaborate and detailed. In certain new situations, it was made mandatory for a company to appoint a person as secretary.

11. **The Companies Amendment Act, 1977**: The Amendment Act incorporated significant changes in Sections 10E, 58A, 108H, 220, 293 and 635. A new Section 634A was also added to the Act. An important amendment was made to Section 293 under which the ceiling for donations for charitable purposes by companies was raised from ₹ 25,000 to ₹ 50,000.

12. **The Companies Amendment Act, 1985**: The following important changes were made in the Act under this amendment:
    (a) Under Section 293 A, every company which is not a government company and has been in existence for at least three years can make contribution to any political party. The amount of such contribution cannot exceed five percent of the company's average net profits for the preceding three financial years, and the amount has to be included in the company's Profit and Loss Account. It is also necessary to record the amount of contribution and the name of the political party.
    (b) In case of winding up of a company, the workmen's dues and debts due to secured creditors shall be paid in priority to all, other debts. Sections 529 and 530 of the Companies Act, 1956; were amend and a new Section 529A was introduced.

13. **The Companies Amendment Act, 1988**: Based on the recommendations made by the Expert Committee (Sachar Committee) the Companies (Amendment) Act, 1988 substantially amended the Companies Act, 1956 in order, to streamline some of the existing provisions of the Companies Act, 1956 and to ensure better working and administration of the Act. The committee made an attempt to introduce workers participation in management of the company affairs, define the social obligations of the company and bring in professionalization in the management sectors; The Committee recommended the deletion or amendment of as much as 175 sections.

    The important changes introduced by the Amendment Act of 1988 were:

    Definition of Secretary brought in line with the definition of Company Secretary in the Company Secretaries Act, 1980 and includes an individual possessing the prescribed qualifications.

    The concept of company secretary in practice was introduced for the first time in the Companies Act. The Amended Act, among other things, also set up an independent Company Law Board to exercise such judicial and quasi-judicial functions, earlier being, exercised either by the Court or the Central Government.

14. **The Companies Amendment Act, 1996:** After the implementation of this amendment, a company limited by shares cannot issue irredeemable preference shares and the companies have been permitted to issue preference shares having maximum 20 years redemption

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period instead of 10 years. In addition to equity and preference shares, the companies have been given the privilege of issuing shares without voting rights. Mutual Fund, Venture Capital Fund, etc., having approval from Indian security and Exchange Board and have share capital of a company have been given voting rights, in the meeting of that company. Companies have been allowed to present papers and documents to the registrar on computer format. The company can make alteration in Memorandum of Association without rectification from Company Law Board will be necessary if registered office of the company is to be transferred from one state to another. In the event of winding up of the company the maximum limit of ₹ 1000 regarding of claims in respect of arrears of wages and salary of an employee has been abolished.

The Depositories Act, 1996 made the other following major amendments to the Companies Act, 1956:

(a) Every person holding equity share capital of a company and whose name is entered as beneficial owner in the records of the depository shall be deemed to be a member of the concerned company.

(b) Stamping of transfer instruments is not required where both the transferor and transferee are entered as beneficial owners in the records of a depository.

(c) The securities of a company other than a private company have been made freely transferable. The transfer has to be effected immediately by the company/depository.

(d) The register of members shall indicate the shares held by a member in demat mode but such shares need not be distinguished by a distinctive number.

(e) Company to give in the offer document option to the investor to ask for issue of securities in demat mode.

15. **The Companies Amendment Act, 1999**. The companies (Amendment) Act, 1999 made the following major changes to the Companies Act, 1956:-

(a) Companies allowed to issue Sweat Equity shares and to buy back their own securities.

(b) Companies have been empowered to allot shares to investors and employees in lieu of services rendered by them.

(c) Facility for nomination provided for the benefit of share/debenture/deposit holders.

(d) An Investor Education and Protection Fund to be established.

(e) National Advisory Committee on Accounting Standards for companies to be established.

(f) Prior approval of Central Government not required for inter-corporate investment/ lending proposals subject to certain conditions.

16. **The Companies Amendment Act, 2000**: Under this amendment the provision regarding appointment of Public Trustee by the Central Government has been abolished, so that the trust can directly exercise its voting rights. For smooth functioning of the company postal ballot system on special resolution has been introduced. The company will have to make payment of dividend and interim dividend within 30 days of its declaration. Earlier the time limit was 42 days. A person can be appointed auditor of 20 companies excluding private companies. A person who is a shareholder in a company and has voting rights cannot be appointed auditor of that company. While preparing report, the auditor will have to write compulsorily the factors in bold letter that have badly affected the functioning of the company. After this amendment, no person can be director of more than 15 companies at a time. This number does not include private companies.

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Further the Companies (Amendment) Act, 2000 made the following major amendments:

(a) Private Companies and Public Companies to have a minimum paid-up capital of Rupees one lakh and five lakh respectively.

(b) Change of place of registered office from the jurisdiction of one Registrar of Companies to another Registrar of Companies within the same state requires confirmation from the Regional Director.

(c) Provisions relating to deemed public companies became inoperative and a new provision relating to conversion of a public company to a private company inserted in the Companies Act, 1956.

(d) SEBI has given powers regarding issue and transfer of securities and non-payment of dividend by listed public companies.

(e) Certain measures included for protecting the interest of small deposit holders in a company.

(f) Preferential offer/Private placement of securities to 50 (fifty) persons or more treated as public issue. This shall not apply to a preferential offer made by public financial institutions and NBFCs.

(g) Provisions relating to shelf-prospectus and information memorandum, issue of equity share capital with differential rights as to dividend, voting or otherwise included.

(h) Every listed company making initial public offer of any security for a sum of Rupees ten crores or more will have to issue the same only in a dematerialized form.

17. **The Companies Amendment Act, 2002**: Parliament has by this amendment provided the legal framework for the establishment and growth of an innovative model of private company called The Producer Company'. The producer company will be formed as a private company, but in this private company there shall be at least ten or more individual producers as members or two or more producers and producer institutions. There is no limit on the maximum members as against minimum two and maximum fifty in other private companies. The word 'Private' does not form part of the name in these companies. The formation and management of these companies will be in accordance with the statutory provisions in Part IX A of the Companies Act, 1956. In Producer Company the other provisions of Company Act will apply in the same manner as are applicable in any other private company.

18. **The Companies Second Amendment Act, 2002**: By this amendment under section 10 FB, the Central Government has been given power to constitute a Tribunal known as the National Company Law Tribunal. Under section 10 FR National Company Law Appellate Tribunal has also been established to hear the appeals against the orders of the Tribunal. The appeals against the orders of the Appellate Tribunal will be heard by the Supreme Court. By this amendment under section 10 FR, Company Law Board has. been abolished and some powers earlier under the jurisdiction of the Company Law Board have been transferred to Central-Government and some to National Company Law Tribunal (called the Tribunal) under section 75/ 80 A(2)/ 100 to 104/107/203/243/394 A and 395. The word 'Court' has been changed as Tribunal'.

In nutshell the Companies (Amendment) Act, 2002 and Companies (Second Amendment) Act, 2002 made the following changes to the Companies Act, 1956:

(a) New Part IXA consisting of Section 581A to 581ZT relating to Producer Companies inserted.

(b) The existing Company Law Board is proposed to be dissolved and in its place a National Company Law Tribunal (Tribunal) is to be constituted.

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(c) Appeals against the orders of the Tribunal can be filed with the Appellate Tribunal. Further appeal against the orders of the appellate tribunal would lie to the Supreme Court.

(d) The Board for industrial and Financial Reconstructions to be abolished and SICA will be repealed.

(e) Transfer of all the powers from the BIFR to the Tribunal.

(f) Transfer of certain powers of the High Court to the Tribunal.

(g) Greater role for professionals in the administration of Company Law.

(h) Transfer of powers relating to winding up, mergers and amalgamations from Court to the Tribunal.

19. **The Companies (Amendment) Act, 2006**: This Amendment Act received the assent of the President of India on 29th May 2006 and was notified in the Gazette of Indian Extraordinary dated 30th May, 2006. The amending Act shall come into force on such date as the Central Government may, by notification, appoint and different dates may be notified for different provisions of the Act.

The Companies (Amendment) Act, 2006 inserted new Sections 61OB, 61OC, 61OD and 61OE and also certain sections pertaining to Director Identification Number (DIN), Salient features of the provisions of Companies (Amendment) Act, 2006 are as follows:

New Sections 266A, 266B, 266C, 266D, 266E, 266F and 266G have been inserted so as to provide for allotment a unique DIN to all existing directors and every other person, intending to become a director in future, for the purpose of his identification as such through electronic form and to provide for penalty for any violation in this regard.

The applications, balance sheet, prospectus, return, declaration, memorandum and articles of association, particulars of charges or any other particulars or document required to be filed or delivered, are to be filed in electronic form. The Amendment Act contains provisions for implementing an e-governance progamme of the Ministry of Corporate Affairs (MCA) through a project named MCA-21. E-filing or electronic filing is a key-feature of the MCA-21 programme.

1.4 EVOLUTION OF COMPANIES ACT 2013

The Companies Act, 1956 was enacted with the objective to amend and consolidate the law relating to companies. This Act provided the legal framework for corporate entities in India and was a mammoth legislation. As the corporate sector grew in numbers and size of operations, the need for streamlining this act was felt and as many as 24 amendments had taken place since then. Major amendments were made through the Companies (Amendment) Act, 1988 after considering the recommendations of the Sachar Committee, and then again in 1998, 2000 and in 2002 through the Companies (Second Amendment) Act, 2002. Unsuccessful attempts were made in 1993 and 1997 to replace the present Act with a new law. Companies (Amendment) Bill, 2003 containing important provisions relating to Corporate Governance and aimed at achieving competitive advantage was also introduced.

Till some time back Companies Act, 1956 was the principal legislation governing the corporate sector in India. However, several changes had taken place in the national and international economic environment after the enactment of this Act during the last two to three decades. Thus, modernization of company law governing setting up and functioning of enterprises, structures for sharing risk and reward, governance and accountability to the investors and other stakeholders and structural changes in the law commensurate with global standards had become critical for governing and guiding a vibrant corporate sector and business environment.

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To frame a law that enables companies to achieve global competitiveness in a fast changing economy, the Government had taken up a fresh exercise for a comprehensive revision of the Companies Act, 1956, even if through a consultative process. As a the first step in this direction, a Concept Paper on Company Law drawn up in the legislative format was exposed for public viewing on the electronic media so that all interested parties may not only express their opinions on the concepts involved but may also suggest formulations or various aspects of Company Law.

The response to the concept paper on Company Law was tremendous. The Government, therefore, felt it appropriate that the proposals contained in the Concept Paper and suggestions received thereon be put to merited evaluation by an independent Expert Committee. A Committee was constituted on 2nd December, 2004 under the Chairmanship of Dr. J J Irani, Director, Tata Sons, with the task of advising the Government on the proposed revisions to the Companies Act, 1956 with the objective to have a simplified compact law that will be able to address the changes taking place in the national and international scenario, enable the adoption of internationally accepted best practices as well as provide adequate flexibility for timely evolution of new arrangements in response to the requirements of ever-changing business models. The Committee remitted its report to the Government on 31st May 2005.

1.5 INTRODUCTION TO COMPANIES ACT 2013

The Companies Act, 2013 replaced the Companies Act, 1956 which was about six decades old. The Companies Bill, 2012 was assented to by the President of India on 29th August, 2013 and notified in the Gazette of India on 30th August, 2013. It finally became the Companies Act, 2013. Highlights of the Companies Act, 2013 are as follows:

Passed in Lok Sabha	December18, 2012
Passed in Rajya Sabha	August 08, 2013
President's Assent	August 29, 2013
Came into force w.e.f	30th August, 2013
Total Number of Sections	470
Total Number of Chapters	29
Total Number of Schedules	7
Number of Sections Notified (282)	Section 1 on August 29, 2013
	98 Sections on September 12, 2013
	183 Sections on April 01, 2014
Total Number of Rules Notified	Rules Under 21 Chapter Notified

1.6 OBJECTIVES OF COMPANIES ACT 2013

The Companies Act, 2013 has the following objectives:

- To provide free access to entrepreneurs to the open global market.
- To protect the interests of investors and stakeholders.
- To provide for more simplified and rationalized legislation.
- To promote transparency and accountability in the working of companies.
- To provide strict provisions prohibiting insider trading practices.
- To promote corporate social responsibility activities undertaken by the companies.

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1.7 MAJOR CHANGES/CHARACTERISTICS OF COMPANIES ACT, 2013

1. The concept of One Person Company (OPC) has been introduced by this Act which means a private limited company may have only one person as a member. It may enjoy limited liability. The Memorandum of Association of such a company should indicate the name of the other person who shall become member of the company in the event of subscriber's death or his incapacity to contract due to insanity, etc.
2. It prescribes a uniform financial year i.e., from 1st April to 31st March for all the companies subject to certain exceptions. This would facilitate financial accounting of companies to a great extent.
3. The private companies can now have maximum of 200 members as against the maximum 50 as provided in the Companies Act, 1956. This increase would provide greater scope for operation of private companies.
4. The permissible limit of 18 months for holding Annual General Meeting (AGM) from the date of its incorporation has been curtailed to nine months. Therefore now the company shall have to hold its annual general meeting within nine months from the closure of its first financial year, and in other case, within the period of six months from the date of closing of the financial year.
5. The requirement of 'object clause' of the Memorandum of Association into three distinct classes, i.e., the main, ancillary and other objects, have been scrapped in the new Companies Act of 2013 and now only the objects for which the company is incorporated are required to be mentioned in the Memorandum of Association.
6. Where money raised from public through prospectus has not been fully utilized for the purpose and object it was raised, the un-spent money cannot be utilized for any other object unless a special resolution for this purpose has been passed and dissenting share-holders are provided an exit-opportunity.
7. Misuse of 'public deposits' in the past is well known. Companies will no longer be permitted to invite, accept or renew deposits from the public. However, this restriction will not apply to the following classes of companies:
   (a) Banking companies;
   (b) Non-banking financial companies (NBFCs);
   (c) Public companies having such net worth or turnover as may be prescribed subject to compliance with the specified conditions; and
   (d) Such other companies as Central Government may specify after consultation with the Reserve Bank of India.

   Companies, however, have been permitted to accept deposits from their members subject to certain conditions.
8. The requirement of Statement in lieu of Prospectus by private companies has been done away with. The new Act of 2013 requires a detailed prospectus to be issued and the companies cannot vary the terms of contract or objects referred to in the prospectus without the approval of share-holders by special resolution in the general meeting of the company.
9. The preceding Companies Act, 1956 permitted only financial institutions, public sector banks and scheduled banks to issue shelf prospectus but the Act of 2013 empowers SEBI

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to prescribe class/classes of companies which can file Shelf Prospectus with the Registrar of Companies (ROC).

10. The Act of 2013 requires the Companies to file return of allotment for all kinds of securities besides the securities in the form of shares and a Company may issue Global Depository Receipt (GDR) by passing a special resolution in the general meeting subject to conditions as prescribed.
11. The provisions relating to buy back of shares by companies have been fairly liberalized and now consequent to the enforcement of the Companies Act, 2013, the companies can buy back their shares even if they have defaulted in repayment of deposits or interest payable thereon, redemption of debentures or payment of dividend to shareholders etc.
12. The Non-Banking Financial Companies (NBFCs) will now be governed by RBI rules in the matter of acceptance of deposits and not by the provisions of Companies Act, 2013.
13. The 2013 Act specifically provides that the books of accounts may be kept in electronic form. The company is required to prepare and file financial statement which shall include its balance sheet, profit and loss account and cash flow statement in a consolidated form. These documents are not required to be-filed separately as was necessary under-preceding Companies Act, 1956.
14. The National Advisory Committee on Accounts Standards (NACAS) has been renamed by the 2013 Act as the National Financial Reporting Authority (NFRA). It was merely an advisory body under the 1956 Act which has now been converted into a quasi judicial authority having power to exercise disciplinary control over the Chartered Accountants of C.A. Firm.
15. A new provision relating to Corporate Social Responsibility (CSR) has been introduced which provides that every company having a specified net worth or turnover or net profit during any financial year shall constitute the Corporate Social Responsibility Committee of its Board of Directors to formulate policies for the activities specified in Schedule VII of the Act for social and economic welfare of the people, particularly, those who have remained deprived or neglected so far.
16. It has been made mandatory that the prescribed class or classes of companies shall have at least one Director of the Board must have stayed in India for not less than 182 days in the previous calendar year.
17. Every listed company should have at least 1/3rd of the total number of its Director, non-executive Director, on its Board as independent Directors. The independent Director shall be a not being a promoter or key managerial personnel,
18. The maximum number of Directors that a company may have is raised from 12 to 15 under the 2013 Act. Similarly, now a person can become Director of maximum 20 companies instead of 15 as was provided under the Companies Act, 1956. Out of these 20 companies, he cannot be the Director of more than ten public companies at a time.
19. New provisions, duties of directors have been codified for the first time and various duties have been prescribed. Contravention of any of the duties is punishable with fine ranging from ₹ 1,00,000 to ₹ 5,00,000. It is also provided that if any director is found guilty of making any undue gain either to himself or to his relatives, partners or associates, he shall be liable to pay an amount equal to that gain to the company.
20. It has been made mandatory for a Director who resigns from his post, to forward the copy of his resignation to the Registrar of Companies (ROC) within thirty days of such resignation. There was no such provision in the earlier Act of 1956.

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21. The Companies Act of 2013 requires a company to hold at least four meetings in every year and the gap between two consecutive meetings should not exceed 120 days. It allows the Director(s) to participate in Boards meeting through Video conferencing or other audio-visual mode as may be prescribed. Video conferencing is a great facility for transacting business with speed, apart from cost saving and helping the directors to participate in board meetings from their work place. Thus, the requirement that a company should hold its meeting quarterly as existed in the preceding Companies Act, 1956, has been modified.
22. For the first time the expression 'Key Managerial Personnel' has been inserted by the Act. According to section 2 (51), 'Key Managerial Personnel', in relation to a company means:
    (a) The Chief Executive Officer or the Managing Director or Manager,
    (b) The Company Secretary,
    (c) The Whole time Director;
    (d) The Chief Financial Officer, and
    (e) Such other officer as may be prescribed.
23. The new Companies Act, 2013, has raised the limit of political contribution by company from 5 per cent to 7.5 per cent of the average net profit of the company during the three immediately preceding financial years.
24. The term 'loan' shall not include debentures.
25. The new Act has done away with the requirement of Central Government's approval for:
    (i) Giving loan to Directors by companies, or
    (ii) For entering into any related party transactions, or
    (iii) For appointment of any Director or any other person to any office of profit in the company or its subsidiary.

    Such approval was mandatory under the earlier Companies Act, 1956.
26. The conditions required to be fulfilled for the appointment of Managing Director/whole time Director/Manager and the provisions of the Act in this regard shall also apply to a private company.
27. The 2013 Act provides a new provision defining 'fraud' in relation to affairs of a company or anybody corporate. It also provides stringent punishment for this offence. There was no definition of 'fraud' in the Companies Act, 1956 nor was there any specific punishment for this offence under the Act.
28. The Companies Act, 2013 makes the submission of Auditor's certificate mandatory before the Tribunal grants sanction for compromise or arrangement.
29. In respect of any property, stocks, shares, debentures, securities, goodwill or net worth of a company or its assets, if valuation is required, it shall be done by a registered value appointed by the Audit Committee or in its absence by the Board of Directors of the company. Any Chartered Accountant, Cost Accountant, Company Secretary or such other person possessing such qualifications, as may be prescribed, may apply to the Central Government (Ministry of Corporate Affairs) for being registered as a valuer. The Central Government shall maintain a register of valuer.
30. The Companies Act of 2013 provides for 'class action suit' for relief from oppression and mis-management.

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31. The new Act of 2013 seeks to rationalize the revival and rehabilitation of sick companies by providing that a company which fails to repay the debt of secured creditors representing 50 per cent or more of its debt amount may also apply to the Tribunal for declaring the company as sick company.
32. A new provision regarding appointment of interim administrator by the Tribunal has been inserted for revival or rehabilitation of a sick company.
33. A new provision in the form of Section 442 is inserted in the Act of 2013 for setting up mediation and conciliation panel of experts to mediate at the request of parties to the proceedings before the Central Government i.e., Tribunal or the Appellate Tribunal.
34. A new-provision in the form of Section 195 has been inserted in the Companies Act, 2013 to prohibit insider trading of securities by Directors or Key Managerial personnel of companies.
35. In the procedure set out for voluntary winding up of a company, some new requirements have been prescribed under Section 310 of the Companies Act, 2013. Firstly, the Company Liquidator for a voluntarily winding up company shall be appointed from the panel prepared by the Central Government. Secondly, the Company Liquidator so appointed shall, (throughout the term of his appointment) file a declaration in the prescribed form disclosing conflict of interest or lack of independence in respect of his appointment, if any, with the company or the creditors.
36. As regards disclaimer of onerous property of a company which is being wound up, by the Company Liquidator, the powers and functions which hitherto exercisable by the Court under the Companies Act, 1956 are now transferred to the Tribunal under Section 333 of the new Companies Act, 2013.
37. The new Act does not require the Central Government to notify companies as Nidhi companies and provides a new provision regarding dormant company.

1.8 BRIEF HIGHLIGHTS OF COMPANIES ACT, 2013

1. Introduction of new types of companies

(i) One person Company: ‘One person Company’ means a company which has only person as a member. [Section 2(62)]

(ii) Associate Company: A company is considered to be an associate company of the other, if the other company has significant influence over such company but which is not a subsidiary company of the company and includes a joint venture company. Significant influence means control of at least 20 per cent, of total share capital of a company or of business decisions under an agreement. [Section 2(6)]

(iii) Small company: Small company means company, other than a public

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed not exceeding ₹ 5 crore or

(ii) turnover of which does not exceed two crore rupees or such higher amount as may be prescribed not exceeding twenty crore rupees. [Section 2(85)].

(iv) Dormant Company: Where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

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2. Board of Directors

(i) **Number of directors**: Maximum number of directors in a company has been increased to 15 from 12. More directors can be added by passing of special resolutions without getting the approval of Central Government as earlier required.

(ii) **Women director**: At least one woman director shall be on the Board of such class or classes of companies as may be prescribed. [Section 149 (2)]

(iii) **Resident Director**: Every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. [Section 149 (3)]

(iv) **Independent Director:** Concept of independent directors has been introduced for the first time in Company Law. All listed companies shall have at least one-third of the Board as independent directors. [149(4)]

(v) **Duties of Directors:** Duties of directors have been defined for the first time.

3. Appointment of key Managerial Personnel

Every company belonging to such class or classes of companies as may be prescribed shall have the 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 Chief Financial Officer [Section 203]

4. Related Party Transaction

Related party transactions by a company having prescribed paid-up capital **or** value of transaction exceeding prescribed limits will require prior approval of members by special resolution. The related party who is a member of such a company cannot vote in such special resolution. The Boards report has to disclose related party transactions along with the justification. [Section 188]

5. Cross Border Amalgamation

Mergers and amalgamations between companies registered under this Act. Companies incorporated in the jurisdictions of such countries as may be notified from time to time by Central Government are allowed.

6. Class Action Suits

For the-first time a provision has been made for; class action. Class action suits may be filed by investors in a court of law if they believe that the affairs of the company are being conduct in a manner detrimental to the interest of the company and its shareholders. Enabling such class action suits should, in the long-run, may help: to improve the quality of financial reporting as well as the quality of corporate governance among firms: [Section 245]..

7. Serious Fraud Investigation Office (SFIO)

The Companies Bill, 2012 has provisions to give SFIO suo moto powers to arm it with legal and statutory powers to probe corporate misdoings. Given that corporate frauds are becoming increasingly sophisticated with the improvement in technology, SFGIO has been demanding more powers, in line with those enjoyed by Income Tax Authorities, Customs Department, Enforcement directorate, etc. [Section 211]

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8. Prohibition of insider trading

New clause has been introduced with respect to prohibition of insider trading of securities. The government proposes to tighten the insider trading regulations, prescribing in five years of jail for key company executives and directors found guilty. [Section 195]

9. Fraud defined

The term "Fraud" has for the first time been defined in the Bill. Any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than months but which may extend to ten years and shall also be liable to fine which shall not be less than amount involved in the fraud, but which may extend to three times the amount involved in the fraud. [Section 447]

10. National Company Law Tribunal and Appellate Tribunal

The Central Government shall, by notification constitute a Tribunal to be known as National Company Law Tribunal and an Appellate Tribunal to known as National Company law Appellate Tribunal. [Section 408 and 410]

11. Special Court

The Central Government may, for the purpose of providing speedy trail of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary.

12. Constitution of National Financial Reporting Authority

The Central Government may, by notification, constitute a National Financial Reporting Authority to provide for matters-relating to accounting and auditing under this Act. [Section 132]

1.9 JOINT STOCK COMPANY

With the technological improvements, the scale of operations of business has increased. The requirements for finances and managerial resources have gone up. The traditional forms of organization such as sole-proprietorship, joint Hindu family, partnership, could not meet the requirements of business. The company form of organization has developed as the most suitable alternative.

A joint stock company is an association of persons joining together for carrying on business and having a separate legal entity. The persons joining the business contribute to the stock of the company and are called shareholders.

- A company is registered under the Companies Act 2013.
- A company is an artificial person created under law.
- It is a voluntary association of persons, having separate legal entity with limited liabilities of shareholders.
- The company has perpetual succession and common seal.
- The shareholders are the real owners of the company and elect Board of Directors for carrying on managerial activities.
- Shares of the company are transferrable without disturbing its continuity.

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Definitions

James Stephenson: A company is 'an association of many persons who contribute money or money's worth to a common stock and employs it is some trader business and who share the profit and loss (as the case may be) arising there from'.

Prof. L.H. Haney, "A Joint Stock Company is a voluntary association of individuals for profit, having a capital divided into transferable shares, the ownership of which is the condition of membership".

Chief Justice Marshall, "A corporation is an artificial being, invisible, intangible and existing only in contemplation of the law. Being a mere creation of law, it possesses only the properties which the charter of its creation confer upon it either expressly or as incidental to its very existence."

Section 2(20) of the Companies Act, 2013 provided that "Company means a company incorporated under this Act or under any previous Company Law".

Characteristics of Joint Stock Company

Following are the characteristics of a Joint Stock Company:

1. **Artificial Person.** A company is created under law and exists independent of its members. Like a person, a company can own property, own bank accounts, undertake agreements with outsiders, raise capital, borrow money, sue others. Therefore, a company is called an artificial person.
2. **Formation.** A company is formed under Companies Act, 2013, There are a number of formalities, which need to be completed before a company is formed. A number of documents are prepared which are submitted at the time of registration. The formation of a company is complicated and time-consuming process.
3. **Independent Legal Entity.** The company is created under law. It has a separate legal entity apart from its members. A company acts independently of its members. The company is not bound by the act of its members, and members do not act as agents of the company. A person can own its shares and can be its creditor too. The life of the company is independent of the lives of its members. The company can sue and be sued in its own name.
4. **Limited Liability.** The liability of its shareholders is limited to the value of shares they have purchased. In case the company incurs huge liabilities, the shareholders can only be called upon to pay the unpaid balance of their shares. The company being a separate legal entity can incur debts in its own name and the shareholders will not be personally liable for that. However, shareholders of an unlimited company have unlimited liability. The liability of members of a company limited by guarantee is limited to the guaranteed amount.
5. **Common Seal.** A company being an artificial person cannot put its signatures. The law requires every company to have a seal and get its name engraved on it. The seal of the company is affixed on all important documents and contracts as a token of signature. The directors must witness the affixation of the seal.
6. **Transferability of Shares.** The shares of a company can be transferred by its members. Whenever the members want to dispose off the shares, they can do by following the procedure devised for this purpose. Under Articles of Association, the company can put certain restrictions on the transfer of shares, but it cannot altogether stop it. However, private companies can put more restrictions on transferability of shares, virtually making it zero.

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7. **Separation of Ownership and Management.** The share holders of a company are widely scattered. A shareholder may like to invest money but may not be interested in its management. The companies are managed by Board of Directors. The ownership and management are in two separate hands. The shareholders do not get any right to participate in company management. The right to manage company affairs is vested in the directors who are elected representatives of the shareholders.

1.10 FORMATION OF A JOINT STOCK COMPANY

The promotion of every business requires a process to be followed. A number of formalities have to be completed before a unit can come into existence. The promotion of a company involves the conceiving of a business opportunity and taking the initiative to give it a practical shape.

Stages for Promotion of a Company

Following are the stages for promotion and incorporation of a company:

A. Promotion Stage

B. Incorporation/Registration Stage

C. Floatation or Raising of Capital Stage

D. Commencement of Business Stage

A. Promotion Stage: Promotion of a company is the first important stage where necessary steps are taken for bringing the idea of a company into practice. It is the process of planning and arranging various inputs required for running an enterprise. Promotion involves identification of an opportunity, studying the feasibility, assembling the requirements, financing the proposition, etc. All these activities are undertaken by the promoters who perform various stages of promotion.

Promoter: Section 2(69) of the Company Act, 2013 defines the promoter as a person:

(a) Who has been named as such in the prospectus or is identified by the Company in the annual statement.

(b) Who has control over the affairs of the company, directly or indirectly.

(c) In accordance with whose advice, direction or instructions the Board of Directors of the Company is accustomed to act.

A promoter is a person who initiates the setting up of a company and controls its working. A promoter may be an individual, a firm or body corporate.

Following are the steps in promotion:

1. **Identification of Business Opportunity.** The first stage in promotion of a business is the identification of a business opportunity. The promoter visualizes that there are opportunities for a particular type of business and it can be run profitably. The idea may be to exploit a new area of natural resources or a venture in the existing line of business. He develops the ideas with the help of technical experts of that field. When the promoter feels that there are opportunities in taking up a particular venture then the idea is taken further.

2. **Detailed Investigation**. At the second stage, various factors relating to the business are studied from a practical point of view. The demand for the product is estimated and the likely business share is determined. After determining the prospective

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demand, the promoter thinks of arranging finances, labour, raw materials, power, etc. The cost structure of the product is analysed to find out profitability from the venture. An expert opinion is sought upon the viability of the project.

3. **Signatories to Memorandum**. The promoters decide the names of persons to be the signatories to the memorandum of association. Usually, the first signatories to the memorandum become the first directors of the company. The written consent of the persons to act as directors is taken and they are asked to take qualifying shares of the company.
4. **Appointment of professionals.** The next stage is of raising funds and deciding about various contracts. So, promoters appoint the brokers and underwriters to ensure the availability of capital by sale of company's securities. They also appoint solicitors to deal with legal matters of the company.
5. **Preparing necessary documents.** The promoters take steps to prepare various legal documents of the company which have to be submitted to the Registrar of Companies at the time of incorporation. The documents which are required to be prepared include Memorandum of Association, Articles of Association, Prospectus, etc.

B. **Incorporation/Registration Stage:** A company being an artificial entity comes into existence only after its registration with the Registrar of Companies. A number of formalities have to be completed before a request is made to the Registrar for its registration. A legal process has to be completed before a company obtains a separate legal entity. After ensuring that all necessary documents are filed, the Registrar of Companies issues a Certificate of Incorporation. With this Certificate, the company becomes a separate legal entity.

Steps for Incorporating a Company:

Before getting a company registered, a number of steps have to be taken up:

1. **Application for approval of name.** The first step in getting a company incorporated is of obtaining the approval of name from Registrar of Companies. A company may adopt any name which is not prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 and which is not identical with or does not closely resemble the name of a company already registered. The applicant should give a maximum of six names in order to avoid delay. The application for the approval of name should be sent to the Registrar of Companies of the state in which the company is to be situated. The Registrar is expected to approve the name within 7 days of the receipt of application. The proposed name must be registered within 3 months from the date of intimation by the Registrar failing which the promoter will have to apply again to the Registrar for the revalidation of the approval.
2. **Preparation of Memorandum of Association.** The preparation of Memorandum of Association is the next step in the incorporation of a company. It is the constitution of the company which describes its objects and scope and the relation with outside world. The memorandum is to be signed by at least seven persons if it is a public limited company and atleast two persons in case of a private limited company. The memorandum should be printed and properly stamped.
3. **Preparation of Articles of Association**. Besides memorandum, the promoters will also prepare Articles of Association. It is a document which contains rules and regulations relating to the internal management of the company. A public limited company may not file its own Articles of Association, it may adopt model clauses prescribed in Table A, Schedule I of the Act. A private limited company is also required to submit its Articles duly signed by the signatories.
4. Preparation of other documents.

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The promoters are also expected to prepare the following documents at the time of incorporating the company:

(i) **Power of Attorney**: With a view to fulfilling various formalities that are required for incorporation of a company, the promoters may execute a power of attorney in favour of one of them or an advocate or some professional to carry out the formalities required for registration.

(ii) **Consent of Directors**: A list of persons who have agreed to become the first directors of the company along with their consent should be filed

(iii) **Particulars of Directors**: Where the company names in its Articles the persons who are to act as directors, the particulars of such directors may be filed with the Registrar at the time of registration.

(iv) **Affidavit by Subscribers and First Directors** : Affidavits from each of the subscribers to the memorandum and from persons named as the first directors, if any, in the articles that he/she is not convicted of any offence in connection with the promotion, formation or management of any company.

(v) **Address for Communication and Notice of Registered Address** : Address for communication till the company acquires its registered office shall also be supplied. A company is required to have a registered office within 15 days of incorporation and within 30 days of incorporation, it must submit the verification of the registered office in the prescribed manner.

(vi) **Statutory Declaration:** A statutory declaration to the effect that all the requirements of this Act and the rules made there, under in respect of registration have been complied with. The declaration is to be signed by an advocate, chartered accountant, cost accountant or company secretary who is engaged in the formation of the company. A person named in the articles as a director, manager or secretary of the company should also sign this declaration.

5. **Payment of fee.** At the time of registration, prescribed registration fee and filing fee for each document filed for registration are to be paid at the Registrar's office. The fee to be paid varies with the amount of nominal capital in case of companies with share capital or according to the number of members in case of companies without share capital.

INCORPORATION CERTIFICATE

When all the required documents are filed with the Registrar along with the requisite fee, a scrutiny is made. When all documents are found in order, the Registrar will enter the name of the company in the Register of Companies and issues a Certificate of Incorporation. The date mentioned in the certificate is the date of incorporation of the company.

Effect of Certificate of Incorporation

After the incorporation, the company becomes a separate legal entity with perpetual succession. The certificate of incorporation is a conclusive proof of the existence of the company. Once a certificate of incorporation is issued, the company comes into existence from the date mentioned on it. Any deficiency or infirmity found in the incorporation of the company later on will not influence the existence of the company and the incorporation will remain valid.

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Specimen of Certificate of Incorporation

GOVERNMENT OF INDIA MINISTRY OF CORPORATE AFFAIRS

Registration of Companies, New Delhi

Certificate of Incorporation

Pursuant to sub-section (2) of section 7 of the Companies Act, 2013 and rule 8 of the Companies (Incorporation) Rules, 2014.

I hereby certify that...............is incorporated on this eight day of December Two Thousand Fifteen, Under the Companies Act, 2013 and that the company is limited by shares.

The CIN of the company is ....

Given under my hand at New Delhi this eighth day of December Two Thousand Fifteen.

Sd.

Registrar of Companies

New Delhi

C. Floatation or Raising of Capital Stage: After going through the incorporation formalities, the next stage will be to raise funds.

A public or private company having share capital cannot commence business unless minimum subscription as stated in the prospectus has been subscribed. A company not having share capital may commence business after obtaining certificate of incorporation. The amount stated for allotment should be duly received in cash and allotment has been made properly.

Following steps are required to raise funds from the public:

(i) SEBI approval. SEBI (Securities Exchange Board of India) is a regulatory body to control capital markets in India. A public company is required to submit relevant information with the SEBI before issuing securities in the capital market. The companies are required to give information according to guidelines for disclosure and investor protection 2000'. So, prior permission of SEBI is required before raising funds from the public.

(ii) Filing of prospectus. A prospectus or a 'statement in lieu of prospectus[7] has to be filed with the registrar of companies. A prospectus is a document inviting general public to subscribe to the shares or debentures of the company. The investors make-up their mind about investments on the basis of information contained in the prospectus.

(iii) Appointment of bankers, brokers, underwriters. The bankers are appointed to receive application money from the public. The application money goes to the bank account of the company. The brokers encourage public to subscribe to the shares offered by the company. If the company is not sure of selling the whole lot of shares, it may appoint underwriters. The brokers purchase unsold shares themselves and charge commission for this service.

(iv) Minimum subscription. In order to prevent companies to start business with inadequate funds, a minimum subscription is fixed. A company must sell a minimum number of shares before starting the next process. This minimum number is called minimum subscription. As per the rules of SEBI, a company must receive 90 per cent of the issued amount within a period of 120 days from the issue of prospectus. In case the company does not receive the minimum subscription then it must return the application money within the next 10 days.

(v) Application to Stock exchange. A company must get itself listed in a stock exchange before selling the securities to general public. The company must make application to atleast one stock exchange for a permission to deal in its stocks. The stock exchange authorities verify the financial soundness and other aspects of the company. After satisfying from the information of the company, the name of the company is listed in the exchange. If the company fails to get permission from the stock exchange within ten weeks from the date of closure of subscription list then the allotment will become void and money received on applications must be returned within eight days.

(vi) Allotment of shares. After getting the shares listed, the company makes allotment of shares. A list is prepared giving details about names and addresses of all the shareholders, and the number of shares allotted etc. The company has to submit a return of allotment with the registrar giving details of shares allotted to each shareholder.

D. Commencement of Business: After obtaining the certificate of incorporation, a company not having share capital can commence business. The companies having share capital, whether public company or private company, cannot commence business before obtaining the certificate of commencement of business. The Companies Act, 2013 provides that companies having share capital shall not commence any business or exercise any borrowing power without complying with the following requirements:

(i) Declaration by a Director: A declaration needs to be filed by a director with the Registrar that every subscriber to the memorandum has paid the value of shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and one lakh rupees in case of a private company on the date of making this declaration.

(ii) Filling of Verification of Registered Office: The company shall file with the Registrar a verification of registered office in the prescribed form.

The Registrar will scrutinize all those documents and if he is satisfied, then he issues a Certificate of Commencement of Business. The grant of this certificate computes the process of formation of a company. The company can start its business activities from the date of issue of the certificate.

Relevance of Certificate of Commencement

- This certificate is a legal document and proof that formation of the company is complete.
- This certificate is a concluding evidence that the company is entitled to commence its business.
- It is also a declaration that every subscriber to the memorandum has paid the value of shares agreed to be taken by him.
- The paid up share capital is not less than five lakh rupees in case of a public company and one lakh rupees in case of a private company.

1.11 MEMORANDUM OF ASSOCIATION (MOA)

The Memorandum of Association is the constitution of the company and provides the foundation on which its structure is built. It is the principal document of the company and no company

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can be registered without the memorandum of association. It defines the scope of the company's activities as well as its relation with the outside world.

The company law defines it as per Section 2 (56) of the Companies Act, 2013, "The memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.

Purpose

The main purpose of the memorandum is to explain the scope of activities of the company. The prospective shareholders know the areas where company will invest their money and the risk they are taking in investing the money. The outsiders will understand the limits of the working of the company and their dealings with it should remain within the prescribed scope.

Clauses of memorandum

The memorandum of association contains the following contents:

1. **The Name Clause.** A company being a separate legal entity must have a name. A company may select any name which does not resemble the name of any other company and it should not contain the words like king, queen, emperor, government bodies and the names of world bodies like U.N.O., W.H.O., World Bank, etc. The name should not be objectionable in the opinion of the government. The word 'Limited' must be used at the end of the name of a Public and 'Private Limited' is used by a Private Company. These words are used to ensure that all persons dealing with the company should know that the liability of its members is limited. The name of the company must be painted outside every place where business of the company is carried on.

   If the company has a name which is undesirable or resembles the name of any other existing company, this name can be changed by passing an ordinary resolution.

2. **Registered Office Clause.** Every company should have a registered office, the address of which should be communicated to the Registrar of Companies. This helps the Registrar to have correspondence with the company. The place of registered office can be intimated to the Registrar within 30 days of incorporation or commencement of business, whichever is earlier.

   A company can shift its registered office from one place to another in the same town with intimation to the Registrar. But if the company wants to shift its registered office from one town to another town in the same state, a special resolution is required to be passed. If the office is to be shifted from one state to another state it involves alteration in the memorandum.

3. **Object Cause.** This is one of the important clauses of the Memorandum of Association. It determines the rights and power of the company and also defines its sphere of activities: The object clause should be decided carefully because it is difficult to alter this clause later on. No activity can be taken up by the company which is not mentioned in the object clause. Moreover, the investors, i.e. shareholders will know the sphere of activities which the company can undertake. The choice of the object clause lies with the subscribers to the memorandum. They are free to add anything to it provided it is not contrary to the provisions of the Companies Act and other laws of the land.

   The object clause can be altered to enable a company to carry on its activities more economically or by improved means to carry on some business which under existing circumstances may conveniently be combined with the object clause.

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4. **Liability Clause.** This clause states that the liability of the members is limited to the value of shares held by them. It means that the members will be liable to pay only the unpaid balance of their shares. The liability of the members may be limited by guarantee. It also states the amount which, every member will undertake to contribute to the assets of the company in the event of its winding-up.
5. **Capital Clause.** This clause states the total capital of the proposed company. The division of capital into equity shares capital and preference share capital should also be mentioned. The number of shares in each category and their value should be given. If some special rights and privileges are conferred on any type of shareholders, mention may also be made in the clause to enable the public to know the exact nature of capital structure of the company.

   The capital clause can be altered by passing a special resolution and by obtaining the approval of the Company Law Board.
6. **Name of Nominee in case of One Person Company**: In case of one person company, memorandum must state the name of the person who, in the event of death of the subscriber or his inability to act shall become the member of the company.
7. **Association Clause.** This clause contains the names of signatories to the memorandum of association. The memorandum must be signed by atleast seven persons in the case of a public limited company and by at least two persons in case of private limited company. Each subscriber must take at least one share in the company. The subscribers declare that they agree to incorporate the company and agree to take the shares stated against their names. The signature of subscribers is attested by at least one witness each. The full addresses and occupations of subscribers and the witnesses are also given.

1.12 ARTICLES OF ASSOCIATION (AOA)

The rules and regulations which are framed for the internal management of the company are set out in a document named Articles of Association. The articles are framed to help the company in achieving its objectives set out in memorandum of association. It is a supplementary document to the memorandum.

Purpose

The purpose of preparing Articles of Association is to frame various rules and regulations for the internal working of the company. The articles will act as a guide to all those persons who are required to take various decisions. The written document helps in improving the day to day working and decision maker also acts within their authority.

Section2(2) of the Companies Act, 2013, "Articles of association of the company as originally framed or as altered from time to time in pursuance of any previous companies law or of this act."

The private companies limited by shares, companies limited by guarantee and unlimited companies must have their articles of association. A public company limited by shares may or may not have its own Articles of Association. As per Companies Act, it is not obligatory on the part of a public company limited by shares to prepare and register Articles of Association along with Memorandum of Association. However, such a company may adopt all or any of the regulations contained in the model set of Articles given in Table A in Schedule I of the Act. It means the company can partly frame its own articles and partly incorporate some of the regulations in Table A. Unless the company prepares its own articles, regulations of Table A shall be applicable in the same manner as if they were contained in its own registered articles.

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The articles cannot contain anything contrary to the Companies Act and also to the memorandum of association. Each subscriber to the memorandum must sign the articles in the presence of at least one witness.

Nature of Articles of Association

(i) Articles of association are subordinate to memorandum of association,

(ii) These are controlled by memorandum.

(iii) Articles help in achieving the objectives laid down in the memorandum.

(iv) Articles are only internal regulations over which members exercise control.

(v) Articles lay down the regulations for governance of the company.

Contents of Articles of Association

(i) Share capital shares their value and their division into equity and preference shares, if any.

(ii) Rights of each class of shareholders and procedure for variation of the rights.

(ii) Procedure relating to the allotment of shares, making of calls and forfeiture of shares.

(iv) Increase, alteration and reduction of share capital.

(v) Rules relating to transfer or transmission of shares and the procedure to be followed for the same.

(vi) Lien of the company on shares allotted to the members for the amount unpaid in respect of such shares and the procedure in respect thereof.

(vii) Appointment, remuneration, powers, duties etc. of the directors and officers of the company.

(viii) Constitution and composition of Audit Committee, Remuneration Committee, CSR Committee.

(ix) Procedure for conversion of shares into stock and vice versa.

(x) Notice of the meetings, voting rights of members, proxy, quorum, poll, etc.

(xi) Audit of accounts, transfer of amount of reserves, declaration of dividend, etc.

(xii) Borrowing powers of the company and the mode of exercise of those powers.

(xiii) Issue of share certificates including procedure for issue of duplicate shares.

(xiv) Winding up of the company.

Alteration of Articles of Association

The articles of association can be altered by passing a special resolution. Certain restrictions are imposed on the nature and extent of the alternation that may be made.

(a) The change should not be violating the provisions of the Companies Act.

(b) It should not be contrary to the provisions of the memorandum of association.

(c) The alteration must not have anything illegal.

(d) The alteration should not adversely affect the minority shareholders.

1.13 GOVERNMENT COMPANY

A government company means any company in which not less than 51% of the paid-up share capital is held by the Central Government and / or by any State Government(s) or partly by the Central Government and partly by one or more State Government.

Such companies have to follow all provisions of the Indian Companies Act, 1956. It has to be registered under the Indian Companies Act, 1956.

Examples: Hindustan Machine Tools, Bharat Heavy Electricals Ltd.

A public enterprise incorporated under the Indian Companies Act, 1956 is called a government company. These companies are owned and managed by the central or the state government. According to Indian Companies Act, 1956, a government company means "any company in which not less than 51 percent of the paid up share capital is held by the central or by state government and partly by the central government and includes a company which is a subsidiary of Government Company". These companies are registered as private limited companies though their management and their control vest with the government. This is a type of organization where both the government and private individuals are shareholders. Sometimes these companies are called as a mixed ownership company.

The following are some of the essential features of a government company:

(i) It is formed under the provisions of the Indian Companies Act, 1956.

(ii) The total share capital or 51 percent or more of share capital is held by the government.

(iii) It enjoys the status of a legal entity and therefore it can sue or be sued by others.

(iv) The finance of a government company is obtained from the government and from private share holders.

(v) The employees are governed by the rules prescribed for the company by the board of directors.

(vi) It is not subject to budgeting, accounting and audit rules applicable to a government department.

(vii) The directors are nominated by the government depending upon participation of private capital.

1.14 KEY MANAGERIAL PERSONNEL

As per Section 203 (1) read with Rule 8 of Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, every listed company and every other public company having a paid up share capital of ten crore rupees or more shall have the following whole time key managerial personnel's,

(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

In this regard the following points are to be noted:

1. An individual shall not be appointed or reappointed as the chairperson of the company as well as the managing director or chief executive officer of the company at the same time unless (a) the articles of such a company provide otherwise or (b) the company does not carry multiple businesses.
2. Appointment of whole-time key managerial personnel should be in a Board meeting and by way of passing a Board resolution. The Board resolution should contain the terms and conditions of the appointment including the remuneration of such personnel.
3. If the office of any whole-time key managerial personnel is vacated (by resignation or otherwise), the resulting vacancy shall be filled-up by the Board of directors at a Board meeting within six months from the date of such vacancy.

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4. Whole-time key managerial personnel can't hold office in more than one company except in its subsidiary company at the same time. However, with the permission of the Board of directors, such key managerial personnel may be appointed as a director in any other Company. To clarify, a whole time key managerial person can't hold any office in other companies at the same time (either as a director or otherwise) except (a) in its subsidiary company (b) as a director in any other company with the previous approval of Board.
5. A person can't be appointed as a managing director of a company if he is the managing director or manager of another company except if such person is the managing director or manager of not more than one company. He can be appointed as a managing director if his appointment is approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting. For such Board meeting specific notice should be been given to all the directors then in India.

ROC filing for appointment of key managerial personnel and/or changes in managerial personnel:

The Company is required to file a form MR. 1 for appointment of key managerial personnel (i.e. Managing Director, Whole Time Director or Manager, Chief Executive Officer (CEO), Company Secretary and Chief Financial Officer (CFO)).

Form MR I should be filed within sixty days from the date of appointment.

In addition to the aforesaid, form DIR 12 should also be filed with the Registrar of Companies for appointment and/or changes in the key managerial personnel (s) within thirty days of such appointment or change, as the case may be.

Disclosures and statement related to key managerial personnel (kmp), directors and other employees in the board report

1. Every Listed Company shall make the following disclosures in its Board report related to key managerial personnel's:
   (a) The ratio of the remuneration of each director to the median remuneration of the employees of the company for the financial year; (NOTE: "median" means the numerical value separating the higher half of a population from the lower half and the median of a finite list of numbers may be found by arranging all the observations from lowest value to highest value and picking the middle one)
   (b) The percentage increase in remuneration of each director, Chief Financial Officer, Chief Executive Officer, Company Secretary or Manager, if any, in the financial year;
   (c) The percentage increase in the median remuneration of employees in the financial year;
   (d) The number of permanent employees on the rolls of company;
   (e) The explanation on the relationship between average increase in remuneration and company performance;
   (f) Comparison of the remuneration of the Key Managerial Personnel against the performance of the company;
   (g) Variations in the market capitalization of the company, price earnings ratio as at the closing date of the current financial year and previous financial year and percentage increase over decrease in the market quotations of the shares of the company in comparison to the rate at which the company came out with the last public offer

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in case of listed companies, and in case of unlisted companies, the variations in the net worth of the company as at the close of the current financial year and previous financial year;

(h) Average percentile increase already made in the salaries of employees other than the managerial personnel in the last financial year and its comparison with the percentile increase in the managerial remuneration and justification thereof and point out if there are any exceptional circumstances for increase in the managerial remuneration;

(i) Comparison of the each remuneration of the Key Managerial Personnel against the performance of the company;

(j) The key parameters for any variable component of remuneration availed by the directors;

(k) 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

(l) Affirmation that the remuneration is as per the remuneration policy of the company.

2. The board's report shall include a statement showing the name of every employee of the company, who:

(a) If employed throughout the financial year, was in receipt of remuneration for that year which, in the aggregate, was not less than sixty lakh rupees;

(b) 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 five lakh rupees per month;

(c) 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 and holds by himself or along with his spouse and dependent children, not less than two percent of the equity shares of the company.

(d) The said statement shall also indicate—

- designation of the employee;
- remuneration received;
- nature of employment, whether contractual or otherwise;
- qualifications and experience of the employee;
- date of commencement of employment;
- the age of such employee;
- the last employment held by such employee before joining the company;
- the percentage of equity shares held by the employee in the company within the meaning of clause (iii) of sub-rule (2) above and
- whether any such employee is a relative of any director or manager of the company and if so, name of such director or manager.

(e) Particulars of employees posted and working in a country outside India, not being directors or their relatives, drawing more than sixty lakh rupees per financial year or five lakh rupees per month, as the case may be, as may be decided by the Board, shall not be circulated to the members in the Board's report, but such particulars

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shall be filed with the Registrar of Companies while filing the financial statement and Board Reports. Such particulars shall be made available to any shareholder on a specific request made by him in writing before the date of such Annual General Meeting wherein financial statements for the relevant financial year are proposed to be adopted by shareholders and such particulars shall be made available by the company within three days from the date of receipt of such request from shareholders. In case of request received even after the date of completion of Annual General Meeting, such particulars shall be made available to the shareholders within seven days from the date of receipt of such request.

Member

In relation to a company, means -

(i) The subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;

(ii) Every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company;

(iii) Every person holding shares of the company and whose name is entered as a beneficial owner in the records of a depository;

Net Worth

Net worth means the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write-back of depreciation and amalgamation.

Officer

Who is in default, for the purpose of any provision in this Act which enacts that an officer of the company who is in default shall be liable to any penalty or punishment by way of imprisonment, fine or otherwise, means any of the following officers of a company, namely:

(i) Whole-time director;

(ii) Key managerial personnel;

(iii) Where there is no key managerial personnel, such director or directors as specified by the Board in this behalf and who has or have given his or their consent in writing to the Board to such specification, or all the directors, if no director is so specified;

(iv) Any person who, under the immediate authority of the Board or any key managerial personnel, is charged with any responsibility including maintenance, filing or distribution of accounts or records, authorizes, actively participates in, knowingly permits, or knowingly fails to take active steps to prevent, any default;

(v) Any person in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act, other than a person who gives advice to the Board in a professional capacity, 20.

(vi) Every director, in respect of a contravention of any of the provisions of this Act, who is aware of such contravention by virtue of the receipt by of any proceedings of the Board or participation in such proceedings without objecting to the same or where such contravention had taken place with his consent or connivance;

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(vii) In respect of the issue or transfer of any shares of a company, the share transfer agents, registrars and merchant bankers to the issue or transfer;

1.15 ONE PERSON COMPANY

A view concept of 'one person company' has been incorporated in the Companies Act, 2013. This concept is widely accepted in developed countries like the UK and one of our neighbouring countries China. Minimum two members are required to form a private company and minimum seven members are required for a public company under the Companies Act. This is looked as a barrier by businessmen and professionals who do not want any participant in business. But with introduction of one person company it will be possible to form a company with only one member. One person company provides benefit of both forms of business- Proprietorship and Company. With formation of a one person company, business can be run in same way as a proprietorship, of course, by complying with law and keeping liability of the member limited by share or guarantee, as the case may be.

Section 2(62) of the Act defines one person company. As the name suggests, it means a company which has only one person as a member and where legal and financial liability is limited to the company only and not to that person (i.e., liability is limited). Section 2(68) of the Act provides for the definition of a private company to include one person company. This implies that all the provisions of the Act applicable to a private company shall also be applicable to an one person company, unless otherwise excluded from the compliance. Also section 3 of the Act, further clarifies the fact that one person company shall be treated as a private company for all legal purposes with only one member.

Formation of One Person Company (OPC)

The 2013 Act allows the formation of a one person company (OPC). The following provisions regarding formation of OPCs may be noted:

1. For forming a private company being a one person company, one person should subscribe his name to memorandum and comply with the requirements of the 2013 Act in respect of registration. (Section 3(l)(c) of the 2013 Act.)
2. Only an Indian citizen and resident of India is eligible to incorporate a one person company. This means body corporate and persons resident outside India cannot set up.
3. To ensure smooth perpetual succession of OPCs, the first proviso to section 3(1) of the 2013 Act provides that the memorandum should indicate the name of the other person (nominee) who shall become the member of the company in the event of the subscriber's death or his incapacity to contract. Prior consent of the nominee should be obtained in prescribed form for mentioning his name in memorandum. Such written consent shall be filed with Registrar of Companies at the time of incorporation of the OPC along with its memorandum and articles.
4. The nominee person may withdraw his consent in such manner as may be prescribed. (Second proviso to section 3(1) of the 2013 Act).
5. The member of the-OPC may at any time change the nominee in such manner as may be prescribed: (Third-proviso to section 3(1) of the, 2013 Act).
6. The member of a One Person Company shall intimate the company the change, if any, in the name of the person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as maybe prescribed. The company shall intimate such change to ROC within such time and in such manner as may be prescribed.

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(Fourth proviso to section 3(1) of the 2013 Act.) Such change in the name of the nominee shall not be deemed to be an alteration of the memorandum (Firth proviso to section 3(1) of the 2013 Act.)

Penalty

Where a one person company or any of its officer contravenes the provisions, then a fine shall be composed which may extend to ten thousand rupees and a further fine which may extend to one thousand rupees for everyday of default.

1.16 PRIVATE COMPANY

A Private Company can be formed with the association of atleast two members but the maximum number of share holders, cannot exceed 200. A Private Company restricts the transfer of its shares, prohibits any invitation to public for subscribing to share.

According to [Sec. 2(68)], a private company is a very suitable form for carrying on the business of family and small concerns as the minimum number of members required is only tow. [Sec. 2(68)] of the Companies Act, 2013 deals with the definition of a private company.

The definition of private company is quoted u/s 2(68) of the Companies Act, 2013. It means a company which has paid-up capital as may be prescribed and by its articles:-

(i) restricts the right to transfer its shares,

(ii) limits the numbers of its members to two hundred (excluding members who are or were in the employment of the company); [Maximum no has been increased from 50 to 200 as per Companies Act, 2013].

(iii) Prohibits any invitation to the public to subscribe for any shares or debentures of the company, and

(iv) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

1.17 DIFFERENCE BETWEEN MEMORANDUM OF ASSOCIATION AND ARTICLES OF ASSOCIATION

	Memorandum of Association	Articles of Association
1	**Scope:** The memorandum is a sort of constitution of the company. The company works in the framework given in the memorandum	The articles contain bye-laws for the day-to-day working of the company. Articles are framed in the orbit of the memorandum of association.
2	**Necessity:** The memorandum is a must for getting a company registered.	Public companies may not have their own articles, but can adopt Table A of Schedule as its articles. Private companies, companies limited by guarantee and unlimited companies must have their own articles.
3	**Provisions:** The memorandum cannot contain anything contrary to Companies Act.	The articles of association are subordinate to the memorandum and Companies Act and cannot contain anything contrary to both.

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4	**Limitation:** A company cannot do anything beyond the scope of the memorandum. Any act beyond its scope done will be void.	Anything done beyond the scope of the articles will not be void and it can be ratified by passing a special resolution.
5	**Relationship:** It regulates the relationship between company and the members of the public.	It defines relationship between company and the members and among members themselves.
6	**Alternation:** Memorandum can be altered only under special circumstances and involves many formalities.	Alteration of articles is not difficult. It can be altered by passing special resolution.

1.18 PROSPECTUS

After getting the company incorporated, promoters will raise finances. The public is invited to purchase shares and debentures of the company through an advertisement. A document containing detailed information about the company and an invitation to the public subscribing to the share capital and debentures is issued. This document is called 'prospectus'. Private companies cannot issue a prospectus because they are strictly prohibited from inviting the public to subscribe to their shares. Only public companies can issue a prospectus.

Section 2(70) of Companies Act, 2013 defines a prospectus as :

"Any document described or issued as a prospectus and includes a red herring prospectus referred to in Sec. 32 or shelf prospectus referred to in Sec. 31 or any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of a body corporate."

In simple words, a prospectus is a document, notice, circular, advertisement issued for inviting public to subscribe to the shares or debentures of a company.

A prospectus should have the following essentials:

(i) There must be an invitation offering to the public.

(ii) The invitation must be made on behalf of the company or intended company.

(iii) The invitation must be to subscribe or purchase.

(iv) The invitation must relate to shares or debentures.

A prospectus must be filed with the Registrar of Companies before it is issued to the public. The issue of prospectus is essential when the company wishes the public to purchase its shares or debentures.

A prospectus brings to the notice of the public that a new company has been formed. The company tries to convince the public that it offers best opportunity for their investment. A prospectus outlines in detail the terms and conditions on which the shares or debentures have been offered to the public. Every prospectus contains an application form on which an intending investor can apply for the purchase of shares or debentures. A company must get minimum subscription within 120 days from the issue of prospectus. If it fails to obtain minimum subscription from the members of the public within the specified period, then the amount already received from public is returned. The company cannot get a certificate of commencement of business because the public is not interested in that company.

1.19 LEGAL REQUIREMENTS IN RELATION TO A PROSPECTUS

(1) Dating of prospectus (Section 26)

A prospectus issued by a company must be dated. Section 26 further provides that the date on the prospectus shall, unless contrary is provide, be taken as the date of the publication of the prospectus. This ensures a prima facie evidence of the date of its publication. However, this evidence may be rebutted by a contrary evidence.

(2) Registration of prospectus (Section 27(7))

(i) **Nature.** A prospectus must not be issued unless a copy thereof has been delivered to the Registrar for registration.

(ii) **Time Limit** Registration must be made on or before the publication of the prospectus.

(iii) **Signatures.** The copy sent for registration must be signed by every person who is named in the prospectus as a director or a proposed director of the company or by his agent duly authorized in writing.

(iv) **Date of issue of prospectus.** The date of issue of prospectus is the date on which the prospectus first appears as a newspaper advertisement.

(v) **Contents.** Prospectus should—

   (a) State that a Copy thereof has been delivered to ROC for registration,

   (b) Specify documents endorsed or attached to the copy so delivered, and

   (c) Contain an endorsement that the consent of Experts has been obtained.

(vi) **Enclosures**

   (a) Consent of the Expert to the Issue of Prospectus, where it contains a Report by an Expert,

   (b) Copy of every material contract appointing or fixing remuneration of a MD or Manager.

   (c) Copy of every other material contract. However, the following need not be enclosed—

   - Contract entered into in ordinary course of business, or
   - Contract entered into more than 2 years before the date of Prospectus.

   (d) Written statement from Auditors relating to the adjustments to figures of abridged Financial Statements along with reasons there for.

   (e) Consent of every person named therein as Auditor, Legal Adviser, Attorney, Solicitor, Banker or Broker of the Company/Intended Company to act in that capacity.

(vii) **Registration.** The prospectus must be issued within ninety days of its registration. If it is issued say 91 days after, it shall be deemed to be a prospectus a copy of which has not been delivered for registration.

(viii) **Penalty for non-registration of prospectus.** If a prospectus is issued without a copy thereof being delivered to the Registrar for registration or without the required documents or consent attached thereto, the company and every person knowingly party to the issue of the prospectus, shall be punishable with fine which may extend to ₹ 50000 which may extend to rupees three lakhs.

(ix) **Opening of subscription list.** Where a prospectus has been issued, no allotment of any shares shall be made until—

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(a) The beginning of the 5th day after prospectus is first issued; or

(b) Such later time as may be specified in the prospectus or

(c) The beginning of the 5th day after public notice is given. Such day is referred to as 'date of opening of subscription list'.

Disclosures to be made (Section 26)

Section 26 of the Companies Act requires every prospectus to disclose the matters specified in Schedule II of the Act. The Schedule is divided into three parts.

When Registrar can Refuse registration (Sec. 26)

The Registrar can refuse to register a prospectus if:

(a) it is not dated;

(b) it does not comply with the requirements of as to the matters and reports to be set out in it;

(c) it contains statements or reports of experts engaged or interested in the formation or promotion or management of the company;

(d) it includes a statement purported to be made by an expert without a statement that he has given and has not withdrawn his consent to the manner of its inclusion in the prospectus;

(e) it does not contain the consent in writing of directors and copy of the documents has not been filed or does not comply with the provisions with regard to the fact that a copy of it has been filed with the Registrar;

(f) it is not accompanied by the consent in writing of the auditor, legal adviser, solicitor, banker or broker of the company if named in the prospectus to act in that capacity.

CONTENTS OF PROSPECTUS

A prospectus is the most important document since the intending investors base their decisions on the facts and figures furnished in the prospectus. It is the window through which a prospective investor can look into the soundness of a company's venture. In order to protect the interests of the investing public against the frauds of the promoters, the Companies Act requires every company issuing a prospectus to observe a large number of regulations. Failure to observe them is made punishable with fine or imprisonment or both. Hence, utmost care should be taken in drafting a prospectus.

Section 26 of Companies Act, 2013 read with Rule-3 of Companies (Prospectus and Allotment of Securities) Rules, 2014

Under Section 26 and Rule 3, every prospectus shall be dated and signed and shall contain the following matters:

(A) MATTERS IN PROSPECTUS

(i) Names and addresses of the registered office of the company, company secretary, Chief Financial Officer, auditors, legal advisers, bankers, trustees, if any, underwriters and such other persons as may be prescribed;

(ii) Dates of the opening and closing of the issue, and declaration about the issue of allotment letters and refunds within the prescribed time;

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(iii) A statement by the Board of Directors about the separate bank account where all monies received out of the issue are to be transferred and disclosure of details of all monies including utilised and unutilised monies out of the previous issue in the prescribed manner;

(iv) Details about underwriting of the issue;

(v) Consent of the directors, auditors, bankers to the issue, expert's opinion, if any, and of such other persons, as may be prescribed;

(vi) The authority for the issue and the details of the resolution passed therefore;

(vii) Procedure and time schedule for allotment and issue of securities;

(viii) Capital structure of the company in the prescribed manner;

(ix) Main objects of public offer, terms of the present issue and such other particulars as may be prescribed;

(x) Main objects and present business of the company and its location, schedule of implementation of the project;

(xi) Particulars relating to—

(a) Management perception of risk factors specific to the project;

(b) Gestation period of the project;

(c) Extent of progress made in the project;

(d) Deadlines for completion of the project; and

(e) Any litigation or legal action pending or taken by a Government Department or a statutory body during the last five years immediately preceding the year of the issue of prospectus against the promoter of the company;

(xii) Minimum subscription, amount payable by way of premium, issue of shares otherwise than on cash;

(xiii) Details of directors including their appointments and remuneration, and such particulars of the nature and extent of their interests in the company as may be prescribed; and

(xiv) Disclosures in such manner as may be prescribed about sources of promoter's contribution;

(B) REPORTS IN PROSPECTUS

The prospectus must set out the following reports for the purposes of the financial information, namely:

(i) Reports by the auditors of the company with respect to its profits and losses and assets and liabilities and such other matters as may be prescribed;

(ii) Reports relating to profits and losses for each of the five financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries and in such manner as may be prescribed;

In case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out the reports relating to profits and losses for each of the financial years immediately preceding the financial year of the issue of prospectus including such reports of its subsidiaries;

(iii) Reports made by the auditors upon the profits and losses of the business of the company for each of the five financial years immediately preceding issue and assets and liabilities of its business on the last date to which the accounts of the business were made up,

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being a date not more than one hundred and eighty days before the issue of the prospectus :

In case of a company with respect to which a period of five years has not elapsed from the date of incorporation, the prospectus shall set out the reports made by the auditors upon the profits and losses of the business of the company for all financial years from the date of its incorporation, and assets and liabilities of business on the last date before the issue of prospectus; and

(iv) Reports about the business or transaction to which the proceeds of the securities are to be applied directly or indirectly.

(C) DECLARATION

The prospectus shall make a declaration about the compliance of the provisions of this Act and a statement to the effect that nothing in the prospectus is contrary to the provisions of this Act, the Securities Contracts (Regulation) Act, 1956 (42 of 1956) and the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the rules and regulations made there under.

The prospectus shall also state such other matters and set out such other reports, as may be prescribed.

1.20 COMPARATIVE STUDY OF COMPANIES ACT, 1956 AND COMPANIES ACT, 2013

The first Indian Companies Act was passed in 1850 for registration of companies. After independence, Companies Act 1956 was passed to register and regulate the working of companies. This act was amended a number of times and finally it has been replaced by Companies Act, 2013. Some important changes in the Companies Act, 2013 as compared to the Companies Act 1956 which are relevant for the syllabus of this class are mentioned as follows:

1. **Number of Members in Companies:** A private company can have a maximum of 200 members as per the new act whereas it was 50 under Companies Act, 1956. The increased number would provide greater scope for the operations of private companies. There is no limit on maximum number of members of a public company. The minimum number of members for starting a company (2 in case of a private company and 7 in case of public company) remained the same.
2. **One Person Company:** The concept of One Person Company (OPC) was incorporated in Companies Act 2013 whereas there was no such provision in the earlier act. A private limited company can be started by one person also.
3. **Concept of Small Company**. The latest Companies Act has also introduced the concept of small company for the first time. A small company is one whose share capital does not exceed Rs. 50 lakhs and its turnover does not exceed Rs. 2 Crore. The limits of capital and turnover may be changed but not beyond Rs. 5 Crore and Rs. 20 Crore respectively.
4. **Objective Clause:** Memorandum of Association contains ‘Object Clause’, defining the areas of activities the company will undertake. In Companies Act, 1956, the object clause was divided into three classes *i.e.,* the main, auxiliary and other objects. The Companies Act 2013 has now scrapped this classification and now only the objects for which the Company is incorporated are required to be mentioned in the Memorandum of Association.
5. **Statement in Lieu of Prospectus:** The statement in lieu of prospectus by private companies has been done away with. The Act of 2013 requires a detailed prospectus to be issued.

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6. **Commencement of Business:** As per the Companies Act, 1956, a private company could commence business after getting a 'Certificate of Incorporation. These Companies were not required to get a certificate of Commencement of Business. The public companies were required to get a Certificate of commencement before starting the business. Now the Companies Act, 2013 has stated that Companies having share capital, whether public or private, must acquire a 'Certificate of Commencement of Business' before starting the business.
7. **Corporate Identity Number:** As per the new act, the Registrar of Companies shall allot to the Company a 'Corporate Identity Number' (CIN) which shall be a distinct identity for the company and which shall also be included in the certificate of incorporation.
8. **Number of Directors:** The Companies Act, 2013 has raised the maximum number of directors from 12 to 15. A person can become director of maximum of 20 Companies instead of 15 Companies as prescribed in the Act of 1956. Out of the 20 Companies, he/she cannot be the director of more than ten public Companies at a time.
9. **Woman Director:** As per the new Act of 2013 it is mandatory that the prescribed class or classes of Companies shall have atleast one Woman Director.
10. **Use of Technology for Filling Information**: The new Act of 2013 has given statutory recognition to filing of applications, documents, etc. with the Registrar of Companies through electronic means.

1.21 PROMOTER

A promoter is a person who initiates the setting up of a company and controls its working. A promoter makes preliminary investigation and ensures about the future prospectus of the business. This stage includes all the processes starting from the inception of an idea to the completion of the project. It includes following steps:

(a) Identification of business opportunity

(b) Detailed investigation

(c) Signatories to Memorandum

(d) Preparing necessary documents.

Role and Importance of Promoter

A promoter can be defined as a person or group of persons who conceive the idea of setting up a new business, assess its feasibility and take necessary steps to arrange the basic requirements and establish a business unit say, a Company and put into operation. Promoter plays a pivotal role in the promotion of a company. He conceives the idea of business enterprise, analyses its prospects, works out a tentative scheme of organization, brings together the requisite men, material, machines and money and starts the enterprise.

Functions of a Promoter

The main functions of a promoter are as follow:

1. Planning and assessing the possibilities.
2. Discovering of idea for establishing a company.
3. Make detailed investigation about the demand for the product, availability of power, labour, raw material, etc.

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4. Find out suitable persons who are willing to act as first directors of the company and are ready to sign on the Memorandum of Association.
5. Selecting of bank, legal advisor, auditors and underwriters for the company.
6. To prepare essential documents of the company.
7. To prepare draft of the Memorandum of Association, Articles of Association, Prospectus of the company and get them printed,
8. To submit all the documents, required for incorporation with the Registrar.
9. To arrange for advertisement of prospectus of the company in the newspapers.
10. To meet all the preliminary expenses for floating of a company.
11. To make contracts with vendors, underwriters and managing director of the company.
12. To raise the required finances and get the company going.
13. To make proper arrangement for the office of the company.

Rights of Promoters

The rights of promoters are as follows:

1. Right to receive preliminary-expenses.
2. Right to receive remuneration for their services.
3. Right to receive the proportionate money from co-promoters.

Liability of the Promoters

The liabilities of promoters are as follows:

1. To disclose the liability and pay the secret profits if promoters have earned.
2. Liability is up to the completion of contracts.
3. Liability on statutory mistakes or fraud in the prospectus.
4. His property becomes liable for payment even after his death.

Types of Promoters

The task of business promotion may be carried out by an individual, a firm, a body corporate or a banker. Based on the nature of their operation the promoters can be classified into the following categories:

(a) **Professional Promoters:** These promoters are specialists in promoting new business ventures. They do it on a whole time basis as their occupation or profession. They initiate all the steps in establishing new enterprises and find out the persons who can finance it. After completing all the formalities they pass on the management to their owners or shareholders and then move to another new venture.

(b) **Financial Promoters:** These promoters float companies only during favorable conditions in the securing market. They have the financial capacity and look forward to opportunities for new investment.

(c) **Technical Promoters:** These promoters are technical experts in different fields. They make use of their specialized knowledge, experience and training in promoting new business. They generally charge fees for their services.

(d) **Entrepreneurial Promoters:** They are the people who conceive new ideas of business, take necessary steps to set up the business unit to give it a shape and ultimately control

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and manage it. Most promoters in India (like Tata, Birla and Ambanies) fall in this category.

(e) **Specialized Institutions:** There are certain financial institutions which provide financial assistance and guidance in launching new ventures and often collaborate with new entrepreneurs to promote new business. They also provide management and technical expertise to the existing enterprises.

(f) **Government:** Both the central and state governments also act as promoters in most cases where the new business is floated either in public sector or joint sector which involve huge amount of capital and risk. HMT, ONGC, SAIL, BHEL are glaring examples of units set up by the government.

1.22 SUMMARY

- A company is a corporate body and a legal person having status and personality distinct and separate from that of the members constituting it.
- According to Section 2(20) of the Companies Act, 2013 Company means a company incorporated under this act or under any previous company law".
- MOA is the constitution of the company and provides the foundation on which its structure is built. It is the principal document of the company and no company can be registered without it.
- Articles of Association is the rules & regulations which are framed for internal management of the company.
- OPC is promoted by one person, has separate legal entity. It can be registered as limited by shares or limited by guarantee. Small company is allowed in company act 2013. The paid up capital does not exceed Rs.50lakh or such high amount as will be prescribed which shall not be more than Rs. Five Crore.
- Prospectus is a document containing detailed information about the company and an invitation to the public subscribing to the share capital and debentures. Promotion of a company is the first important stage where necessary steps are taken for brining the idea of a company into practice. It is process of planning and arranging various inputs required for running an enterprise.

1.23 SELF ASSESSMENT QUESTIONS

1. Define Company Act 1956.
2. Discuss various Amendments in the Company Act 1956.
3. Give brief introduction to Company Act 2013.
4. Explain the characteristics of Company Act 2013.
5. Discuss various administrative authorities.
6. Explain the formation of Joint stock Company.
7. What is Memorandum of Association?
8. What is Articles of Association?
9. What is Government Company?
10. What is one person company?

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11. What is private company?
12. Define prospectus.
13. Define promoter.
14. Discuss various functions of promoter.
15. What are the contents of prospectus?

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UNIT 2: INCORPORATION OF COMPANY–II

Structure

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2.0 OBJECTIVE

After going through this unit, you will be able to:

- Understand about public company and small company
- Define the procedure of Director's appointment
- Describe the circumstances leading to the disqualification of appointment as a director
- Understand duties of director
- Define Annual general meeting
- Understand Quorum and Minutes of Meeting

2.1 PUBLIC COMPANY

Section 2(7) of the Companies Act defines a public company to mean a company which.

(i) It is not a Private Company

(ii) has a minimum paid up capital of Rs. 5 lakh or such higher capital, as may be prescribed.

Characteristics of Public Company

(i) It is formed with a minimum of seven members.

(ii) It invites general public to subscribe to its shares.

(iii) There is no restriction on their maximum number of shares.

(iv) The shares can easily be transferred.

(v) Before starting business, it must get certificate of commencement from Registrar of Companies.

Public Limited Company

As per section 3(1) (a), a public company may be formed for any lawful purpose by seven or more persons, by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of registration.

A public company may be said to be an association consisting of not less than 7 members, which is registered under the Act. In principle, any member of the public who is willing to pay the price may acquire shares in or debentures of it. The securities of a public company may be quoted on a Stock Exchange. The number of members is not limited to two hundred. It may be noted that in case of a public company, the articles do not contain the restrictions provided in Sections 2(68) of the Act.

As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable. However, any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

The concept of free transferability of shares in public and private companies is very succinctly discussed in the case of Western Maharashtra Development Corporation Ltd. V. Bajaj Auto Ltd [2010J154 Com Cases 593 (Bom). It was held that the Companies Act makes a clear distinction in regard to the transferability of shares relating to private and public companies. By definition, a "private company" is a company which restricts the right to transfer its shares. In the case of a public company, the Act provides that the shares or debentures and any interest therein, of a company, shall be freely transferable.

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The provision contained in the law for the free transferability of shares in a public company is founded on the principle that members of the public must have the freedom to purchase and, every shareholder the freedom to transfer. The incorporation of a company in the public, as distinguished from the private, realm leads to specific consequences and the imposition of obligations envisaged in law. Those who promote and manage public companies assume those obligations. Corresponding to those obligations are rights, which the law recognizes as inherent in the members of the public who subscribe to shares.

Types of Public Limited Companies

It is of further two types:

(1) **Unlisted Public Companies**: These types of companies do not invite general public to subscribe for its shares and securities and generally the directors, friends, their relatives and associates hold all the shares and securities in such companies. Unlisted companies are not required to comply with any requirements of the stock exchanges and SEBI, until and unless it proposes to offer its securities to the general public by way of public issue otherwise.

(2) **Listed Public Companies:** Section 2(52) of the Companies Act 2013 provides that a Company which has any of its securities listed on any recognized stock exchange is a listed company. These types of companies are having listing of its securities with one or more recognized stock exchanges in the country and are required to comply with the requirement of the Listing Agreement, Depository Rules and SEBI regulations as may be notified from time to time.

2.2 DISTINCTION BETWEEN PRIVATE AND PUBLIC COMPANIES

S.No.	Private Company	Public Company
1.	**Number of Members:** To constitute a private company two members are a must. The number of members cannot exceed two hundred	A public company can be started by seven persons and there is no maximum limit for members.
2.	**Commencement of Business:** The business can be started only after getting the certificate of commencement, earlier it could start work after incorporation. subscribed by the public.	The business can be started only after getting the certificate of commencement of business, This certificate is issued only when minimum number of shares have been
3.	**Transfer of Shares:** The transfer of shares is generally restricted by the articles.	Transfer of shares is freely allowed, though some procedure for transfer has to be followed.
4.	**Issue of Prospectus:** A private company cannot issue a prospectus giving public invitation for purchase of its shares or debentures.	A public company must issue a prospectus for inviting public for the purchase of its shares and debentures.
5.	**Statutory Meeting:** A private company is not required to call a statutory meeting and to submit statutory report to the Registrar of Companies.	A statutory meeting must be held within a prescribed period. A statutory report is also submitted to the Registrar of Companies.

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6.	**Quorum Meeting:** The quorum for a meeting of a private company is two.	Five members constitute the quorum.
7.	**Number of Directors:** A minimum of two directors must be there.	A minimum of three directors must be there and the names and addresses of directors must be intimated to the Registrar of Companies along with the memorandum of association.
8.	**Filing of Documents:** A private company need not send the list of directors, their consent, etc., to the Registrar of Companies.	The list of directors, their consent and a contract with them must be sent to the Registrar of Companies.
9.	**Usage of the word limited:** In case of private company, the word 'Pvt. Limited must be used at the end of the name of the company.	Only the word 'Limited' is used with the name of a public company.
10.	**Paid up capital:** It is registered with a minimum paid up capital of ₹ 1 lakh.	It is registered with a minimum paid up capital ₹ 5 lakhs.

2.3 SMALL COMPANY

As recommended by the Dr. J.J. Irani Committee, the concept of small companies has been introduced in the Companies, Act, 2013. The recommendation of the Irani committee in this regard was as under:

"The Committee sees no reason why small companies should suffer the consequences of regulation that may be designed to ensure balancing of interests of stakeholders of large, widely held corporate. Company law should enable simplified decision making procedures by relieving such companies from select statutory internal and administrative procedures. Such companies should also be subjected to reduced financial reporting and audit requirements and simplified capital maintenance regimes. Essentially the regime for small companies should enable them to achieve transparency at a low cost through simplified requirements. Such a framework may be applied to small companies through exemptions, consolidated in the form of a Schedule to the Act."

Small company is a new form of private company under the Companies Act, 2013. A classification of company into a small company is based on its size i.e. paid up capital and turnover. In other words, such companies are small sized private companies.

The concept of small company has been incorporated for the first time in the Companies Act, 2013. According to section 2(85) of the Companies Act, small company means a company, other than a public company:

(i) Paid up share capital of which does not exceed 50 lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or

(ii) Turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.

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PRIVILEGES OF SMALL COMPANY

Privileges and exemptions enjoyed by a small company or its advantages over other companies are as follows:

Sl. No.	Section	Nature of Privileges/ Exemptions
1.	2 (40)	The financial statement with respect to Small Company may not include the cash flow statement.
2.	67 (2)	Financial assistance can be given for purchase of or subscribing to its own shares or shares in its holding company.
3.	92 (1)	The annual return shall be signed by the company secretary; or where there is no company secretary, by the director of the company. In other words it need not be signed by the company secretary in practice.
4.	121 (1)	Need not prepare a report on Annual General Meeting.
5.	134 (3)(p)	Need not prepare 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.
6.	149 (1)	Small company need not have more than two directors in its Board.
7.	149 (4)	Need not appoint independent directors on its Board.
8.	152 (6)	A proportion of directors need not have to retire every year.
9.	164 (3)	Additional grounds for disqualification for appointment as a director may be specified in the articles.
10.	165 (1)	Restrictive provisions regarding total number of directorships which a person may hold in a public company do not include directorships held in One Person Company which are neither holding nor subsidiary company of a public company.
11.	167 (4)	Additional grounds for vacation of office of a director may be provided in the Articles.
12.	173 (5)	It is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days.
13.	190 (4)	The provisions relating to contract of employment with managing or whole-time directors does not apply to a Small Company.
14.	197 (1)	Total managerial remuneration payable by a small company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed eleven percent of the net profits.

As per Section 462(1), the Central Government may in public interest, by notification, direct that any of the provisions of this Act, shall not apply to such class or classes of companies, or shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification.

Therefore, the Central Government may grant further privileges/ exemptions to small companies by issuing a notification.

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2.4 HOLDING AND SUBSIDIARY COMPANIES

Holding and subsidiary companies are relative terms. A company which controls another company is known as the 'holding company' and the company so controlled is called as 'subsidiary company'.

Holding Company

According to section 2(46) of the Companies Act, 2013, "holding company", in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Subsidiary Company

According to section 2(87) of the Companies Act, a "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company:

(i) Controls the composition of the Board of Directors; or

(ii) Exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies. Total share capital means paid up equity share capital and paid up preference share capital.

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

Explanation. For the purposes of this clause:

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

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

(c) The expression "company" includes any body corporate;

(d) "Layer" in relation to a holding company means its subsidiary or subsidiaries.

The following illustration will make the definition of holding and subsidiary company clear. A company (say X) is a subsidiary of another company 'Y' and Y is X's holding company if:

(i) Y is a member of X and controls the composition of X's board of directors; or

(ii) Y holds more than half of Xs equity share capital or,

(iii) X is subsidiary of a third company (Z) which is itself a subsidiary of Y.

2.5 UNLIMITED LIABILITY COMPANIES:

A company with unlimited liability is one wherein the liability of the members is not limited. The members of such a company are personally liable for the debts of the company. In other words, the liability of the members of an unlimited liability company is not limited to their share in the company—it extends beyond that and encompasses the personal assets of its members. The liability of the members is valid for a period of one year after the company is wound up or any member disassociates from the company. There is a provision for the formation of such company in the Company Law, but a company with limited liability is more often the rule because the liability of its members is limited to the shares they hold in the company. Unlimited liability companies are, therefore, not very popular.

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Such companies are rare in the business scenario today. In fact, it would not be wrong if such a company was described as an elaborate form of partnership—the difference being that the company is registered under the Indian Companies Act. If a company with unlimited liability wants to convert itself to one with limited liability, it can do so provided it passes a special resolution to that effect and officially informs the Registrar of Companies. An unlimited liability company may or may not have share capital, but it must have a memorandum of association and articles of association. The company can sell its shares.

2.6 WHO IS A DIRECTOR?

Statutory definition of director

According to Section 2(34) of the Companies Act, 2013, "director" means a director appointed to the Board of a company.

Definition based on Function

Sir George Jessel is of the same opinion when he observed in Re Forest of Dean Coal Mining Co.

It does not matter much what you call them so long as you understand what the true position is, which is that they are commercial men managing a trading concern for the benefit of themselves and all other shareholders."

The important factor to determine whether a person is or is not a director is to refer to the nature of the office and its duties. It does not matter by what name he is called. Thus "function is everything, name matters nothing."

Deemed Directors

A person in accordance with whose directions and instructions the Board of Directors of a company is accustomed to act shall be deemed to be a director of the company. Such persons have been addressed under English Law as 'Shadow Director'. The person in accordance with whose directions or instructions the BOD is accustomed to act need not necessarily be an individual. The person may even be a body corporate. However, no person shall be deemed to be a director of a company if the Board acts on the advice given by him in his professional capacity such as Solicitor, Chartered Accountants etc.

Only individuals to be Directors

Nobody corporate, association or firm shall be appointed director of a company and only an individual shall be so appointed (Section 149). It is because that the office of a director is to some extent an office of trust. There should be somebody readily available who can be held responsible for the failure to carry out the obligations of such an office. It will be difficult to fix that responsibility if the director is a body corporate, association of persons or firm.

If all the members of a company are bodies corporate, it will be impossible to comply with this section, except when:

(a) The company's articles provide that no qualification shares are necessary so that outsiders may be appointed as directors of the company; or

(b) The members who are bodies corporate appoint their own nominees and transfer qualification shares to them.

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Number of Directors

The Minimum and Maximum Number of Directors. Every public company must have at least 3 directors and every private company must have a minimum of 2 directors and every one person company must have 1 director. (Section 149).

The Act has prescribed the maximum number of directors as 15. However a company may appoint more than 15 directors after passing a special resolution.

Implication where number of directors fall below statutory minimum. Since the provision of minimum number of directors is mandatory and any business transaction after the fall of directors fall below the statutory minimum was held to be invalid.

Approval of Central Government

In the case of a public company any increase in the number of directors of more than 15, the shareholders can do so by passing a special resolution in the general meeting.

Number of Directors

	Public Company	**Private Company**	**One PersonCompany**
Minimum Number of Directors	**3**	2	1
Maximum Number of Directors	15	15	15
For more than 15 directors	Pass a special resolution	Pass a special resolution	Pass a special resolution

Woman Director

Under Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014, the following companies shall appoint alteast ONE WOMAN DIRECTOR

(i) Every listed company.

(ii) Every other public companies having a paid share capital of ₹ 100 crores or more or turnover of ₹ 300 crore or more.

2.7 TYPES OF DIRECTORS

Following are the categories of directors who constitute 'Board' of a company:

1. Ordinary Directors

Ordinary directors are also referred to as simple who attend Board meeting of a company and participate in the matters put before the Board. These directors are neither whole time directors nor managing directors.

2. Managing Director

"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 a director occupying the position of managing director, by whatever name called.

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The power to do administrative acts of a routine nature when so authorised by the Board such as the power to affix the common seal of the company to any document or to draw and endorse any cheque on the account of the company in any bank or to draw and endorse any negotiable instrument or to sign any certificate of share or to direct registration of transfer of any share, shall not be deemed to be included within the substantial powers of management.

3. Whole-time/Executive Directors

Whole-time Director or Executive Director includes a director in the whole-time employment of the company.

4. Additional Directors

Additional Directors are appointed by the Board under section 161 of the Companies Act, 2013 between the two annual general meetings subject to the provisions of the Articles of Association of a company. Additional directors shall hold office only up to the date of the next annual general meeting of the company. Number of the directors and additional directors together shall not exceed the maximum strength fixed for the Board by the Articles.

5. Alternate Director

According to the provisions of section 161 of the Companies Act, 2013, an Alternate Director is a person appointed by the Board if so authorised by the Articles or by a resolution passed by the company in the general meeting to act for a director called "the original director" during his absence for a period of not less than three months from India. Generally, the alternate directors are appointed for a person who is Non-resident Indian or for foreign collaborators of a company.

6. Professional Directors

Any director possessing professional qualifications and do not have any pecuniary interest in the company are called as "Professional Directors". In big size companies, sometimes the board appoints professionals of different fields as directors to utilise their expertise in the management of the company.

7. Nominee Directors

The banks and financial institutions which grant financial assistance to a company generally impose a condition as to appointment of their representative on the Board of the concerned company. These nominated persons are called as nominee directors.

8. Independent Directors

Section 2 (47) defines "independent director" to mean an independent director referred to in section 149(5).

9. Small shareholders directors

Explanation to provision of section 152(l) provides that a small shareholder means a shareholder holding shares of nominal value of ₹ 20,000 or less in a public company. A shareholder holding any number of shares up to ₹ 20,000 will be able to participate in the election of directors from the small shareholders.

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Small shareholders may have a directors

Public company having:

(a) A paid up capital of 5 crore rupees or more,

(b) One thousand or more small shareholders may, have a director elected by such small shareholders in the manner as may be prescribed. Small shareholder means a shareholder holding shares of nominal value ₹ 20,000 or less in such public company. [Section 152 (1)]

It is to be noted that the appointment of directors by small shareholders is optional and not mandatory.

As per Rule 7 of the Companies (Appointment and Qualification of Directors) Rules 2014

(i) A company may act suo moto to elect a small shareholders' directors.

(ii) It may also act upon the notice in writing of atleast 1/10 of small shareholders, proposing the name of a small shareholders.

(iii) The notice must be given 14 days before the meeting. The notice shall be accompanied by a statement signed by the person whose name is being proposed stating:

   (a) his DIN (Director Identification Number);

   (b) that he is not disqualified to become a director under the Act;

   (c) his consent to act as a director of the company.

(iv) The notice must be signed by 100 small shareholders.

(v) In case of listing company, the election of small shareholders director will be through postal ballot.

(vi) The tenure of such a director shall be for a maximum period of 3 years and he shall not retire by rotation. On expiry of the tenure, such director shall not be eligible for reappointment.

(vii) No such person shall hold office at the same time in more than 2 companies (It means he can be a normal director).

(viii) Such a person shall be treated as director for all other purposes except for appointment as whole time director or managing director.

Resident Director [Section 149(3)]. Every Company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty two days in the previous calendar year.

10. Executive and Non-executive Director

2.8 DIRECTOR IDENTIFICATION NUMBER (DIN)

As per Rule 9 of the Companies (Appointment and Qualification of Directors) Rules, 2014, every individual who is an existing Director or intends to be appointed as Director of a Company, is required to apply for Director Identification Number electronically in Form DIR-3 to the Central Government for allotment of a DIN. This application is to be made electronically. A provisional DIN is generated by the system, which remains valid for a period of 60 days.

Section 152(3) provides that no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154.

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DIN is not required for directors of foreign company having branch offices in India, but DIN is required by foreign directors of Indian companies.

DIN is essential for every director including nominee directors and Government appointed directors. However, only those directors who are required to sign e-forms are required to obtain digital signature certificate (DSC). Other directors need not have DSC.

The concept of a Director Identification Number (DIN) has been introduced for the first time with the insertion of Sections 153 to 159 of Companies Act, 2013 As such, all the existing and intending Directors have to obtain DIN within the prescribed time-frame as notified.

Under the government regarding companies, Director Identification Number is mandatory and compulsory for becoming the director of a Company. Any person desirous of becoming Director of a private or public company has to apply for the allotment of Permanent Din Number to the Central Government of India as per the Form DIN-1. We have all kinds of support for making the allotment of DIN an easy affair for the clients. Thus avail our peerless Directors Identification Number Services and that also at a very nominal charge.

2.9 APPOINTMENT OF DIRECTORS

The success of a company depends to a great extent, upon the competence and honesty of its directors. It is therefore desirable that the administration of companies should be in right hands. The appointment of directors is accordingly regulated by the Act.

For being appointed as a director the person must comply with following provisions :

1. Otherwise expressly provided in the Act, every Director shall be appointed by the company in the General Meeting.
2. Every proposed Director shall have DIN.
3. Every proposed Director shall furnish DIN and a declaration that he is not disqualified to become a Director
4. Proposed Director shall give his consent in Form DIR.-12 to hold the office as director and such consent be filed with the Registrar in Form DIR-12 within 30 days of his appointment.

Directors may be appointed in the following ways:

1. By the Articles as regard first directors (Section 152).
2. By the Company at General Meeting (Sections 152 & 160).
3. By the principle of Proportional Representation (Section 163).
4. By the Board (Section 161).
5. By Third parties (Section 152).
6. By the Central Government.
7. By the Small Shareholders.
8. By the Tribunal in Sick Industries (i.e. special directors).

Now let us understand them one by one:

(1) Appointment of First Directions (Sec. 152)

(a) **If directors are named in articles.** Directors named in the articles shall be the first directors.

(b) **If the directors are not named in the articles**

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In other words, if all the subscribers to the memorandum happen to be bodies corporate, none of the subscribers can be deemed to be directors and the company will have no directors until the first directors are appointed under section 152(2).

Formalities to be complied with for the appointment of the first Directors

At the time of appointing a director to a company, especially the first directors, the following formalities ought to be followed scrupulously:

- Check the availability of the DIN of the proposed director. In the case of absence of it, Form DIR 3 should be filled in up, and sent to the Central Government, for allotment of the DIN
- Observe the filing of DIR 8 in case of the first directors, along with the consent to act as the director of the specified company
- Information regarding the director's interests in other companies, firms or organizations, and also the names of his relatives for the purpose of Section 188 and 184 of the Companies Act shall be obtained. A general notice of the interests under Section 184 shall also be provided in Form RD 1 prescribed under the Companies (Central Government's) General Rules & **Forms, 2013.**
- Particulars, regarding the directors, must be entered with respect to each director in the Register of Directors
- Particulars of the Directors' shareholding shall be entered in the Register of directors' shareholdings, **[Section 170]**
- Any other Agreement, which the company may propose to enter into with any individual, for appointment as its managing director or whole-time director or manager, will be filed with the registrar.

In case of One Person Company (OPC), an individual being member shall be deemed to be its first Director until the Director(s) are duly appointed by the member provide for any qualification shares, only those subscribers who hold such shares shall be deemed to be directors.

When all subscribers to the memorandum are bodies corporate.

If all the subscribers to the memorandum happen to be bodies corporate, none of the subscribers can be deemed to be directors and the company will have no directors until the first directors are appointed under Section 152(2).

2. Appointment of directors at General Meeting (Section 152(2))

Except for the first directors, the subsequent directors are appointed by the company in the general meeting. Section 152(2) provides that not less than two third of the total number of directors of a public company, or of a private company which is subsidiary of a public company must be appointed by the company in general meeting. These directors must be subject to retirement by rotation. The remaining directors of such a company and the directors generally of a purely private company must also be appointed by the company in general meeting. In other words, not more than one third of the total number of directors can act as non-retiring directors i.e. not subject to retirement by rotation.

The object of Section 152(2) is to prevent the mischief of self perpetuating management.

(i) Retirement by Rotation (Section 152(6)):

2/3 of the directors liable to retire by rotation, only 1/3 shall retire at every annual general meeting. It follows that all such directors must retire in the course of 3 years, l/3rd retiring in each year.

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If the number is not three or a multiple of three, then any fraction shall be rounded off as one.

A company has 9 directors. Out of 9, 3 directors can be appointed as permanent directors if the company so desires. The remaining 6 directors will be liable to retire by rotation. Out of 6 directors, directors shall retire, in each of 3 years.

The directors to retire by rotation at every annual general meeting must be those who have been longest in office since their last appointment. As between persons who become directors on the same day, those who are to retire will, subject to any agreement among themselves, be determined by lot.

Rotational director means a director retiring by rotation and does not include additional, alternate, debenture holders' or central government's nominee directors. Similarly, directors appointed by financial institutions in pursuance of the agreement entered into by these institutions with the company are not liable to retire by rotation.

Such nominee directors are also not to be taken into account for computing one-third numbers of directors liable to retire.

(ii) Where Annual General Meeting is not held

The directors cannot prolong' their tenure by not holding an annual general meeting in time. They would automatically retire from office on expiry of the maximum permissible period within which such meeting ought to have been held. To call annual general meeting is the duty of directors and by omitting to convene such meeting, they cannot take advantage of their own default.

(iii) Deemed Reappointment of a Retiring Director

At the annual general meeting at which a director retires, the company may fill up the vacancy by appointing the retiring director or some other person thereto. [Sec. 152(6)(e)]

Adjournment of meeting. If the place of the retiring director is not so filled, and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned. [Sec. 152(7)(a)]

Automatic Reappointment. If at the adjourned meeting also the vacancy is not filled, and the meeting has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting. [Sec. 152(7) (b)]

(iv) No Automatic Reappointment

At an adjourned meeting, a retiring director shall not be deemed to be automatically reappointed in the following cases:

- Where a resolution for the reappointment of such director was put and lost.
- Where the retiring director has, in writing, expressed his unwillingness to continue, or
- Where he is not qualified or is disqualified for appointment, or
- Where a resolution (special or ordinary) is necessary for his appointment or reappointment.
- Where it is resolved to fill two or more vacancies by a single resolution.

In case the vacancy is not filed at the AGM and the retiring director donot get automatically reappointed, the vacancy may be filled by the Board of directors.

NOTES

(v) Fresh Appointment or Appointment of a director other than a retiring director (Section 160) and Rule 3 of Companies (Appointment and Qualification) Rules, 2014.

Section 160 provides the procedure of appointment of a person other than retiring director.

(i) Persons who can give notice for directorship

(a) A person who is not a retiring director can give notice in writing signifying his candidature

(b) A member (proposer) can give a notice of the candidature of any other person

(ii) Requirement of notice

A notice in writing signifying, his candidature must be left at the office of the company at least fourteen days before the date of the meeting along with a deposit of ₹. One lakh which shall be refunded to such person or as the case may be to such member, if the person succeeds in getting elected as a director. In other words, if such person is not elected as director, he or the member, as the case may be, will not be entitled to the refund of ₹. One lakh and it will be forfeited by the company.

(iii) Notice by the Company to members

The company shall inform the members at least seven days before the meeting about the candidature; It is not necessary for the company to serve individual notices upon the members if the company advertises such candidature not less than seven days before the meeting, in at least two newspapers. One of the newspapers must be in English language and the other in the regional language of the place where the registered office of the company is located. [Rule 13 of companies (Appointment and Rules, Qualification 2014]

Non compliance of procedure prescribed such as non-circulation of notice to members, would render the appointment invalid.

(vi) Appointment of each director to be voted individually

Appointment of each director must be made through a separate resolution of the simple majority unless the meeting unanimously resolves otherwise.

(vii) Filing of Written Consent by directors

Section 152 requires a new director (i.e. other than a retiring director) to file his written consent to act as director within 30 days of his appointment.

3. Appointment of directors by proportional representation (Section 163)

Directors of a Company are generally appointed by simple majority. As a result, majority shareholders controlling 51% or more votes may elect all directors and a substantial minority, as high as 49%, may find no representation on the Board.

Section 163 intends to protect the interests of minority shareholders by giving them an opportunity to -place their nominees on the Board.

The articles of a company may provide that the appointment of not less than 2/3 of the total number of directors of a company shall be according to the principle of proportional representation. (Section 163)

Such appointment may be by:

(1) Single Transferable Vote. Under it a quota of Votes is fixed.

Say 6000 votes are cast. The number of directors are 5.

NOTES

Any one getting 1001 votes will be elected. The voter is asked to give ranking to all i.e., 1, 2, 3, 4, 5.

1. Namita Gupta V Cachar Native Joint Stock Co. Ltd. (1999) Comp as 655.

   Candidate getting 1001 gets elected excess of votes for the elected candidate are passed to the second ranking candidate so on.

2. Cumulative Voting. In this method

   Total No. of Votes = Number of shares × No. of Directors to be elected.

   Say Number of Shares = 10,000

   No. of Directors = 10

   Total Votes = 10,000 × 10 = 10,0000

Such appointment shall be made once in three years and interim casual vacancies may be filled up according to section 161.

Directors elected on the principle of proportional representation cannot be removed under the provisions of section 169.

4. Appointment by Directors

The directors are empowered to appoint—

(i) Additional directors

(ii) Alternate directors

(iii) Directors filling casual vacancy

(i) Additional Directors

The board of directors may appoint additional directors from time to time if so authorized by its articles. The number of directors and additional directors must not exceed the maximum strength fixed for the board by the articles. The additional directors shall hold office only upto the date of the next annual general meeting (Sec. 161).

It may be noted that without a power given by the Articles, the Board cannot appoint additional directors.

Powers of Additional Directors

Additional directors will enjoy the same powers and rights as other directors. The purpose of section 161 is to enable the board to appoint competent persons who may otherwise find it difficult to come in by election.

Appointment by Resolution only

An additional director can be appointed by passing a resolution at a Board meeting or by passing a resolution by circulation.

Term of office of an additional director

The additional director is entitled to hold office only upto the date next annual general meeting of the company.

If the annual general meeting of the company is not held, or cannot be held, the person appointed as additional director vacates his office on the last day on which the annual general meeting should have been held in terms of section 96 of the Act.

NOTES

Additional directors is not a retiring director.

An additional director holds office upto the next AGM i.e. he does not retire at next AGM. Hence he is not a retiring director.

Obligation to take qualification shares

An additional director is required to take the qualification shares, if the Articles of Association of the Company require holding of qualification shares.

(ii) Alternate Directors

Condition for appointment of alternate director

An alternate director acts in the place of a director who is absent for more than three months from the State in which board meetings are held.

Term of Office

He cannot hold office for a period longer than that permissible to the original director in whose place he has been appointed. He must vacate office on the return of the original director.

The Department of Company Affairs has clarified that the alternate director vacates his office whether or not the original director attends the Board meeting on his return to the state.

Power to Appoint

The board of directors may appoint an alternate director if authorized (i) by the articles or (ii) by a resolution of the company at general meeting.

Neither the shareholders of the company nor the original director can exercise the power to appoint alternate director. Moreover, an alternate director is neither an agent of the original director nor his proxy.

Moreover, an alternate director is not obliged to act as per instructions of the original Director.

Position of an alternate director

- An alternate director is subject to the same liabilities and supposed to perform the same duties as any other director.
- The alternate director merely fills a temporary vacancy in the office of director.
- An alternate director is not required to hold any qualification shares.
- Alternate directorship held by a person cannot be counted towards maximum number of directorship which a person can hold.

Consent

An alternate directors is required to file his consent with the Registrar within 30 days of his appointment.

(iii) Casual Vacancy

What is casual vacancy? A casual vacancy is a vacancy where the office of any director appointed in general meeting is vacated before the term of office expires in the normal course, such as death, resignation or insolvency. It means any vacancy other than one caused by retirement of a director by rotation or by efflux of time is a casual vacancy.

Power to fill casual vacancy is on the Board

A casual vacancy is to be filled only at a meeting of the Board and not by means of a resolution passed by circulation.

NOTES

Tenure of office A person, who is appointed as a director in a casual vacancy, shall vacate the office on the date when the original director in whose place he is appointed would have held office of if had not been vacated.

Consent

The director appointed to fill the casual vacancy must file his consent with the Registrar within 30 days of his appointments.

Vacancy created by resignation etc of a director appointed to fill casual vacancy

Where the casual vacancy filed by the board is again vacated, the resulting vacancy is not a casual vacancy and cannot be filed by the Board, as Section 161 applies only in case of casual vacancy in the office of any director appointed by the company in general meeting. However in such a case, the Board should appoint additional director if so authorized by articles.

5. Appointment by third parties

Section 152 permits one third of the total number of directors of a public company and of a private company which is a subsidiary of a public company to be appointed by parties other than shareholders on a non-rotational basis.

The articles may give right to debentureholders, financial corporations or banking companies who have advanced loans to the company to nominate directors on the board of company.

The number of directors so nominated should not exceed one third of the total strength of the board.

They are not liable to retire by rotation.

6. Appointment by the Central Government

The Central Government has the power to appoint directors on an order passed by the NCLT to effectively safeguard the interest of the company or its shareholders or the public interest to prevent mismanagement or oppression. Such directors shall hold office for a period not exceeding three years on any one occasion.

The power can be exercised by the NCLT either on a reference made by the central government or on an application

(i) of not less than one hundred members of the company or

(ii) of members of the company not holding less than one tenth of the total voting power therein.

A Director Appointed by the Central Government shall not be :

- taken into account for purpose of reckoning 2/3 or any other proportion of the total number of directors.
- required to hold qualification shares.
- required to retire by rotation.
- not required to hold qualification shares

He shall keep the government informed of the affairs of the company to enable it to take appropriate action.

7. Appointment by Small Shareholders

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The small shareholders, in case of a public company having

(i) paid up capital of ₹ 5 crore or more, and

(ii) having at least 1000 shareholders holding shares of nominal value of ₹ 20,000 or less may elect at least one director to represent them on the Board.

A company may act:

(i) suo motu on its own-it is optional to appoint a small shareholder's director.

(ii) or it may act on the notice of not less than l/10th of the total number of Small Shareholders.

(iii) Such notice shall be given at least 14 days before the meeting.

(iv) The notice must be signed by 100 Small Shareholders.

(v) The tenure of office of the Small Shareholder director shall be 3 yrs.

(vi) Such director shall not be subject to retirement by rotation.

(vii) A person can't be a small shareholders director in more than 2 companies.

8. Appointment of Special directors by the Tribunal in case of Sick Industrial Companies

The NCLT can appoint one or more persons who possess knowledge, expertise in management and control of the affairs of any other company to be a special director on the Board of a Sick Industrial Company.

Any provision regarding share, qualification, age limit, number of directorship, removal from office etc. shall not apply to a special director appointed by NCLT.

Appointment of Directors to be Voted Individually (Section 162)

- At a general meeting of a company, a motion shall not be moved for the appointment of 2 or more persons as directors of the company by a single resolution, unless a resolution has first been agreed at meeting without any vote being cast against it.
- Resolution moved in contravention of section 162(1) shall be void whether any objection was taken or not.
- Motion for approving a person for appointment or for nominating a person for appointment shall be treated as a motion for his appointment.

2.10 QUALIFICATIONS FOR DIRECTOR

The Companies Act does not lay down any specified academic qualification for appointment as a company director, not even qualification shares. So far as the Act is concerned, a director need not hold any shares and need not be a member of a company.

The articles of association generally require that the qualification of director shall be the holding of a specified number of shares known as qualification shares. A director must hold atleast on share in a company.

The articles, of a company generally provide for such qualification shares so that directors may have personal interest in the company.

Time Limit of Obtaining Qualification Shares

Unless he is already qualified, he must obtain the qualification shares within two months after his appointment as a director. Any provision in the articles of a company in so far as it requires a person to hold the qualification shares before his appointment as a director or to obtain them within a shorter time than two months will be void. The date of appointment is the date when the result of a poll for the election was announced to the company by the scrutinizers and not the date when the poll was taken.

Amount of Share qualification

(i) The nominal value of qualification shares shall not exceed ₹ 5,000

(ii) Where the nominal value of one shall exceed ₹ 5000, share qualification shall be holding of one share only.

It may be noted that the bearer of share warrant is not deemed to be a holder of qualification shares.

Any provision requiring a director to hold as qualification shares more than this amount will be invalid. The holding of share warrant shall not be deemed to be the holding of qualification shares.

It is not essential for the director to buy his shares directly from the company. The director must hold these shares in his own right. Until the required number of shares are registered, in the name of the director, he is not qualified. Lodging of shares transfer form is not the holding of shares.

Liabilities in respect of qualification shares

If the company is wound up during this period of two months, such director cannot be placed on the list of contributories in as much as there is no express or implied contract under which he would be bound to take the qualification shares.

Consequences of failure to hold qualification shares

(i) If a director fails to obtain within 2 months or at anytime thereafter ceases to hold the qualification shares, he automatically vacates office after the expiry of said 2 months and cannot act as a director and no notice of the director is required.

(ii) If a person acts as a director when he knows that the office of director held by him has become vacant, he shall be punishable with fine upto ₹ 5000 per day for the period he acts as a director [Section 283 (2A)].

(iii) If a person acts as a director of a company without holding the qualification shares, he will be punishable with fine which may extend to ₹ 500 for every day for the period he acts as a director (Section 272).

In a nut shell, if a person acts as a director after the expiry of said 2 months without taking qualification shares, he shall be liable to a cumulative fine upto ₹ 5,500 (₹ 5,000 + ₹ 500) for everyday for the period he acts as a director (Section 272 read with section 283).

Directors not required to hold qualification shares

The following directors are not required to hold qualification shares

(i) Technical Director, unless articles so provide,

(ii) Directors representing special interest,

(iii) Directors appointed by the central government,

(iv) The directors of an independent private company.

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2.11 DISQUALIFICATIONS OF DIRECTORS (SEC. 164)

The circumstances in which a person cannot be appointed as a director of a company are enumerated in Section 164. According to this section, a person cannot be appointed as a director of a company, if

(I) U/S164(1):

(a) he has been found to be of unsound mind by a competent court and the finding is in force;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted of an offence involving moral turpitude and sentenced to imprisonment for not less than 6 months and a period of 5 years has not elapsed since the expiry of his sentence;

(e) he has not paid any call in respect of shares of the company held by him for a period of six months from the last day fixed for the payment;

(f) he has been disqualified by an order of the court or Tribunal of an offence in relation to promotion, formation or management of the company of fraud or misfeasance in relation to the company.

(g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceeding five years; or

(h) he has not complied with provisions u/s 152(3) (i.e he has not obtained DIN)

Such person is already a director of a company which :

(A) Has not filed the annual accounts and annual returns for any continuous three financial years commencing on and after the first day of April, 1999; or

(B) Has failed to repay its deposit or interest thereon on due date or redeem its debentures on due date or pay dividend and such failure continues for one year or more.

In addition to the disqualification mentioned above there is another disqualification namely, the person should not be a minor or under any disability but should be competent to contract.

Vacation of Office by Directors (Section 167)

1. The office of a director shall become vacant in case :

   (a) He incurs any of the qualifications specified in section 164;

   (b) He absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;

   (c) He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;

   (d) He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested, in contravention of the provisions of section 184;

   (e) He becomes disqualified by an order of a court or the Tribunals;

   (f) He is convicted by a court of any offence, whether involving moral turpitude or otherwise; and sentenced in respect thereof to imprisonment for not less than six months:

   Provided that the office shall be vacated by the director even if he has filed an appeal against the order of such court;

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(g) He is removed in pursuance of the provisions of this Act;

(h) He having been appointed a director by virtue of his holding any office or other employment in the holding, subsidiary or associate company, ceases to hold such office or other employment in that company.

2. If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications u/s 167(1), he shall be with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to five lakh rupees, or with both.

3. Where all the directors of a company vacate their offices under any of the disqualifications specified U/s 167(1), the promoter or in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in the general meeting.

2.12 REMOVAL OF DIRECTORS

A director may be removed from his office;

1. By the Shareholders (Sec. 169);
2. By the Tribunal [Sec. 242].

1. Removal by Shareholders. Section 169 empowers the company to remove a director by ordinary resolution before the expiry of his period of office except in the following cases.

The following categories of directors cannot be removed by a company under section 169 of the Act:

(a) a director appointed by the Tribunal under section 242;

(b) a nominee director of a public financial institution which is by its charter empowered to nominate a person as a director or to remove him notwithstanding any power contained in any other Act;

(c) a director coming within the purview of directors appointed according to the principle of proportional representation under section 163 of the Act.

While the shareholders have no power, apart from that given in the statute or the Articles, to intervene in the management of the company's affairs, this section is designed to enable them to control the directors by their removal.

Special notice

Special notice is required of any resolution to remove a director or to appoint somebody in his place at the meeting at which he is removed.

On receipt of such notice, the company will immediately send a copy thereof to the director concerned and the director (whether or not he is a member of the company) shall be entitled to be heard on the resolution at the meeting.

Reasons for Removal—Not Necessary

It is not necessary to give reasons in the special notice given to the company or in the company notice to the members or in the resolution proposed by the Board itself, for removal of a director.

The explanatory statement u/s 102 are also not necessary in respect of the resolution for removal of directors, because the company is acting in pursuance of a special notice received by it to move the resolution. It is in fact, not resolution proposed by the company.

NOTES

Director's right to make representation (Sec. 169(4))

The director concerned may also make any representation in writing and the copy of such representation may be sent by the company to every member. Where the copy of the representation is not sent to the members, in that case the director concerned may require the representation to be read at the meeting. Copies of such representations need not be sent to members nor the same be read out at the meeting if the Central Government is satisfied on an application being made by the company or the aggrieved person that the right as to representation is being abused to secure publicity for defamatory matter. In such a case the director concerned may have to pay costs, though not a party to the proceedings.

Filling of vacancy (Sec. 169 (5), (6) & (7))

A vacancy created by the removal of a director as aforesaid can be filled up at the meeting at which he is removed provided special notice of the proposed appointment was also given. The director so appointed shall hold office till the date the director removed would otherwise have held office. If the vacancy is not filled, it shall be filled up as casual vacancy except that the director removed shall not be re-appointed.

Compensation (Sec. 169(8))

A director so removed shall not be deprived of any compensation or damages payable to him in respect of the termination of his appointment as director or of any appointment terminating with that as director.

Section 169 is general and applies to all directors including permanent and life directors (subject to the exceptions above). The right under this section is a statutory right given to a company and the company can exercise this power wherever it finds a director unsatisfactory or otherwise undesirable. The articles need not specify the circumstances in which the power can be exercised.

2. Removal by the Tribunal. On an application to the Tribunal for prevention of oppression and mismanagement, the Tribunal may terminate, or set aside or modify any agreement between the company and the managing director or any other director or manager. (Sec. 242). On such termination, the director cannot serve the company in a managerial capacity for a period of five years from the date of the order of termination, without the permission of the Tribunal. The director on removal cannot sue the company for damages or compensation for loss of office. [Consequences of termination u/s 243].

Assignment of office. A director cannot assign his office to anybody. If such assignment is made it shall be void. (Sec. 166).

Removal of a non-rotational director of a Government company

Directors appointed by the State Government as a nominee director can be removed by such Government. The Government is entitled to revoke the nomination as a matter of right, which flows from the Articles of Association. Revoking of the appointment by the Government under the Articles is not the same thing as removal of a director by the company under section 169 of the Act. Hence, if the Government revokes the nomination, there is no circumvention of section 169.

Civil Court cannot interfere in the matters of removal of a director

The right to remove a director of the company is provided in the Companies Act and it itself provides a procedure for enforcement of such right. Civil Courts cannot interfere with such

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matters of internal management of the companies. [Khetan Industries Pvt. Ltd. v Manju Ravindra Prasad Khetan (1995) 16 CLA 169 (Bom)]

The Court should not be a party to removal of permanent directors (or of any director) of a company by exercising its discretion under section 98 and dispensing with the special notice as required in section 169, in the absence of concrete, precise and specific charges against these directors.

2.13 RESIGNATION OF DIRECTORS

Earlier neither the Companies Act, 1956 nor the Table A was containing provision regarding resignation by a director. Moreover, section 283 of the Companies Act, 1956 also did not include resignation as one of the grounds for the vacation of office of a director. However, now section 168 provides for resignation of a director of a company.

1. **A director may resign by giving notice in writing to the Company and Board of directors.** Rule 15 provides that in terms of Section 168(1) a director may resign from his office by giving a notice in writing to the company and the Board shall on receipt of such notice take note of the same and the company shall intimate the Registrar within 30 days in Form DIR-12 along with the fee as per the companies (Registration Offices and Fees) Rules, 2014 and post the information on its website, if any. Further that the company shall also place the fact of such resignation in the report of directors laid in the immediately following general meeting by the company.
2. **The resigning director may also forward a copy of the resignation to the Registrar along with the reasons for resignation.** Rule 16 of the Companies (Appointment and Qualification of Directors) Rules, 2014 provides that where a director resigns from his office, he shall also within thirty days from the date of resignation, forward to the Registrar a copy of his resignation along with reasons for the resignation in Form DIR-11 along with the fees prescribed under the Companies (Registration Offices and Fees) Rules, 2014.
3. **Effective date of resignation by the Director.** Section 168(2) provides that the resignation of a director shall take effect from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.
4. **Director shall be liable after his resignation for offences which occurred during his tenure.** It has been provided that the director who has resigned shall be liable, even after his resignation, for the offences which occurred during his tenure.
5. **Powers to appoint directors in case where all the directors resign from the company.** Section 168(3) provides that where all the directors of a company resign from their offences, or vacate their offices under section 167, the promoter or, in his absence, the Central Government shall appoint the required number of directors who shall hold office till the directors are appointed by the company in general meeting.
6. **Duty of the after resignation.** After the resignation is received and the chairman of the Board has noted it, a letter informing of the receipt of the resignation should be sent to the director concerned. The Registrar of Companies shall be informed of the resignation of the director from the directorship by way of filing Form DIR-12 with the Registrar of Companies and the entry of the date of cessation will be made in the Register of directors.

   At the next Board meeting, the letter of resignation will be placed before the Board and that fact will be recorded in the minutes of the meeting. It is common to place on record appreciation of the services of the concerned director. General notice of resignation of director is to be given to the public.

2.14 POWERS OF DIRECTORS

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A company being an artificial person, acts through its directors. The directors represent the directing mind or will of the company and control what it does. All the powers of management of the affairs of the company are vested in the board of directors. The board thus becomes the working organ of the company. In their domain of power, there can be no interference, not even by shareholders. The directors enjoy such powers as are given to them by the Act, memorandum or articles. Sections 179 & 180 deal with the powers of the board and the restrictions thereon.

The powers which vest in the board can be classified under three different heads :

I. **General Powers**: Powers which can be exercised in accordance with the articles.

II. **Powers: u/s 179(3).** Powers which can be exercised only at board meetings.

III. **Powers under Rule 8.**

IV. **Other Matters**

Let us understand them one by one:

I. **General Powers.** The general powers of the Board of directors have been laid down in section 179 of the Companies Act, 1956. It empowers the board to exercise all such powers and do all such acts and things, as the company is authorized to exercise and do. In other words, the directors can do what the company is authorized to do unless there is any express restriction on their powers.

   There are, however, two limitations upon their powers.

   1. The Board shall not exercise those powers which under the Companies Act, 2013, or the memorandum of association or otherwise, are required to be exercised by the company in general meeting.

   2. In exercising, all such powers or doing of any such act, the Board will be subject to the provisions of this or any other Act, the memorandum or the articles.

Do shareholders have right to intervene/Powers cannot be usurped.

The directors shall exercise their powers bonafide and in the interests of the company. But once specific powers of control and management have been granted by the company to its directors, the company cannot without justification impose its will at a general meeting. The shareholders cannot dictate to the directors the manner in which their executive authority is to be employed. Thus where the power to sell the assets of a company is vested in the board and the board thinks that it is not in the interests of the company to sell its assets, it is not bound to do so, notwithstanding a resolution to the contrary in general meeting. Similarly where the shareholders by resolution pressed the directors to forego a debt, it was held that the directors were entitled to enforce the payment of the debt.

"If powers of management are vested in the directors they and they alone can exercise those powers. The only way in which the general body of shareholders can control the exercise of the powers vested by articles in directors is by altering the articles, or, by refusing to re-elect the directors of whose action they disapprove. They cannot themselves usurp the powers, which by articles are vested in the directors, any more than the directors can usurp the powers vested by articles in the general body of shareholders."

Exceptions

A company is an institution owned and controlled by its shareholders. As such the shareholders have an inherent and a residual executive power greater than the powers conferred upon

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directors. The powers of the directors are subject to the control by the shareholders at the general meeting. In the following exceptional cases the general meeting is competent to intervene in a matter delegated to board.

1. **Directors acting malafide.** The general body of shareholders can interfere where it is proved that the directors have acted from some improper motive or arbitrarily or capriciously. When the directors are themselves the wrongdoers against the company and have acted malafide or beyond their powers, and their personal, interest is in conflict with their duty in such a way that they cannot or will not take steps to seek redress for the wrong done to the company, the majority of the shareholders must in such a case be entitled to take steps to redress the wrong.
2. **Board incompetent.** The general body of shareholders may exercise the powers vested in the board when there is no legally constituted Board which could function or if there is a board but that is unable or unwilling to act. The shareholders have to step in where all the directors are interested in a transaction.
3. **Deadlock in the Board.** Where the directors are unable to act on account of a deadlock and the administration was at a standstill, the shareholders have the inherent power to take necessary steps to ensure the working of the company.
4. **Residuary powers.** The residuary powers of a company reside in the general meeting of shareholders and the shareholders can always exercise such residuary powers.

II. Powers under section 179(3): Matters which shall always be considered at the meeting of the Board

There are specific provisions in the Act which require that certain matters, which are of importance to the company, shall always be considered at a meeting of the Board and accorded approval by resolution as per provisions of section 179(3) of the Companies Act, 2013, as given below:

(a) to make calls on shareholders in respect of money unpaid on their shares;

(b) to authorize buy-back of securities under section 68;

(c) to issue securities, including debentures, whether in or outside India;

(d) to borrow monies;

(e) to invest the funds of the company;

(f) to grant loans or give guarantee or provide security in respect of loans;

(g) to approve financial statement and the Board's report;

(h) to diversify the business of the company;

(i) to approve amalgamation, merger or reconstruction;

(j) to take over a company or acquire a controlling or substantial stake in another company;

(k) any other matter which may be prescribed.

It is also provided in the section that the Board may delegate by a resolution to a committee of directors, the managing director, manager or a principal officer of the company, any of the powers at items (d), (e) and (f).

III. Powers under Rule-8

Rule 8 of the Companies (Meeting of the Board and its powers) Rules, 2014 provides that in additions to be matters specified under section 179(3) the following powers shall the exercised only by means of resolutions passed at meeting of the Board, namely:

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(i) to make political contributions;

(ii) to appoint or remove Key Managerial Personnel (KMP)

(iii) to take note of appointment(s) or removal(s) of one level below the Key Management Personnel;

(iv) to appoint internal auditors and secretarial auditors;

(v) to take note of the disclosure of director's interest and shareholding;

(vi) to buy, sell investments held by the company (other than trade investments), constituting five percent or more of the paid- up share capital and free reserves of the investee company;

(vii) to accept or accept or public deposits and related matters;

(viii) to review or change the terms and conditions of public deposits;

(ix) to approve quarterly, half yearly and annual financial statements or financial results as the case may be.

IV. Other matters

In addition to the items referred to above, there are various other matters, as illustrated below in the routine working of a company which are considered by the Board at Board meetings:

(a) Issuance of shares.

(b) Allotment of shares and debentures.

(c) Appointment of Directors and Managing Director/Whole-time Director.

(d) Consideration of Annual Accounts.

(e) Approval of interim dividend and recommendation of final dividend.

(f) Appointment of sole selling/buying agents.

(g) Merger and amalgamation of companies.

(h) Capitalization of reserves and issuance of bonus shares.

(i) Appointment of auditors in casual vacancy caused otherwise than by resignation.

(j) Appointment of whole time secretary for issuance of compliance certificate.

(k) Further, where proposals are initiated by the Board and recommended for the consideration of the company in general meeting, all these matters are first considered at a meeting of the Board.

2.15 RESTRICTIONS ON POWERS (SECTION 180)

The Board of directors of a public company or of a private company which is a subsidiary of a public company shall not exercise the following powers except with the consent of the company in general meeting:

(a) Power to sell lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company.

In case of an improper sale or lease by the director, the title of the purchaser or lessee will not be affected provided he buys or takes it in good faith and with due care and caution; i.e. the title of a bonafide buyer or lessee shall be free from any defect.

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No approval of general meeting is required if the ordinary business of the company consists of selling or leasing of properties.

(b) Power to remit or give time for repayment of any debt due to the company by a director.

However, no such consent is required for renewal or continuance of an advance made by a banking company to its director in the ordinary course of its business;

(c) Power to invest otherwise than in trust securities, the amount of compensation received by the company in respect of the compulsory acquisition

(i) of any undertaking

(ii) or premises or properties of the company;

It is worth mentioning that no consent of the shareholders is required if compensation received by the company is invested in trust securities specified under section 20 the Indian Trust Act.

(d) Power to borrow money,

where the money to be borrowed together with the moneys already borrowed by the company will exceed the aggregate of the paid-up capital of the company and its free reserves. This however, will not include temporary loans obtained from the company's bankers in the ordinary course of business;

The resolution passed in the general meeting shall specify the total amount upto which moneys may be borrowed by the Board otherwise the resolution shall be void.

(e) Power to contribute to (Sec. 181)

(i) charitable funds

(ii) any other fund not directly relating to the business of the company

(iii) any other fund not directly relating to welfare of the employees

If the amount contributed in a financial year exceeds 5% of average net profit during 3 immediately preceding financial years, then a prior permission in the General Meeting is required.

2.16 DUTIES OF DIRECTORS

As directors possess immense powers they hold a key position in the company management. Law imposes certain duties upon them, in the interest of the public good and for the protection of those who invest money in the company. The duties of a director vary from company to company and within any one company the directors may and frequently do have different responsibilities. Breach of these duties or negligence in performing them on the part of a director entitles the company to sue him for any damage which has been suffered by the company as a result of the breach or negligence.

The duties of directors may be discussed under the following heads :

1. Fiduciary duties,
2. Duty of care and skill,

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3. Duty to attend board meetings,
4. Duty not to delegate,
5. Duty to disclose interest and
6. Statutory duties.

1. Fiduciary duties

The directors occupy a fiduciary position and must therefore, exercise their powers in good faith and for the benefit of the company as a whole. Directors should not enter into engagements in which there is a possibility that the directors personal interest could conflict with those of the company which they are bound to protect.

Another consequence of the fiduciary position of a director is that he cannot make a secret profit by reason of opportunities acquired as a result of his position. Where a director makes profits by the use of confidential information, he is not entitled to retain it unless these profits are disclosed to and approved by the company.

The fiduciary duty so owed is owed to the company as a whole and not to any individual member of it.

Where a director is instructed to purchase some property for the company, and he purchases the same for himself and then sells it to the company at a profit, he is clearly liable to account for the profit so made.

2. Duty of care and skill.

Honesty alone is not enough. A director must perform his duties with reasonable care and skill i.e. with that amount of care which an ordinary man will be expected to take, if the business of the company was his own. A director will be liable for negligence in the carrying out of his duties, where a dividend was paid by directors after the company traded only for eight months without any investigation-of company's trading position such payment was improper and the directors must refund. However, a director cannot be held liable for mere error of judgment, if he acts honestly and with reasonable care.

The duty of care and skill will depend upon the nature and size of the company's business and the manner in which the work of the company is distributed between the directors and other officials of the company. The nature of the duties of a director to the company were discussed by Romer J. in the famous case of Re. City Equitable Fire Insurance Co. Ltd wherein he observed:

"As a general proposition a director will not be held liable for negligence unless guilty of ...gross or culpable negligence in a business sense."

The learned judge laid down the following propositions relating to the duty of care and skill.

1. "A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance does not guarantee that he has the skill of an actuary or a physician.
2. A director is not bound to give continuous attention to the affairs of the company. His duties are of an intermittent nature to be performed at periodic board meetings and the meetings of any committee to which he is appointed. He is not bound to attend all such meetings though he ought to attend whenever he is reasonably able to do so.

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3. In respect of all duties, that having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

To conclude in the words of Lindley M.R. "If directors act within their powers, if they act with such care as is to be reasonably expected of them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as legal duty to the company.

3. Duty to attend board meetings

Reasonable care requires that a director should give a reasonable amount of attention to the affairs of the company. A director should attend the board meetings whenever he is able to do so, but he is not bound to attend all board meetings. Continuous non-attendance may render a director liable for the acts of his co-directors. Section 164 provides that the office of director becomes vacant if he absents himself from (i) three consecutive meetings of the board or (ii) from all meetings of the board, for a continuous period of three months, whichever is longer, without obtaining leave of absence from the board.

4. Duty not to delegate

As a rule, directors must perform their duties personally and should not delegate their office. The directors are bound by the maxim, "delegates nonpotest delegare. The rule is, however, subject to certain exceptions. The directors may delegate their duties if the Act or the articles specifically authorize them to do so. Secondly, having regard to the exigencies of the business, the directors may distribute the work among themselves and other officials of the company.

5. Duty to disclose interest

As a director is an agent of the company, he must see that his interest and duty do not conflict. "For the proper exercise of the functions of a director, it is essential that he should be disinterested that is to say, he should be free from any conflicting interest." It follows that the company can avoid a contract in which the director has an interest unless the prior sanction of the board has been taken.

According to section 184 of the Companies Act, a director who is interested in any transaction of the company, he is bound to disclose his interest to the board. The disclosure shall be made at the first meeting of the board held after he has become so interested. An interested director cannot take part in the discussion or vote on any contract in which he is directly or indirectly interested [Sec, 2(49)].

6. Statutory duties

Apart from the duties explained above, the directors have some specific duties laid down by the Companies Act.

Some of the important duties are enumerated below:

1. Duty not to allot shares until minimum subscription is raised. (Sections 39).
2. Duty to sign annual returns and the certificate attached thereto. (Sec. 92).
3. Duty to forward the statutory report to every member of the company.
4. Duty to call an annual general meeting every year within the proper time. (Sec. 96).
5. Duty to call an extraordinary general meeting on a valid requisition. (Sec. 100).

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6. Duty to prepare profit and loss account and balance sheet and lay before the company with the director's report as to the state of the company's affairs. (Sections 128, 129 and 134).
7. Duty to take share qualification.

2.17 REGISTER OF MEMBERS

Companies Act, 2013 requires companies to maintain register and index of members, register and index of debenture holders, but the 2013 Act requires company to maintain register and index of other securities also.

The particulars of Register of members and other details are prescribed in Companies (Management and Administration) Rules, 2014

Registers to be maintained:

Every company shall keep and maintain the following registers:

(a) ROM indicating separately for each class of equity and preference shares held by each member residing in or outside India;

(b) Register of Debenture-holder and

(c) Register of any other security holders.

(1) Every company shall from the date of its registration, keep and maintain a register of its members in one or more books in Form No. MGT-1.

In the case of existing companies, registered under the Companies Act, 1956, particulars shall be compiled within six months from the date of commencement of these rules.

(2) For Company not having share capital

(a) ROM shall contain following Particulars:

- Name of the member;
- Address (registered office address in case the member is a body corporate);
- e-mail address;
- Permanent Account Number or CIN;
- Unique Identification Number, if any;
- Father's/Mother's/Spouse's name;
- Occupation; Status;
- Nationality;

  In case member is a minor

  Name of the guardian and

  DOB of the member;

  Name and address of nominee;

(b) Date of becoming member;

(c) Date of cessation;

(d) Amount of guarantee, if any;

(e) Any other interest if any.

(f) Instructions, if any, given by the member with regard to sending of notices etc.

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Every company which issues or allots debentures or any other security shall maintain a separate register of debenture holders or security holders, as the case may be, for each type of debentures or other securities in one or more books in Form No. MGT-2.

Maintenance of the Register of members etc. under section 88.

Every company shall maintain the registers in the following manner:

1. **Entries after allotment or transfer of shares, debentures or other securities:** The entries in the registers maintained under section 88 shall be made within seven days after the Board of Directors or its duly constituted committee approves the allotment or transfer of shares, debentures or any other securities, as the case may be.
2. **Register at R.O/other place:**
   - Registers shall be maintained at the registered office of the company
   - Registers shall be maintained at other place- If

     A special resolution is passed in a general meeting authorizing the keeping of the register at
   - Any other place within the city, town or village in which the registered office is situated or
   - Any other place in India in which more than l/10th of the total members entered in the register of members reside.
3. **Other entries in ROM or in respective registers:** Consequent upon any forfeiture, buy-back, reduction, sub-division, consolidation or cancellation of shares, issue of sweat equity shares, transmission of shares, shares issued under any scheme of arrangements, mergers, reconstitution or employees stock option scheme or any of such scheme provided under this Act or by issue of duplicate or new share certificates or new debenture or other security certificates, entry shall be made within seven days after approval by the Board or committee, in the register of members or in the respective registers, as the case may be
4. **Change in Status:** If any change occurs in the status of a member or debenture holder or any other security holder whether due to death or insolvency or change of name or due to transfer to Investor Education Protection Fund or due to any other reason, entries thereof explaining the change shall be made in the respective register.
5. **Reference of Order:** The necessary reference of order shall be indicated in the respective register - If
   - Any rectification is made in the register by the company pursuant to any order passed by the competent authority under the Act,
   - Any order is passed by any judicial or revenue authority or by Security and Exchange Board of India (SEBI) or Tribunal attaching the shares, debentures or other securities and giving directions for remittance of dividend or interest
6. **Particulars of pledge/charge/Lien/hypothecation created by promoter:** In case of companies whose securities are listed on a stock exchange in or outside India, the particulars of any pledge, charge, hen or hypothecation created by the promoters in respect of any securities of the company held by the promoter including the names of pledgee/ pawnee and any revocation therein shall be entered in the register within fifteen days from such an event.

If promoters of any listed company, which has formed a joint venture company with another company have pledged or hypthoticated or created charge or lien in respect of any security of the listed company in connection with such joint venture company, the particulars of such pledge, hypothecation, charge and lien shall be entered in the register members of the listed company within fifteen days from such an event.

Corresponding register and index:

Every register maintained shall include an index of the names included therein.

The register and index of beneficial owners maintained by a depository under section 11 of the Depositories Act, 1996 (22 of 1996), shall be deemed to be the corresponding register and index for the purpose of this act.

Index of names to be included in Register.

1. Every register maintained under sub-section (1) of section 88 shall include an index of the names entered in the respective registers and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found. The maintenance of index is not necessary in case the number of members is less than fifty.
2. The company shall make the necessary entries in the index simultaneously with the allotment or transfer of any security in such Register.

Foreign Register:

A company may keep a part of the register, in any country outside India, if so authorized by its articles, in such manner as may be prescribed called "foreign register", containing the names and particulars of the members, debenture-holders, other security holders or beneficial owners residing outside India.

Foreign register of members, debenture holders, other security holders or beneficial owners residing outside India.

1. A company which has share capital or which has issued debentures or any other security may, if so authorised by its articles, keep in any country outside India, a part of the register of members or as the case may be, of debenture holders or of any other security holders or of beneficial owners; resident in that country (hereafter in this rule referred to as the foreign register).
2. The company shall file Form MGT-3 with the Registrar for
   - Notice of the situation of the office within 30 days from the date of the opening of any foreign register along with the fee as provided in Annexure B where such register is kept and
   - Any change in the situation of such office or of its discontinuance, within 30 days from the date of such change or discontinuance.
3. A foreign register shall be
   - Deemed to be part of the company's ROM or of Register Of Debenture holder or of any other security holders or BO.
   - Maintained in the same format as the Principal Register.
   - Open to inspection and extracts may be taken there from and copies thereof may be required, in the same manner, mutatis mutandis, as is applicable to the principal register
   - Closed but advertisement before closing the register shall be inserted in at least two newspapers circulating in the place where it is kept.
4. If a foreign register is kept by a company in any country outside India, the decision of the appropriate authority in regard to the rectification of the register shall be binding.

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5. The company shall:
   (a) Transmit to its registered office in India a copy of every entry in any foreign register within 15 days after the entry is made; and
   (b) Keep at such office a duplicate register of every foreign register duly entered up from time to time.
   (c) Every such duplicate register shall, for all the purposes of this act, be deemed to be part of the principal register.

2.18 MEETINGS

Meaning and Definition

A 'meeting' is said to take place when two or more than two persons meet. For a meeting to take place, it is essential that two or more than two persons are present because a meeting implies that one person meets another person or persons; but it does not really define the 'meeting' of a company. A get-together of two or more than two persons does not necessarily constitute a 'meeting'. A 'meeting' may be defined as the gathering together of two or more persons by previous notice or by mutual agreement for discussion and transaction of some business.

In the context of a 'company meeting', a 'meeting' is a get-together of the company's members, shareholders, directors and debenture-holders with a previous notice and a time and place previously defined.

The definitions of a 'meetings' are as follows.

- "Any gathering, assembly or coming together of two or more persons for the transaction of some lawful business of common concern is called 'meeting". **— RK. Ghosh**
- "A concurrence or coming together of atleast a quorum of members by previous notice or mutual agreement for transacting business for a common interest is a 'meeting'.

From what has been said above, it can be concluded that a meeting is the coming together of two or more persons, or a quorum of members of a company by a prior notice and mutual agreement at an agreed place and time for transacting some lawful business of the company.

Characteristics of a Company Meeting

From the above definitions, the following characteristics of a meeting are highlighted:

(i) A company's meeting—except where it is otherwise specified—is a get-together of two or more persons who are members of the company.

(ii) The members of the company get together for discussing and taking a decision on some lawful business of the company.

(iii) Before a meeting is held, the members are given a notice about the meeting.

(iv) A meeting is held at a specific place and time.

(v) A company's meeting is held according to the provisions of the Companies Act.

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2.19 KINDS OF MEETINGS

There are four kinds of meetings such as

A. Shareholders meeting
B. Board of directors meeting
C. Creditors meeting
D. Debenture holders meeting

A. Shareholder's Meeting

A company's shareholders are its de facto owners; but, since they are scattered over a wide area and are too many in number, they are not in a position to run the affairs of the company—which is why there is the Board of Directors to manage the company's business. To ensure that the shareholders are informed of the company's affairs, periodic meetings of the shareholders are called. These are the general meetings of a company, and are referred to as 'company meetings'.

To protect the interests of the shareholders, various provisions have been made in the Companies Act, 2013, so that a company's shareholders can participate in the decision-making of the company. Shareholders' meetings may be of the following kinds:

A.1. Annual General Meeting
A.2. Extraordinary General Meeting
A.3. Class meeting

The Companies Act, 1956 contained provision relating statutory meeting and Statutory Report under Section 165 of that but this section has been omitted in the Companies Act, 2013 and, therefore, there is no provision for statutory meeting of the companies under the New Act of 2013.

2.19 (A1) Annual General Meeting

Meaning: Every company must hold in each year, in addition to any other meetings, a general meeting of its member, which is called the company's 'annual general meeting'. In the normal course, such meeting is called by the company only. But in some special circumstances, in exercise of the powers vested in it may also call a company's annual general meeting. According to Section 96, every company shall call its annual general meeting once every year, and the notice of such meeting being called must clearly state that it is the company's annual general meeting.

Objects and Importance of the Meeting: The main object of calling the annual general meeting is that, at least once in a year, the company's members get together and have an opportunity to collectively examine the affairs of the company. Thus, from the point of view of the shareholders, the annual general meeting of the company is specially important because, besides other things, the company declares the dividend that is payable to its shareholders, which is of primary interest to all its members. The directors and the auditors report is also presented to the members, which gives them all information about the company's activities in the preceding year. In this manner, the members are apprised of the company's performance and its profits or losses. The members are free to move any resolution which relates to them in the meeting. It is mandatory for the company to present its final accounts in the annual general meeting, and any member can ask any question to the chairman of the meeting.

Business transacted in Annual General Meeting: The annual general meeting of a company provides a forum for the shareholders to come together and review the working of the company for the preceding year. Under Section 102 of the 2013 Act, the business to be transacted at

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the annual general meeting of a company has been classified into two heads, namely; (a) General/Ordinary Business and (b) Special Business.

1. **General/Ordinary Business:** The general or ordinary business of the meeting constitutes the following:
   (i) To discuss the final accounts and profit and loss account of the company, and the 'directors' and auditors' report for the previous year.
   (ii) To declare the dividend for the year.
   (iii) To appoint new directors to replace those who retire by rotation.
   (iv) To appoint auditors.
2. **Special Business:** Any other business besides what is normally transacted in the meeting is called 'special business'. The approval of the general meeting of any special business of a company must necessarily be there. Such business may include:
   (i) the appointment, renewal of appointment and remuneration of directors.
   (ii) increasing the company's share capital.
   (iii) altering the company's articles of association.

When some special business has to be transacted in the annual general meeting, the notice for the meeting must contain a statement of the important aspects of such business, including in particular, the interest if any of every director and the manager. If such business involves another company, and a director (including other key managerial personnel) of the company holds 20 per cent or more share capital of such other company, it must be specifically clarified in the notice. In case a resolution is to be passed, the notice for the meeting must specify the time and place where any documents relating to the resolution can be inspected.

Statutory Provisions Regarding the Annual General Meeting

The statutory provisions regarding the annual general meeting of a company are as follows:

1. **Time Interval for Calling the Meeting:** Every company other than a One Person Company shall in each year hold in addition to any other meetings, a general meeting as its annual general meeting and shall specify the meeting as such in the notices calling it, and not more than fifteen months shall elapse between the date of one annual general meeting of a company and that of the next.

   In case of the first annual general meeting, it shall be held within a period of nine months from the date of closing of the first financial year of the company and in any other case, within a period of six months, from the date of closing of the financial year, if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any annual general meeting in the year of its incorporation. The Registrar may, for any special reason, extend the time within which any general meeting (not being the first annual general meeting) shall be held by a period not exceeding three months.
2. **Notice and Place of Meeting:** The general meeting of a company may be called by giving not less than twenty-one days' notice in writing. It may be called after giving a shorter notice in case the consent of all members entitled to vote at such meeting is obtained.

   The annual general meeting of a company must be called for a time during the business hours, on a day which is not a public holiday, and must be held either at the company's registered office or at some other place within the city, town or village in which the registered office of the company is situated.

A public company may, by its articles, fix the time for its annual general meetings, and may also fix the time and place for its subsequent annual general meetings by passing a resolution to that effect in one annual general meeting. Likewise, a private company may also, by a resolution agreed to by all members, fix the time and place for its annual general meeting.

3. **Consequences of not holding the Annual General Meeting:** The consequences of not holding the annual general meeting are as follows:

   (i) Tribunal Calling Meeting: If default is made in holding an annual general meeting in accordance with Section 96, the Tribunal may, notwithstanding with the provisions of the Act or the articles of the company, call or direct the calling of a general meeting of the company on an application being made by any member of the company. The directions that may be given by the Tribunal may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.**—Section 98**

   An Annual general meeting held in pursuance of the directions of the Tribunal shall be deemed to be an annual general meeting of the Company under the Act.

   (ii) Penalty: In case a company on its own or on the direction of the Tribunal defaults in calling such meeting, the company and every officer of the company who is in default, shall be punishable with fine which may extend to one lakh rupees. In case the default continues, an additional fine of rupees five thousand may be imposed for each day the default continues.

2.19(A.2) Extraordinary General Meeting

Besides the statutory and the annual general meetings, any meeting of the company's shareholders called for whatever purpose is an 'extraordinary general meeting'. In other words, an extraordinary general meeting of a company is any meeting of its shareholders which is called during the period between its two consecutive annual general meetings.

When an Extraordinary General Meeting may be Called

The need to call an extraordinary general meeting of a company arises when any such matter has to be decided which cannot wait till the next annual general meeting of the company is to be held. An extraordinary general meeting of a company may be called in the following circumstances:

(i) To make an alteration in the company's memorandum or articles of association.

(ii) To issue fresh debentures.

(iii) To increase, reduce or reorganise the company's share capital.

(iv) Any other urgent matter

Who may Call such Meetings

An extraordinary general meeting of a company may be called: (1) by the directors, (2) by the directors on requisition of the members, (3) by the requisitionists themselves and (4) by the National Company Law Tribunal.

1. **By the Directors:** In case it is authorized by the company's articles, the directors may, convene an extraordinary general meeting by passing a resolution to that effect in the Board's meeting. According to Rule 48 of Table A, the Board may, whenever it thinks fit, call an extraordinary general meeting. Such meeting is called by the directors to do any

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special and necessary act which must be done before the next annual general meeting of the company,

In case any such meeting is called by the directors, it is necessary to give a 21 -day notice for the meeting. It is also necessary to state the purpose for which the meeting is being called. If the purpose of the meeting is to seek the support of members for some resolution, the notice for the meeting must specify the time and place where the members can examine such resolution.

Although it is necessary to give a 21-day notice for an extraordinary general meeting of the company, it is possible, under the following circumstances, to call such meeting by a notice which is less than the prescribed 21-days. These circumstances are:

(i) When the members of a company with share capital who are entitled to vote and hold 95 per cent of the company's capital agree that a meeting be called.

(ii) When 95 per cent of the members of a company without share capital agree to hold such meeting.

2. **By the Directors on Requisition of Members:** In case the directors do not call a general meeting of the company as required under the provisions of the Act, the members mentioned hereunder can bind the directors to call an extraordinary general meeting.

(i) In case of a company having a share capital, members who hold ten per cent of the company's paid-up share capital and have the right to vote.

(ii) In case of a company that does not have share capital, ten per cent of the members who have the right to vote.

When two or more than two persons are the joint owners of a share or shares of a company, the consent of one or more than one such persons shall be deemed to be the consent of all the joint holders of shares.

When the above-mentioned members of a company demand that an extraordinary meeting of the company be held, it becomes mandatory for the directors to call such meeting. The requisition notice must state the issues for discussing which the demand for the extraordinary general meeting is being made. The demand notice must bear the signatures of the members making such demand, and the notice must be delivered to the company's registered office. After a valid requisition for such meeting has been delivered, the Board of Directors shall initiate the procedure to call such meeting within twenty-one days of the receipt of the requisition and the meeting should actually be held within 45 days from the date of the requisition. **—Section 100**

3. **By the Requisitionists Themselves:** If the directors fail to call the meeting within a forementioned time limits, the requisitionists may themselves convene a meeting within three months from the date of the deposit of the requisition. A meeting called by the requisitionists. must be called in the same manner as a meeting called by the Board of Directors. Any reasonable expenses incurred by the requisitionists by reason of the Board's failure to call a meeting shall be repaid to the requisitionists by the company, and the company shall retain such amount out of any sums due or to become due by way of fees or other remuneration of the directors who were in default.

4. **By National Company Law Tribunal:** If, for any reason, it is impractical to call a meeting of a company other than an annual general meeting, the National Company Law Tribunal may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote, order a meeting of the company to be held in such manner as the Tribunal thinks fit and give such directions

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as it thinks expedient in relation to the calling of such meeting. The directions may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting. **—Section 98**

2.19 (A.3) CLASS MEETINGS

When a company issues different classes of shares, it calls a meeting of that class of shareholders. Such meeting of a type of shareholders is called a 'class meeting'. These meetings are called to alter or define the rights and obligations of a class of shareholders—for example, to convert one class of shares to another, like a class meeting of the shareholders needs to be called to convert preference shares into equity shares. Only those members of a company who hold the class of shares for which the meeting is called may participate in such meetings. The articles of a company normally define the conditions and the provisions for calling class meetings. The rights and obligations of any class of shareholders can only be altered up to the limits defined in the company's articles and memorandum of association. In other words, any alteration about any class of shares can only be made according to the conditions under which the shares were issued. If any alteration is to be made in such rights and obligations of a class of shareholders, it can only be done in a meeting of that class of shareholders by the members of the class passing a special resolution to that effect, i.e. the resolution must be passed by a majority of three-fourths of the members of that class.

According to Section 48, where the share capital of a company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or with the sanction of a special resolution passed at a separate meeting of the holders of issued shares of that class.

Any default in complying with the provisions of Section 48 of the Companies Act, 2013 shall render the company liable to punishment with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees or with both.

B. Board of Directors' Meetings

A company, being an 'artificial person', performs all its actions through its directors. In fact, it is the directors who manage the affairs of a company. A company's policy, its management and other important issues are decided in the meetings of its Board of Directors. It is, therefore, necessary that meetings of the company's Board of Directors are held to take decisions relating to its policy and management. Except for the issues on which the decision-making right rests with the shareholders, all matters of the company are dealt with in the meetings of its Board of Directors.

The meetings of a company's directors can be categorised as:

(i) Meetings of the Board of Directors, and (ii) Meetings of Directors' Committees.

C. Creditors Meetings (Sec-230)

The meeting of the creditors is usually called when the company wants to make any compromise or arrangement with the creditors or any class of them. In fact, these meetings are not the meetings of the company as they are called by the creditors.

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Purpose of Meeting

1. To enter into a compromise or arrangement proposed between a company and its creditors, or any class or them.
2. To seek approval of creditors for amalgamation or reconstruction of a company.
3. To seek consent of the creditors for winding up of a company.

D. Debenture holders Meetings

The company may call the meeting of debenture holders to consider, (i) any variation in the conditions of their security, (ii) any alteration in their rights. The company may also hold debenture holders meeting for issuing new debentures or effecting a change in the rate of interest on the existing debentures. The rules and procedure of these meetings are usually stated on the reverse of debenture trust deed.

2.21 VALIDITY OF MEETING

Any meeting of the shareholders of a company is only valid if it is held in a proper manner. For any valid business to be conducted in a company's meetings, it is very important that the meetings have the requisites of a valid meeting and are held according to the provisions of law. It is important to point out here that not only the proceedings of a meeting held contrary to the provisions of law will be invalid, all decisions taken in such meetings shall also be void. The Companies Act, defines the provisions that need to be followed by every public company, or a private company which is subsidiary of a public company, in convening and conducting the company's meetings. Besides this, it is also necessary for a company to follow the guidelines laid down in its articles. The main requisites of a valid meeting are as under:

2.22 CONVENING AUTHORITY

The first requisite of a valid meeting is that it should be called by an authorized officer of the company. The authority to call a general meeting of the shareholders is vested in the company's Board of Directors, which can call such meeting by passing a resolution to that effect. In case a company's general meeting of its shareholders is not called by the Board of Directors of the company, the National Company Law Tribunal, on an application being made by any member of the company, may direct the company to hold its general meeting. It is important to note here that the resolution to call a general meeting must also be passed by a valid meeting of the company's Board of Directors, otherwise the notice for the meeting shall not be valid and all proceedings of the meeting so called shall be void.

2.23 NOTICE OF MEETING

The next requisite of a valid meeting is that all members of the company should be given a proper notice of the meeting being called. The requirements of a proper notice are as follows:

(i) Duration of Notice: According to Section 101 of the Act, a general meeting of a company may be called by giving not less than twenty-one days' notice in writing. Such notice is necessary whether it is the company's annual general or its extraordinary general meeting. The duration of notice, i.e. twenty-one days', shall not include the day when the notice is received by the members (or when it deemed to be received) and the day the meeting is to be held.

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In the following circumstance, a meeting may be called by giving a notice which is of shorter duration:

(a) In case of an annual general meeting, if consent is accorded to such shorter notice by all members of the company who are entitled to vote.

(b) In case of any other meeting, if consent is accorded to such notice by members holding 95 per cent of the paid-up share capital of the company (and having the right to vote) if the company has share capital, or in case of a company not having a share-capital, by members holding not less than 95 per cent of the total voting power exercisable at the meeting.

(ii) Procedure to Send Notice: A notice may either be delivered in person or sent to the members' registered address. If a member has no registered address in India, the notice must be sent to the address he has given to the company for communication. In case any member has requested the company to send him such notice under certificate of posting or by registered post and has deposited the necessary amount with the company to do so, the company shall send the notice according to the member's instructions.

In case the company does not have the registered addresses of some of its member, it can fulfill its obligation of serving a notice on such members by giving an advertisement in a newspaper which has a wide circulation in the region where the company's head office is situated. With such advertisement in the newspaper the notice would be deemed to have been served on all its members.

In the case of joint holders of the company's shares, a notice served to person whose name appears first as a joint holder in the company's register of members shall be deemed to be an adequate notice.

(iii) Subject-matter of Notice: Every notice issued for a meeting of the company must clearly state the date, day, place and time of the meeting; it must also give a description of the business to be transacted at the meeting. The agenda of a meeting is sent to the members participating in it so that before they attend the meeting they can deliberate on the subject matter to be dealt with in the meeting and decide their course of action. In case some special business is to be transacted by the meeting, then an 'explanatory statement' with regard to the important facts concerning such business must be attached with the notice. Further, in case any director or manager of the company has any personal interest in the business to be transacted, it should be described in the notice. In the notice of a meeting of a company having share-capital, it should be stated that the member is entitled to nominate a proxy (in case it is permitted by the provisions of the Act and the company's articles) and that the proxy nominated need not necessarily be a member of the company. The proxy form should also be enclosed with the notice of the meeting. The notice for a meeting must be served to every member of the company. If any member is not given an appropriate notice, he is entitled to challenge the legality of the meeting. But, in case the decisions taken in the meeting do not adversely affect the interests of the member who has not been given notice, the meeting shall be deemed to be valid.

(iv) On Whom to Serve a Notice?: According to Section 101 of the Act, notice of every meeting of the company shall be given to: .

(a) every member of the company (in the case of a meeting of the Board of Directors, to every director).

(b) the legal representative of a deceased member.

(c) the official liquidator in the case of an insolvent member.

(d) the auditor or auditors of the company.

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(v) **Notice of the Meetings of Directors:** According to Section 173, the notice of every meeting of the Board of Directors of a company shall be given in writing to every director in India and to every other director who is outside India for the time being at his usual address in India. The notice must state the date, time and place of the meeting. It is always a good practice to send such notice to the directors before it is due. It is also to be noted that a company's articles may also state that the meeting of the company's Board of Directors shall be held once a month or after any specified period. In such case, it is not necessary to send any notice. But notwithstanding such provision, a notice is normally sent to all directors for any meeting of the Board.

2.24 QUORUM:

Another requisite of a valid meeting is the presence of the required quorum of members. By quorum is meant the minimum number of members who must be present for a meeting to be valid. Such number of members—or a quorum, as it called—is pre-defined in the company's articles. It may be more, but cannot be less, than what is deemed to be a valid legal limit. Only such members who have the right to vote can constitute a quorum.

Unless there is a provision to the contrary in the company's articles which provides for a larger number of members to constitute a quorum, in the case of a public company, the presence of five members; and, in the case of a private company, the presence of two members is considered to constitute the quorum of a meeting. While counting the quorum of a meeting, the physical presence of such members who have the right to vote is necessary. Proxies are not counted to be a part of the quorum. Besides that, the presence of more than one joint shareholder is deemed to represent only one member.

It is important to note here that the presence of the required number of members is essential before the proceedings of any meeting can start. After the proceedings of a meeting have started, such presence is not mandatory. In this connection, it was held in the case of Hartley Baird Ltd. that, in case the required quorum of members is present at the start of a meeting, and some member or members leave after the proceedings have started, it would not have any effect on the validity of the meeting and any decision taken at the meeting would be a valid decision.

In case the required quorum is not present within half-an-hour of the commencement of the company's meeting, and the meeting is called on the demand of the members, the meeting, would be deemed to be over. In other circumstances, the meeting would be deemed to be adjourned, and would be held at the same place and at the same time after one week, or at any other place or time as decided by the Board of Directors. In case, even if at the next such meeting, the required quorum is not present after half-an-hour of the commencement of the meeting, the number of members present at the meeting would be deemed to constitute the quorum.

Quorum of Meetings of Directors

The quorum of the meetings of a company's directors is normally specified in the company's articles. In case it is not so specified, the quorum for a meeting of the Board of Directors of a company shall be one-third of its total strength (any fraction in that one-third being rounded off as one), or two directors, whichever is higher. For example, if a company has eight directors, one-third (which is 2 2/3) would be deemed to be 3.

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2.25 CHAIRMAN

The fourth requisite of a valid meeting is that there must be a chairperson to preside over the meeting and to conduct its proceedings. Unless there is a provision to the contrary in the company's articles, the members personally present at the meeting shall elect one of themselves to be the chairman of the meeting by a show of hands.

If a poll is demanded on the election of the chairman, it shall be taken forthwith in accordance with the provisions of the Act, and the chairman elected on a show of hands shall exercise all the powers of the chairman under the said provisions. **—Section 104**

In case the articles of a company so provide, the chairman of the company's meetings may be appointed permanently. Normally, the functions of permanent chairman are performed by the company's managing director. In case the chairman does not arrive at any meeting within fifteen minutes of its start, the vice-chairman takes over. When there is no vice-chairman, or the vice-chairman is also absent, the members present may elect a chairman to preside over the meeting in the normal manner, who will then conduct the proceedings of the meeting.

It is the chairman who maintains the meeting's discipline and conducts the proceedings. The chairman makes the proposal for any resolution, calls for a vote on such resolution and declares the result of such vote. The minutes of any meeting also must bear the signature of the chairman.

The chairman of any meeting is responsible to settle any dispute or controversy that might arise between the members. Unless the requisite quorum is not there, or all matters related to the meeting have been disposed of, or the members present in the meeting so demand, the chairman does not have the right to end or adjourn the meeting. If the chairman adjourns the meeting without any reason, the members present may elect another chairman and continue the proceedings. Besides this, the chairman does not have the right o terminate any discussion on any matter that is going on in a meeting; he only has the right to stop any member from taking too much time in speaking in the meeting.

It is important to note here that, unless the articles of a company provide otherwise, the chairman has the right to cast the deciding vote in case the votes for and against a motion are equal, and thereby accept or reject the motion being discussed.

2.26 MINUTES

By 'minutes' is meant a record that is kept of the proceedings of any meeting. Under Section 118 of the Act, the provisions governing the minutes of a meeting are as follows:

(i) Every company must record the minutes of every meeting by making entries in a 'minutes book' kept for the purpose within thirty days of the conclusion of every meeting.

(ii) The minutes of meetings of members of a company and its Board of Directors must be kept in separate books with their pages consecutively numbered. Each page of every such book must be initialed or signed, and the last page must be dated and signed by the chairman of the said meeting. In the case of minutes of proceedings of a general meeting, the minutes must be signed and dated by the chairman within thirty days and, in the case of the minutes of the Board of Directors or a committee thereof, the minutes must be signed by the chairman of the said meeting or the chairman of the next succeeding meeting.

(iii) In the case of a meeting of the Board of Directors, the minutes must also contain the names of the directors dissenting from or not concurring in any resolution.

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(iv) The chairman of the meeting shall exercise an absolute discretion in regard to the inclusion or non-inclusion of any matter in the minutes.

(v) Minutes of meetings kept in accordance with the provisions of Section 118 shall be evidence of the proceedings recorded therein.

(vi) Where minutes of the proceedings of any meeting have been kept with the above provisions, the meeting shall be deemed to have been duly called and held.

(vii) The books containing the minutes of the proceedings of any general meeting of a company are kept at the registered office of the company, and must be open, during business hours, to the inspection of any member without charge, subject to such reasonable restrictions as the company may impose by its articles, so that not less than two hours in each day are allowed for inspection. Any member of the company shall be entitled to be furnished, within seven days of making such request with a copy of any minutes on the payment of such sum as may be prescribed.

2.27 SUMMARY

- A public company must have a minimum paid up capital of ₹ 5 lakhs. A minimum of seven persons can start a public company and there is no limit on maximum members. Public company has to invite public to subscribe shares. It can start its business only after getting a certificate of commencement of business.
- A company not having any limit on the liability of its members is termed as unlimited company. In such a company the liability of each member extends to the whole amount of the company's debts and liabilities. But he will be entitled to claim contribution from other members.
- Small company means a company other than a public company paid up share capital of which does not exceed 50 lakhs rupees or such higher amount as may be prescribed which shall not be more than five crore rupees.
- According to Companies Act 2013, "director" means a director appointed to the board of a company.
- The word 'meeting' implies the coming together of a certain number of members for transacting the business in the agenda for which a previous notice has been given. Quorum means the minimum number of directors which must be present to make the proceedings of the board valid. The Chairman of the meeting is a person who presides the meeting. The Chairman can be explained as the umpire of debate, the Judge of admissibility and upholder of order and decorum.

2.28 SELF ASSESSMENT QUESTIONS

1. Distinction between a private and public company.
2. Describe the details about public company.
3. Who is a director? Discuss the role of director.
4. Discuss various types of Director.
5. Explain the appointment procedure of directors.
6. Discuss disqualifications for appointment of directors.
7. Discuss the duties of director.

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8. Explain register of members.
9. Discuss AGM.
10. Discuss the requisites of a valid meeting.
11. Write note on notice of meeting.
12. Write note on Quorum.
13. Discuss the minutes of meeting.
14. Discuss about Chairman of Meeting.

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UNIT 3: SHARE CAPITAL AND WINDING UP

Structure

3.0 OBJECTIVE

After going through this unit, you will be able to:

- Understand Share Capital
- Describe kinds of share capital
- Define voting rights
- Understand the concept of corporate social responsibility
- Describe the concept of winding up.
- Define various modes of winding up.
- Understand legal aspect of Accounts and Audit.

3.1 INTRODUCTION

Capital is the money or wealth needed to produce goods and services. All businesses must have capital in order to purchase assets and maintain their operations. Business capital comes in two main forms such as equity and debt.

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Business Capital refers to the financial assets needed for a business to produce the goods and services it offers to its customers. Capital is necessary for a business to maintain its operations. Some businesses sell equity on ownership portion of the company, in exchange for a financial investment.

Capital is one of the basic factors of production along with land and labour. It is the accumulated assets of business that can be used to generate income for the business. Capital includes all goods that are made or created by humans and used for producing goods and services. Capital can include physical assets, such as a production plant or financial assets such as an investment portfolio. Some treat the knowledge, skills and abilities that employees contribute to the generation of income as human capital.

3.2 SHARE CAPITAL

Meaning: The Joint Stock company is a big form of business organization. The amount required by the company for its business activities is raised by the issue of shares. The amount organized is called "Share Capital" (or capital) of the company. It may he noted that a company limited by shares will have share capital. A company limited by guarantee or an unlimited company may not have any share capital.

The persons who buy the shares of company are called 'Shareholders'

3.3 KINDS OF SHARE CAPITAL

(i) **Authorized, registered or nominal capital.** This is the amount of capital with which the company intends to get itself registered. This is the amount of share capital which a company is authorized to issue. Nominal capital is divided into shares of a fixed amount. It must be set out in the memorandum of association. It can be increased or decreased by following .the prescribed procedure.

(ii) **Issued capital.** It is that part of the nominal capital which is actually issued by the company for public subscription. A company need not issue the entire authorized capital at once. It goes on raising the capital as and when the need for additional funds is felt. The difference between the nominal and-the issued capital is known as '**unissued capital'** which can be issued to the public at a later date. Where the whole of authorized capital is offered to the public, the authorized and issued capital will be the same. Issued Capital cannot be more than the authorized capital. Issued capital includes the shares allotted to public, vendors, signatories to memorandum of association etc.

(iii) **Subscribed capital.** It is that amount of the nominal value of shares which have actually been taken up by the public. It is that part of the nominal capital which has actually been taken up by shareholders who have agreed to give consideration in kind or in cash for shares issued to them. Where shares issued for subscription are wholly subscribed for issued capital would mean the same thing as 'subscribed capital'.

(iv) **Unsubscribed capital.** The difference between shares issued to public and shares subscribed by the public is termed as unsubscribed capital/ that part of issued capital which is not subscribed is also called as unsubscribed capital.

There is no unsubscribed capital in this case.

(v) **Called up capital.** The amount due on the shares subscribed may be collected from the shareholders in installments at different intervals. Called up capital is that amount of the nominal value of shares subscribed for which the company has asked its shareholders

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to pay by means of calls or otherwise. If 10,000 shares of ₹ 100 each, have been subscribed by the public, and the company has asked the shareholders to pay ₹ 10 on application, ₹ 20 on allotment and ₹ 30 on first call, then the called up capital of the company would be ₹ 6,00,000 (i.e. 10,000 × 60). The remaining amount i.e. ₹ 40 per share on 10,000 shares (i.e. ₹ 4,00,000) would be the uncalled capital of the company.

(vi) Paid up capital: That part of the called up capital which is actually paid up by the members is known as the paid up capital. In other words, paid up capital represents the total payments made by the shareholders to the company in response to the calls made by the company.

Paid up capital = Called up capital Less Calls-in-arrears

(vii) Unpaid up capital: It is that part of the called up capital which is not being paid by the shareholders.

(viii) Reserve Capital: It is the capital which has not been called up by the company and it has decided, not to call the uncalled capital, except, on its winding up, by passing a special resolution.

So the reserve portion of the subscribed capital becomes reserve capital and it will be available only to the creditors in case of liquidation of the company.

(ix) Calls-IN-Arrears: When money is demanded from shareholders on allotment or on calls, the respective accounts are debited. Sometimes, some shareholders do not pay their dues on allotment and on calls within the fixed time. The amount which is not paid by defaulter shareholders is called call in arrears.

3.4 VOTING RIGHTS

The articles of a company gives the right to vote to its shareholders and prescribe the regulations and procedure for voting at the company's meetings. The shareholders of a company are entitled to attend the company's general meetings and have the right to vote therein subject to the provisions of sections 43 and sub section 2 of section 50- (i) every member of company limited by shares and holding equity share capital therein shall have right to vote on every resolution place before the company and his voting right on a poll shall be in proportion to his share in the paid up equity share capital of the company.

Shares with differential voting rights:

Any company, whether private or public, will now have to comply with the below requirements.

- The shares have to be 'equity' class.
- The company cannot convert its existing share capital to a differential voting class but has to be fresh issuance of shares.
- Issuance requires prior shareholders approval through ordinary resolution and the Articles of Association shall authorize issue of such shares. Also, there is a limit that such shares should not exceed 26% of the total post-issue paid up equity share capital. Further the Company should not have defaulted in filing financial statements and annual returns for 3 financial years. The Company should not have any subsisting default in the payment of
  - a declared dividend to its shareholders or
  - repayment of its matured deposits or

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- redemption of its preference shares or debentures that have become due for redemption or
- Payment of interest on deposits or debentures

⑩ Besides this, the Rules require that the Company should not have defaulted on
- Repayment of loans from banks and public financial institutions or interest thereon
- Payment of dividend on preference shares
- Payment of statutory dues for employees
- Depositing moneys into the Investor Education and Protection Fund.

3.5 VARIATION OF SHAREHOLDERS

1. Where a share capital of the company is divided into different classes of shares, the rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class:
   a. If provision with respect to such variation is contained in the memorandum or articles of the company; or
   b. In the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class.

   Provided that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.
2. Where the holders of not less than ten percent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation, they may apply to the Tribunal to have the variation cancelled and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal.

   Provided that an application under this section shall be made within twenty-one days after the date on which the consent was given or the resolution was passed, as the case may be, and may be made on behalf of the shareholders entitled to make the application by such one or more of their number as they may appoint in writing for the purpose.
3. The decision of the Tribunal on any application under sub-section (2) shall be binding on the shareholders.
4. The company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.
5. Where any default is made in complying with the provisions of this section, the company shall be punishable with, fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months or with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees or with both.

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3.6 WHAT IS CORPORATE SOCIAL RESPONSIBILITY?

CSR (Corporate Social Responsibility) is an evolving concept and there is no single definition of it that is universally acceptable. The key three definitions that have received wide acceptance and favour are by Philip Kotler and Nancy Lee (2005), World Business Council for Sustainable Development, and by Archie Carrol (1991). According to Philip Kotler and Nancy Lee, CSR is "a commitment to improve community well-being through discretionary business practices and contributions of corporate resources." According to World Business Council for Sustainable Development, "Corporate Social Responsibility is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large." Archie Carrol describes CSR as a multilayered concept that can be differentiated into four interrelated aspects - economic, legal, ethical, and philanthropic responsibilities. Carrol presents these different responsibilities as consecutive layers within a pyramid, such that 'true' social responsibility requires the meeting of all four levels consecutively.

While the definitions of CSR may differ, a consensus is emerging on some common principles that underline CSR:

- **CSR is a business imperative:** Whether pursued as a voluntary corporate initiative or for legal compliance reasons, CSR will achieve its intended objectives only if businesses truly believe that CSR is beneficial to them.
- **CSR is a link to sustainable development:** Businesses feel that there is a need to integrate social, economic and environmental impact in their operation; and
- **CSR is a way to manage business:** CSR is not an optional add on to business, but it is about the way in which businesses are managed.

Some thinkers have suggested that in developing countries like India where poverty is widespread and millions of people suffer from malnutrition and under nutrition, the canvas of CSR needs to be extended specifically to cover the socially and economically disadvantaged groups of people. The 'disadvantaged' groups in India include: (i) small and marginal farmers with unirrigated holdings, (ii) casual workers and workers in unorganised, informal sector, (iii) rural artisans, (iv) landless labourers, (v) tribals, (vi) urban slum dwellers, (vii) specific sections of population that are constantly exploited (bonded labourers, child labourers etc.), (viii) disabled people and (ix) households headed by women (for example, single parent). In the Indian context, therefore, a socially responsible company would be one that actively influences public policy in favour of the disadvantaged and the environment while also deriving a business benefit. "At the very least, a socially responsible company will not argue for policies that it knows will harm the disadvantaged and the environment". Thus, according to Harsh Shrivastava and Shankar Venkateswaran, the Indian definition of CSR would look at the following in descending order of importance:

- "All activities aimed at communities (be they philanthropic, social investment or commercial initiatives) that benefit them in a sustainable manner. However, a company that undertakes such activities but does not comply with business basics cannot be termed as socially responsible.
- Basic business practices and value chain that go beyond legal compliance to benefit the disadvantaged amongst the company's stakeholders, for example, poor customers, marginalised producers (small/marginal farmers or traditional crafts persons, for instance) and so on.
- Advocating for change in public policy and laws that benefit disadvantaged people".

The above wider concept of CSR which is advocated in the context of poor developing countries does not say that companies should not support activities that benefit their employees, shareholders and customers. It only argues that the companies could make a greater difference if they extend their activities beyond them (i.e., the employees, shareholders and customers).

Arguments in vavour of Corporate Social Responsibility

1. **Philanthropy.** Although many new reasons for CSR are now being discussed in business literature, the basic reason continues to be that of philanthropy. The market survey referred to above noted that 50 per cent of the companies surveyed supported development activity for purely philanthropic reasons. The Tatas supported the concept of trusteeship advocated by Mahatma Gandhi in the pre-Independence period. In this context, the following quote from JRD Tata is significant: “The private sector should realise that they have to play their part in the spirit of trusteeship advocated by Mahatma Gandhi. No business success is worthwhile unless it serves the needs or interests of the country or its people”. In a similar vein, the former Managing Director of Infosys Technologies, N.S. Raghavan once commented, “Our company was founded by middle-class people who have now become rich. We know what it is to struggle and we now feel the need to contribute to society”.
2. **Changing public expectations of business.** Scandals at Enron, World-Corn and elsewhere have undermined trust in big business worldwide and has adversely affected public confidence in the ability of regulatory bodies and organizations to control corporate excesses. This has led to an increasing expectation that companies will be more open, more accountable and be prepared to report publicly on their performance in social and environmental arenas.
3. **Better relationship with employees.** The internal publicity a company can generate through its community development work can foster a sense of belonging and pride among its employees. This helps in building up a better relationship with the employees. This, in turn, helps in improving the work culture of the company.
4. **Vigilant customers.** Thanks to sustained campaigns by voluntary organizations worldwide, the public is now aware of social and environmental issues. They are prepared to stop buying from companies that are perceived to be socially irresponsible or environmentally unfriendly. For instance, Shell suffered bad press over the dumping of an old oil-rig in the North Sea. Similarly, Nike got into trouble because it allegedly used ‘sweatshop’ Vietnamese labour for making its shoes. In recent times, NGOs in many developed countries have started raising voices against imports of certain goods (like carpets, jute bags, etc.) from underdeveloped countries where child labour is extensively used in their manufacture.
5. **Shareholders concern.** Like enlightened customers, enlightened shareholders prefer to invest in socially responsible companies. They prefer to invest in a new class of mutual funds known as ‘ethical funds’. These funds are invested only in those companies that are socially responsible and environmentally conscious. For example, \$ 1 out of every \$ 9 under professional management in America now involves an element of “socially responsible investment”, according to Geoffrey Heal of Columbia Business School. Some of the big banks, including Goldman Sachs and UBS, have started to integrate environmental, social and governance issues in some of their equity research.
6. **Corporate brand.** CSR improves the ‘public image’ of the company. As noted by ASSOCHAM, “in an economy where corporates strive for a unique selling proposition to differentiate themselves from their competitors, CSR initiatives enable corporates to build a stronger

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brand that resonates with key external stakeholders - customers, general public and the government". A strong corporate brand built up on the strength of an enhanced public image (flowing from CSR activities) enables the company to gain more customers, better employees and a number of other economic and social benefits.

7. **Tax benefits.** Many companies are drawn towards being socially responsible also for tax benefits. For example, Indian tax laws grant various concessions for donation made by companies. These include Sections 35AC, 35CCA, 35CCB and Section 80G of the Income Tax Act. To give an illustration, Section 35AC provides that 100 per cent of the donation made to a local authority or an association/institution approved by a Committee constituted by the Union government for carrying out any project to promote the social and economic welfare of the public or the uplift of the public, as the Union government may notify, can be deducted from the income. Section 35CCB provides that 100 per cent of the donation made to any institution approved by the government working for the conservation of natural resources or for afforestation can be deducted from the income. Section 80G provides that 50 per cent of the donation made to voluntary organizations, trusts, and charitable institutions that are approved by the government, can be deducted from the income.

8. **Enlightened self-interest.** Some observers argue that CSR is a part of what businesses need to do to keep up with (or, if possible, stay slightly ahead of) society's fast changing expectations. It is an aspect of taking care of a company's reputation, managing its risks and gaining a competitive edge. So paying attention to CSR can amount to enlightened self-interest, something that over time will help to sustain profits for shareholders. As noted by The Economist, "It is the interaction between a company's principles and its commercial competence that shapes the kind of business it will be. A company that is weak on both values and commercial competence is simply a bad business. One that has strong values but is badly run, without proper attention to translating values into profits, will plainly not do well. In contrast, a company that is highly competent commercially but does not bother with corporate responsibility may work just fine, but it could also prove increasingly risky. Lastly, a combination of a strong commitment to CSR and strong commercial competence gives a good chance of success".

9. **Protecting environment and ensuring sustainable development.** The mad rush for industrial growth has, over the years, led to environmental degradation on a large-scale accompanied by massive resource depletion. Therefore, the focus is now increasingly on protection of environment. In this context, the economists now emphasise the concept of sustainable development. A development path is sustainable, if and only if the stock of overall capital assets remains constant or rises over time. This implies that the stock of natural capital should remain at least constant and the environment is not degraded further. This places immense responsibility on business as the basic damage to the environment has come from rapid expansion of industries. World Development Report 1992 points out three factors that intensify the environmental problems associated with rapid industrial development. First, as emissions from existing activities increase, they pass the point at which they can be readily assimilated by the environment. Second, as industrial towns expand, more people are exposed to pollution. Third, within industry the structure shifts away from activities that are moderately polluting, such as textiles, wood products and food processing, and toward others with much greater potential for causing environmental harm, such as metals, chemicals and paper. Smoke from the factory chimneys pollutes the air while disposal of industrial effluents in the rivers pollutes the water. The carbon emissions and greenhouse gases are causing a threat to environment as the Earth's capacity to absorb these gases is being overwhelmed. Global warming and climate change challenges are now getting increasing focus.

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10. **Globalisation.** In an increasingly fast-paced global economy, CSR initiatives enable corporates to engage in more meaningful and regular stakeholder dialogue and thus, be in a better position to anticipate and respond to regulatory, economic, social and environmental changes that may occur. As global concerns regarding the operations of human resource management practices, labour standards (including health and safety concerns), community responses and market behaviours are growing, reporting on CSR activities by corporate is increasingly becoming mandatory.

11. **International legal instruments and guidelines.** In recent times, certain indicators and guidelines such as the SA 8000, a social performance standard based on ILO (International Labour Organization) conventions have been developed. International agencies such as the United Nations and OECD (Organization for Economic Cooperation and Development) have developed compacts, declarations, guidelines, principles and other instruments that set the tone for social norms (although these norms are advisory and not mandatory). A soft 'guidance standard' on social responsibility, ISO 2600, is in the works. A soft code that is proving quite popular is that of the UN's Global Compact. To sign up, companies need only commit themselves to ten broad principles — such as promoting environmental responsibility and working against corruption — and report on their progress once in a year.

Arguments against Corporate Social Responsibility

1. **Profit maximization.** According to the critics of CSR, the most important objective of business is profit maximization. One of the important proponents of this view has been Milton Friedman. According to Friedman, "there is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud". In an article published in New York Times Magazine in 1970, Friedman reiterated that "the social responsibility of business is to increase its profit".

2. **Government's responsibility.** Critics of CSR point out that it is the responsibility of the elected government of a country to look after the welfare of the society and business should not be burdened with this responsibility. Thus, CSR encroaches upon what should be the proper business of government. Lobby groups find it more rewarding to put pressure on corporate executives because they respond faster than governments; governments are only too happy to duck the issue or let business pick up the bill.

3. **The very act of doing business creates profits for the society.** It is argued that the welfare that firms create in the form of jobs, products and innovation dwarfs anything firms are likely to do explicitly in the name of CSR. In this context, The Economist refers to a study of the economic impact of Unilever's operations in Indonesia conducted jointly in 2004-05 by Oxfam, an agency devoted to poverty relief and Unilever. The study found that Unilever in Indonesia supported the equivalent of 3,00,000 full-time jobs across its entire business, created a total value of at least $ 630 million and contributed $130 million a year in taxes to the Indonesian government. "The lesson for firms is that they have been far more defensive about their contribution to society. If efforts to do good become a distraction from the core business they may actually be downright irresponsible. After all, a socially conscious but bankrupt business is no good to anyone".

4. **Spending other people's money**. The most fundamental criticism of CSR is that what executives spend on it is other peoples'- i.e., shareholders'- money. They may have good intentions and it may give them satisfaction to write cheques for hurricane victims or

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disadvantaged poor, but that is not what they are hired to do. Their job is to make money for shareholders. It is irresponsible for them to sacrifice profits in the pursuit of goodness. According to Friedman, “few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stakeholders as possible. This is a fundamentally subversive doctrine”.

5. **It is difficult to measure CSR performance.** As stated earlier, the canvas of CSR is very large and is constantly growing as new issues and areas (like environmental protection and sustainable development) are getting added to it. Accordingly, it has become difficult to measure CSR performance. It is said that the time and energy spent on CSR diverts attention from the basic objective of business enterprises which is that of profit maximization and maximization of shareholders’ wealth. And since it is not possible to measure CSR performance, one is not sure of the net benefits of such an exercise. According to a critic, despite a surge of interest in CSR, in most cases it remains” too unfocused, too shotgun, too many supporting someone’s pet project with no real connection to the business.” According to another critic, the value-building type of CSR is “an act of faith, almost a fantasy.

NEED OF CSR

(i) Any business needs a stable social environment that provides a predictable climate for investment and trade. Also, at the same time, society also has expectations from the business. In this manner, business and society are interdependent and businesses must take full account of societal expectations.

(ii) Increasing regulatory pressures could be one of the reasons for undertaking CSR activities.

(iii) In this day and age, CSR is increasingly being viewed, not only as making good business sense, but also contributing to long-term prosperity of the companies and ultimately its survival.

(iv) The challenge for successful company in Indian and global economy is to build and maintain efficient, effective and fair relationship with its global and domestic stakeholders.

BENEFITS OF CSR

(i) An increased brand value

(ii) Greater access to finance

(iii) Stronger risk management and corporate governance

(iv) Healthier and safe work place

(v) Motivated people

(vi) Customer loyalty

(vii) Enhanced confidence and trust.

(viii) Upliftment of poor people and society

(ix) Contributes to the long-term prosperity of people and the business.

“The purpose of Corporation is to do as much good as we can, everywhere for everybody concerned and incidentally to make money.” —Henry Ford

COMPANIES ACT 2013 INTRODUCES MANDATORY CSR

Companies Act 2013 passed in August 2013, which replaces the 57 year old Companies Act 1956, has for the first time, made CSR mandatory. Section 135 of the Act says that every

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company having networth of ₹ 500crore or more, or turnover of ₹ 1,000 crore or more or a net profit of ₹ 5crore or more during any financial year will have to spend, in every financial year, at least 2 per cent of the average net profits of the company made during the three immediately preceding years. 'Net profits' shall mean net profit before tax as per book of accounts and shall not include profits arising from branches outside India. First CSR reporting of net profit shall mean average of the annual net profits of the preceding three financial years ending on or before March 31, 2014. Reporting will be done on an annual basis commencing from financial year 2014-15. Although the law does not stipulate penalties for non-compliance, companies are required to justify any shortfall in this regard.

Activities to be Included under CSR

The Draft Rules include the following activities under CSR:

Activities relating to

(i) Eradicating extreme hunger and poverty;

(ii) Promotion of education;

(iii) Promoting gender equality and empowering women;

(iv) Reducing child mortality and improving maternal health.

(v) Combating human immunodeficiency virus, acquired immune deficiency syndrome, malaria and other diseases;

(vi) Ensuring environmental sustainability;

(vii) Employment enhancing vocational skills;

(viii) Social business projects;

(ix) contribution to Prime Minister's Relief Fund or any other fund set up by the Central government or the State governments for socio-economic development and relief and funds for the welfare of the Scheduled Castes, Scheduled Tribes, other backward classes, minorities and women; and

(x) Such other matters as may be prescribed.

3.7 MEANING OF WINDING UP

The term winding up of a company may be defined as the proceedings by which a company is dissolved.

There are 3 ways in which a company may cease to exist in the eye of law; they are :

(a) Under a scheme of reconstruction and amalgamation a company may be dissolved by the order to tribunal without being wound up (sec. 232)

(b) When the company becomes a defunct company, the Registrar may remove the name of the company from the register of companies, (sec 248)

(c) Through winding up process.

Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights. During the process of winding up the company still exists and has corporate powers until dissolution. Till dissolution the property of the company remains vested in the company.

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However, there are marked distinctions between winding up and bankruptcy, which are:

1. In bankruptcy, the property of the debtor is divested from him and rests in the official receivers or the official assignee, while in a winding up, the property of the company is not divested from it.
2. An individual can be declared insolvent only when he is unable to pay his debts, whereas a company cannot be declared insolvent even if it is unable to pay its debts. It can only be wound up and this can be done even when it is solvent.
3. The doctrines of relation back and reputed ownership do not apply to-winding up.

3.8 MODES OF WINDING UP (SECTION 270)

I. COMPULSORY WINDING UP BY TRIBUNAL (NCLT)

A company may be wound up by an order of the Tribunal. This is called compulsory winding up. The Tribunal will make an order for winding up on an application by any of the person enlisted in Section 272.

Grounds for Compulsory Winding-up (Section 271)

Section 271 lays down the following grounds where a company may be wound up by the Tribunal.

1. Special resolution.
2. Inability to pay debts.
3. Just and equitable.
4. Default in filling P/L account and B/S or Annual Return.
5. Acted against Sovereignty & Integrity of India.
6. Sick Industrial Company u/s 424G.

1. **Special resolution of the company.** [Sec 271 (b)] If the company has by a special resolution resolved that it may be wound up by the Tribunal, the Tribunal may pass a winding up orders.

   The power of the Tribunal in such a case is discretionary and should be exercised only where a bona fide case is made out. The Tribunal may refuse to order winding up where it is opposed to public or company's interest.

   The public interest is one of the matters which ought to be taken into consideration while deciding the case of a winding up of a company. The only fact that special resolution has been passed by the shareholders is only one factor which cannot overrule the discretion of the Tribunal in the matter.

   This is based on the fact, barring other circumstances, the shareholders themselves are the best judge to decide as to whether or not the company should be wound up. It is the shareholders who had formed themselves into the company and therefore, it is for them to dissolve the company. The directors are not entitled to file a winding up petition without the authority of the general meeting. However, the directors may file such a petition, subject to the general meeting ratifying their action. It may be noted that the company itself can present a petition for winding up.

   Winding up under this ground is not a common feature because if such a large number of shareholders want the company to be wound up, they would prefer the mode of voluntary winding up, which involves less time and is cheaper than winding up.

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2. **Inability to pay debts [Sec 271 (2)].** The Tribunal may order for the winding up of a company if it is unable to pay its debts. The basis of an order for winding up under this clause is that the company has ceased to be commercially solvent i.e., it is unable to meet its current demands, although the assets when realised may exceed its liabilities. Thus, inability to pay debts is to be taken in the commercial sense. The test of inability to pay debts, therefore, is whether the company can pay its existing liabilities so long as it is a going concern. If the company is not in a position to meet its existing liabilities, a petition for winding up is maintainable even if it may have very valuable assets not presently realisable.

   According to section 271 of the Act a company shall be deemed to be unable to pay its debts in the following cases.

   (a) **Statutory notice.** If a creditor to whom the company owes a sum of ₹ 1,00,000 or more has served on the company a notice at the registrar office for payment and the company has for three weeks neglected to pay or otherwise satisfy him. In computing the time for three weeks, the day on which the notice is despatched and the day on which it is served should both be excluded.

   [**Note**: 2013 Act has increased the limit to ₹ 1 lacs from ₹ 500]

   A notice of demand giving less than three weeks time does not make the demand ineffective. It only postpones the right of action to a date falling after the expiry of three weeks. But where the company bona fide disputes the debts, and the Tribunal is satisfied with the defence of the company, the Tribunal will not order for its winding up.

   (b) "**Decreed debt.** If execution or other process issued on a decree or order of any Civil Court in favour of a creditor is returned unsatisfied in whole or in part.

   It is open to the petitioner to establish its claim in the civil court and if the decrees that man be obtained by it remains unsatisfied in whole or in part, the petitioner can seek the winding up of the company.

   (c) **Commercial insolvency.** If it is proved to the satisfaction of the Tribunal that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the Tribunal will take into account the contingent and the prospective liabilities of the company. What has to be proved under this clause is not whether the company's assets exceed its liabilities, but whether it is unable to meet its current demands. If a company is unable to meet its current liabilities, it is commercially insolvent and liable to be wound, up.

3. **Just and equitable. [Sec 271 (g)] A**nother ground on which the Tribunal can order the winding up of a company is when the Tribunal is of the opinion that it is just and equitable that the company should be wound up. This clause gives the Tribunal a very wide power to order winding up wherever the Tribunal considers it just and equitable to do. The Tribunal will consider such grounds to wind up a company for just and equitable reasons as are not covered by the preceding five clauses. What is just and equitable will depend upon the facts of each particular case. The Tribunal while winding up a company under this clause will have to take into consideration not only the interests of the shareholders and creditors but also public interest in the shape of needs of community, interests of the employees etc.

   It is important to note that relief based on the just and equitable clause is in the nature of a last resort when other remedies provided in the Act are not sufficient to protect the general interest of company. Further, the Tribunal may refuse to make an order for

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winding up if it is of the opinion that some other remedy is available to the petitioner and he is acting unreasonably in seeking to have the company wound up instead of following that other remedy.

Following are the instances where the Tribunals have dissolved the companies under the just and equitable clause.

(i) Loss of substratum. It is just and equitable to wind up a company where the company's main object or substratum is gone. The substratum of a company is deemed to be gone when—(a) the subject-matter of the company is gone or (b) the object for which it was incorporated has substantially failed or (c) it is impossible to carry on the business of the company except at a loss or (d) the existing and the possible assets are insufficient to meet the existing liabilities of the company.

Example: A company was formed for the purpose of manufacturing coffee from dates under a patent which was to be granted by the Government of Germany. The German patent was never granted. On a petition of a shareholder it was held that the substratum of the company had failed and it was impossible to carry on the objects for which it was formed and therefore it was an equitable that the company should be wound up. [Res German Date Coffee Company (1982) 20 Ch. 169]

(ii) Deadlock in management When there is a deadlock in the management of a company, it is a proper case for winding up under the just and equitable clause.

Example: A and B, who traded separately as cigarette manufactures agreed to amalgamate their business and formed a private limited company of which they were the shareholders and the only directors. They had equal voting rights. A dispute arose which was submitted to arbitration but one of them refused to accept the award. Both then became so hostile that neither of them would speak to the other except through the secretary. There was a complete deadlock and as such the court (now Tribunal) ordered for the winding up of the company, although its businesses was flourishing. [Re. Yenjidije Tobacco Co. Ltd. (1916) 2 Ch. 420].

(iii) Oppression of minority. Where the majority shareholders have adopted an aggressive or oppressive policy towards the minority, it is a sufficient ground for winding up of the company under this clause.

(iv) Fraudulent purpose. Where the company was conceived and brought forth in fraud or for illegal purposes, it is just and equitable to wind up a company.

Example: Where the main object of a company is the conduct of a lottery, the mere fact that some of its objects were charitable will not prevent the company from being ordered to be wound up as being one formed for an illegal purpose. [Universal Mutual Aid and Poor Houses Association v A.D. Thapa Naidu. AIR 1933 Mad. 16]

(v) Incorporated or Quasi Partnership. Where a private company consisting of members of one or more families or a group of friends is really in nature of partnership business, any circumstances justifying the dissolution of a partnership (such as misconduct of one or more partners) will constitute just and equitable ground for winding up of the company though they may not constitute sufficient grounds for winding up under the provision of the Companies Act.

(vi) Where the company is a bubble and has no business to carry on, it was wound up.

(vii) Where the company was insolvent and was being carried on for the benefit of the debenture holders, who had taken possession, a winding up order was made.

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In the following cases, the courts (now Tribunal) have declined to make a winding up order on "just and equitable grounds."

(a) Where there were allegations of groupings among shareholders.

(b) Where it was found that the substratum had not wholly gone and the majority of the shareholders opposed winding up.

(c) Where there were allegations of mismanagement or misappropriation of funds by directors and nothing more.

(d) Where the company was running at a loss.

(e) Where the petitioner had an alternative remedy.

In the case of a winding up petition on the just and equitable ground, while the petitioner will not be allowed to travel beyond the petition, one further point to be noted is whether the ground exists at the time of hearing the petition. The Tribunal will decide the question of winding up on the facts existing at the time of hearing the petition and not merely on the date of the petition. If the facts which existed at the time of presenting the petition had subsequently melted away, that would be a case for not ordering winding up.

The following clauses (g) (h) and (i) provide additional grounds on which a company may be wound up by the Tribunal. [These clauses has been inserted by the Companies (Second Amendment) Act, 2002].

4. **Non filing of Financial Statements or annual returns with the Registrar.** If the company has made a default in filing with the Registrar, its balance sheet and profit & loss account or annual return for five consecutive financial years. [Section 271(f)]

5. **If company acts against sovereignity and integrity of India.** If the company has acted against the interests of the sovereignity and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.

   Provided that the tribunal shall make an order for winding up of a company on application made by the Central Government or a State Government. [Section 271(c)]

6. **Sick Company.** If Tribunal is of the opinion that the company should be wound up under chapter XIX i.e. Where a sick industrial company is not likely to become viable in future and that it is just and equitable that the company should be wound up.

3.9 WHO CAN PETITION FOR WINDING UP [SECTION 272]

The Tribunal does not choose to wind up a company of its own motion. It has to be petitioned. Section 272 of the Companies Act enumerates the persons who can file a petition to the Tribunal for the winding up of a company.

The following persons can file a petition :

1. The company.
2. Any creditor or creditors including any contingent or prospective creditor or creditors.
3. Any contributory or contributories.
4. All or any of the aforesaid parties, together or separately.
5. The Registrar.
6. Any person authorized by the central government under section 245.
7. By the Central or State Government.

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1. **Company's petition [Sec 272 (1) (a)].** A company itself cannot file a petition for winding up. But it can do so only when the company has passed a special resolution to that effect. The directors have no power to present a petition for winding up unless they have been authorized by the members by passing a special resolution at the general meeting of the company. However, where the company is found by the directors to be insolvent due to circumstances which ought to be investigated by the Tribunal, the directors may apply to the Tribunal for an order of winding up, even without obtaining the sanction of the company in general meeting.
2. **Creditors' petition [Sec 272 (1) (b)].** A creditor can also apply for the winding up a company. The term creditor, is not limited, to one to whom a debt is due at the date of the petition. Every person who has a pecuniary claim, against the company whether actual or contingent is creditor. The word 'creditor' includes a secured creditor, debenture holder, the trustee for debenture holder, an assignee of a debt, an executor or a deceased creditor, judgement creditor, receiver, etc. The Tribunal will not order the winding up of the company where the debt is bona fide disputed. Where a creditor's petition is opposed by other creditors, the Tribunal may ascertain the wishes of the majority of the creditors before making any order for winding up.
3. **Contributory's petition. [Sec 272 (1) (c)].** The term 'contributory' means every person liable to contribute to the assets of a. company in the event of its being wound up. It includes the holder of any shares which are fully paid up and includes any person alleged to be a contributory.

   A contributory shall be entitled to present a petition for winding up only

   (a) When the number of members is reduced below 7 in the case of a public company and below 2 in the case of a private company, or

   (b) When he holds shares which were originally allotted to him or (c) has held shares for six out of the eighteen months prior to the commencement of winding up or the shares have devolved on him through the death of a former holder.

   The Tribunal will not order the winding up if the interest of the petitioning contributory is very small and the majority of the members do not wish the order to be made or if the number of contributories is very small.

   The term 'contributory' for the purpose of making a petition for winding up would include even a shareholder who is in arrears of payment of calls. But as a general rule, the Tribunal will not hear the petition of such a person unless the petitioner pays the calls into the Tribunal or gives an undertaking for payment thereof.
4. **Joint petition.** This means that any combination of the company, the creditors and the contributories can present a petition for winding-up under section 272 (l)(d).
5. **Registrar's petition [Sec 272 (l)(e)]. The registrar is entitled to present a petition for winding up of a company on the following grounds only:**

   (i) if default is made in delivering the statutory report to the registrar or in holding the statutory meeting:

   (ii) if the company does not commence its business within a year of its incorporation or suspends its business for a whole year;

   (iii) if the number of its members is reduced in the case of a public company below seven and in the case of a private company below two ;

   (iv) if a company is unable to pay its debts; and

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(v) if the Tribunal is of the opinion that it is just and equitable that the company be wound up.

(vi) if there is a default in filing with the Registrar its balance sheet and profit & loss account or annual return for any five consecutive financial years.

6. **Petition by a person authorized by Central Government [Sec. 272 (1) (f)].** The central government on consideration of inspector's report is empowered to authorize any person to move an application for winding up before the Tribunal for winding up in certain cases. The petition can be authorized by the central government on the report of inspector to apply for winding up the company. The central government can authorize any person including the registrar to act on its behalf for the purpose.

7. **Central Government's or State Government's Petition.** According to Section 271 If the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality, then on an application made by the Central Government or State Government Section 211(g), a petition may be presented for winding up a company.

Commencement of Winding Up by Tribunal

The winding up of a company by the Tribunal is deemed to commence; at the time of the presentation of the petition for winding up. But where, before the presentation of the petition, a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution. Any proceedings taken in voluntary winding up will be deemed to have been validly taken unless the Tribunal direct otherwise on proof of fraud or mistake.

In all other cases, the winding up of a company must be deemed to commence at time of the presentation of the petition for the winding up. Where an order is made by a Tribunal on more than one petition, the commencement of the winding up starts from the earliest petition.

In may be noted here, voluntary winding up shall be deemed to commence at the time when the resolution for voluntary winding up is passed.

Power of Tribunal on hearing petition. On hearing a winding up petition, the Tribunal may—

1. Dismiss it with or without cost; or
2. Make any interim order as it thinks fit; or
3. Appoint a provisional liquidator of the company till the making of a winding up order
4. Make an order for the winding up of the company with or without costs or any other order as it thinks fit. [Sec 273 (1)]

3.10 CONSEQUENCES OF WINDING UP ORDER

The consequences of the making of a winding up order relate back to an earlier date than that on which the order was actually made. This date is called the commencement of the winding up. The winding up commences from the time of the presentation of the petition or where, before the presentation of the petition, the company was in voluntary liquidation from the time of the passing of the resolution for voluntary winding up.

The various consequences of the winding up by the Tribunal are as under:

1. **Intimation to Official Liquidator and Registrar.** Where the Tribunal makes an order for the winding up of a company, the Tribunal shall within a period not exceeding seven days

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from the date of passing of the order cause intimation thereof to be sent to the official liquidator or provisional liquidator and the registrar. (Sec. 277). The object of intimation to official liquidator is that he may take up the administration immediately.

2. **Copy of the winding up order to be filed with the registrar. Note:** U/S 445 of 1956 Act, on the making of a winding up order it is the duty of the petitioner in the winding up proceedings and of the company to file with the registrar a certified copy of order within thirty days from the date of the making of the order. But section 277 of the 2013 Act, dispenses the requirement of filing of certified copy of winding up order with ROC by the petitioner and company. The Tribunal shall directly send a copy of winding up order to ROC.

3. **Order for winding up deemed to be notice of discharge.** Once such an order is made it shall be deemed to be notice of discharge to the officers and employees of company except when the business of the company is continued [Section 277 (3)]

   Where there is a contract of service for particular term, an order for winding up will amount to wrongful discharge of the appointee and damages will be allowed as for breach of contract of service. But carrying on the business by the liquidator for the beneficial winding up of a company is not continuing the business of the company so as to prevent the winding up order operating as notice of discharge of the officers and employees.

4. **Suits stayed on winding up order.** When a winding up order has been made, or the official liquidator has been appointed as provisional liquidator, no suit or other legal proceeding shall be proceeded with except by the leave of Tribunal. Further no suit or legal proceeding pending on the date of winding up order shall be proceeded with [Sec 279]. Any suit or proceeding instituted without leave of the Tribunal may be regarded as ineffective until leave is obtained.

   Any application to the Tribunal seeking leave under this section shall be disposed of by the Tribunal within 60 days.

   The object of winding up of a company by the Tribunal is to facilitate the protection of its assets with a view to ensure an equitable distribution there of among those entitled and to prevent the administration from being embarrased by a general scramble among creditors and others. These provisions are intended to safeguard the assets of a company in winding up against wasteful or expensive litigation in regard to matters capable of being determined expeditiously and cheaply by the winding up Tribunal itself.

5. **Responsibility of directors and officers to submit to Tribunal audited books of account (Section 274)**

   The directors and other officers of every company shall ensure that books of account of the company are completed and audited up to date of winding up order made by the Tribunal and submitted to it at the cost of the company, failing which such directors and officers shall be liable for punishment for a term not exceeding 6 months and a fine for an amount not less than ₹ 25,000 but which may extend to ₹ 5 lacs.

6. **Powers of the Tribunal**

   The Tribunal which is winding up the company shall have jurisdiction to entertain or dispose of—

   (a) Any suit or proceeding by or against the company;

   (b) Any claim made by or against the company;

   (c) Any application made under section 230 by or in respect of the company;

(d) Any question of priorities or any other question whatsoever which may arise in the course of the winding up of the company or which may relate to the winding up of the company.

The claim referred to above must be a claim enforceable at law at the date of the winding up order. A claim which had become time barred on the date of the presentation of the winding up petition cannot be described as a legally enforceable claim.

II. VOLUNTARY WINDING UP

A voluntary winding up of a company is entirely different from a compulsory winding up. Voluntary winding up is winding up by the members or creditors of a company without interference by the Tribunal.

The object of a voluntary winding up is that the company and its creditors are left to settle their affairs without going to the Tribunal, but they may apply to the Tribunal for any directions or orders if and when necessary. From the point of view of the company itself a voluntary winding up has more advantages over a compulsory winding up, the chief being that there are not so many formalities to be complied with. This form of winding up is by far the most common and the most popular.

A company may be wound up voluntarily when—

(a) The period fixed by the articles for the duration of the company has expired or an event upon which the company is to be wound up has happened and the company in general meeting has passed ordinary resolution.

(b) The company has for any cause whatever passed a special resolution to wind up voluntarily [Section 304]. The company may be wound up by special resolution even if it is prosperous. No articles of the company can prevent the exercise of this statutory right.

A resolution for voluntary winding up must be advertised in the official gazette and also in some newspaper, circulating in the district where the registered office of the company is situated, within 14 days of the passing of the resolution. If default is made in complying with this provision, the company and every defaulting officer shall be punishable with fine which may extend to ₹ 5,000 per day for every day during which default continues. [Section 307]. Officer herein includes the liquidator also.

A voluntary winding up commences from the date of the passing of the resolution. [Section 308].

The date of commencement of winding up is important for various matters, such as liability of past members who will not be affected if, on the date of commencement of winding up, a year had elapsed after they ceased to be members.

Consequences of Voluntary Winding Up

1. **Effect on status of a company.** In the case of a voluntary winding up, the company ceases to carry on the business from the commencement of the winding up except so far as may be required for the beneficial winding up of the business. However, the corporate status and the corporate powers of the company will continue until it is dissolved. (Section 309).

   A voluntary winding up does not necessarily operate as notice of dismissal to the company's employees, but there is no change in the personality of the employer. But where the circumstances of the winding up are such that the company can no longer

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carry on business, its contracts and its servants will necessarily cease, leaving the employees free to claim damages if they are so entitled.

2. **Board's power to cease on appointment of a liquidator.** On the appointment of a liquidator, the powers of the board of directors, managing or whole time directors and the manager, if there be any of these shall cease, except for the purpose of giving notice to the registrar of the appointment of the liquidator. (Sec. 313).

   In the appointment of a liquidator the powers of the board of directors cease except so far as the company in general meeting or the liquidator (in a members voluntary winding up) or the committee of inspection or if there is no such committee, the creditors (in a creditors voluntary winding up), sanction the continuance. (Sec. 313).

3. **Avoidance of transfer etc. after commencement of winding up**. In the case of a voluntary winding up, any transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void. (Sec. 334).

4. **Discharge of Employees**

   A resolution to wind up voluntarily operates as notice of discharge to the employees of the company except.

   (a) When the liquidation is only with a view to 'reconstruction'.

   (b) When business is continued by the liquidator for the beneficial winding up of the company.

   It may be noted, that employees have a right to claim damages for premature termination of their services.

3.11 TYPES OF VOLUNTARY WINDING UP

A voluntary winding up may be:

(A) Member's voluntary winding up.

(B) Creditor's voluntary winding up.

A. Member's Voluntary Winding Up

A member's voluntary winding up takes place only when the company is solvent. It is initiated by the members and is entirely managed by them. The liquidator is appointed by the members. No meeting of creditors is held and no committee of inspection is appointed. To obtain the benefit of this form of winding up, a declaration of solvency must be filed.

Declaration of Solvency Section 305 provides that where it is proposed to wind up a company voluntarily the directors or a majority of them, may, at a meeting of the Board, make a declaration verified by an affidavit that the company has no debts or that it will be able to pay its debts in full within a period not exceeding 3 years from the commencement of winding up as may be specified in the declaration.

(i) Such declaration shall be made within five weeks immediately preceding the date of the passing of the resolution for winding up.

(ii) Shall be delivered to the Registrar before that date.

(iii) Shall also be accompanied by a copy of the auditors on the profit and loss account and the balance sheet of the company prepared upto the date of the declaration and must embody a statement of the company's assets and liabilities as on that date.

Provisions Applicable to Members' Voluntary Winding Up

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1. **Appointment of liquidator. [Section 310].** The company in general meeting shall appoint one or more liquidators for winding up the affairs of a company and for distributing the assets. The company shall also fix his remuneration and unless his remuneration is not fixed, he will not take charge of his office. Such remuneration cannot be increased in any circumstance whatsoever. The liquidator may be appointed at the meeting at which the resolution for voluntary winding up is passed.
2. **Board's power to cease. [Section 313].** On the appointment of a liquidator all the powers of the board and other managerial personnel shall come to an end, except in so far as the company in general meeting or the liquidator sanctions the continuance thereof. However, a resolution for voluntary winding up does not automatically dismiss all servants but if it takes place because the company is insolvent it does operate as a discharge.
3. **Power to fill vacancy in the office of liquidator. [Section 311].** Where a vacancy for whatever cause occurs in the office of the liquidator the company in general meeting, subject to any agreement with the creditors fill the vacancy. The general meeting may be called by any contributory or by any continuing liquidator.
4. **Notice of appointment of liquidator to registrar. [Section 312];** The company shall give notice to the registrar of the appointment of a liquidator. The company shall also give notice of every vacancy occurring in the office of liquidator and of the names of the liquidators appointed to fill every such vacancy. The notice shall be given by the company within 10 days of the event to which it relates. If default is made in complying with these provisions, the company and its officers who are in default shall be punishable with fine upto ₹ 1000 for every day during which the default continues.
5. **Duty of the Liquidator to inform the Assessing officer:** Every Liquidator of a Company being wound up is to give notice of his appointment as liquidator to the Assessing officer, having jurisdiction to assess the income of the company within 30 days of his appointment. It may also be noted that the official liquidator has been held to be principal officer of the company for income tax assessment purposes.
6. **General meeting at the end of each year.** [Section 316]. The Company Liquidator shall report quarterly on the progress of winding up of the company in such form and in such manner as may be prescribed to the members and creditors and shall also call at meeting of the: members and the creditors as and when necessary but at least one meeting each of creditors and members in every quarter and apprise them of the progress of the winding up of the company in such form and in such manner as may be prescribed.

   If the liquidator fails to comply with the above mentioned provisions, he shall be punishable in respect of each failure with fine which may extend to ₹ 10 lakhs.
7. **Final meeting and dissolution. [Section: 318].** When the affairs of the company are fully wound up, the liquidator shall perform the following duties:
   (a) He shall make up an account of the winding up, showing how the same has been conducted and how the property has been disposed of.

   (b) He shall call a general meeting of the company for laying before it the said accounts. This meeting is the final meeting of the company. The meeting shall be called by advertisement specifying the time, place and object thereof. The advertisement shall be made not less than one month before the meeting in the official gazette and also in some local newspaper where the registered office of the company is situated. Failure to call meeting is punishable with fine which may extend to 1 lakh rupees.

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(c) Within one week after the meeting, the liquidator shall send a copy of the account to the registrar and the official liquidator and also a return of the holding of the meeting and the date thereof. If the copy is not so sent or the return is not so made, the liquidator shall be punishable with fine which may extend to 1 lakh rupees.

If a quorum is not present at the final meeting, the liquidator shall make a return that the meeting was duly called and that no quorum was present thereat.

B. Creditor's Voluntary Winding Up

Where a company proposes to wind up voluntarily and the directors are not in a position to make the statutory declaration of solvency, the winding up is a creditor's voluntary winding up. The provisions for creditors voluntary winding up are similar to those applicable to the member's voluntary winding up except that in the former, it is the creditors who appoint the liquidator, fix his remuneration, and generally conduct the winding up.

Provisions of creditor's voluntary winding up. They are discussed as under:

1. **Meeting of creditors. (Section 306).** When the declaration of solvency is not made by the directors, the company shall cause a meeting of the creditors of the company to be called on the day or next following day on which the resolution for voluntary winding up is to be proposed. Notice of the meeting of creditors shall be posted to creditors simultaneously with notice of the meeting of the company. The notice calling the meeting of the creditors shall be advertised in the official gazette and once at least in two newspapers circulating in the district where the registered office of the company is situated. The board of directors shall lay before the meeting of the creditors a full statement of the position of the company's affairs together with the list of its creditors and the estimated amount of their claims. One of the directors must preside at the meeting.

   If the meeting of the company at which the resolution for voluntary winding up is to be proposed is adjourned and the resolution is passed at an adjourned meeting, any resolution passed at the meeting of the creditors shall have effect as if it had been passed immediately after the passing of the resolution for winding up of the company.

- Section 306 of the 2013 Act provides that company cannot be wound up voluntarily unless two-thirds in value of creditors of the company are in favour of that. If two thirds in value of creditors of the company are of the opinion that the company will not be able to pay for its debts in full from the proceeds of assets sold in voluntary winding up and pass a resolution that it will be in interest of all parties if the company is wound up by the Tribunal, the company shall within 14 days thereafter file an application before the Tribunal. This is a new requirement which was not there in the 1956 Act.

2. **Notice to registrar.** [Section 306). The company shall give notice of resolution passed at the creditors meeting to the registrar within 10 days of its passing.

   If the company fails to send the notice, within the prescribed period, the registrar of companies, the company, every officer of the company and the liquidator shall be punishable with fine which may extend to ₹ 50,000 to 2 lacs for every day during which the default continues.

3. **Appointment of liquidator. [Section 310].** The creditors and the company shall appoint a person to be the liquidator. If different persons were nominated, the person nominated by the creditors shall be the liquidator. Any director, member or creditor of the company may, within 7 days of the nomination made by the creditors, apply to the Tribunal for an order that the person appointed by the company shall be the liquidator. Where no

person is nominated by the creditors, the person nominated by the company shall be the liquidator. On the other hand, if no person is nominated by the company, the person nominated by the creditors shall be the liquidator.

4. **Committee of inspection. [Section 315].** The creditors at their meeting may appoint a committee of inspection consisting of not more than five persons. Where such a committee is appointed, the company may also appoint at a meeting such number of persons not exceeding five to act as the members of the committee. The creditors may resolve that any of the person appointed by the company ought not to be the members of the committee of inspection. In such cases, unless the Tribunal otherwise directs, they cannot act on the committee. The Tribunal may appoint other persons in place of persons objected to.
5. **Liquidator's remuneration. [Section 310].** Remuneration of the liquidator may be fixed by the committee of inspection or the creditors if there is no committee of inspection. Otherwise the Tribunal may fix his remuneration. Remuneration fixed as above cannot be increased in any circumstances.
6. **Power of board to cease. [Section 313].** The board usually ceases to function on appointment of the liquidator. The board may act in so far as the committee of inspection (if any) or the creditors in general meeting may sanction the continuance thereof.
7. **Vacancy in office of liquidator. [Section 311].** The creditors in general meeting may fill up any vacancy caused in the office of the liquidator other than a liquidator appointed by or by the direction of the Tribunal.
8. **Meeting at the end of each year. [Section 316].** Where the winding up continues for more than a year, the liquidator shall call a general meeting of the company and a quarterly meeting of the creditors. The liquidator shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding year. The object of these provisions is to give regular information to the creditors and shareholders.

   If the liquidator fails to comply with these provisions, he is liable to be fined upto ₹ 10 lacs in respect of each failure.
9. **Final meeting and dissolution. [Section 318].** As soon as the affairs of the company are wound up, the liquidator shall make up the account of the winding up showing how the winding up has been conducted and property of the company has been disposed of. He shall call a general meeting of the company and a meeting of the creditors for the purpose of laying the accounts before the meetings. Each such meeting shall be advertised in the official gazette and also in some newspaper circulating in the district where the registered office of the company is situated. Within a week after the meeting, the liquidator shall send to the registrar a copy of the account and a return which will be registered. Thereafter the procedure is the same as in member's voluntary winding up.

3.12 CONSEQUENCES OF WINDING UP

Winding up affects a number of parties. The consequences of winding up are as under:

1. **Consequences as to shareholders.** A member of a company is liable and bound to pay the full amount on the shares held by him. This liability continues even after the company goes into liquidation; for the purposes of winding up, he is described by the Act as a contributory. The term 'contributory' means a person liable to contribute to the assets of a company in the event of its being wound up and includes the holder of any shares which are fully paid up. Contributory may be present or past. The liability of a present

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contributory is limited to the amount remaining unpaid on the shares held by him. A past contributory can only be called upon to pay if the present contributory is unable to pay.

2. **Consequences as to creditors.** The object of winding up is to realise the assets and discharge the liabilities and then if there be any surplus, to pay it off to the shareholders. It is the duty of the liquidator to pay off the liabilities of the company. In order to ascertain the liabilities, the Act requires that all persons having claims of whatever nature against the company should submit proofs of what is due to them. Every kind of a liability, whether present or future, certain or contingent and however difficult of valuation is provable and has got to be proved. This Section applies to proofs of debts where a company is solvent i.e. where its assets are sufficient to pay all its debts and liabilities as well as the costs of the winding up.

Where an insolvent company is being wound up, the insolvency rules will apply and only such claims shall be provable against the company as are provable against an insolvent person.

Right of secured creditors. The position of a secured creditor in relation to the winding up of a company is quite different from that of an unsecured creditor. He can stand wholly outside the winding up proceedings unless he abandons his security and joins the ranks of unsecured creditors.

A secured creditor, has three alternatives before him.

(i) He may rely on his security for the payment of all that may be due to him and ignore the liquidation altogether; or

(ii) He may value or realise the security and prove for the deficiency in the winding up, or

(iii) He may give up the security and prove for the whole amount.

Where the secured creditor proceeds to realise the security, he is liable to pay all the expenses incurred by liquidator for the preservation of the security before its realisation.

Right of unsecured creditors. All debts due to unsecured creditors are to be treated equally and paid pari passu.

When the list of claims is settled the liquidator has to commence making payments.

The assets available to the liquidator are applied in the following orders:

- Overriding preferential payments.
- Cost of the liquidation.
- Preferential payments.
- Debenture holders secured by a floating charge.
- Unsecured creditors.
- Balance returned to the contributories.

Overriding Preferential Payments U/s 326

1. In the winding up of a company—

   (a) Workmen's dues; and

   (b) Debts due to secured creditors, shall be paid in priority to all other debts.

2. The debts payable under clause (a) and clause (b) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions.

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Preferential payment. Section 327 enumerates certain debts which are to be paid in priority to all other debts. Such payments are called preferential payments. It may however be noted that such payments are made after paying the secured creditors and costs, charges and expenses of the winding up.

These preferential payments are:

(a) All revenues, taxes, cesses and rates due from the company to the central or state government or to a local authority. The amount should have become due and payable within 12 months before the winding up.

(b) All wages or salary of any employee in respect of services rendered to the company and due for a period not exceeding 4 months within 12 months, before the winding up and any compensation payable to any workman under any of the provisions of Chapter V-A of the Industrial Disputes Act. 1947. The amount must not exceed Rs.20,000 in the case of any one claimant.

(c) All accrued holiday remuneration becoming payable to any employee or in the case of his death to any other person in his right, on the termination of his employment before or by the effect of the winding up.

(d) All amounts due in respect of contributions payable by the company as employer but this is not payable if the company is being would up voluntarily for the purpose of reconstruction and amalgamation.

(e) All amounts due in respect of any compensation or liability for compensation in respect of death or disablement of any employee under the Workmen' Compensation Act, 1923 but this is not payable if the company is being wound up voluntarily for reconstruction or amalgamation.

(f) All sums due to any employee from a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees maintained by the company.

(g) The expenses of any investigation held in pursuance of section 235 and 237, in so far as they are payable by the company.

3. **Consequences as to servants and officers.** A winding up order by a Tribunal operates as a notice of discharge to the employees and officers of the company except when the business of the company is continued. The same principle will apply as regards discharge of employees in a voluntary winding up. Where there is a contract of service for a particular period, an order for winding up will amount to wrongful discharge and damages will be allowed as for breach of contract of service.

4. **Consequences of proceedings against the company.** When a winding up order is made, or an official liquidator has been appointed as provisional liquidator no suit or legal proceeding can be commenced and no pending suit or legal proceeding continued against the company except with the leave of the Tribunal and on such terms as it may impose. In the case of a voluntary winding up, the Tribunal may restrain proceedings against the company if it thinks fit.

   It may be noted that law does not prohibit proceedings being taken by the company against others including directors or officers or other servants of the company.

5. **Consequences as to costs.** Where the assets of the company are insufficient to satisfy the liabilities, the Tribunal may make an order for payment out of the assets of the costs, charges and expenses incurred in the winding up. The Tribunal may determine the order of priority in which such payments are to be made. (Section 298).

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6. **Consequences as to documents.** When a company is being wound up whether by Tribunal or voluntarily, the fact must be made known to all those having any dealing with the company; every document in the nature of an invoice, order for goods or business letter issued in the name of the company, after the commencement of winding up must contain a statement that the company is being wound up. (Sec. 344).

Where a company is being wound up, all documents of the company and of the liquidators shall, as between the contributories of the company, prima facie evidence of the truth of all matters recorded therein. (Sec. 345).

3.13 LEGAL ASPECTS OF ACCOUNTS AND AUDIT

I. Books of Account

Section 2(13) and 128 of the Companies Act requires every company to keep at its registered office proper books of account with respect to :

(a) All sums of money received and expended by the company and the matters in respect of which the receipt and expenditure take place;

(b) All sales and purchases of goods by the company;

(c) The assets and liabilities of the company; and

(d) In the case of a company engaged in production, processing, manufacturing or mining activities, such particulars relating to (i) utilisation of material or (ii) labour or (iii) other items of cost as may be prescribed, if such class of companies is required by the Central Government to include such particulars in the books of account. The Central Government has framed a number of Cost Accounts Records Rules—one for each class of companies activity wise. The object of this Section is to make efficiency audit possible.

Where the company has a branch office (whether in India or outside), it may maintain books of account at its branch of the transactions effected there, but proper summarised returns should be sent at least quarterly to the company's registered office.

The books kept must be such as to give a true and fair view of the state of the affairs of the company or branch office and to explain its transactions. Similarly, books of account must be kept on accrual basis and according to the double entry system of accounting.

Now it is obligatory on Companies to maintain accounts on mercantile system only and plugs the existing lacunae which permitted companies to maintain accounts on cash basis also.

The provisions of Section 338 of the Companies Act are also relevant in determining what constitutes 'proper books of accounts'. Proper books of accounts constitute such books or accounts as are necessary to exhibit and explain the transactions and financial position of the business of the company, including books containing sufficient detailed entries, made from day to day, of cash receipts and cash payments. It is further provided that in the case of a company engaged in dealing in goods, statements of annual stock taking and of all goods sold & purchased (normal profit in the case of goods sold by way of ordinary retail trade), along with details of sellers and buyers, should also be maintained.

Location. The books of account are to be kept at the registered office of the company. However, the Board of directors may decide to keep any or all of the account books at any other place. When the Board so decides, the company shall, within 7 days of the decision, file with the Registrar the address of that place. However, where a company has a branch office (whether in India or outside), the company shall be deemed to have complied with the provisions of, if proper books of accounts relating to the transactions effected at the branch office are kept at that office.

Responsibility for keeping the Books of Account. The primary duty for the proper maintenance of the books of account is that of the managing director or manager. Where a company has neither a managing director or manager, it is the responsibility of every director of the company. In all casess it is the duty of every officer, employee and agent of the company to see that proper books are maintained.

Period for which books of account to be retained. The books of account of every company relating to the period of not less than eight years immediately preceding the current year shall be preserved in good order along with the relevant vouchers where a company has not been in existence for eight years, the books of account right from the first accounting year of the company i.e. for the entire period. The Registrar may direct a company to preserve any of these documents for a longer period.

Punishment for default. For failure to take reasonable steps to maintain proper books of account, the persons responsible to maintain them are liable to imprisonment which may extend to 1 year or with fine of Rs.50,000 which may extend to Rs. 5 lacs or both. However, no person shall be sentenced to imprisonment for any such offence unless it was committed willfully.

The 2013 Act has Introduced the Following new Provisions Which were not there in the 1956 Act

(1) Electronic Mode. Company may keep such books of account or other relevant papers in electronic mode in such manner as may be prescribed.

Rule 3 of the companies (Accounts) Rules, 2014 prescribes the manner of maintenance of books of account in electronic mode. Company must comply with Rule 3 if the company opts to maintain them in electronic mode.

Rule 3 provides as under:

- The books of account and other relevant books and papers maintained in electronic mode shall remain accessible in India so as to be usable for subsequent reference.
- The books of account and other relevant books and papers shall be retained completely in the format in which they were originally generated, sent or received, or in a format which shall present accurately the information generated, sent or received and the information contained in the electronic records shall remain complete and unaltered.
- The information received from branch offices shall not be altered and shall be kept in a manner where it shall depict what was originally received from the branches.
- The information in the electronic record of the document shall be capable of being displayed in a legible form.
- There shall be a proper system for storage, retrieval, display or printout of the electronic records as the Audit Committee, if any, or the Board may deem appropriate and such records shall not be disposed of or rendered unusable, unless permitted by law.
- The back-up of the books of account and other books and papers of the company maintained in electronic mode, including at a place outside India, if any shall be kept in servers physically located in India on a periodic basis.
- The company shall intimate to the Registrar on an annual basis at the time of filing of financial statement:
  - (a) The name of the service provider;
  - (b) The internet protocol address of service provider;

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(c) The location of the service provider (wherever applicable);

(d) Where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

Rule 4 of the Companies (Accounts) Rules, 2014 provides as under:

- The summarised returns of the books of account of the company kept and maintained outside India shall be sent to the registered office at quarterly intervals, which shall be kept and maintained at the registered office of the company and kept open to directors for inspection.
- Where any other financial information maintained outside the country is required by a director, the director shall furnish a request to the company setting out the full details of the financial information sought , the period for which such information is sought. The company shall produce such financial information to the director within fifteen days of the date of receipt of the written request. The financial information required shall be sought for by the director himself and not by or through his power of attorney holder or agent or representative.
- Inspection in respect of any subsidiary of the company shall be done only by any person authorised in this behalf by a resolution of the Board of Directors.

Inspection of Books of Account, etc, of Companies by any Director

The books of account and other books and papers shall be open to inspection by any director during business hours.

The books of account and other books and papers shall be open to inspection during business hours by:

(i) The ROC; or

(ii) Such officer of the Government as may be authorized by the Central Government in this behalf.

(iii) By such officers of the Securities and Exchange Board of India [SEBI] as may be authorized by it.

The directors can also make inspection through agents. However, the right of inspection is not an absolute right and may be refused if it is malafide.

Disqualification to hold the 'same' office.

When a director or any other officer of a company has been convicted, he shall be deemed to have vacated his office as such from the date of conviction. Further, he shall be disqualified for holding such office in any company for a period of five years from such date. But he may be re-employed by the same or any other company in any other capacity and may be in a higher grade office.

Statutory Books and Registers

In addition to the books of account or financial books to be maintained by every company under Section 209, every company must maintain the following statutory books:

1. Register of Investments not held in company's name [Section 187].
2. Register of charges [Section 85].
3. Register of members [Section 88].

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4. Index of members, if the company has more than 50 members, unless the Register of Members in such a form as will in itself constitute an Index [Section 88].
5. Register of Debenture holders [Section 88].
6. Index of Debenture holders where the number is more than 50 unless the Register of Debenture holders itself constitutes an Index. [Section 88].
7. Register of Foreign Members and Debenture holders, if any, [Section 88].
8. Minute books containing proceedings of general meetings. [Section 118].
9. Books for recording minutes of Board Meetings. [Section 118].
10. Register of contracts, companies and firms in which directors are interested directly or indirectly. [Section 189].
11. Register of directors, managing director, manager and secretary [Section 170].
12. Register of Director's shareholdings. [Section 170].
13. Register of fixed deposits [Under the companies (Acceptance of Deposits) Rules, 1975 framed under [u/s 73 and 74.]
14. Cost Accounts Records for companies engaged in Industries so specified by the central government [Under Section 128].

Annual Accounts and Balance Sheet [U/S 129]

The annual accounts of a company consist of two statements, namely, the profit and loss account and balance sheet. In the case of a non-trading company an income and expenditure account is prepared instead of a profit and loss account. A balance sheet is a formal arrangement of facts and figures showing the total value of assets owned and the total amount of liabilities owed by a business on a particular date or at the end of a particular period. It is also known as a statement of assets and liabilities.

At every annual general meeting of a company, the Board of directors shall lay before the meeting the following documents:

1. A balance sheet for the year;
2. A profit and loss account (or an income and expenditure account in the case of a non trading company). [Section 129]; and
3. A report by the Company's Board of directors (Section 134).

In the case of a company not carrying on business for profit, an income and expenditure account shall be laid before the company at its annual general meeting instead of a profit and loss account [Section 129].

3.14 AUDITORS

A company carries on its business with capital furnished by persons who buy shares. The owners of the capital are, however, passive and the real control of the affairs of the company is in the hands of the executives composed of the directors and the officers. The Companies Act, therefore, provides for the compulsory appointment of an auditor to examine the affairs of the company and to report them to shareholders. That examination by an independent agency, such as the auditor is practically the only safeguard which the shareholders have against the enterprise being carried on in an unbusiness like way or their money being misapplied or misappropriated without their knowing anything about it.

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1. Qualifications of an auditor

Section 141 lays down the qualifications necessary for appointment as the auditor of the company.

According to Section 141 (1) "A person shall not be qualified for appointment as auditor of a company unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949". It is further provided that a firm, whereof all the partners practising in India are qualified for appointment as company auditors, may be appointed by its firm name to be auditor of a company, in which case any partner so practising may act in the name of the firm.

It may be noted that under the Chartered Accountants Act, 1949, only a chartered accountant holding a Certificate of Practice can be engaged in the public practice of accountancy.

In such a case the Section 141(2) of the Act states that if a firm (including a limited liability partnership) is appointed as an auditor, only those partners who are chartered accountants are authorized to sign on behalf of the firm.

Thus, it is only a practicing chartered accountant who can be appointed as an auditor of a company. Further, such a chartered accountant is also subject to the requirements of ethical conduct as contained in the Chartered Accountants Act.

2. Disqualifications of an Auditor

The following persons shall not be qualified for appointment as the auditor of a company **[section 141(3)]**

(a) A body corporate other than a limited liability partnership registered under the Limited Liability Partnership Act, 2008;

(b) An officer or employee of the company;

(c) A person who is a partner or who is in the employment of an officer or employee of the company;

(d) A person who or his relative or partner -

- (i) is holding any security of or interest in the company or its subsidiary, or of its holding or associate company or a subsidiary of such holding company. However the relative may hold security or interest in the company of face value not exceeding one thousand rupees or such sum as may be prescribed;
- (ii) is indebted to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, in excess of such amount as may be prescribed; or
- (iii) has given a guarantee or provided any security in connection with the indebtedness of any third person to the company, or its subsidiary, or its holding or associate company or a subsidiary of such holding company, for such amount as may be prescribed;

(e) A person or a firm who, whether directly or indirectly, has business relationship with the company, or its subsidiary, or its holding or associate company or subsidiary of such holding company or associate company of such nature as may be prescribed;

(f) A person whose relative is a director or is in the employment of the company as a director or key managerial personnel;

(g) A person who is in full time employment elsewhere or a person or a partner of a firm holding appointment as its auditor, if such persons or partner is at the date of such appointment or reappointment holding appointment as auditor of more than twenty companies;

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(h) A person who has been convicted by a court of an offence involving fraud and a period of ten years has not elapsed from the date of such conviction;

(i) Any person whose subsidiary or associate company or any other form of entity, is engaged as on the date of appointment in consulting and specialized services as provided in section 144.

A Chartered Accountant is also subject to the disabilities prescribed under section 8 of the Chartered Accountants Act, 1949.

Under Section 139, where an auditor holds appointment as auditor of the specified number of companies or more than the specified number of companies, he shall not be further appointed as an auditor of the company.

An auditor is disqualified under Section 8 of Chartered Accountant Act, 1999 if

(i) He ceases to be in practice.

(ii) His certificate of practice is cancelled

(iii) He is adjudged to be of unsound mind.

(iv) He is an undischarged insolvent.

Automatic Vacation of office. If an auditor after his appointment suffers from any of the disqualifications, he shall be deemed to have vacated his office as auditor from the date he has become so disqualified.

Position of Auditors

The position of the auditors of the company may be discussed under the following heads:

1. **As an agent.** The auditor may be regarded as an agent of the shareholders appointed to carry out certain duties as laid down by the Act and the articles or agreement for the purpose of the audit. However, constructive notice of facts coming to the knowledge of the auditor cannot be imputed to the shareholders.

   In the absence of any special contract, an auditor is not an agent of the company. If he signs a statutory report or the Balance Sheet specifying its correctness, that does not constitute an acknowledgement of a debt by an agent of the company. However an auditor is regarded as an agent of the company for the purposes of Section 217 of the Act i.e. for the purposes of investigation of affairs of the company by the Central Government under Section 210.

   So far as third parties are concerned, an auditor does not owe any duty of care unless he has a contractual relationship with the third party or he knows that his skill and judgement will be relied on by the third party.

2. **As an Officer**. An auditor is an officer of the company for the purposes of Sections 299,300,342, 336,439 and 463. He is liable for wrongful acts and for defaults just like any director or employee of the company for the purposes of these sections. However, he is entitled to the relief that any officer may claim.

3. **As an employee.** The relationship between an auditor and a company is that of a professional man and a client rather than that of a master and a servant.

4. **As a detective.** An auditor is not bound to be detective or to approach his work with suspicion. He is a watch dog but not a blood hound. His duty is verification and not detection. He is justified in believing the servants of the company in whom confidence is placed by the company and to assume that they are honest.

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5. **As an adviser.** An auditor is not an advisor to the company. It is no part of his duty to give advise either to directors or to shareholders as to what they ought to do.
6. **Not an insurer.** The auditor is not an insurer. He does not guarantee that the books do correctly show the true position of the company's affairs. He does not even guarantee that his balance sheet is accurate according to the books of account of the company. It is pertinent to mention here, it is the duty of auditor to certify the true and fair financial position of the company to the shareholders.

Appointment of Auditors

I. First Auditors. [Sec 139(6)]

The **first auditors of a company shall be appointed by the Board of directors** within one month of the incorporation of the company. The auditors so appointed shall hold office until the conclusion of the first annual general meeting of the company.

The company may at general meeting remove the auditors appointed by the board and appoint in their place any other person as auditors who have been nominated for appointment by any member of the company, and of whose nomination notice has been given to the members of the company not less than 14 days before the date of the meeting.

If the Board fails to appoint such auditors, the company may in the general meeting appoint the first auditors.

The first auditors are not required to inform the Registrar of Companies whether they have accepted the appointment or not.

It seems that the Board of directors has been given the power to appoint the first auditors to ensure that the company does not remain without any auditors till the first general meeting is held.

Sometimes, the first auditor of the company are named in the Articles of Association. Such appointments can't be held valid since the Companies Act grants it no recognition. The first auditor can be appointed by the Board of Directors by following the method laid down or if the Board fails, by the company in general meeting.

In case of Government company or a company owned or controlled by the Central Government, State Government or Governments or partly by the Central Government and partly by one or more State Governments, the first auditors shall be appointed by the Comptroller and Auditor-General of India (CAG) within sixty days from the date of registration of the company. If the CAG fails to exercise his power, the Board is authorized to appoint the first auditors within the next thirty days. In case of a failure by the Board, the members must be informed who shall appoint the first auditor in an extraordinary general meeting within sixty days [Section 139(7)]. The first auditors so appointed hold office till the conclusion of the first annual general meetings.

II. Appointment of Subsequent Auditors at Annual General Meeting. The authority to appoint auditors of a company rests primarily with its shareholders.

The following may be noted in this regard:—

Appointment at AGM. Subsequent auditors must be appointed at each annual general meeting of the company by passing an ordinary resolution, and the auditor so appointed shall hold office from the conclusion of that meeting until the conclusion of sixth annual general meeting.

Consent of the Auditor

Before any such appointment is made, the written consent of the auditor proposed to be appointed shall be obtained along with a certificate [proviso to Section 139(1)]. The Companies (Audit and Auditors) Rules 2014 require the auditor to certify that:

(a) He is eligible for appointment and is not disqualified for appointment under the Act, the Chartered Accountants Act, 1949 and the rules or regulations made there under;

(b) The proposed appointment is as per the term provided under the Act;

(c) The proposed appointment is within the limit laid down by under the authority of the Act;

(d) The list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate is true and correct. (Rule 4). Within fifteen days of the meeting in which the auditor is appointed, the company shall inform the auditor concerned and also file a notice of such appointment with the Registrar, [proviso to Section 139(1)].

Tenure of office. Section 139(10) provides that an auditor is appointed for a particular period i.e. from the conclusion of one annual general meeting until the conclusion of the sixth annual general meeting. In any case where an annual general meeting is not held within the period prescribed by section 166, the auditor will continue in office until the next annual general meeting is held and concluded. If the next annual general meeting happens for any reason to get adjourned, the auditor will continue to hold office until the conclusion of the adjourned meeting. In view of the provisions in there can be held only one annual general meeting during the tenure of office of any particular auditor. Moreover, it is also clear that the auditor's appointment is not related to any particular balance sheet or profit and loss account to any particular financial year.

Though an auditor is appointed for a period of five years, the matter relating to such appointment needs to be placed before the members at every annual general meeting for ratification [proviso to Section 139(1)]. The company also has a right to remove the auditor before the tenure is over. Similarly an auditor may resign from his office before his term is over.

III. Appointment of Subsequent auditor for a Government company

The Comptroller and Auditor-General of India (CAG) has been empowered to appoint the auditor in respect of a Government company Section 139(5) states that in case of a Government company or a company owned or controlled, directly or indirectly, by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments, the auditor shall be appointed by the CAG for each financial year. The auditor so appointed shall meet the qualification criteria laid down by the Act. The auditor shall be appointed within one hundred and eighty days of the commencement of the financial year and shall hold office till the conclusion of the annual general meeting.

IV. Casual Vacancy

Any casual vacancy in the office of an auditor may be filled up by the Board within thirty days. While any such vacancy continues, the remaining auditor or auditors, if any, may act. But where such a vacancy is caused by the resignation of an auditor, it shall be filled by the company in a general meeting within three months of the recommendation of the Board. Such an auditor shall hold office until the conclusion of the next annual general meeting. The casual vacancy here denotes the vacancy occurred due to death, disqualification etc., of a validly appointed auditor and not a vacancy caused by any deliberate omission on the part of the company.

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It may be noted that where there are two or more auditors of a company, and there is a casual vacancy in the office of one or more of the auditors, the remaining auditors may act.

REMOVAL OF AN AUDITOR

The Companies Act has laid down a specific procedure for the removal of the auditor of a company before the expiry of his term. This is meant to ensure that an auditor cannot be removed at will by management or the share holders.

Removal before expiry of the term

(i) An auditor may be removed, at any time before the expiry of his term by passing a special resolution of the company after obtaining the prior approval of the Central Government and giving the auditor a reasonable opportunity of being heard [Section 140(1)].

(ii) The matter of the removal is first considered at the Board meeting and necessary board's resolution passed.

(iii) The auditor proposed to be removed need to be given an opportunity of being heard.

(iv) Within thirty days of the Board's resolution an application shall be made to the Central Government in form ADT-2 prescribed under the Companies (Audit and Auditors) Rules, 2014.

(v) The form contains details of the grounds for removal, opportunity given to the auditor of being heard, pendency of audit etc.

(vi) Within sixty days of the Central Government's approval, the general meeting of the members shall be held for passing the special resolution [Rule (7) of the Companies (Audit and Auditors) Rules, 2014].

(vii) For removal of auditor before the expiry of the term, besides passing a special resolution, prior permission of the Central Government must be obtained.

Thus, it is difficult to remove an auditor before the expiry of his term since adequate grounds must exist to prove that such auditor is unsuitable for continuing as the auditor.

Removal by the Tribunal

In certain circumstances the Tribunal may direct the company to remove the auditors. If the Tribunal is satisfied that the auditor of a company has acted in a fraudulent manner or has abetted or colluded in any fraud by or in relation to the company or its directors of officers, it may direct the company to change its auditors. The Tribunal may take such an action either suo motus or on an application made to it by the Central Government or by any person concerned [Section 140(5)].

Resignation by an Auditor

If an auditor resigns from his office before the expiry of his term, he needs to file a statement with the Registrar within thirty days of the date of resignation [Section 140(2)]. The statement stating the reasons and other facts relevant to resignation shall be filed in the Form ADT-3 prescribed in the Companies (Audit and Auditor) Rules, 2014. A failure to file the statement would make the auditor punishable by fine which shall not be less than rupees fifty thousand but may extend to rupees five lakh [Section 140(3)].

Remuneration of Auditors (See 142)

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The remuneration of the auditors of a company shall be fixed by the company in the general meeting or in such manner as the company in general meeting may determine. If the auditors are appointed by the Board of directors, their remuneration may be fixed by the Board.

Even the remuneration of auditors of Government Companies appointed by Comptroller and Auditor General of India shall be fixed by the Company in general meeting or in such manner as the company in general meeting may determine. It may be noted that, earlier the remuneration of government companies was fixed by the Central Government.

Any sums paid by the company in respect of the auditors' expenses shall be deemed to be included in the expression 'remuneration'. The profit and loss account shall further contain or give by way of a note detailed information in regard to the amounts paid to the auditors, whether as fees, expenses or otherwise for services rendered, (a) as auditor; and (b) in any other capacity.

Rights and Powers of Auditors

1. **Right of access to the Books of Accounts.** Every auditor has a right to have access at all times to the books of accounts, vouchers and other relevant records of the company wherever kept.

   The term 'vouchers' includes, in addition to vouchers of sales, purchase, receipts and payments, all documents, correspondence, agreements, etc. which may in any way serve to vouch for the accuracy of the books and accounts. 'Books and accounts' will include all financial, statutory, statistical, commercial and memoranda books. Thus, cost records maintained are included in this term.

2. **Right to call for information and explanation.** He is entitled to require from the officers of the company such information and explanation as the thinks necessary for the performance of his duties. The power is very wide and the decision as to what information and explanation is necessary is left entirely to the discretion of the auditor. In case the information is not supplied to the auditor, he can report the same to members.

3. **Right to sign the audit report.** Only the person appointed as auditor of the company or where a firm is so appointed or only a partner in the firm practising in India, may sign the auditor's report, or sign or authenticate any other document of the company required by law to be signed or authenticated by the auditor.

4. **Right to receive notice of and attend Annual General Meeting.** The auditors have the right to attend any general meeting and to receive any notice or communication relating thereto which members are entitled to receive and to be heard at any general meeting on any part of the business which concerns them as auditors. The auditor may make any statement or explanation with regard to the accounts as he may desire. This power to make explanation at the meeting does not absolve the auditor from making a clear and unambiguous report. Thus, the auditor cannot avoid liability for omissions or inaccuracies in the accounts merely by making a verbal explanation to such members of the company as are present at the annual general meeting.

5. **Right to visit the branches and access to books. Where the accounts of any branch office are audited by a person other than the company's auditor, the company's auditor—**

   (a) Shall be entitled to visit the branch office, if he deems it necessary to do so for the performance of his duties as auditor; and

   (b) Shall have a right of access at all times to the books and accounts and vouchers of the company maintained at the branch office.

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In the case of a banking company having a branch office outside India, it shall be sufficient, if the auditors is allowed access to such copies of, and extracts from the books and accounts of the branch as has been transmitted to the principal office of the company in India.

6. **Right to be indemnified.** The auditor has a right to be indemnified out of the assets of the company against any liability incurred by him in defending himself against civil and criminal proceedings by the company. But he must have been acquitted in these cases by the Court.
7. **Right to take legal and technical advice.** The auditor has a right to take legal or technical advice in connection with the performance of his work. But he must give his own opinion in the audit report and not that of the experts.
8. **Right to Remuneration.** The auditor has a right to receive remuneration for auditing the accounts of the company. He can, however, claim the remuneration on the completion of his work.

Duties of Auditors

The duties of auditors depend on the terms of the articles as well as on the statutory provisions. Their duties are summarized as follows:

1. **To make enquiries. Section 143 requires the auditor to enquire into the following matters:**
   (a) Whether loans and advances made by the company, on the basis of security have been properly secured and whether the terms on which they have been made are not prejudicial to the interests of the company or its members.
   (b) Where transactions of the company which are represented by book entries are not prejudicial to the interests of the company.
   (c) Where the company is not an investment company or a banking company, whether so much of the assets of the company as consist of the shares, debentures and other securities have been sold at a price less than that at which they were purchased by the company.
   (d) Whether loans and advances made by the company have been shown as deposits.
   (e) Whether personal expenses have been charged to revenue account.
   (f) Where any shares have been allotted for cash, whether cash has been actually received in respect of such allotment and if no cash has been actually received, whether the position as stated in the account books and the balance sheet is correct, regular and not misleading.
2. **To make a Report to the Members**. The principal duty of the auditors is to make a report to the members on the accounts examined by him and on every balance sheet, profit and loss account and on every other document annexed thereto which would be laid before the general meeting during his tenure of office. The report must state whether in his opinion and to the best of his information and according to the explanations given to him, the said accounts give the information in the manner required by this Act, and give a true and fair view in the case of the balance sheet of the state of the company's affairs as at the end of its financial year and in the case of the profit and loss account, of the profit or loss for its financial year.
3. **Duty to include matters specified by the Central Government in the Report**. The Central Government may, by general or specific order, direct that, in the case of such class or

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descriptions of companies as may be specified in the order, the auditor's report shall also include a statement on such matters as may be specified therein. Before making any such order the Central Government may consult the Institute of Chartered Accountants of India in regard to the class or description of companies and other ancilliary matters proposed to be specified therein.

In addition to the above duty of an auditor in connection with the audit of the annual accounts, the auditor has to perform the following duties:

1. **Duty to certify the Statutory Report.** The auditor has to certify the correctness of the statutory report as far as—
   (a) The number of the shares allotted by the company, whether against cash or for any other consideration;
   (b) The total amount of cash received by the company in respect of all the shares allotted distinguishing as aforesaid;
   (c) An abstract of the receipts of the company and the payments made therein;
2. **Duty to certify Profit and Loss Account in a Prospectus.** Provides that a prospectus issued by an existing company shall contain a statement of profits and losses, year wise for the previous five years showing the rate of dividend paid each year and a statement of assets and liabilities of the company. Such a statement has to be certified by the auditor of the company.
3. **Duty to attend the meeting of Audit Committee.** The auditor of the Company shall attend and participate at meetings of the audit committee formed.

   It may be noted that every public company having a paid up capital of ₹ 5 crore or more shall form an Audit Committee.
4. **Duty to assist Investigators.** An auditor is bound to assist the inspectors in every possible way when the affairs of the company are being investigated.
5. **Duty as to Declaration of solvency in Members' Voluntary Winding Up.** In case of members, voluntary winding up of a company, a copy of the report of the Company's auditor on the profit and loss account and the balance sheet for the period commencing from the date by which the last account was prepared and upto the date of declaration is to be sent along with the declaration of solvency. In the said report a statement of the company's assets and liabilities for the same period should also be included.

   The statutory duties of the auditors as stated above can be expanded but they cannot be curtailed either by the articles of association or by the directors of the company.
6. **Duty of Reasonable Care.** An auditor must act honestly and with reasonable care and skill; otherwise he may be sued for damages. Further, it is the duty of an auditor to verify with skill, care and caution which a reasonably competent, careful and cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong.
7. **Duties of Auditor to Comply with SAP**. According to the decision of the Council of the Institute of Chartered Accountant of India, it has been resolved that while discharging their functions, it will be the duty of the members of the institutes, to ensure that the Accounting Standards are implemented in the presentation of financial statements covered by their audit reports. In the event of any deviation from the standards, it will also be their duty to make adequate disclosures in their reports so that the users of such statements may be aware of such deviations.

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8. **Duty to know the Duties.** The auditors are duty bound to become aware of their duties under the Companies Act (Re Bolivia Exploration Syndicate (1913) 3T.L.R-146). They should understand the Articles of Association of the Company. Sometimes these may contain some additional duties. There ignorance will not be an excuse to avoid the liability on account of negligence [Leads Estate Building Investment Co. Vs Shephered (1887) 36. C.H.D. 787.]

9. **Professional Duties.** Every profession governs itself through code of conduct or ethics. The members of the profession of accounting are also expected to observe ethics given to them by the Institute of Chartered Accountants of India. For example, when a person is appointed as auditor of a company, he should correspond with the previous auditor before accepting the assignment.

Liabilities of an Auditor

An auditor's liability, in relation to accounts, which he has audited, may be considered as below:

(A) Civil liability. An auditor may be sued in a court of law for damages arising out of negligence in the performance of his duties. Negligence is a breach of duty caused by omission to do something which a reasonable man would do, or doing something which a prudent and reasonable man would not do.

An auditor is appointed to report whether the balance sheet and profit and loss account of the company show true and fair view of the state of affairs of the company and incidentally to detect frauds errors etc. If on account of negligence in the performance of his duties and consequently the company suffers any loss, the auditor will be held responsible for damages. He is an agent in regard to his duties and therefore must show reasonable skill and diligence in the performance of his duties.

(B) Criminal Liability. Criminal liability of an auditor arises out of an act constituting a crime, e.g., if an auditor willfully makes a false statement either in the balance sheet or any other document, destroys or mutilates any voucher or document.

Section 448 of the Companies Act lays down: "If in any return, report, certificate, balance sheet, prospectus, statement or any other document, required by or for the purposes of any of the provisions of this Act, any person makes a statement—

(a) which is false in any material particular, knowing it to be false; or

(b) which omits any material particular, knowing it to be material he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years and shall also be liable to fine."

3.15 SUMMARY

- The Capital of a Company refers to that amount of money which a company uses to commence its business and to acquire movable and immovable properties that are required for running the business. The capital of a company includes both its share capital and its loan capital-and there needs to be an appropriate ratio between the two for the successful running of the companies businesses.
- Corporate social responsibility is "a commitment to improve community well being through discretionary business practices and contributions of corporate resources". In the Indian context, therefore, a social responsible company would be one that actively influences public policy in favour of the disadvantaged and the environment while also deriving a business's benefit.

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- Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.
- According to Companies Act, 2013, company may keep such books of accounts or other relevant papers in electronic mode in such manner as many be prescribed. Section 2(13) and 128 of the companies Act required every company to keep at its registered office proper books of accounts with respect to:-
  - (a) All sum of money received and expended by the company.
  - (b) All sales and purchases of goods by the company.
  - (c) The assets and liabilities of the company.

  The Companies Act, 2013 provides for the compulsory appointment of an auditor to examine the affairs of the company and to report them to shareholders.

3.16 SELF ASSESSMENT QUESTIONS

1. What do you mean by Share Capital and define various kinds of Share Capital.
2. What is voting Rights?
3. What is Corporate Social responsibility?
4. Discuss various arguments in favour of CSR.
5. Discuss about critical review of CSR.
6. Define winding up.
7. Discuss various modes of winding up.
8. What is voluntary winding up?
9. Discuss various consequences of winding up.
10. What is Annual Account and Balance Sheet?
11. Who is an Auditor, and what are his qualifications?
12. Discuss Rights and Powers of auditor.
13. Describe various duties of Auditor.
14. Discuss Companies Auditor’s Report Order 2015.

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UNIT 4: TAX PLANNING AND TAX MANAGEMENT

Structure

4.0 OBJECTIVE

After going through this unit, you will be able to:

- Understand the concept of Income Tax
- Discuss constitutional provisions governing taxation in India.
- Understand corporate taxation
- Define the concept of tax evasion

- Meaning of Tax Avoidance
- Understand Meaning of tax planning
- Know the concept of tax management
- Need for Tax planning

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4.1 MEANING OF TAX

According to the constitution of India, the government has the right to levy taxes on individuals and other artificial bodies or organizations. It is a well structured system derived from the Indian constitution.

A tax may be defined as a compulsory extraction made by the Central Government from the general public. It is a financial charge imposed on Individuals or legal entities by the government in pursuant to its legislative authority. The proceeds from taxes constitute a major source of revenue to government that spends the collected amount for the common benefits of the society.

Income tax is a financial charge on the income of a person. It is a tax on income, gains or profits earned by a person such as individuals and other artificial entities.

4.2 CHARACTERISTICS

1. **Levied as per the constitution.** Income tax is levied in India by virtue of entry 82 of list I (Union List) of Seventh Schedule to the Article 246 of the Constitution of India which authorizes the Central Government to impose tax on income other than agricultural income.
2. **Levied by Central Government**. Income tax is charged by the Central Government on all income other than agricultural income. However, the power to charge income tax on agricultural income has been vested with the State Government as per Entry 46 of List II, **i.e..** State List.
3. **Direct Tax.** Income tax is a direct tax. It is so because the liability to deposit and ultimate burden are on same person. The person earning income is liable to pay income tax out of his own pocket and cannot pass on the burden of tax so paid on the persons from whom the income has been earned.
4. **Annual Tax.** Income tax is an annual tax because it is the income of a particular year which is chargeable to tax.
5. **Tax on Person**. It is a tax on income earned by a person. The term ‘person’ has been defined under the Income tax Act. It includes individual, HUF, Firm, Company, local authority, Association of person or body of Individual or any other artificial juridical persons. The persons who are covered under Income tax Act are called ‘assessees’.
6. **Tax on Income**. It is a tax on income. The Income tax Act has defined the term income and it includes salary income, house property income, business/profession income, capital gains and other sources income. However, there are certain incomes which are specifically exempt from income tax.
7. **Income of ‘Previous Year’ is assessable in ‘Assessment Year’**. Income earned during a particular financial year is assessed to tax in the immediately following financial year. The year of earning income is called ‘Previous Year’ and the year in which assessment of

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income is done is called 'Assessment Year'. The return of previous year's income is filed in the relevant assessment year.

8. **Charged at prescribed rate(s).** Income tax is charged at prescribed rate(s). The rates of income tax differ for different incomes and for different persons. While tax rates for normal incomes are prescribed by the annual Finance Act, tax rates for certain special incomes have been prescribed under Income Tax Act itself. For instance, the following tax rates have been prescribed under Income Tax Act :
   (i) Tax on long term capital gain @ 20% (Section 112).
   (ii) Tax on short term capital gain on shares covered under STT @ 15% (Section 111A)
   (iii) Tax on lottery income @ 30% (Section 115BB).
9. **Administered by the Central Government.** Income tax is administered by the Central Government (Ministry of Finance) with the help of 'Income tax department' with branches throughout the country. The Central Government has constituted the 'Central Board of Direct Taxes' (CBDT) which exercises overall control over the Income tax department by issuing guidelines for various related matters.
10. **Applicability.** Income Tax is applicable throughout India including the State of Jammu and Kashmir.

4.3 HISTORY OF INCOME TAX IN INDIA

The income-tax was introduced in India for the first time in 1860 by British rulers following the mutiny of 1857. The period between 1860 to 1886 was a period of experiments in the context of income-tax. This period ended in 1886 when first Income-tax Act came into existence. The pattern laid down in it for levying of tax continues to operate even to-day though in some changed form. In 1911 another Act—Income-Tax Act, 1918 was passed but it was short lived and was replaced by Income-tax Act, 1922 and it remained in existence and operation till 31st March, 1961.

4.4 DOCUMENTS CONTAINING LAWS RELATING TO INCOME TAX

The law relating to Income tax is one of the most complicated law of India. A number of different documents cover the various aspects of Income tax provisions and one has to go through all these documents (sources) to have a through knowledge of it. These documents are known as 'sources of Law relating to Income tax' and are as follows :

1. **Income Tax Act, 1961**. On the recommendation of Law Commission and Direct Taxes Administration Enquiry Committee chaired by Sh. Mahavir Tyagi, a bill was framed. This bill was referred to a select committee and was finally passed in September, 1961. This Act came into force from April I, 1962 in whole of the country. Income Tax Act, 1961 is a comprehensive Act which consists of 298 sections and many subsections grouped under XXIII Chapters along with XIV Schedules. The Act contains detailed provisions regarding applicability, basis of charge, residential status, heads of income, clubbing provisions, set-off of losses, deductions, exemptions and assessment procedures involving appeals, penalities and filing of return etc.
2. **Income Tax Rules, 1962**. The provisions contained in Income Tax Act are duly supported by Income Tax Rules, 1962 that help in carrying out the purposes of the Act. These rules are prepared by 'Central Board of Direct Taxes" (CBDT) by virtue of power granted to it (i.e.. Board) under section 295 of the Income Tax Act, 1961. These rules deal with procedural part of the various aspects of Income Tax.

Certain Examples of Income Tax Rules :

(i) Rule 3—Valuation of perquisites for calculating 'Salary income'.

(ii) Rule 6—Prescribed authority for expenditure on scientific research.

(iii) Rule 7—Splitting up of partly agricultural income and partly non-agricultural income.

(iv) Rule 6DD—Cases and circumstances in which payment exceeding ₹ 20,000 may be made otherwise than by an account payee cheque or account payee bank draft.

These rules are made applicable by way of notification in the Official Gazette of India and are subject to the control of Central Government.

3. **Annual Finance Act**. Annual Finance Act is an important piece of legislation that updates/ amends the Income Tax Act. 1961. It gives effect to the financial proposals of the government for the relevant financial year and is finalised at the beginning of every financial year. It contains :

   (i) Introduction of new sections to the Income Tax Act, 1961;

   (ii) Deletion of certain sections from the Income Tax Act, 1961; and

   (iii) Rates of Income Tax for an assessment year, rates of tax for deducted at source for the financial year and rates of advance tax for the relevant financial year.

4. **Circulars and Clarifications issued by CBDT.** The Indian Central Board of Direct Taxes (CBDT) is the apex institution that regulates the overall administration of the direct taxes (Income Tax and Wealth Tax) of the country. Section 119 of the Income Tax Act, 1961 empowers CBDT to issue certain orders, instructions and directions to the revenue department (i.e., Income Tax department) to assist in the interpretation of the law. These orders/instructions/directions are issued in the form of circulars/instructions and are required to be followed by the Income Tax authorities. These circulars clarify the ambiguities in statutory provisions and provide greater ease of administration.

5. **Judicial Decisions.** Judicial decisions are also one of the most important source of income tax law. Any decisions given by any High Court & Supreme Court shall be treated as law applicable as per decision.

4.5 CONSTITUTIONAL PROVISIONS GOVERNING TAXATION IN INDIA

Article 246 (Seventh Schedule) of the Indian Constitution contains the legislative powers (including taxation) of the Union Government and the State Governments. It contains the following 3 lists covering the various subjects :

List I—Central List. It contains the areas in respect of which only the Parliament *i.e.,* Central Government can make laws (including taxation laws.)

List II—State List. It contains the areas in respect of which only the State Legislature can make laws (including taxation laws).

List III—Concurrent List. It contains the areas in respect of which both the Parliament and the State Legislature can make laws concurrently.

List I—Union/Central List (14 Heads of Taxation)

1. Taxes on income other than agricultural income; [Entry 82] [Income Tax Act 1961]
2. Duties of customs including export duties; [Entry 83] [Customs Act 1962]

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3. Duties of excise on tobacco and other goods manufactured or produced in India except (i) alcoholic liquor for human consumption and (ii) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in (ii); [Entry 84] [Central Excise Act 1944]
4. Corporation Tax; [Entry 85]
5. Taxes on capital value of assets, exclusive of agricultural land, of individuals and companies, taxes on capital of companies; [Entry 86]
6. Estate duty in respect of property other than agricultural land; [Entry 87]
7. Duties in respect of succession to property other than agricultural land; [Entry 88]
8. Tenminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freight; [Entry 89]
9. Taxes other than stamp duties on transactions in stock exchanges and futures markets; [Entry 90]
10. Rate of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of landing, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. [Entry 91]
11. Taxes on the sale or purchase of newspapers and on advertisements published therein; [Entry 92]
12. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce; [Entry 92 A] [Central Sales Tax Act 1957]
13. Taxes on the consignment of goods in the course of inter-State trade or commerce. [Entry 92 B]
14. All residuary types of taxes not listed in any of the three lists of Seventh Schedule of Indian Constitution: [Entry 92 C] for **e.g.** Service Tax.

List—II (State List) (19 Heads of Taxation)

The nineteen heads List-II of Seventh Schedule of the Indian Constitution covered under State taxation, on which State Legislative enacts the taxation law, are as under:

1. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues;
2. Taxes on agricultural income; [Entry 46]
3. Duties in respect of succession to agricultural income; [Entry 47]
4. Estate Duty in respect of agricultural land; [Entry 48]
5. Taxes on lands and buildings; [Entry 49]
6. Taxes on mineral rights; [Entry 50]
7. Duties of excise for following goods manufactured or produced within the State (i) alcoholic liquors for human consumption, and (ii) opium, Indian hemp and other narcotic drugs and narcotics; [Entry 51]
8. Taxes on entry of goods into a local area for consumption, use or sale therein; [Entry 52]
9. Taxes on the consumption or sale of electricity; [Entry 53]

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10. Taxes on the sale or purchase of goods other than news papers; [Entry 54]
11. Taxes on advertisements other than advertisements published in newspapers and advertisements broadcast by radio or television; [Entry 55]
12. Taxes on goods and passengers carried by roads or on in land waterways; [Entry 56]
13. Taxes on vehicles suitable for use on roads; [Entry 57]
14: Taxes on animals and boats; [Entry 58]
15. Tolls; [Entry 59]
16. Taxes on profession, trades, callings and employments; [Entry 60]
17. Capitation taxes; [Entry 61]
18. Taxes on luxuries, including taxes on entertainments amusements, betting and gambling; [Entry 62]
19. Stamp duty in respect of documents other than those specified in the provisions of List I.

List—III (Concurrent List)

No item of taxation.

4.6 CORPORATE/COMPANY TAXATION

Corporate sector is the most widely used form of business Organisation particularly for medium and large scale business. Under corporate sector, a business is carried on by floating a company duly registered with appropriate authority.

Corporate taxation refers to taxation of companies (as defined under Income Tax Act, 1961) and is a major source of revenue to the Government. Under Income Tax Act, 1961, a company is liable to pay tax on its income at a flat rate (just as partnership firm) without any basic exemption limit as applicable to an individual or H.U.F.

Corporate Tax

The tax collected from companies (as defined under the Income Tax Act, 1961) is called 'Company Tax' or 'Corporate tax'. A company incorporated in India or having its entire control and management in India is treated as a resident company and is taxed on its global income. A non resident company is taxed only in respect of Indian income derived from Indian operations. It is important to note that an income is said to be Indian Income in any or all of the following circumstances : (i) It accrues or arises in India or (ii) It is deemed to accrue or arise in India or (iii) It is received in India. It is interesting to note that the proceeds of corporate tax are retained by the Central Government and are not shared with state governments.

From the point of view of companies/corporations, corporate tax constitutes a substantial outflow of cash from business. It is a compulsory cost of performing profitable economic activities by these companies. Corporate tax directly influences the distributable profits of the companies which these companies distribute to their shareholders by way of dividend.

4.7 CORPORATE TAX PLANNING

Corporate Tax Planning provides significant opportunities for corporations to manage and increase cash flows through minimisation or deferral of taxes on corporate earnings. It is so because corporate presents a significant part of overhead cost for these companies. The key

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objective in "Corporate Planning" is to identify the main factors in the organisation's structure that dictate the opportunities for tax efficiencies/savings. Under Income Tax Act, 1961, many tax benefits/concessions have been provided to companies/corporate sector. Thus, it is imperative for companies operating in India to derive benefit of every available tax break so that they compete successfully with multinationals. After identifying tax saving opportunities, a tax planner devises and implements tax strategies for the business or for the specific transactions of the business. Thus, Corporate Tax Planning aims to structure a business in such a way as to ntinimise both its current and future income tax liabilities. It enables managers to consider their decisions after analysing tax consequences.

4.8 BENEFITS OF CORPORATE TAX PLANNING

1. **Reduction in tax liability.** The first and foremost purpose of tax planning is reduction in tax liability and tax planning helps the tax payer to reduce his tax liability by enabling him to claim the various exemptions, deductions, rebates or reliefs etc. These exemptions or deductions are deliberately provided by the law makers. Non-planning of tax may cast a heavy burden of tax on the shoulders of the tax payer. Since, tax constitutes cash outflows, therefore, tax planning helps a tax payer to make savings and to feel a lesser pinch of taxation.
2. **Minimisation of litigation.** Taxation laws being so complicated and cumbersome, have always been a cause of litigation. Tax litigation occurs due to the conflicting objectives of the tax officials and tax payers. Tax officials make every effort to collect more and more tax revenue whereas tax payers try to pay lesser and lesser tax. In this context, sometimes, tax officials derive such interpretations of the tax laws which cause increased tax burden on the assessee. Considering such tax demand as unjustified, the aggrieved assessee often approaches the various appellate authorities as provided under the law. Similarly, quite often, tax payers, in a bid to reduce tax liability, interpret the law as causing either no tax liability or reduced tax liability (by fabricating artificial transactions as real ones) for them. As and when such a case comes to the knowledge of the tax officials, they serve a demand notice to such an assessee (treating it as a case of tax avoidance or tax evasion) which is often challenged by the assessee in the court of law.
3. **Healthy Growth of Business.** 'Corporate Tax Planning' enables corporate houses to save money payable otherwise by way of taxes. The volume of money involved in corporate sector is generally high and hence, corporate tax constitutes significant amount. This amount, if saved, can be invested in acquisition of fixed assets to strengthen the future earning capacity of the business.
4. **A Source of Working Capital**. Since Tax payment involves outflow of cash therefore it affects the liquid assets available with the company to meet day to day expenses of the business. Corporate Tax planning enables companies to save money on account of taxes, thus causing a lesser strain on the cash resources of the company. Thus, Corporate Tax Planning proves to be a source of working capital.
5. **Increase in distributable profits**. Distributable profits of the Companies constitute those profits which are available for distribution of dividend. Corporate tax is a huge drain on distributable profits. It is the profit after tax which is left for distribution of dividend. Corporate Tax Planning, by reducing the burden of corporate tax, leaves more distributable profits with the corporate houses. It enables a corporate house to pay more dividends.
6. **Enables to face competition from Multinationals**. Corporate Tax Planning enables corporate houses to face competition provided by multinationals. The saving in cost affected by tax planning enables these corporate houses to lower the prices of goods and services.

7. **Maximising Market Valuation**. It is well settled now that the main aim of financial planning/financial management is to increase or maximise the wealth of business. It is often seen that tax efficient companies have been successful in increasing their market valuations.
8. **Other Benefits**. Apart from these major benefits, there are some derived benefits also, such as boost to capital market, cost effectiveness, employment generation etc.

4.9 TAX EVASION

All methods by which tax liability is illegally avoided are termed as tax evasion. It is illegal method of saving tax and makes the personliable to penalties and prosecution. 'Tax evasion' refers to an exercise/attempt by a tax payer for not paying the tax legally becoming due. It is the general term for efforts by assessees (person who are liable to pay tax) to evade taxes by illegal means. Tax evasion usually involves assessees deliberately misrepresenting or concealing the true state of their economic/financial affairs to the tax authorities to reduce their tax liability and includes dishonest tax reporting. A Tax evader either (i) pays less tax than what he is supposed to pay or (ii) does not pay any tax when he is legally liable to pay it as per the rules of tax laws. Tax evasion typically involves failing to report income or improperly claiming deductions that are not allowed or authorized.

The method of tax evasion are :

(i) Not showing income at its real level i.e. under disclosure of income;

(ii) Inflating the expenses and thus reducing the real income;

(iii) Manipulation of accounts to reduce the income;

(iv) Violation of rules and regulations of laws with the intention to save tax;

(v) Manipulation of sale and purchase of property i.e. Benami transactions.

Although tax Evasion may lead to lower cash outflow on account of taxes yet such saving of money may not be real and absolute. Infact, tax evaded remains a liability of the evader. If trapped, he will have to pay the tax evaded. Moreover, the additional tax outflow on account of penalities and unnecessary mental tension and due to fear of action and prosecution may prove heavy on tax evader.

Tax evasion is considered as a white collar crime and is spreading like anything. It is the most serious and perpetual problem being faced not only by India but by all most all the countries of the world. Tax evasion leads to generation of 'black money' which, with its all ills, is a matter of grave concern since it has adverse long lasting ill economic effects on the Society.

Therefore, in order to curb the practice of tax evasion, the Government all over the world have framed stringent provisions.

In India, the Income Tax Act 1961 also provides for very stringent penalties which may range from a minimum of an amount equal to tax payable to a maximum of 300% of tax. There are also some fixed penalties for certain defaults. Along with the various penalties, there are certain sections of the Act which provide for prosecution and then imprisonment for various terms.

A tax evader cannot have a sound sleep. The fear of tax authorities will always be on his head and he cannot enjoy the fruits of his such efforts. Quite often, a tax evader has to face raids by the tax officials at his business and residential premises leading to loss of business as well as personal reputation, harassment, litigation, reopening of past assessments and payment of

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interest as well as penalty involving an amount much more than the normal tax. As such, an assessee is never advised to go in for tax evasion.

"Tax evasion is illegal but tax avoidance is in no way a crime. " It has been said very rightly and to understand the meaning of this statement we have to understand the meaning of evasion and avoidance. The latest trend and judgements do not subscribe to this view. The burden of tax is so heavy that even die honest citizen will also like to save tax. To save the incidence of tax, a person may opt legal or illegal methods. These methods are (a) Tax avoidance and (b) Tax evasion

The Direct Taxes Enquiry Committee (Wanchoo Committee) has tried to draw a distinction between the two items in the following words.

"The distinction between 'evasion' and 'avoidance', therefore, is largely dependent on the difference in methods of escape resorted to. Some are instances of merely availing, strictly in accordance with law, the tax exemptions or tax privileges offered by the government. Others are manoeuvers involving an element of deceit, misrepresentation of facts, falsification of accounting calculations or downright fraud. The first represents what is truly tax planning, the latter tax evasion. However, between these two extremes, there lies a vast domain for selecting a variety of methods which, though technically satisfying the requirements of law, in fact circumvent it with a view to eliminate or reduce tax burden. It is these methods which constitute "tax avoidance."

Reasons of Tax Evasion

(i) High tax rates
(ii) Complicated tax laws and filing mechanism.
(iii) Rampant Corruption at various levels.
(iv) Absence of distinction between Tax payers & non-tax payers.
(v) Absence of Social Security System.
(vi) Weak Surveillance mechanism.
(vii) Lack of transparency in government spending.
(viii) Non existence of effective judiciary.
(ix) Absence of Coordination amongst various taxes
(x) Inflation and unstable economy.

4.10 TAX AVOIDANCE

Tax avoidance is reducing or negating lax liability in legally permissible ways and has legal sanction. Essential features of lax avoidance are as under:

- Legitimate arrangement of affairs in such a way so as to minimize tax liability.
- Avoidance of tax is not tax evasion and carries no public disgrace with it.
- An act valid in law cannot be treated as fictitious merely on the basis of some underlying motive supposedly resulting in lower payment of tax to authorities.
- There is no element of **mala fide** motive involved in tax avoidance.

Over and over again, the courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Tax avoidance is sound law and certainly not bad morality for any body to so arrange his affairs in such a way that the brunt of taxation is the minimum. This can be done within the legal framework even by taking help of loopholes in the law. If on account of a lacuna in the law or otherwise, the assessee is able to avoid payment of tax within the letter of law, it cannot be said that the action is void because it is intended to save payment of tax So long as the law exists in its present form the taxpayer is entitled to take its advantage.

In the words of justice Chinappa Reddy, "tax avoidance is an art of dodging tax authorities without breaking the law". Thus, tax avoidance is an attempt to manage financial affairs by using colourable devices with the intention of reducing tax liability. Many a time, tax avoidance involves an attempt to reduce tax burden by taking advantage of certain loopholes or weaknesses in tax laws & is also known as "Loophole tax planning".

The Institute of Taxation in U.K. has defined Tax Avoidance as:

- The transactions that are designed to avoid or reduce the liability of tax or
- The transactions that are brought into existence solely for tax avoidance and not to achieve a commercial purpose and
- The transactions that arc clearly outside the purview of the intentions of the law-makers.

According to The Organization for Economic Co-Operation and Development (OECD), "Tax avoidance is an arrangement of a tax payers' affairs that is intended to reduce his liability and that although the arrangement could be strictly legal, is usually in contradiction with the intent of the law it purports to follow."

Thus, tax avoidance involves : (1) use of colourable devices; (2) instances where doctrine of substance is defeated; (3) defeating the genuine spirit of law; (4) mis-representation or manipulation of facts; (5) taking only strict interpretation of law and suppressing the legislative intent behind it.

A. Traditional approach towards tax avoidance (Tax avoidance is lawful)

The practice of using tax avoidance techniques under the name of tax planning, perhaps, must have started from the moment tax laws were implemented in any part of the world. During early days, tax planning and tax avoidance meant one and the same thing and perhaps never got so much attention for discussion. However, in 1920's and 1930's, a faction of intellectuals (judiciary, tax officers, political leaders and media) in U.K. started discussing and differentiating the two. The discussion lead to a widespread acceptance of tax avoidance as a tool of reducing tax liability citing it to be within law.

In the year 1926, it was observed in the case of Inland Revenue Commissioners v. Fisher's Executors 1926 AC 395,412

"The highest authorities have always recognized that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any expressed terms or any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability nor incurs blame."

Lord Tomlin in the case of Inland Revenue Commissioner (IRC) vs. Duke of Westminster [(1936) AC 1] said,

"Every man is entitled, if he can, to order his affairs, so that the tax attaching under the appropriate Acts, is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax gatherers may be of his ingenuity, he cannot be compelled to pay an increased tax".

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In India, Justice Chagla in the case of Provident Investment Co. Ltd. v. CIT [1953] 24 ITR 33 (Bom.) said- "A citizen is perfectly entitled to exercise his ingenuity so to arrange his affairs as may make it possible for him legally and lawfully not to pay tax, and if his ingenuity succeeds, however reluctant the Court may be to acknowledge the cleverness of the assessee, the Court may give effect to the letter of the taxation law rather than strain that letter against the assessee."

Justice S. R. Singh of the Punjab High Court observed in Raghbir Singh Sandhawalia v. CIT [1958] 34 ITR 719, "A taxpayer has full liberty to decrease what otherwise would be his taxes or altogether to avoid them, by means which the law allows. The fact that a certain transaction has been entered into with the ulterior object of enabling the taxpayer to avoid payment of income-tax would not render the transaction void, for motive alone cannot make unlawful what the law allows.... - 5. Raghbir Singh Sandliawalia v. CTT[1958] 34 TTR 719, 720.

The crux of principles evolved by the various earlier High Courts and Supreme Court judgments is as follows :

(i) That avoidance of tax liability by so arranging commercial affairs that charge of tax is distributed is not prohibited.

(ii) The taxpayer may resort to a device to divert the income before it accrues to him.

(iii) The effectiveness of the device depends not upon consideration of morality, but on the operation of the Income-tax Act.

(iv) The tax laws are not to be violated but can be lawfully circumvented.

B. Modern approach towards tax avoidance (Tax avoidance is unlawful)

The acceptance of tax avoidance as a lawful exercise did not continue long as tax officials, governments, academicians and judiciary started raising voices against it, Lord Simon in Latilla vs. IRC (1943) case observed as follows:

"There is, of course no doubt that they are within their legal rights but that is no reason why there efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of the good citizenship. On the contrary, one result of such methods, if they succeed, is of course to increase protante the load of tax on the shoulder of the body of good citizens who do not desire or do not know how to adopt these manoeuvers."

In - Greenberg v. IRC [1971] 3 ALL ER 136, the court observed:

"We seem to have travelled a long way from the general and salutary rule that the subject is not to be taxed except by plain words. But I must recognise that plain words are seldom adequate to anticipate and forestall the multiplicity of ingenious schemes which are constantly being devised to evade taxation. Parliament is very properly determined to prevent this kind of tax evasion and if the courts find it impossible to give very wide meanings to general phrases, the only alternative may be for Parliament to do as some other countries have done and introduce legislation of a more sweeping character which will put the ordinary well-intentioned person at much greater risk than is created by a wide interpretation of such provisions as those which we are now considering.....I am inclined to think that the real explanation of these verbal difficulties may be that, in legislation of such extreme complexity as we have here, it is not humanly possible for a draftsman to preserve that consistency in the use of language which we generally look for. Indeed, I sometimes suspect that our normal meticulous methods of statutory construction tend to lead us astray by concentrating too much on verbal niceties and paying too little attention to the provisions read as a whole".

In W.T. Ramsay Ltd, v. IRC [1982] AC 300, the court observed:

"Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well known principle of Inland Revenue Commissioners v. Duke of Westminster [1936] AC 1. This is a cardinal principle but it must not be overstated or overextended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not -compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded : to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be recorded. They are not, under the Westminster doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole ".

In a case CIT Vs Kharwar [72 ITR 603], the same view was observed:

"The taxing authority is entitled and is indeed bound to determine the true legal relation resulting from a transaction, if the parties have chosen to conceal by a device the legal relation, it is open to the taxing authorities to unravel the device and to determine the true character of relationship. But the legal effect of a transaction cannot be displaced by probing into the substance of the transaction."

In India, before the decision of Supreme Court in McDowell's CTO. Case, tax avoidance was regarded as a lawful act. It was the landmark judgement given by justice Reddy of Honourable Supreme Court in McDowell & Co. Ltd. vs. CTO (1985) IS4ITR 148 (SC) which is considered as a turning point in the judicial approach on avoidance of tax.

While delivering the judgement, the court said, "Tax planning may be legitimate provided it is within the framework of law. Colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by dubious method. It is obligation of every citizen to pay the taxes honestly without resorting to sub-terfuges. In deciding whether a transaction is a genuine or colourable device, it is open for the tax authorities to go behind the transaction and examine the "substance" and not merely the "form ".

Justice Reddy further said, "But, surely, it is high time for the judiciary in India too to part its ways from the principle of Westminster and the alluring logic of tax avoidance. We now live in a welfare State whose financial needs, if backed by the law, have to be respected and met. We must recognise that there is behind taxation laws as much moral sanction as behind any other welfare legislation and it is pretence to say that avoidance of taxation is not unethical and that it stands on no less a moral plane than honest payment of taxation. In our view, the proper way to construe a taxing statute, while considering a device to avoid tax, is not to ask whether the provisions should be construed literally or liberally, nor whether the transaction is not unreal and not prohibited by the statute, but whether the transaction is a device to avoid tax, and whether the transaction is such that the judicial process may accord approval to it."

Thus, the Supreme Court in the case of M/s Mc Dowell and Company Ltd. Vs. Commercial Tax Officer [1985][154 ITR 148 (SC)] clearly changed its view from its earlier observations and gave its observations in following manner:

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(i) There is substantial loss of public revenue required for the economic development of the nation;

(ii) It results in creation of black money economy which results into inflation;

(iii) It results into lot of litigation which results into huge amount of tax arrears, busy courts and wastage of time and money ;

(iv) It results into injustice and inequality caused by the tax avoidance for the honest tax payers;

(v) It results into an unethical practice of transferring the incidence of tax liability from the tax dodgers to the honest tax payers who have to pay tax at higher rates.

4.11 TAX PLANNING

Meaning: Tax Planning is an arrangement of one's financial affairs in such away that the burden of taxation on the assessee is reduced to the minimum without violating in any way the legal provisions. The income tax Act provides for certain sections which allow a person to save tax legally by adopting the path shown in the sections. When a person takes shelter behind these sections, provisions and rules and as a result reduces his tax liability, it is called Tax Planning'. In tax planning, maximum advantage is taken of all tax exemptions, deductions, concessions, rebates, allowances other reliefs or benefits permitted under the Act. It is an act of prudence and farsightedness on the part of an assessee to reduce the burden of his tax liability to maximum possible extent by remaining in the four corners of the law.

Tax planning is a legitimate right of the tax payer. However, it is not an inherent right of the tax payer. It can be exercised only if it is provided under the taxation law. In other words, Tax planning can be done only if the tax laws contain provisions in this respect. The concept of tax planning has originated from the very existence of certain exemptions, deductions etc. provided under the tax laws.

For instance, in case of an individual or HUF, tax planning can be done in following manner;

(i) By making investment in specified permissible avenues eligible for deduction under section 80C upto a maximum of ₹ 1,50,000 or

(ii) By claiming deduction u/s 80D in respect of medical insurance premium paid upto specified limit for self, spouse, children or parents, or

(iii) By claiming various other prescribed deductions u/s 80.

(iv) By making investment in an SEZ unit.

It is legitimate as the legislature intends optimum utilisation of these deductions and exemptions to promote economic activity in the country.

Essential features of tax planning

(i) Tax Planning is an exercise aimed at reducing tax liability by availing maximum benefits of various deductions, exemptions, rebates, reliefs etc. provided under tax laws.

(ii) It comprises of arrangements completely within the framework of law. In other words, tax-reduction strategies involve full compliance to law.

(iii) Transactions do not take the form of colourable devices (i.e., those devices where the statute is followed in strict words but the actual spirit behind the statute is marred).

(iv) There is no intention to deceit the legal spirit behind the taxation laws.

(v) It is legal and accepted by judiciary.

(vi) It is based on principle of disclosure.

(vii) It is a deliberate creation of law for wealth generation through encouraged savings and investment.

(viii) It leads to more resources with the tax payer without any fear of being eroded later on rather used for productive purposes.

(ix) It leads to sound sleeps for the tax payer i.e. stress-less device.

(x) Tax planning is an honest effort of the tax payer to benefit himself and economy as a whole.

Tax planning strategies deal with how to optimise after tax income and capital flows after considering transaction cost, the management structure and business risk. It is a systematic and scientific exercise with due respect to the letter and spirit of the prevalent tax laws. It is a process of looking at various tax option in order to determine whether, when and how to conduct business/personal transaction so that the taxes are either eliminated or reduced. Tax planning should not be done with an intention to defraud the revenue and should be in correct form and substance of law.

Tax planning is an arrangement of a person's financial affairs in such a way that, without contravening in any way the legal provisions, full advantage is taken of all tax exemptions, deductions, concessions, rebates, allowances and other reliefs or benefits permitted under the Act to reduce the burden of taxation on the assessee. This statement is based on a judgement given under English law in a case Inland Revenue Commissioner vs. Duke of Westminster 1936 AC.

"Every man is entitled if he can, to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax."

Business Transactions and Tax Planning

Every business transaction has tax consequence or consequences, Whether that transaction is a day-to-day transaction like purchase, sale, routine expense, etc or certain special transactions like purchase of fixed assets, raising of capital etc. So, while taking any business decisions, its tax effects must be analysed before hand. If not always but in certain cases, tax consequences guide in carrying out a particular business transaction. Thus, tax planning aids business owners in making tax conscious business decisions. It involves revenue planning, expense planning, investment planning and finance planning.

4.12 TAX MANAGEMENT

Tax management, a part of the tax planning, is name given to compliance of tax laws. It deals with the relationship of a person with the tax authorities. It has three facets:

(i) **Past:** At the end of financial year filing of various returns, issuing certificates, payment of tax etc.

(ii) **Present:** During the course of financial year payment of tax at appropriate time, deduction of tax at source, its payment etc.

(iii) **Future** : Rectification of any mistake committed, going in for appeals etc.

Tax management is that part of the tax planning where the planner saves the organization from payment of interest, penalties and prosecutions and as such has nothing to do with tax

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avoidance or tax evasion rather it deals with compliance with tax rules and regulations. It involves compliance with legal formalities to avail of various incentives available under Income Tax Act. Tax management is essential because often tax deductions/Exemptions/Incentives provided under IT Act are conditional. In other words, deductions/exemptions are available only if assessee fulfills certain specified conditions prescribed under I.T Act. Thus, it becomes imperative to fulfill the conditions and to comply with statutory requirements to get a reduction in tax liability. For example, Sec 10A of Income Tax Act 1961 provides, a deduction to certain types of undertakings in respect of profit from export of articles or things or computer software. A number of conditions have been prescribed under that section to enjoy the deduction. Thus, an attempt to comply with those conditions is called Tax management. Tax management, now-a-days has become a complex exercise involving high time and labour.

This is so because of the following two reasons :

(i) Economic uncertainity under which corporations/companies/business houses operate, and

(ii) Ever growing regulatory flameworks being introduced by the legislature.

A well developed system and set procedures are required to be employed to deal effectively and efficiently with company's tax obligations. Tax management system may be manual or mechanical. However, under present times mechanical system (i.e. computer) are increasingly being used for tax management.

Thus, Tax management can be described as a 'road' that leads to the destination of tax planning.

4.13 NEED FOR TAX PLANNING

Tax Planning strategies deal with how to optimise after tax income and capital flows after considering transaction cost, the management structure and business risk.

The main need of tax planning are as follows :

1. **Reduction in tax liability.** The first and foremost purpose of tax planning is reduction in tax liability and tax planning helps the tax payer to reduce his tax liability by enabling him to claim the various exemptions, deductions, rebates or reliefs etc. These exemptions or deductions are deliberately provided by the law makers. Non-planning of tax may cast a heavy burden of tax on the shoulders of the tax payer. Since, tax constitutes cash outflows, therefore, tax planning helps a tax payer to make savings and to feel a lesser pinch of taxation.
2. **Minimisation of litigation.** Taxation laws being so complicated and cumbersome, have always been a cause of litigation. Tax litigation occurs due to the conflicting objectives of the tax officials and tax payers. Tax officials make every effort to collect more and more tax revenue whereas tax payers try to pay lesser and lesser tax. In this context, sometimes, tax officials derive such interpretations of the tax laws which cause increased tax burden on the assessee. Considering such tax demand as unjustified, the aggrieved assessee often approaches the various appellate authorities as provided under the law. Similarly, quite often, tax payers, in a bid to reduce tax liability, interpret the law as causing either no tax liability or reduced tax liability (by fabricating artificial transactions as real ones) for them. As and when such a case comes to the knowledge of the tax officials, they serve a demand notice to such an assessee (treating it as a case of tax avoidance or tax evasion) which is often challenged by the assessee in the court of law.
3. **Healthy growth of nation**. As we know that tax revenues constitute a major source of revenue to the government. Any effort, by the government to provide deduction, exemption

etc. to tax payer, leads to fall in the revenue of the government. But inspite of this, government deliberately provides such exemptions and deductions to the tax payers. As most of the times, these exemptions, deductions are for the socio-economic development of the country. For example, the deduction u/s 80IA is provided to build up a strong infrastructure base in the economy. Similarly, certain exemptions/ deductions etc. are available to undertakings set up in industrially backward areas.

4. **Helps in Capital Formation**. Savings and investment decide the level and pace of economic development of a nation. Tax planning helps a lot in the process of capital formation. Most of the times, tax laws encourage tax payer to invest money in government instruments. Many tax benefits/concessions can be availed by investing money in government owned undertakings or by depositing money in state sponsored saving schemes. For example, section 80C of Indian Income Tax Act, 1961, provides deduction for investment in NSCs etc. which helps the government to garner the idle money or money saved through tax planning of the assessees. The money so generated gives a big push up to the economy in its development phase.

5. **A Source of Working Capital**. As we know Cash/Bank Balance is the main constituent of working Capital and is regarded as life blood of business. It is required for meeting day to day expenses, purchasing assets, payment to creditors and payment of dividend to shareholders etc. Effective tax planning helps in conserving this important constituent of working capital. In the absence of proper tax planning, much of the cash will go out of business, thus leaving lesser cash for other important purposes.

6. **Other implications**. Apart from these major ones, there are some derived implications also such as, boost to capital market, cost effectiveness, employment generation and economic stability etc.

These very implications of tax planning explain that tax planning is not only the necessity of tax payer but also beneficial for him.

Does Tax Planning reduce governmental revenue?

As we know, tax planning aims at reducing the tax outflows of the taxpayer which leads to reduction in the revenue of the government. Therefore, some experts are of the opinion to do away with provisions involving tax concessions, exemptions etc. But, by and large, it has been accepted that although these concessional provisions reduce the inflow of government yet it offsets the fall in revenue by channelising savings and investment in the growth of economy.

The savings through tax planning are pumped into the economy by the individual & corporate tax payers and not by government. Thus, the ultimate purpose of socio-economic development is fulfilled.

4.14 LIMITATIONS OF TAX PLANNING

1. Tax planning has its own scope beyond which an assessee cannot go. All decisions regarding tax planning should be taken in such a manner that they do not hurt others.
2. Taxation laws are most dynamic laws and they keep ch‘nging very frequently. There is no stability in the applicability of these laws. The government can change them at any time it likes. As a result tax planning can be done only for a very short period i.e. only for one to two previous years. Long term tax planning is not possible.
3. The law gives several benefits to an assessee and to claim them certain preconditions are imposed. It is essential that those preconditions must be fulfilled to claim that benefit.

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A blind person must get a certificate from the medical authorities about his blindness to claim deduction u/s 80U. The procedure to claim this certificate is very complicated and as such the blind person is in difficulty. As such tax planning becomes limited to the extent of fulfillment of these conditions.

4. Indian tax laws are among the most complicated laws of the world. Understanding its intricacies is a very difficult job. This acts as a limitation for successful tax planning.
5. Tax planning does not mean infringement of different provisions of law. It means reducing the tax liability while lawfully implementing the different provisions of law.. Thorough knowledge of Income Tax Act, Wealth tax Act, Interest Tax Act, Expenditure Tax Act, Money Laundering Act, Foreign Exchange Management Act etc is very necessary to be a successful tax planner.
6. It is not only the knowledge of tax and other laws is necessary it is also essential for good tax planning to be an expert in the field of accountancy. The little knowledge of accountancy can cause bad tax planning.
7. As the income increases, the tax liability increases. The increase in profitability of business is good for the economy. But when the profits increase the financial managers become busy in finding ways and means to reduce the tax burden. The time which they should devote towards more profitability is devoted towards tax planning.

4.15 DIFFERENCE BETWEEN TAX PLANNING AND TAX EVASION

Although Tax Planning and Tax evasion are poles apart, but the basic purpose of these two different terms is more or less the same which is reduction of tax liability to the extent possible. For both these practices, one should have thorough and comprehensive knowledge of taxation laws. But sometimes, tax evasion may be due to ignorance of law. But ignorance of law is not an excuse in the eyes of law.

Some of the points of their difference are as follows:

S. No.	Tax Planning	Tax Evasion
1	Tax Planning is an exercise aimed at reducing tax liability by availing maximum benefits of various deductions, exemptions rebates, reliefs etc. provided under tax laws.	Tax evasion is an exercise of reducing tax liability either (i) by showing lesser income than actual or (ii) by hinding the very source of any income.
2	Tax planning is completely within the framework of law i.e. it is an exercise involving obedience of law.	Tax evasion is willful disobedience of law and involves an element of deceit.
3	It is legal and accepted by judiciary.	It is illegal and is prohibited.
4	It is based on principle of disclosure.	It involves hiding the facts regarding incomes and expenditure.
5	It is a deliberate creation of law for wealth generation through encouraged savings and investment.	It is a white collar crime and is seen as an offence.
6	It leads to more resources with the tax payer without any fear of being eroded later on rather used for productive purposes.	The increased resources due to tax evasion may get eroded later on by way of penalties.

7	It leads to sound sleep for the tax payer i.e. stress-less device.	Tax evasion leads to fear of penalties and prosecutions. A tax evader cannot have a sound sleep i.e. stress full device.
8	Tax planning is an honest effort of the tax payer to benefit himself and economy as a whole.	It requires a dishonest nature and courage to violate the law.
9	Tax planning leads to socio-economic development of the economy.	It leads to generation and accumulation of black money which is great hurdle in the progress of an. economy.

4.16 DIFFERENCE BETWEEN TAX PLANNING AND TAX AVOIDANCE

Tax Planning is a legally permitted exercise whereas avoidance is against the legal intentions. Some of the basic differences between Tax Planning & Tax avoidance are as follows:

Sl. No.	Tax Planning	Tax Avoidance
1.	Tax Planning is an exercise of reducing tax liability by staying within the four corners of law.	Tax avoidance is an exercise of reducing tax liability by exploiting some loopholes of the law.
2.	It involves, fair obedience of law with an honest attitude.	It involves foul play with law. It involves dodging tax law.
3.	Tax planning is legal and acceptable by judiciary.	Tax avoidance is unethical, illegal and is prohibited.
4.	In tax planning, transactions are real and natural.	In tax avoidance, transactions are fabricated artificially.
5.	Tax planning is dependable.	Tax avoidance is not dependable because as and when the ingenuity is exposed, tax avoider has to pay tax retrospectively.
6.	Tax planning is long term.	Tax avoidance is short team.

4.17 DIFFERENCE BETWEEN TAX AVOIDANCE AND TAX EVASION

The following are the broad areas of distinction between the two:

S.No.	TAX AVOIDANCE	TAX EVASION
1.	Any planning of tax which aims at reducing or negating tax liability in legally recognized permissible ways, can be termed as an instance of tax avoidance.	All methods by which tax liability is illegally avoided is termed as tax evasion.
2.	Tax avoidance takes into account the loop-holes of law.	Tax evasion is an attempt to evade tax liability with the help of unfair means/ methods.

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3	Tax avoidance is tax hedging within the framework of law.	Tax evasion is tax omission.
4	Tax avoidance has legal sanction.	Tax evasion is unlawful and an assessee guilty of tax evasion may be punished under the relevant laws.
5	Tax avoidance is intentional tax planning before the actual tax liability arises.	Tax evasion is intentional is attempt to avoid payment of tax after the liability to tax has arisen.

4.18 TAX PLANNING VS. TAX MANAGEMENT

Tax management involves the procedures of compliance with the statutory provisions of law. The following are the broad areas of distinction between tax planning and tax management.

S.No.	TAX AVOIDANCE	TAX EVASION
1.	The objective of tax planning is to reduce the tax liability to the minimum.	The objective of tax management is to comply with the provisions of law.
2.	Tax planning is futuristic in its approach	Tax management relates to past (i.e. assessment proceedings, rectification, revision, appeals etc.), present (filing of return of income on time on the basis of updated records) and future (corrective action).
3.	Tax planning is very wide in coverage and includes tax management	Tax management has a limited scope, i.e. it deals with specific activities such as filing of returns of income on time, drafting appeals, deduction of tax at source on time, updating records from time to time, etc.
4.	The benefits arising from tax planning are substantial particularly in the long run.	As a result of effective tax management, penalty, penal interest, prosecution, etc, can be avoided.

4.19 TAX PLANNING FOR EMPLOYEES

Salary received or receivable by the employee whether in cash or in kind is taxable in employee's hands. Employee would be interested to get all type of benefits, allowances, perks etc. from his employer but at the same time, he will be keen to pay the minimum of tax. While making a contract regarding salary, the employee would like to get all type of benefits having the minimum tax liability. For example, if employee is given the option to get rent free accommodation or house rent allowance. Before accepting a particular option, the employee should calculate the tax implications of both the options and finally accept that option in which his tax liability is the rninimum. While negotiating the salary package with employer, the employee should try to get all those allowances, perks, benefits, etc. which are exempted under section 10 and 17 of Income Tax Act, 1961 and must understand the tax implications of all allowances and perks. He must give proper consideration to following points:

(i) Whether he should accept consolidated salary or basic salary plus dearness pay or dearness allowances, commission, etc.

(ii) Whether to accept rent free accommodation or a cash house rent allowance.

(iii) Whether to get fixed medical allowance, or reimbursement of medical expenses or free medical facilities.

(iv) Whether to get a cash conveyance allowance or a car perk or actual reimbursement of conveyance expenses.

(v) Whether to encash leave during service or get it accumulated and then encash it at the time of retirement.

(vi) Whether to accept education allowance or reimbursement of education expenses like school fees etc. of children.

(vii) Whether to accept lunch allowance or actual lunch from the employer.

(viii) Whether to get allowance for gardener, sweeper, etc, or actual free services of such servants.

(ix) Whether to accept an increase in cash salary or higher contribution of employer in employee's provident fund, superannuation fund and other employee's welfare scheme.

(x) Whether to accept an increase in cash salary or to get salary under various other names like border area allowance, rural area allowance, high altitude area allowance, etc.

(xi) Whether there should be more of allowances or more of perquisites.

(xii) Whether to accept an increase in cash salary or higher amount of gratuity, etc.

(xiii) Whether to accept cash gift or gifts in kind.

(xiv) Whether to get cash payment in lieu of leave travel or actual reimbursement of expense on journeys undertaken in connection with leave travel.

(xv) Whether to accept commuted pension or monthly pension.

(xvi) Whether to get free accidental insurance policy or life policies from the employer.

1. Salary Structure

While finalizing salary package, the employee should insist on not getting consolidated salary but it should be split up as basic salary, allowances, perks, fringe benefits, etc. In case consolidated salary is received, it is fully taxable but if it is split up then certain allowances and perquisites are exempted and the employee can enjoy the benefit of these exemptions. For example, certain allowances like education allowance, uniform allowance, flight allowance, disturbed area allowance, remote area allowance and some other allowances are exempted either fully or partially.

Dearness pay or Dearness allowance should always be given as per terms of employment. In case D. A. is treated as part of basic salary, then the employee will be able to get exemption regarding House rent allowance, gratuity, employer's contribution in provident fund, pension, etc.

2. Claim of official allowances covered U/S 10(14) (i)

A salaried individual or employee shall try to convince employee for grant of any of the following allowances:

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(i) Daily allowance on tour/travelling
(ii) Travelling allowance on tour/transfer
(iii) Conveyance allowance
(iv) Uniform allowance
(v) Research allowance
(vi) Helper allowance

Tax treatment of these allowances

These allowances are exempt upto the amount of actual expenditure incurred by the employee for the specified purposes. The employee need not provide the proofs of actual expenditure rather a certificate issued by employer in respect of expenditure by employee is sufficient. An employer does not lose anything in certifying that whole allowance is spent by employee. Hence can be convinced for the same. Thus, employee would be able to reduce his taxable salary income while enjoying more disposable income with him.

3. Tax planning for House Rent allowance

(i) **HRA and payment of rent:** Employees receiving house rent allowance and living in rented houses are required to submit proof of the rent paid in respect of rented accommodation occupied during the previous year. Such rent can be paid to any house owner whether a stranger or even a relative such as father, mother, brother, sister, son & daughter etc. However, though the Income tax Act does not contain any restriction on payment of rent by an individual to his/her spouse yet such payment is often not justified in view of type of relationship involving living together. Hence, it should be avoided in our view.

However, it is important to note that the person receiving rent has to include the rent received as his income U/H house property if the recipient is owner or as income U/H other source if the recipient is not the owner or tenant himself.

(ii) **Submission of land lord's PAN by employee to employer :** The Central Board of Direct Taxes has now made it mandatory for employees to submit PAN of the landlord to the employer if the annual rent exceeds ₹ 1,00,000 and such an employee is claiming exemption of HRA under section 10(13A) of the Income tax Act. Earlier, the limit was capped at ₹ 15,000 p.m. (i.e. ₹ 1,80,000 p.a.) as against the current limit of ₹ 8333 p.m. i.e. ₹ 1,00,000 p.a. (As per new circular of CBDT vide its circular No. 08/2013 F.No. 275/192/2013 - IT (CB) dated 10.10.2013).

(iii) **Proof of rent paid :** The proof of rent paid shall be in the form of a rent receipt issued by the landlord/person receiving rent. Such receipt issued by landlord must have a one rupee stamp affixed with his signature along with other details such as address of rented accommodation, amount of rent paid etc.

4. Tax planning for repayment from Recognized Provident Fund (RPF)

Employees working in organizations/undertakings where recognized provident fund is applicable are advised to leave/switch over the job after completion of 5 years.

However, if an employee leaves such an organisation before the expiry of 5 years for joining some other organisation then it is advised to transfer the amount standing under RPF account to the RPF account under new employer. The same RPF a/c number shall remain applicable on such transfer of RPF a/c with new employer. No tax liability will arise in respect of lumpsum amount standing to the credit of RPF account. However, if such amount is withdrawn before completion 5 years service then the amount will be taxable as per rules.

5. Inclusion of tax free perquisites in the salary package

An employee should convince employer to include certain perquisites in the salary package which are tax free for income tax purposes. Such perquisites may include the following:

(a) Re-imbursement of medical expenses for treatment in Government, notified or private hospital.

(b) Telephone facility

(c) Free conveyance facility for going to or coming back from place of employment

(d) Employer's contribution to staff group insurance scheme

(e) Leave travel concession.

6. Dearness allowance under the terms of employment

If possible, employer should be convinced to include dearness allowance (DA) in the salary package as per terms of employment. In such a case, dearness allowance shall be taken into account while calculating exemption of house rent allowance, gratuity and commuted pension etc. Such a dearness allowance would reduce the taxable portion of such payments and will ultimately reduce the burden of tax.

7. Tax planning through rent free accommodation

HRA and RFA are the two mutually exclusive elements in the salary package of Government and non-government employees. Rent free accommodation facility is valued at a very concessional rate for Government employees at an amount fixed by Government/departmental rules (which is generally lower).

However, valuation of this perk for non-government employees is linked purely to salary of employee if accommodation is owned by the employer. In case, accommodation is hired by the employer for the employee, it is linked to salary & actual rent paid by employee.

The value of this perquisite can be reduced by keeping the salary or other elements of salary such as taxable allowances, fees, commission, bonus etc. at a lower amount by including exempted allowances or perquisites. It is important to note that even taxable perquisites are not included in the salary for the purpose of valuation of RFA.

8. Rent Free Accommodation or House Rent Allowance

Both, the perquisite of rent free house or cash house rent allowance are taxable on concessional basis. Then, a choice between the two can be made as a measure of tax planning.

9. Fixed Medical Allowance of Reimbursement of Medical Expenses

Fixed medical allowance is fully taxable whereas reimbursement of medical expenses of employee and his family members is exempted upto 15,000 p.a., if medical treatment is received from a private hospital and it is fully exempted if hospital, clinic etc. is a government or a recognised or notified one. So, medical reimbursement is a better option and employees should strive to get reimbursement rather than fixed medical allowance.

10. To Accumulate leaves or to get them Encashed

Leave encashment at the time of retirement; termination of service etc. is fully exempted in case of Government employees and exemption u/s 10(10AA) is also given to employees of private sector and this exemption goes upto ₹ 3,00,000. But if leave credited to employee's account is encashed on year to year basis or at any time before retirement, it is fully taxable. So from tax planning point of view, employees are advised to get their leaves encashed only at the time of retirement or superannuation.

11. Education Allowance or free Education to Employee's Children

Education allowance is exempted only upto ₹ 100 p.m. and hostel allowance is exempted only upto ₹ 300 p.m. per child and for 2 children only. But if employer pays fees etc. directly to the school, college or such educational institutions are managed by the employer, then expenses incurred by employer on the education of employee's children are exempted upto ₹ 1,000 p.m. per child.

12. Lunch Allowance or Actual Lunch

Cash lunch allowance received by employee is fully taxable whereas if actual lunch or subsidized lunch is provided by employer at the work place of the employee, then it is exempted upto ₹ 50 per meal. So employees should prefer to get free lunch rather than lunch allowance. Refreshments during working hours is also fully exempted.

13. Servant Allowance or Actual Services of Servants

Allowance for gardener, watchman etc. is fully taxable. But if employer's house is given rent free to the employee alongwith the free service of the gardener, then these free service of gardener is exempted or is taken as part of the perk of rent free accommodation.

14. Higher Contribution in Recognised Provident Fund or Superannuation Fund

Every employee has to save for the betterment of his family or for his old age and one of the best possible saving scheme is provident fund scheme. Employer's contribution in recognised provident fund is exempted upto 12% of employee's salary. So every employer should contribute in recognised provident fund upto 12% of employee's salary. Interest credited on accumulated balance in recognised provident fund is also exempted upto 9.5% of credit balance whereas interest on fixed deposits, etc. is taxable. Employer's contribution in employee's superannuation fund is also fully exempted.

So the employee should opt for higher contribution in provident fund and superannuation fund rather than increased cash salary.

15. An Increase in Cash Salary or an increase in Allowances, Perks, etc.

Due to inflation or rise in prices, salary of an employee is always expected to increase and from tax planning point of view employee or their unions should get in touch with the employer and strive to get an increase in fully or partially exempted allowances, perquisites etc. rather than an increase in salary. An increase in allowances or an addition of new allowances or perks is not going to decrease the benefit to employee but it is definitely not going to increase the tax liability of the employee.

16. Whether more of Allowances or more of Perks ?

Amongst the tax planners, there is no dispute whether the employee should be given more of allowances or more of perquisites. Whenever any increase in salary is to be made, an effort should be made to give more of exempted allowances or exempted perks rather than straight way increase in salary.

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So, an exercise should be made to see the effect of these increases on the tax liability of the employee and only that option should be accepted by employee or introduced by the employer in which option the tax liability of the employee is minimum.

17. An Increase in Salary or Higher Gratuity

Gratuity is exempted upto ₹ 3,50,000; so employee must try to get a maximum of gratuity even at the cost of an increase in salary specially during the last 4-5 years of his service.

18. Cash Gift or Gift in Kind

Gift from employer is taxable in the hands of the employee as salary income.

Cash gifts from relatives are fully exempted. Gifts from non-relatives are exempted upto ₹ 50,000 in a previous year but gifts from non-relatives exceeding ₹ 50,000 are taxable as income from other sources.

19. Leave Travel Concession or Leave Travel Allowance

Leave travel allowance received by employee without undertaking actual journey is fully taxable. Expenses on journeys incurred by employee and reimbursed by employer twice in a block of 4 years are fully exempted. The exemption regarding actual journeys is also allowed to family members of employee including dependent parents, brothers and sisters. Employee should go out on 'See-India' journeys only twice in a block of 4 years and thus not attracting any tax liability.

20. Monthly or Commuted Pension

Pension received, on monthly basis is fully taxable, whereas if pension is got commuted, it is fully exempted in case of government and semi-government employees and is partially exempted in case of employee of private sector. Employee should get a good amount of commuted pension and a part of pension may be received on monthly basis so that his income after retirement comes under exempted limit or is taxed at the lowest rate. Relief u/s 89(1) is also allowed.

21. To get Accident Insurance Policy or Life Insurance Policy

Life insurance policy premium paid by employer on employee's life is fully taxable, whereas any premium paid by employer on employee's accident policy is fully exempted.

22. Taxing ESOP's (Employee's Stock Option)

As Fringe Benefit Tax has been abolished, so w.e.f assessment year 2010-11, the value of ESOP's will be taxable as perquisite in the hands of the employee.

Income Tax Deductions for FY 2017-18. This list can help you in planning the taxes:

1. **Section 80C:** The maximum tax exemption limit under Section 80C has been retained as Rs 1.5 Lakh only. The various investment avenues or expenses that can be claimed as tax deductions under section 80C are as Insurance, PPF, Mutual Funds, 5 years Tax saving Deposits, Tuition Fees, Housing loan repayments Etc.
2. **Section 80CCC:** Contribution to annuity plan of Life Insurance Company for receiving pension from the fund is considered for tax benefit. The maximum allowable Tax deduction under this section is ₹ 1.5 Lakh.

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3. **Section 80CCD:** Employee can contribute to Government notified Pension Schemes (like National Pension Scheme - NPS). The contributions can be upto 10% of the salary (or) Gross Income and ₹ 50,000 additional tax benefit u/s 80CCD (lb) was proposed in Budget 2015. Kindly note that the Total Deduction under section 80C, 80CCC and 80CCD(1) together cannot exceed ₹ 1,50,000 for the financial year 2016-17. The additional tax deduction of ₹ 50,000 u/s 80CCD (lb) is over and above this ₹ 1.5 Lakh limit.
4. **Section 80D:** Deduction u/s 80D on health insurance premium is ₹ 25,000. For Senior Citizens it is ₹ 30,000. For very senior citizen above the age of 80 years who are not eligible to take health insurance, deduction is allowed for ₹ 30,000 toward medical expenditure. Preventive health checkup (Medical checkups) expenses to the extent of ₹ 5,000/- per family can be claimed as tax deductions. Remember, this is not over and above the individual limits as explained above. (Family includes: Self, spouse, dependent children and parents).
5. **Section 24 (B):** The interest component of home loans is allowed as deduction under Section 24B for upto ₹ 2 lakh in case of a self-occupied house. If your property is a let-out one then the entire interest amount can be claimed as tax deduction (Read: Understanding Tax Implications of Income from house property)
6. **Section 80EE:** This is a new proposal which has been made in Budget 2016-17. First time Home Buyers can claim an additional Tax deduction of up to ₹ 50,000 on home loan interest payments u/s 80EE. The below criteria has to be met for claiming tax deduction under section 80EE.
   1. The home loan should have been sanctioned in FY 2016-17.
   2. Loan amount should be less than ₹ 35 Lakh.
   3. The value of the house should not be more than ₹ 50 Lakh and
   4. The home buyer should not have any other existing residential house in his name.
7. **Section 80GG:** As per the budget 2016 proposal, the Tax Deduction amount under 80GG has been increased from ₹ 24,000 per annum to ₹ 60,000 per annum. Section 80GG is applicable for all those individuals who do not own a residential house and do not receive HRA.

4.20 TAX PLANNING RELATING TO INCOME FROM HOUSE PROPERTY

The Income Tax Act divides the income received by a person into five different heads. One of them is the ‘income from house property’ that comprises the income earned by a person through the property(s) owned by him/her.

Property covered under ‘income from house property’ essentially comprises any building (house, office building, godown, factory, hall, shop, auditorium, etc) and/or any land attached to the building (e.g. compound, garage, garden, car parking space, playground, gymkhana, etc.)

(However, income from a vacant land is not covered this head. It is covered under another category of income viz. ‘income from other sources’.)

As may be seen from the example below, the calculation of income from house property is quite simple.

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How to compute income from house property	
Total annual rental income	₹ 2 lakh
Less: Municipal taxes paid	₹ 10,000
Net rental income	₹ 1.9 lakh
Less: 30% of net rental income	₹ 57,000
Interest on borrowed capital	₹ 1 lakh
Income from house property	₹ 33,000

From the total annual rental income, you have to reduce the taxes paid to the local municipal authorities during the year to arrive at the net rental income. (Note: In case some rent cannot be realised then such amount can be reduced from the total rent.) Of this net rental income, 30% is allowed as a standard deduction. Further, you can also deduct the interest paid on the loan taken to acquire the said property to arrive at the income from house property that would be liable for taxation.

Annual rental income: The rental income will be higher of (a) the rent actually received/ receivable by you and (b) the annual letable value (i.e. the amount for which the house property may reasonably be expected to let from year to year on a notional basis). Renting is important from the wealth tax perspective also. You have to pay wealth tax on all your properties (except one self-occupied property) unless they have been rented out.

Self-occupied property: For a self-occupied property you have to take rental income as "zero" in the aforesaid calculation. Accordingly, you will not get credit for any municipal taxes paid nor will there be any standard deduction. But yes, you can deduct the interest paid on the loan availed subject to a specified limit.

Interest on borrowed capital: For the self-occupied property, there is a limit to the interest that you can deduct. If the property is acquired or constructed after April 1, 1999 (and such acquisition/construction is completed within three years) then you are allowed to claim deduction of interest up to ₹ 1.5 lakh. For loans taken to repair or reconstruct the house (and those taken prior to April 1,1999), the limit is only ₹ 30,000.

However and this is important there is no such limit on the interest deduction for all other properties, excepting the self-occupied one. Accordingly, you can take the loan for such property which gives you the maximum benefit.

Thus, taking these provisions of Income Tax Act into consideration, you can work out the most suitable strategy that will keep your tax outgo to minimum and thereby maximize the in-hand post-tax rental income from your property(s).

4.21 TAX PLANNING RELATING TO INCOME FROM BUSINESS

Tax Planning-nature and forms of Business, Sec 10A of Income Tax Act of 1961.

Tax Planning is an exercise undertaken to minimize tax liability through the best use of all available allowances deductions, exclusions, exemptions, etc. to reduce income and/or capital gains. Tax planning can be defined as an arrangement of one's financial and business affairs by taking legitimately in full benefit of all deductions, exemptions alowances and rebates so that tax liability reduces to minimum.

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The important areas where planning can be attempted in an organized manner are as under -

(a) Form of organization/ownership pattern,

(b) Location aspects

(c) Nature of business

(d) Tax planning in respect of corporate restructuring

(e) Tax planning in respect of financial management

(f) Tax planning in respect of employees remunerations

(g) Tax planning in respect of specific managerial decisions

(h) Tax planning in respect of Non Residents

4.22 TAX PLANNING RELATING TO CAPITAL GAINS

The Income Tax Act has laid out exemptions under Section 54 and Section 54F to help taxpayers save tax on capital gains.

1. Exemption under Section 54 is available on long-term Capital Gain on sale of a House Property.
2. Exemption under Section 54F is available on long-term Capital Gain on sale of any asset other than a House Property.

   To reiterate, both the exemptions are available only on long-term capital gains.

Common requirements between the two Sections

1. A new residential house property must be purchased or constructed to claim the exemption
2. The new residential property must be purchased either 1 year before the sale or 2 years after the sale of the property/asset.
3. Or the new residential house property must be constructed within 3 years of sale of the property/asset
4. If you are not able to invest the specified amount in the manner stated above before the date of tax filing or 1 year from the date of sale, whichever is earlier, deposit the specified amount in a public sector bank (or other banks as per the Capital Gains Account Scheme, 1988).
5. Only ONE house property can be purchased or constructed.
6. Starting FY 2014-15 it is mandatory that this new residential property must be situated in India. The exemption shall not be available for properties bought or constructed outside India to claim this exemption.

Section 54EC for Tax Planning Capital Gains:

Section 54EC of Income Tax Act, 1961 provides the opportunity to the assessees to save tax on capital gain arising from transfer of long term capital asset upon fulfillment of some conditions.

Circumstances under which such deduction is available:

The deduction under section 54EC will be available subject to the following conditions:

1. The property transferred should be a long term capital asset;
2. There must be a long term capital gain;

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3. The asset is transferred by the assessee after 1.04.2000;
4. The assessee has invested the capital gain in the long term specified asset within a period of six months of such transfer.

4.23 TAX PLANNING RELATING TO INCOME FROM OTHER SOURCES

Under this residuary head of income, tax is payable by an assessee in respect of income, profits and gains of every kind which do not fall under any of the other heads of income. In particular and without prejudice to the generality of the above statement, income chargeable to tax under this head includes, among others, dividends, annuity, winnings from lotteries, crossword puzzles and races including horse races, card games and other games of any sort or from gambling or betting, income from government securities, income from machinery, plant or furniture and also belonging to the assessee let on hire, and any sum received under a Keyman Insurance Policy (from AY 1997-98, if not assessable as salary), if the income is not chargeable to tax under the head "Profits and gains of business or profession" and where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting if it is not chargeable to income tax under the head "Profits and gains of business or profession.

(a) In case you have received income from letting out your furniture, machinery or plant, then any amount you spend on the repair and maintenance of plant, machinery or furniture or any amount you pay in the form of insurance premium against the risk of damages of machines, plant, and furniture will be allowed as a deduction. It is important to note that depreciation expenses will only be allowed as per the rules and guidelines stated under the Indian Income Tax Act, 1961.

(b) In case you receive income in the nature of a family pension plan, a deduction of one-third of such income or ₹ 15,000, whichever is less. For the purpose of this availing deduction, 'family pension' means a regular monthly sum payable by the employer to a person belonging to the family of the employee in the event of the employee's death.

(c) Any other expenditure other than capital expenditure laid out or expended wholly and exclusively by you to generate such income.

(d) A deduction of a sum equal to 50% of interest income you earn from compensation or enhanced compensation income shall be allowed. Enhanced compensation, in this case, is any amount by which the compensation or consideration is enhanced or further enhanced by a ruling of the Court, Tribunal or other authority.

1. Deductions – Section 57 "Income from Other Sources"

The income chargeable to tax under this head "Income from Other Sources " is computed after making the following deductions, namely:

(i) In the case of dividends, any reasonable sum paid by way of commission or remuneration to a banker or any other person for the purpose of realising such dividend on behalf of the assessee (excluding a foreign company).

(ia) Deduction as per Section 36(1) (va) in respect of income of the nature of referred to in Section 2(24)(x).

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(ii) In the case of income by way of letting of plant and machinery, etc. deductions, so far as may be in accordance with the provisions of Section 30, 31, 32 and 38 like rent, routes, taxes, repairs and insurance of buildings, depreciation, etc.

(ii a) In the case of family pension, standard deduction of 33-1/3% of the pension subject to a maximum of ₹ 15,000.

(iii) Any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly, and exclusively for the purpose of making or earning such income.

2. Income from dividends and income from mutual funds is fully exempted from income tax

A dividend received by a shareholder is deemed to be his income for the previous year in which it is declared, distributed or paid. An interim dividend paid by a company shall be the income of the previous year in which the amount of such dividend is unconditionally made available by the company to the member who is entitled to it.

As per Section 14A of the Income Tax Act, 1961, any expenditure incurred in relation to income not includible in total income is not allowed as a deduction. Thus, with effect from AY 2004-05 any expenditure incurred on earning dividend and units income would not be deductible, for example, the interest you pay on loan taken for the purpose of buying the shares or units in question. Always avoid taking loan and then investing in the stock market in shares and units of equity-oriented mutual funds.

3. Winnings from Lotteries, Crossword Puzzles, Races, Gambling, etc.

Section 2(24) (ix) provides that any winnings from lotteries, crossword puzzles, races, including horse races, card games and other games of any sort, including TV games, or from gambling or betting or any form or nature whatsoever will be included in the definition of “income from other sources”.

It is clearly provided in Section 58 that no deduction in respect of any expenditure or allowance would be allowed in connection with income by way of winnings from lotteries, crossword puzzles, races including horse races, card games and other games of any sort or from gambling or betting of any form or nature.

4.24 SUMMARY

- “Tax planning is legal and accepted by Judiciary”
- A tax may be defined as a compulsory extraction made by the Central Government from the general public. It is a financial charge imposed on individuals on legal entities by the government in pursuant to its legislative authority.
- Tax planning can be defined as an arrangement of one’s financial and business affairs by taking legitimately in full benefit of all deductions, exemptions, allowances and rebates so that tax liability reduces to minimum.
- Short range Tax Planning means the planning thought of and executed at the end of the income year to reduce taxable income in a legal way.
- Long range tax planning means a plan chased out at the beginning or the income year to be followed around the year. This type of planning does not help immediately as in the case of short range planning but is likely to help in the long run.

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- Permissive Tax Planning means making plans which are permissible under different provisions of the law, such as planning of earning income covered by Sec. 10, specially by Sec 10(1), Planning of taking advantage of different incentives and deductions, planning for availing different tax concessions etc.
- Tax avoidance is a practice of using legal means to pay the least amount of tax possible. This is different to tax evasion which is the practice of using illegal methods to avoid paying tax.
- All methods by which tax liability is illegally avoided is termed as tax evasion.
- Tax evasion refers to a situation where a person tries to reduce his tax liability by deliberately suppressing the income or by inflating the expenditure which results into showing of income lower than the actual and resorting to various types of deliberate manipulations. .
- A joint Hindu family pays tax on its total income at prescribed rates on the basis of slab system. The family can pay reasonable remuneration to the Karta and other family members for their services to the business and it is allowed as a deduction in computing the business income.

4.25 SELF ASSESSMENT QUESTIONS

1. What do you mean by income tax and discuss characteristics of income tax.
2. Discuss various constitutional provisions governing taxation in India.
3. Define corporate tax and discuss benefits of corporate tax planning.
4. Define tax evasion and explain reasons for tax evasion.
5. Differentiate between tax planning and tax evasion.
6. Define tax planning and discuss need for tax planning.
7. Discuss tax management
8. Differential between tax planning and tax avoidance
9. Briefly discuss tax planning for employees.
10. Explain tax planning relating to business.
11. Explain tax planning relating to capital gain.
12. Discuss tax avoidance
13. Explain tax planning relating to income from house property.
14. Explain the limitation of tax planning.

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UNIT 5: TAX COMPLIANCES

Structure

5.0 OBJECTIVE

After going through this unit, you will be able to:

- Understand the concept of tax deducted at source
- Describe corporate returns

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- Understand the concept of goods and service tax
- Discuss the Constitution Amendment Act 2016
- Understand the need for GST in India
- Define objective and scope of GST
- Describe the Characteristics of GST
- Understand the advantages and disadvantages of GST

5.1 MEANING OF TAX DEDUCTED AT SOURCE (TDS)

Tax deducted at source (TDS) is a system introduced by income tax department, where person responsible for making specified payments such as salary, commission, professional fees, interest rent etc, is liable to deduct a certain percentage of tax before making payment. It is a process of charging and collecting tax at the source of income.

The specified cases of income where tax is deductible at source are normally those cases where the income can be calculated in advance. Generally in these cases assessees income, may be more or less, is known. Section 192 to 206 deal with the deduction of tax at source.

Tax deducted at source (TDS), as the very name implies aims at collection of revenue at the very source of income. It is essentially an indirect method of collecting tax which combines the concepts of "pay as you earn" and "collect as it is being earned." Its significance to the government lies in the fact that it prepones the collection of tax, ensures a regular source of revenue, provides for a greater reach and wider base for tax. At the same time, to the tax payer, it distributes the incidence of tax and provides for a simple and convenient mode of payment.

The concept of TDS requires that the person on whom responsibility has been cast, is to deduct tax at the appropriate rates, from payments of specific nature which are being made to a specified recipient. The deducted sum is required to be deposited to the credit of the Central Government. The recipient from whose income tax has been deducted at source, gets the credit of the amount deducted in his personal assessment on the basis of the certificate issued by the deductor.

5.2 WHO IS LIABLE TO DEDUCT TDS?

The following are the specified person who are liable to deduct TDS. An individual or an HUF is not liable to deduct TDS on such payment except where the individual or HUF is carrying on a business/ profession where accounts are required to be audited u/s 44AB, in the immediately preceding financial year.

5.3 WHAT PERCENTAGE OF TDS IS DEDUCTED?

TDS will not be deducted if your total income is ₹ 2,50,000.00. This amount is applicable for men and women below the age of 60 years. Normally, TDS deduction rate on salary ranges from 5% to 30%.

5.4 WHO SHALL DEDUCT TAX AT SOURCE?

Section 51 of CGST act provides for deduction of TDS in certain circumstances. As of now, only 3 specified and 1 notified recipient is liable to deduct TDS. In this situation, supply

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recipient is liable to deduct TDS from the payment made or credited to the supplier where the total value of such supply under a contract exceeds ₹ 2.5 lakh. TDS deductor has to compulsorily register in GST without any threshold limit.

Every person responsible for making payment of nature covered by TDS provisions of Income Tax Act shall be responsible to deduct tax.

However in case of payments made under sec. 194A, 194C, 194H, 1941 and 194 J in respect of individual and HUF, only if the turnover or professional receipt exceeds sum of ₹ 40 lakh or ₹ 10 lakh respectively (the limits will be ₹ 60 Lakh or ₹ 15 Lakh respectively w.e.f. 01.07.2010) in previous year, he is required to deduct tax at source.

These persons are mainly:

- Principal Officer of a company for TDS purpose including the employer in case of private employment or an employee making payment on behalf of the employer.
- DDO (Drawing & Disbursing Officer), in case of Govt. Office any officer, designated as such.
- In the case of "interest on securities" other than payments made by or on behalf of the Central Govt. or the State Government, it is the local authority, corporation or company, including the Principal Officer thereof.

Such person is called Deductor while the person from whom the tax is deducted is called Deductee.

Tax must be deducted at the time of payment in cash or cheque or credit to the payee's account whichever is earlier. Credit to payable account or suspense account is also considered to be credit to payee's account and TDS must be made at the time of such credit.

5.5 SOURCES OF INCOME ALLOWS TDS

1. Salaries (Section 192)

U/s 192 (1) any person responsible for paying any income chargeable under the head 'Salaries' (Sec. 15) shall at the time of payment, deduct income tax on the amount payable at the average rate of income-tax computed on the basis of rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year. It means deduction should be made where an amount is paid and it should be calculated at the rate prescribed for the year in which the payment to the employee is made. C.I.T. vs. Srinivasan 83 I.T.R. 346 (S.C.)

The following are the important provisions in case of salaried employees:

(i) **Employment under more than one employer during relevant previous year.** The assessee must furnish details of his salary received from previous employer to the present employer for deduction of tax at source [u/s 192 (2)].

(ii) **Relief u/s 89 (1).** In case any arrears are paid to an employee working in any Government organisation or company, co-operative society, local authority, University, institution, association or body, and he is entitled to relief u/s 89 (1), he may apply to his employer and employer can allow relief u/s 89 (1) [u/s 192 (2A)].

(iii) **Income from any other head**. A salaried employee can furnish details of his other incomes to his employer and employer can deduct tax at source for such incomes also. But assessee has the right to claim the set off of any loss under the head income from house property [Section 192(2B)].

(iv) **Statement of perquisites or Profit in lieu of Salary to employee**. A person responsible for paying any income chargeable to tax under the head "Salaries" shall furnish to the

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person to whom salary is paid a statement giving full and correct particulars of perquisites and profits in lieu of salary provided to him [Section 192 (2C)].

(v) Allowability of deduction under chapter VI-A [Le. u/s 80]

(a) All deductions under section 80C, 80CCC, 80CCD, 80D, 80DD, 80E, 80G, 80GG and 80U may be allowed while calculating estimated total income of employee.

(b) Generally, deduction u/s 80G shall not be allowed by the employer from the salary income. However, the following donations made by the employee through employer shall be allowed while calculating estimated total income of employee :

- Prime Minister's National Relief Fund
- Chief Minister's Relief Fund
- Lieutenant Governor's Relief Fund.

(vi) Tax on perks paid by employer. The employer has been given an option to pay tax on income by way of perquisites (not provided by way of monetary payments) and such amount paid by employer shall be deemed to have been paid by the assessee.

(vii) Rates of Tax to be Deducted at Source. The schedule containing rates of tax to be deducted at source is given in 5.3.

The tax under this section shall be calculated at Average Rate of tax on income chargeable to tax under the head salaries including the value of perks as referred above.

(viii) Employer to obtain evidence from employee in respect of prescribed claims in prescribed manner [Insertion of Section 192(2D)] [w.e.f. 1-06-2015]. The person responsible for making the payment referred to in section 192(1) shall, for the purposes of estimating income of the assessee or computing tax deductible under sub-section (1), obtain from the assessee the evidence or proof or particulars of prescribed claims (including claim for set-off of loss) under the provisions of the Act in such form and manner as may be prescribed.

2. TDS on payment of accumulated balance of Recognised Provident Fund to an employee if it is taxable for employee [insertion of Section 192A] [w.e.f. 1-06-2015]

(i) Assessee liable :

(a) The trustees of the Employees' Provident Fund Scheme, 1952 framed under section 5 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, or

(b) any person authorised under the scheme to make payment of accumulated balance due to employees.

(ii) Conditions :

(a) The fund from which payment is to be made must be a recognized provident fund.

(b) The accumulated balance due to employee is includible in his total income owing to the provisions of rule 8 of Part A of the Fourth Schedule not being applicable.

(c) The aggregate amount of such payment to the payee is Rs.50,000 or more.

(iii) Timing of TDS: At the time of payment of accumulated balance due to the employee.

(iv) TDS at higher rate: Tax shall be deducted at the maximum marginal rate if any person, entitled to receive any amount on which tax is deductible under this section, shall not furnish his Permanent Account Number to the person responsible for deducting such tax. (Second proviso to Section 192A).

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3. Interest on securities [Section 193]

Section 193 deals with deduction of tax at source from income chargeable by way of "Interest on Securities". The person responsible for paying interest on securities to a resident is liable to deduct income-tax at the time of paying the interest. Here again, tax shall be deducted according to the rates specified by the Finance Act of the year.

Tax at source shall not be deducted in the case of following securities:

(i) 4.25% National Defence Bonds, 1972, where the Bonds are held by a resident individual;

(ii) 4.5% National Defence Loan, 1968 or 4.75% National Defence Loan 1972 ;

(iii) National Development Bonds ;

(iv) Seven-year National Saving Certificates, Fourth Issue ;

(v) Debentures issued by any co-operative society or any other approved institution or authority or public sector company, so notified ;

(vi) 6 ½ per cent Gold Bonds, 1977, or 7 per cent Gold Bonds, 1980, where the bonds are held by a resident individual. However, the total nominal value of 6 ½ per cent Gold Bonds, 1977, or the 7 per cent Gold Bonds, 1980 should not exceed ₹ 10,000 ; and

(vii) No tax will be deducted at source on any interest payable on any security of Central Government or a State Government ;

Provided that nothing contained in the clause shall apply to the interest exceeding ₹ 10,000 payable on 8% Savings (Taxable) Bonds 2003 during the financial year. This means the provisions of TDS shall apply if interest exceeds ₹ 10,000 in any year.

(viii) Interest on debentures issued by a public sector company. In case of any other company, tax on interest on debentures shall not be deducted provided :

(a) The interest is paid by a public limited company ;

(b) The debentures are listed on a recognised stock exchange ;

(c) The interest is paid to an individual;

(d) It is paid by an account payee cheque ; and

(e) The amount of such interest or aggregate of the amounts of such interest paid or likely to be paid does not exceed ₹ 5,000 in a previous year.

(ix) The interest payable to Life Insurance Corporation of India in respect of securities held by it or in which it holds beneficial interest.

(x) The interest payable to General Insurance Corporation of India or four insurance companies working under it in respect of securities held by them or in which they hold beneficial interest.

(xi) The interest payable to any other insurer in respect of securities owned by it or in which it holds beneficial interest.

(xii) Any interest payable on any security issued by a company where such security is in dematerialised form and is listed on a Recognised Stock Exchange in India in accordance with the Securities Contracts (Regulation) Act and the rules made there under.

Rate of TDS. 10% [No surcharge and No Education cess/SHEC] However, if the security holder does not quote his/her/its PAN, the rate of TDS shall be 20%.

3A. 21 Dividends [Section 194]

Section 194 deals with deduction of tax at source from dividend of the nature referred to in section 2(22)(e) paid by an Indian company or a company which has made the prescribed

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arrangements for the declaration and payment of dividends within India to a shareholder who is resident in India.

Rule 30A provides for giving credit in respect of tax deducted at source to a person other than the registered shareholder in certain circumstances.

It is further provided that in case an individual shareholder proves through a certificate provided by the Assessing Officer that his income including dividend income is less than minimum liable to income-tax, tax at source shall not be deducted from the dividend paid to such individual shareholder.

No deduction of Tax at Source. No tax will be deducted at source by the authority paying dividend if following conditions are fulfilled :

(i) Dividend is paid to an individual ;

(ii) Shares are listed on a recognised stock exchange in India ;

(iii) Shares are issued by a company in which public are substantially interested ;

(iv) The dividend or interest must be paid in account payee cheque ;

(v) The dividend payable to Life Insurance Corporation of India in respect of shares held by it or in which it holds beneficial interest ;

(vi) The dividend payable to General Insurance Corporation of India or four insurance companies working under it in respect of shares held by them or in which they hold beneficial interest;

(vii) The dividend payable to any other insurer in respect of shares held by it or in which it holds beneficial interest.

No tax shall be deducted at source is respect of dividends declared or distributed by an Indian Company i.e., which is referred to in section 115O.

4. Interest (Other than Interest on Securities) [Section 194A]

Section 194-A enjoins deduction of tax at source from interest other than that which is not chargeable by way of 'Interest on Securities'.

Under Section 194-A (1) any person, not being an individual or a H.U.F. (other than those which are covered u/s 44AB) who is responsible for paying to a resident any income by way of interest other than income chargeable as 'Interest on Securities' shall at the time of credit of such income to the account of payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is there, deduct income-tax thereon at rates in force in that assessment year.

Tax at source shall not be deducted from the amount of interest payable to a person (not being a company or a registered firm) in case such person furnishes :

(a)affidavit, or (b) a statement in writing declaring that his estimated total income assessable for the assessment year next following financial year in which the income is credited or paid will be less than the minimum liable to income-tax.

5. Winnings from lottery or crossword puzzle [Section 194B]

Section 194B says that income-tax will have to be deducted at source from any income by way of winning from any lottery or crossword puzzle or card game and other game of any sort in case the amount exceeds ₹ 10,000.

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In case winnings are wholly in kind, or partly in cash and partly in kind, and amount of cash winnings is not sufficient to meet the TDS liability, the person responsible for making such payment before releasing the winnings must ensure that full tax has been paid in respect of winnings.

Rate of TDS. 30% [No Surcharge and No Education cess/SHEC]

6. Winning from horse races [Section 194BB]

Any person who is responsible for paying to any person any income by way of winning from any horse race an amount exceeding Rs.10,000 shall, at the time of payment deduct tax at the rate prescribed for such year.

Rate of TDS. 30% [No Surcharge and No Education cess/SHEC]

7. Payments to contractors [Section 194C]—[Applicable w.e.f. 1-10-2009]

(1) Any person responsible for paying any sum to any resident contractor for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to— (i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family; (ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family, of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense Account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source—

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or (ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

(4) No individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if a single payment to a contractor does not exceed thirty thousand rupees.

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds ₹ 1,00,000, the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income-tax under this section.

(6) Where a contractor owns ten or less than ten goods carriages at any time during the previous year, no TDS shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing a declaration to that effect alongwith his Permanent Account Number, to the person paying or crediting such sum.

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(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

8. Insurance commission [Section 194D]

The Finance Act, 1973, introduced Section 194-D whereby tax at source will be deducted by any person responsible for paying to a resident, any income by way of remuneration or reward, whether by way of commission or otherwise or soliciting or procuring insurance business. It must exceed ₹ 15,000 [w.e.f. 1-6-20161 [upto 31-5-2016, this limit was ₹ 20,000].

Rate of TDS. 10% [No Surcharge and No Education cess/SHEC]

However, if the recipient has not quoted his PAN, then the rate of TDS will be 20%.

9. Payment under a life insurance policy [Section 194DA] [Inserted by the Finance Act, 2014 w.e.f. 1-10-2014]

(i) **Assessee liable.** Any person responsible for paying any sum under a life insurance policy.

(ii) Conditions :

  (a) The payee (i.e. recipient) of sum must be a resident of India.

  (b) The payment must be under a life insurence policy including the sum allocated by way of bonus on such policy.

  (c) Such sum shall not be exempt in the hands of recipient u/s 10(10D).

  (d) The amount of such payment or, as the case may be, the aggregate amount of such payments to the payee during the financial year is ₹ 1,00,000 or more. In other words, no TDS if such payment or aggregate amount of such payments is less than ₹ 1,00,000.

(iii) Timing of payment. At the time of making such payment.

(iv) Rate of TDS. 1% of such payment [w.e.f. 1-6-2016] [upto 31-5-2016, the rate was 2%]

10. Payments to Non-Resident sportsmen or sports associations [Section 194E]

With effect from 1st November 1989, where any income as referred u/s 115 BBA is payable to a non-resident sportsman (including an athlete) who is not resident of India or a non-resident sports association or institution, the person making such payment or crediting it to the account of payee shall deduct tax @ 20%. However, if PAN is not quoted by the recipient, the rate of TDS shall be 20%.

11. Payment in respect of deposits under national savings scheme [Section 194 EE]

The person responsible for making payment of any amount to any person, who has deposited any amount in National Saving scheme and has claimed deduction u/s 80 CCA, shall deduct income-tax at the rate of 10% [w.e.f. 1-6-2016] [20% upto 31-5-2016] provided such payment or aggregate amount of payments made during the financial year is ₹ 2,500 or more. This provision shall not be applicable in case of payment of said amount to the heirs of assessee.

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12. Repayment of units of mutual fund covered u/s 80 CCB [194 F]

At the time of repayment of Units of UTI or Mutual Funds on which a deduction u/s 80 CCB was claimed, a tax @ 20% shall be deducted at source.

13. Commission etc. on sale of lottery tickets [Section 194 G]

Any person who is responsible for paying any income by way of commission, remuneration or Prize (by whatever name called) to a person who has been stocking, distributing, purchasing or selling lottery tickets, shall deduct tax @ 5% [w.e.f. 1-6-2016] [10% upto 31-5-2016], [20% if PAN is not quoted by the recipient] while making payment of such income in cash or in cheque or bank draft or by any other mode. No tax shall be deducted at source if such income does not exceed 15,000 [w.e.f. 1-6-2016] ₹ 1,000 upto 31-5-2016] at any time. The tax will be deducted at source even if income is credited to the account of the assessee or it is credited to the suspense account. This provision came into effect from 1-10-91.

14. TDS on commission or brokerage [Section 194H]

Tax @ 5% [w.e.f. 1-6-2016] [10% upto 31-5-2016] [20% if PAN is not quoted by the recipient] will be deducted at source when any payment is made by a person who is not an individual or HUF (other than those covered u/s 44AB) to a resident assessee by way of commission [not insurance commission] or brokerage provided such payment exceeds ₹ 15,000 [w.e.f. 1-6-2016] ₹ 5,000 upto 31-5-2016]. Such commission should not be for professional services rendered.

BSNL and MTNL shall not be required to deduct TDS on any commission or brokerage paid or payable to their public call office franchisees.

15. Income from rent [Section 194-1]

In case any amount of rent is paid by a person other than individual or H.U.F. (other than those covered u/s 44AB) the person responsible for making payment or crediting the amount to the account of payee who is resident, shall deduct income-tax:

This provision will not be applicable if the total amount of rent credited or likely to be credited during the previous year does not exceed ₹ 1,80,000. The rent means any payment under any lease, sub-lease, tenancy or other arrangement for the use of land, building, factory building, with or without furniture or fittings, whether such building is owned or not.

No TDS on rent shall be made where the income of rent is credited or paid to a business trust, being a real estate investment trust in respect to any real estate asset owned directly by such trust [w.e.f. 1-6-2015].

Rates of T.D.S. w.e.f. 1-10-2009 [Inserted by the Finance Act, 2009]

(a) 2% for the use of any machinery or plant or equipment; and

(b) 10% for the use of any land and building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings.

16. TDS by buyer on purchase of immovable property [Section 194IA] [w.e.f. 1-6-2013]

(i) **Assessee liable.** Every buyer of immovable property (other than agricultural land) **i.e.** Individual, HUF, Firm, company etc.

(ii) **Conditions** : (a) The total amount of consideration for the transfer of immovable property is ₹ 50 lakh or more, (b) The transferor must be a resident of India.

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(iii) Timing of TDS. At the time of making payment or crediting of any sum as consideration for such transfer, whichever is earlier.

(iv) Rate of TDS. 1% of such sum.

17. Fee for professional or technical services [Section 194J]

1. This provision is applicable on all those persons except individuals and Hindu undivided families, (other than those covered u/s 44AB) who make any payment by way of

   (i) fees for professional services ; or

   (ii) fees for technical services ; or

   (ii) royalty ; or

   (iv) any sum referred to in clause (va) of section 28.

2. It provides for deduction of tax at source at the rate of 10% [20%, if PAN is not quoted by the recipient] at the time such payment is made or credited to the account of a person. Payment may be made in cash, cheque or draft.

3. No tax shall be deducted at source in following cases :

   (i) any amount credited or paid before 1-7-1995.

   (ii) any amount credited or paid if such amount does not exceed Rs.30,000.

4. An individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum by way of fees for professional services or technical services is credited or paid, shall be liable to deduct income-tax under this section.

   No individual or a Hindu undivided family referred to in the second proviso shall be liable to deduct income-tax on the sum by way of fees for professional services in case such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

5. The term professional services means services rendered by a person in the course of carrying on legal, medical, engineering, architectural profession or the profession of accountancy or technical consultancy or interior decoration or advertising or such other profession as is notified by the Board. The term technical services shall have the same meaning as is assigned to it in explanation 2 to clause **(vii)** of sub section (1) of section 9.

18. Payment of compensation on acquisition of certain immovable property

Any person responsible for paying to a resident any sum, being in the nature of compensation or the enhanced compensation or the consideration or the enhanced consideration on account of compulsory acquisition, under any law for the time being in force, of any immovable property (other than agricultural land), shall, at the time of payment of such sum in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent (20%, if PAN is not quoted by the recepient) of such sum as Income-tax thereon :

No deduction shall be made under this section where the amount of such payment or, as the case may be, the aggregate amount of such payments to a resident during the financial year does not exceed ₹ 2,50,000 [w.e.f. 1-6-2016] ₹ 2,00,000 upto 31-5-2016].

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19. Income by way of Interest from Infrastructure debt fund [Section 194LB]

Where, any income by way of interest is payable to a non-resident, not being a company, or to a foreign company, by an infrastructure debt fund referred to in Section 10(47), the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax @ 5% (+ S.C. + E.C.).

20. Distributed income of the business trust [Section 194LBA]

(i) **Assessee liable.** A business trust.

(ii) **Conditions :**

(a) The payment by business trust must be by way of distributed income.

(b) Such payment must be made to a unit holder of business trust.

(c) Such distributed income must be taxable in the hands of payee/recipient.

(d) The payee (i.e. unit holder) may be resident or non resident of India.

(iii) **Timing of payment.** At the time of making such payment.

(iv) **Rate of TDS :** I. If distributed income is of the nature referred to in section 10(23FC).

(a) Payment to a resident unit holder—10%.

(b) Payment to a nonresident unit holder—5%.

Rate of TDS shall be 20% of the recepient does not provide PAN.

21. TDS on income in respect of units of investment fund [Insertion of Section 194LBB]

Where any income other than that proportion of income which is of the same nature as income referred to in section 10 (23FBB) is payable to a unit holder in respect of units of an investment fund specified in clause (a) of the Explanation 1 to section 115UB, the person responsible for making the payment shall, at the time of credit of such income to the account of payee, or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax as follows : (i) @ 10%, where the payee is a resident; (ii) at the rates in force, where the payee is a non-resident (not being a company or a foreign company).

22. Income in respect of investment in securitization trust. [Section 194LBC]

(1) Where any income is payable to an investor, being a resident, in respect of an investment in a securitisation trust specified in clause (d) of the Explanation occurring after section 115TCA, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon, at the rate of—

(i) 25%, if the payee is an individual or a Hindu undivided family;

(ii) 30%, if the payee is any other person.

(2) Where any income is payable to an investor, being a non-resident (not being a company) or a foreign company, in respect of an investment in a securitisation trust specified in clause (d) of the Explanation occurring after section 115TCA, the person responsible for

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making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon, at the rates in force.

23. Payment of interest by Indian specified company or by business trust [Section 194LC as amended by the Finance Act 2014, w.e.f 1-10-2014]

(i) Assessee liable:

(a) An Indian Company w.e.f 1.7.2012

(b) A business trust w.e.f 01.10.2014

(ii) Conditions. :

(a) The assessee has to pay interest on money borrowed in foreign currency.

(b) Such money is borrowed from the following sources :

- under a loan agreement entered at any time on or after July 1, 2012 but before July 1, 2017; or
- by way of issue of long term infrastructure bonds as approved by the Central government at any time on or after July 1, 2012 but before October 1, 2014; or
- by way of issue of long term bonds including long term infrastructure bonds at any time on or after October 1, 2014 but before July 1, 2017.

(iii) Timing of IDS. At the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier.

(iv) Rate of TDS. 5% of such Payment + Surchage + Education cess (including SHEC). However, if the payee does not furnish PAN, the rate of TDS shall be 20%.

24. Income by way of interest on certain bonds, government securities [Section 194LD]

(i) Assessee liable. Any person responsible for paying interest to a person being a 'Foreign Institutional Investor' or a 'Qualified Foreign Investor',

(ii) Date of payment. Interest payable at any time on or after 01-06-2013 but before 01-07-2017.

(iii) Nature of investment. Payee must have made the investment in (a) a rupee denominated bond of an Indian company or (b) a government security.

(iv) Timing of TDS. At the time of making payment or crediting the amount to payee A/c.

(v) Rate of TDS. 5% (plus surcharge and education cess). Rate shall be 20% if the recipient does not provide PAN.

25. Any other sums paid to Non-residents [Section 195]

It provides that any person responsible for paying to a non-resident not being a company or to a foreign company, any interest, not being 'Interest on Securities' or any other sum except salaries, chargeable to tax shall at the time of payment (unless he himself is liable to pay any income-tax thereon as an agent) deduct income-tax at the prescribed rates for that year.

No tax shall be deducted at source in case the assessee furnishes a prescribed certificate granted by the Assessing Officer in this respect.

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5.6 INTRODUCTION TO CORPORATE RETURNS

Corporate tax is a tax levied on the net income of a firm for a particular period. Corporate taxes are levied on the revenues of a company after deducting specific items like depreciation, selling, general and administrative expenses and cost of goods sold. Both the public and private companies registered in India under the Companies Act of 1956, have to pay the corporate tax in India. A corporate tax or company tax is a direct tax imposed by a jurisdiction on the income or capital of corporations.

Generally, the tax is imposed on net profit. In some jurisdictions rules for taxing companies may differ significantly from rules for taxing individuals. Certain corporate acts, like reorganizations, may not be taxed. Some types of entities may be excempt from tax.

Return of income is a statement of total income and tax liability filled in the prescribed form duly signed and filed with the income tax authority on or before the due date of furnishing of return. This stipulates an obligation on the assesses that he files return regularly in every assessment year to the department disclosing the income earned by him.

Time limit for filling return of income [Section 139(1)]

	Description	Due Date
1.	Salaried Employees	July, 31
2.	Business Class - Non-company Assessee	July, 31
	(a) Whose accounts need NOT be compulsorily audited	
	(b) Whose accounts required to be compulsorily audited	
3.	Co-operative Societies	September, 30
4.	Trust/Charitable Institutions claiming exemption u/s 11	
5.	Companies Assesses	September, 30

Note:

Failure to file Returns within the due date attracts interest @ 1% p.m. on the balance tax payable from the due date to the actual date of filling.

If a person required to file @ Return u/s 139(1) fails to file Return before the end of the relevant Assessment Year a penalty of Rs. 5,000 shall be levied.

When return of loss should be filed [section 139(3)]

If any person who has sustained a loss in any previous year under the head

1. "Profits and gains of business or profession" or
2. Under the head "Capital gains" and

Claims that the loss or any part thereof should be carried forward , he may furnish, within the time allowed, a return of loss in the prescribed form and verified in the prescribed manner and containing such other particulars as may be prescribed, and all the provisions of this Act shall apply as if it were a return under sub-section (1).

Can return be filed beyond time [section 139(4)]

Any person who has not furnished a return within the time allowed to him, or within the time allowed under a notice issued, may furnish the return for any previous year at any time before

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the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.

Can revised return be filed [section 139(5)]

If any person, having furnished a return under sub-section (1), or in pursuance of a notice issued, discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment, whichever is earlier.

What is a defective or incomplete return [section 139(9)]

Where the Assessing Officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of 15 days from the date of such intimation or within such further period which, on an application made in this behalf, the Assessing Officer may allow; and if the defect is not rectified within the said period of 15 days, the return shall be treated as an invalid return and the provisions of this Act shall apply as if the assessee had failed to furnish the return.

Provided that where the assessee rectifies the defect after the expiry of the said period of 15 days or the further period allowed, but before the assessment is made, the Assessing Officer may condone the delay and treat the return as a valid return.

Who should Sign the Return of Income [SECTION 140]

The return shall be signed and verified-

1. In the case of an individual,-
   (i) By the individual himself;
   (ii) Where he is absent from India, by the individual himself or by some person duly authorised by him in this behalf;
   (iii) Where he is mentally incapacitated from attending to his affairs, by his guardian or any other person competent to act on his behalf; and
   (iv) Where, for any other reason, it is not possible for the individual to sign the return, by any person duly authorised by him in this behalf.
2. In the case of a Hindu undivided family,
   (i) By the karta, and, where the karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;
3. In the case of a company,
   (i) By the managing director thereof, or where for any unavoidable reason such managing director is not able to sign and verify the return, or where there is no managing director, by any director thereof:

   Provided that where the company is not resident in India, the return may be signed and verified by a person who holds a valid power of attorney from such company to do so, which shall be attached to the return:

   (a) Where the company is being wound up, whether under the orders of a court or otherwise, or where any person has been appointed as the receiver of any assets of the company, the return shall be signed and verified by the liequidator.

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(b) Where the management of the company has been taken over by the Central Government or any State Government under any law, the return of the company shall be signed and verified by the principal officer thereof;

4. In the case of a firm,

   (i) By the managing partner thereof, or where for any unavoidable reason such managing partner is not able to sign and verify the return, or where there is no managing partner as such, by any partner thereof, not being a minor;

5. In the case of a local authority:- (i) by the principal officer thereof.,

6. In the case of political party:- (1) by the chief executive officer of such party.

7. In the case of any other person:-

   (i) By that person on by some person competent to act on his behalf.

5.7 MEANING OF GOODS AND SERVICE TAX

GST is a comprehensive indirect tax levied on manufacture, sale and consumption of goods as well as services at the national level. It will replace all indirect taxes levied on goods and services by state and central. It is levied at every step in the production process but is meant to be refunded to all parties, in the various stages of production other than the final consumer. The Goods and Service Tax act was passed in the Parliament on 29^{th} March 2017. The act came into effect on 1^{st} July 2017. Goods and Service Tax law in India is a comprehensive, multistage, destination based tax that is levied on every value addition. GST is one indirect tax for the entire country.

How is GST applied?

GST is a consumption based tax. It is based on destination principle. GST is applied on goods and services at the place where final or actual consumption happens. GST is collected on value added goods and service at each stage of sale or purchase in the supply chain. GST paid on the procurement of goods and services can be set off against that payable on the supply of goods and services. The manufacturer or wholesaler or retailer will pay the applicable GST rate but will claim back through tax credit mechanism but being the last person in the supply chain the end consumer has to bear this tax and so, in many respect. GST is likely a last point retail tax. GST is going to be collected at point of sale.

GST is one tax that is levied on manufacturing, selling and consumption of goods and services, distributed among the Central Government and the State Governments. Credits of input taxes paid at each stage will be available in the subsequent stage of value addition, which makes GST essentially a tax only on the value addition at each stage. The final consumer will thus bear only the GST charged by the last dealer in the supply chain, with set-off benefits at all the previous stages. Being a destination based consumption tax, GST is usually levied on import of goods and services with export transactions being zero rated under the GST scheme.

5.8 GENESIS OF GST IN INDIA

One nation, one tax, one rate will be the new Identity of India. Goods and Service tax (GST) in India is hyped as the single largest tax reform since independence. It is estimated to boost GDP by 1.5 to 2%. The benefits of simplified compliance, technological backing and uniform

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process all over will contribute significantly to the 'Ease of doing Business' while also bringing-in tax compliance and transparency. The Pre-GST taxation system in effect is very complex with more than ten repetitive indirect taxes. In this taxation system, neither manufacturers, nor ultimate consumers are benefitted. All the gains are pocketed by middle man.

The arrival of GST would be a significant step in the field of indirect tax reform in India. By combining the large number of Central and State Taxes into a single tax and allowing set-off of prior-stage taxes, it would mitigate the ill effects of cascading. It will pave the way for a common national market. For the consumers, the biggest gain would be in terms of reduction in the overall tax burden on goods, which is currently estimated at 25%-30%. Introduction of GST would also make products competitive in the domestic and international markets. The chances are that it would instantly spur economic growth. There may also be revenue gain for the Centre and the States due to widening of tax base, increase in trade volumes and improved tax compliance. Last but not the least, this tax, because of its transparent character, would be easier to administer.

With the advent of Goods and Service tax (GST) in India from July 1st 2017, the biggest and most impactful change in Indian indirect taxation has taken place. The GST will replace the Pre-GST indirect taxes on consumption and shall apply on both goods and services. For goods, it will be levied destination based, whereas for services, it will be levied consumption based.

5.9 THE CONSTITUTION OF AMENDMENT ACT, 2016 (122 BILL)

(A) To address all these and other issues, the Constitution (122nd Amendment) Bill was introduced in the 16th Lok Sabha on 19.12.2014. The Bill provides for

- A levy of GST on supply of all goods or services except for Alcohol for human consumption.
- The tax shall be levied as Dual GST separately but concurrently by the Union (central , tax - CGST) and the States (including Union Territories with legislatures) (State tax-SGST) / Union territories without legislatures (Union territory tax- UTGST).
- The Parliament would have exclusive power to levy GST (integrated tax - IGST) on inter-State trade or commerce (including imports) in goods or services.
- The Central Government will have the power to levy excise duty in addition to the GST on tobacco and tobacco products.
- The tax on supply of five specified petroleum products namely crude, high speed diesel, petrol, ATF and natural gas would be levied from a later date on the recommendation of GST Council.
- A Goods and Services Tax Council (GSTC) will be constituted comprising the Union Finance Minister, the Minister of State (Revenue) and the State Finance Ministers to recommend on the GST rate, exemption and thresholds, taxes to be subsumed and other features. This mechanism would ensure some degree of harmonization on different aspects of GST between the Centre and the States as well as across States. One half of the total number of members of GST Council would form quorum in meetings of GST Council. Decision in GST Council would be taken by a majority of not less than three-fourth of weighted votes cast. Centre and minimum of 20 States would be required for majority because Centre would have one-third weight age of the total votes cast and all the States taken together would have two-third of weight age of the total votes cast.

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- The Constitution Amendment Bill was passed by the Lok Sabha in May, 2015. The Bill was referred to the Select Committee of Rajya Sabha on 12.05.2015. The Select Committee had submitted its Report on the Bill on 22.07.2015. The Bill with certain amendments was finally passed in the Rajya Sabha and thereafter by Lok Sabha in August, 2016. Further the bill had been ratified by required number of States and received assent of the President on 8th September, 2016 and has since been enacted as Constitution (101st Amendment) Act, 2016 w.e.f. 16th September,2016.

(B) The GST Council has been notified with effect from 12th September, 2016. GST Council is being assisted by a Secretariat. Twenty four meetings of the GST Council have been held so far. The following major decisions have been taken by the GST Council:

- The threshold exemption limit would be ₹ 20 lakh. For special category States (except J&K) enumerated in article 279A of the Constitution, threshold exemption limit has been fixed at ₹ 10 lakh.
- Composition threshold shall be ₹ 1 Crore. Composition scheme shall not be available to inter-State suppliers, service providers (except restaurant service) and specified category of manufacturers. For special category States (except J&K and Uttarakhand) enumerated in article 279A of the Constitution, threshold exemption limit has been fixed at ₹ 75lakh.
- Existing tax incentive schemes of Central or State governments may be continued by respective government by way of reimbursement through budgetary route. The schemes, in the present form, would not continue in GST. Further, 50% exemption of the CGST portion will be provided to CSD (Defense Canteen).
- There would be four tax rates namely 5%, 12%, 18% and 28%. The tax rates for different goods and services have been finalized and notified. Besides, some goods and services would be under the list of exempt items. The exempted services has been finalized which is same as the services exempted under existing service tax law, except services supplied by Goods and Services Tax Network which is the addition to the list of exempted services under service tax. Rate for precious metals is an exception to 'four-tax slab-rule' and the same has been fixed at 3%. A cess over the peak rate of 28% on certain specified luxury and demerit goods, like tobacco and tobacco products, pan masala, aerated waters, motor vehicles, would be imposed for a period of five years to compensate States for any revenue loss on account of implementation of GST. The list of services in case of which reverse charge would be applicable has also been finalized.
- The five laws namely CGST Law, UTGST Law, IGST Law, SGST Law and GST Compensation Law have been recommended.
- In order to ensure single interface, all administrative control over 90% of taxpayers having turnover below ₹ 1.5 crore would vest with State tax administration and over 10% with the Central tax administration. Further all administrative control over taxpayers having turnover above ₹ 1.5 crore shall be divided equally in the ratio of 50% each for the Central and State tax administration.
- Powers under the IGST Act shall also be cross-empowered on the same basis as under CGST and SGST Acts with few exceptions.

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5.10 NEED FOR GST IN INDIA OF SHORTCOMING OF PRE-GST REGIME

Following are major needs for GST in India:

1. **Cascading Effect**: Pre-GST system of multiple levies distributed between Centre and States resulted into cascading (i.e. tax on tax) effect. For instance, no credit of State VAT was allowed against Central Tax. CST credit paid in the originating State was also not allowed in the receiving State. This resulted in the increase in the overall burden of tax in the hands of end customer and created distortion in the market.
2. **Exemptions and Concessions**: Under the Pre-GST system, businesses enjoyed many kinds of exemptions & concessions under different levies which broke the chain of VAT and thus created distortion. Also these kinds of benefits did not create a level playing field especially when the same commodity was taxed at different rates in different jurisdictions.
3. **Lack of Transparency:** Under excise and service tax law, there was no mechanism to cross verify the claim of CENVAT credit made by the manufacturer/service provider. Even under State VAT laws, all the States in India did not have the mechanism to cross verify the credits.
4. **Lack of uniformity in provisions and rates:** The Pre-GST VAT structure across the States lacked uniformity which was not restricted only to the rates of tax but also the credit provisions as well as procedures.
5. **Multiple points of Taxation:** Under the Pre-GST system there were multiple points of taxation. Excise was levied when goods manufactured were cleared from the factory premises irrespective of the fact that the clearance was on account of sale or otherwise. State VAT was levied on sale of goods. Entry tax was levied on entry of goods in a particular State.
6. **Complexity in determining the nature of transaction - Goods vs. Service:** The distinction between goods and services found in the Indian Constitution became more complex. Today, good and service are being packaged as composite bundles and offered for sale to customers under a variety of supply-chain arrangements. Under the Pre-GST division of taxation powers in the Constitution, neither the Centre nor the States could apply the tax to such bundles in a seamless manner. Each Government could tax only parts of the bundle, creating overlaps in taxation.
7. **Narrow Tax Base**: Due to different thresholds under different laws as well as numerous exemptions and concessions, the Pre-GST tax base under indirect tax was narrow as compared to other countries.
8. **Multiple administrations**: Under the Pre-GST system, businessmen were required to visit different tax offices according to the applicable laws to his business. These increased the compliance cost of businesses and resulted in unnecessary complexity.
9. **To improve tax compliances:** The GST is being introduced not only to get rid of the Pre-GST patchwork of indirect taxes that are partial and suffer from infirmities, mainly exemptions and multiple rates, but also to improve tax compliances.
10. **International Adaptability:** The spread of GST in different countries has been one of the most important developments in taxation over the last six decades.
11. **Transparency and Revenue Buoyancy:** Owing to its capacity to raise revenue in the most transparent and neutral manner, more than 150 countries have adopted the GST.

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12. **Preferred Global Standard:** With the increase of international trade in services, the GST has become a preferred global standard. All OECD countries, except the US, follow this taxation structure.

5.11 OBJECTIVES OF GST

The following are the objective of GST:

1. Ensuring that the cascading effect of tax on tax will be eliminated.
2. Improving the competitiveness of the original goods and services, thereby improving the GDP rate too.
3. Ensuring the availability of input credit across the value chain.
4. Reducing the complications in tax administration and compliance.
5. Making a unified law involving all the tax bases, laws and administration procedures across the country.
6. Decreasing the unhealthy competition among the states due to taxes and revenues.
7. Reducing the tax slab rates to avoid further clarification issues.

15.12 SCOPE OF GST

GST shall cover all goods and services, except alcoholic liquor for human consumption, for the levy of goods and services tax. In case of petroleum and petroleum products, it has been provided that these goods shall not be subject to the levy of Goods and Services Tax till a date notified on the recommendation of the Goods and Services Tax Council.

Article 279A of the Bill provides for constitution of GST Council to examine issues relating to goods and services tax and make recommendations to the Union and the States on parameters like rates, exemption list and threshold limits.

- All goods and services are covered under GST Regime except Alcoholic liquor for Human Consumption.
- Tobacco Products subject to levy of GST and Centre may also levy excise duty
- GST Council yet to decide the incidence and levy of GST on following;
  - (a) Crude Petroleum
  - (b) High Speed Diesel (HSD)
  - (c) Motor Spirit (Petrol)
  - (d) Natural Gas
  - (e) Aviation Turbine Fuel

5.13 CHARACTERISTICS OF GST

The following are the characteristics of GST are:

1. GST would be applicable on "supply" of goods or services as against the present concept of tax on the manufacture of goods or on sale of goods or on provision of services.
2. GST would be based on the principle of destination based consumption taxation as against the present principle of origin-based taxation.

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3. It would be a dual GST with the Centre and the States simultaneously levying it on a common base. The GST to be levied by the Centre would be called Central GST (central tax- CGST) and that to be levied by the States [including Union territories with legislature] would be called State GST (state tax- SGST). Union territories without legislature would levy Union territory GST (union territory tax- UTGST).
4. An Integrated GST (integrated tax- IGST) would be levied on inter-State supply (including stock transfers) of goods or services. This would be collected by the Centre so that the credit chain is not disrupted.
5. Import of goods would be treated as inter-State supplies and would be subject to IGST in addition to the applicable customs duties.
6. Import of services would be treated as inter-State supplies and would be subject to IGST.
7. CGST, SGST UTGST & IGST would be levied at rates to be mutually agreed upon by the Centre and the States under the aegis of the GST Council.
8. GST would replace the following taxes previously levied and collected by the Centre under Pre-GST regime:
   (a) Central Excise Duty;
   (b) Duties of Excise (Medicinal and Toilet Preparations);
   (c) Additional Duties of Excise (Goods of Special Importance);
   (d) Additional Duties of Excise (Textiles and Textile Products);
   (e) Additional Duties of Customs (commonly known as CVD);
   (f) Special Additional Duty of Customs (SAD);
   (g) Service Tax;
   (h) Cesses and surcharges insofar as they relate to supply of goods or services
9. State taxes that would be subsumed within the GST are:
   (a) State VAT;
   (b) Central Sales Tax;
   (c) Purchase Tax;
   (d) Luxury Tax;
   (e) Entry Tax (All forms);
   (f) Entertainment Tax (except those levied by the local bodies);
   (g) Taxes on advertisements;
   (h) Taxes on lotteries, betting and gambling;
   (i) State cesses and surcharges insofar as they relate to supply of goods or services.
10. GST would apply to all goods and services except Alcohol for human consumption**.**
11. GST on five specified petroleum products (Crude, Petrol, Diesel, ATF and Natural gas) would be applicable from a date to be recommended by the GST Council.
12. Tobacco and tobacco products would be subject to GST. In addition, the Centre would continue to levy Central Excise duty.
13. **A common threshold exemption** would apply to both CGST and SGST. Taxpayers with an annual turnover of ₹ 20 lakh (₹ 10 lakh for special category States (except J and K) as specified in article 279A of the Constitution) would be exempt from GST. A compounding

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option (i.e. to pay tax at a flat rate without credits) would be available to small taxpayers (including to manufacturers other than specified category of manufacturers and service providers) having an annual turnover of up to ₹ 1 Crore (₹ 75 lakh for special category States (except J and K and Uttarakhand) enumerated in article 279A of the Constitution). The threshold exemption and compounding scheme would be optional.

14. The list of exempted goods and services would be kept to a minimum and it would be harmonized for the Centre and the States as well as across States as far as possible.

15. All Exports and supplies to SEZs and SEZ units would be zero-rated

16. Credit of CGST paid on inputs may be used only for paying CGST on the output and the credit of SGST/UTGST paid on inputs may be used only for paying SGST/UTGST. In other words, the two streams of input tax credit (ITC) cannot be cross utilized, except in specified circumstances of inter-State supplies for payment of IGST. The credit would be permitted to be utilized in the following manner:
    (a) Input Tax Credit of CGST allowed for payment of CGST & IGST in that order;
    (b) Input Tax Credit of SGST allowed for payment of SGST & IGST in that order;
    (c) Input Tax Credit of UTGST allowed for payment of UTGST & IGST in that order;
    (d) Input Tax Credit of IGST allowed for payment of IGST,CGST & SGST/UTGST in that order. Input Tax Credit of CGST cannot be used for payment of SGST/UTGST and vice versa.

17. Accounts would be settled periodically between the Centre and the State to ensure that the credit of SGST used for payment of IGST is transferred by the originating State to the Centre. Similarly the IGST used for payment of SGST would be transferred by Centre to the destination State. Further the SGST portion of IGST collected on B2C supplies would also be transferred by Centre to the destination State. The transfer of funds would be carried out on the basis of information contained in the returns filed by the taxpayers.

18. Input Tax Credit (Input Tax Credit) to be broad based by making it available in respect of taxes paid on any supply of goods or services or both used or intended to be used in the course or furtherance of business.

19. A not-for-profit, Non-Government Company called Goods and Services Tax Network (GSTN), jointly set up by the Central and State Governments will provide shared IT infrastructure and services to the Central and State Governments, tax payers and other stakeholders.

20. The GST Council will be a joint forum of the Centre and the States. The Council will make recommendations to the Union and the States on important issues like tax rates, exemption list, threshold limits, etc. One-half of the total number of Members of the Council will constitute the quorum of GST council.

21. Administration of GST will be the responsibility of the GST Council , which will be the apex policy making body of the GST. Members of GST Council is comprised of the Central and State ministers in charge of the finance portfolio.

22. A taxpayer or exporter would have to maintain separate details in books of account for availment, utilization or refund of Input Tax Credit of CGST, SGST and IGST.

23. Electronic filing of returns by different class of persons at different cut-off dates.

24. Various modes of payment of tax available to the taxpayer including internet banking, debit/ credit card and National Electronic Funds Transfer (NEFT) / Real Time Gross Settlement (RTGS).

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25. Obligation on certain persons including government departments, local authorities and government agencies, who are recipients of supply, to deduct tax at the rate of 1% from the payment made or credited to the supplier where total value of supply, under a contract, exceeds two lakh and fifty thousand rupees.
26. Refund of tax to be sought by taxpayer or by any other person who has borne the incidence of tax within two years from the relevant date.
27. Obligation on electronic commerce operators to collect 'tax at source', at such rate not exceeding two per cent. (2%) of net value of taxable supplies, out of payments to suppliers supplying goods or services through their portals.
28. System of self-assessment of the taxes payable by the registered person.
29. Audit of registered persons to be conducted in order to verify compliance with the provisions of Act.
30. Limitation period for raising demand is three (3) years from the due date of filing of annual return or from the date of erroneous refund for raising demand for short-payment or non-payment of tax or erroneous refund and its adjudication in normal cases.
31. Limitation period for raising demand is five (5) years from the due date of filing of annual return or from the date of erroneous refund for raising demand for short-payment or non-payment of tax or erroneous refund and its adjudication in case of fraud, suppression or wilful mis-statement.
32. Arrears of tax to be recovered using various modes including detaining and sale of goods, movable and immovable property of defaulting taxable person.
33. Goods and Services Tax Appellate Tribunal would be constituted by the Central Government for hearing appeals against the orders passed by the Appellate Authority or the Revisional Authority. States would adopt the provisions relating to Tribunal in respective SGST Act.
34. Provision for penalties for contravention of the provision of the GST legislation has been made.
35. Advance Ruling Authority would be constituted by States in order to enable the taxpayer to seek a binding clarity on taxation matters from the department. Centre would adopt such authority under CGST Act.

5.14 IMPACT OF GST AND ITS IMPLICATIONS

1. **Price reduction:**
   - Unification of different indirect taxes under GST will give boost to the existing tax-credit system, which will drive tax efficiency for manufacturers, wholesalers and also for consumers of goods. This will decrease the overall cost incurred by manufacturing sector which will reflect in various inflation indices in long-term.
   - GST could have a negative impact on service sector, which contributes over 50% of Indian GDP. The existing Service Tax of 15% would surge to Goods and Service Tax rate which is anticipated at 18-20%. But at the same time, in current tax framework service sector is unable to enjoy tax-credit on VAT and Sales Tax, which is likely to change in favour of service providers after GST implementation. However, this might be lost if the GST rate is higher than anticipated.
2. **Less Compliance and Procedural Cost:** The cost of collecting various taxes, maintaining big records and their respective reports by the government bodies would see a definite decrease as these taxes would come under one big umbrella of GST.

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3. **Pricing and Profitability:** The resultant tax expenditure after GST bill being passed would have a direct impact on pricing and profitability of different goods and services which will vary across different sectors. Given that Margin and Price Bands would also be reexamined, decline in prices is probable, which will have direct impact on consumer demand.
4. **Government Revenue:** Despite the expected change in pricing, the government is expected to set GST @ revenue neutral rate, so there might be no significant change in Government Revenue
5. **Cash Flow:** Goods and Service Tax is set to boost cash flows through the removal of concept of excise duty. Being a consumption-based tax, GST would now be collected at the time of sale/supply over current tax predicament of tax being collected at the production/ removal of goods.
6. **Redress Location Bias:** This would enable uniformity through states and would not let investors discriminate states on basis of tax advantage. The only thing that would drive investor's capital will be profitability, cash flows, and performances promoting smaller businesses and entrepreneurship without location bias.
7. **Uniform Per Capita Taxation:** As mentioned above, Goods and Service Tax being destination-based consumption tax would allow poverty stricken states like Bihar to increase its tax revenue. As GST would be paid to states where the consumption of goods takes place, the states tax revenue would be driven by population (more the population, more the consumption) rather than number of businesses/industries. This would ultimately even out the tax per capita of each state.
8. **Fight Tax Evasion:** Another perk of being destination based system, Goods and Service Tax Framework would ideally reduce tax evasion by large extent and promote use of bills and invoices.

5.15 ADVANTAGES OF GST

1. **Reduction in Prices:** Due to full and seamless credit, manufacturers or traders do not have to include taxes as a part of their cost of production, which is a very big reason to say that we can see a reduction in prices. However, if the government seeks to introduce GST with a higher rate, this might be lost.
2. **Increase in Government Revenues:** This might seem to be a little vague. However at the time of introduction of VAT, the public revenues actually went up instead of falling because many people resorted to paying taxes rather than evading the same. However, the government may wish to introduce GST at a Revenue Neutral Rate, in which case the revenues might not see a significant increase in the short run.
3. **Less Compliance and Procedural Cost:** Instead of maintaining big records, returns and reporting under various different statutes, all assessees will find comfortable under GST as the compliance cost will be reduced. It should be noted that the assessees are, nevertheless, required to keep record of CGST. SGST and IGST separately.
4. **Move towards a Unified GST:** Internationally, the GST is always preferred in a unified form (that is, one single GST for the whole nation, instead of the dual GST format). Although India is adopting Dual GST looking into the federal structure, it is still a good move towards a Unified GST which is regarded as the best method of Indirect Taxes.
5. **GST would introduce uniform taxation laws across states and different sectors**. The taxes would be divided between the state and centre, based on a formula that would be acceptable to both.

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6. Also, it would be easier to supply goods and services uniformly across the country, as no additional taxes would have to be paid across different states.
7. Currently, no tax credits are provided for interstate transactions.
8. It removes multiple taxation.
9. It creates India as a single market.
10. It taxes goods and services at the same rates so many disputes are eliminated on tax matter.
11. It reduces taxes on manufactures. Hence it increases their business and make them more competitive at national and international level.
12. A seamless flow of Credit is available throughout the country. Hence evasion is minimised.
13. Accounting will be simplified and consideration for input tax from raw materials will also become easy.
14. Boost to GDP by 1 to 1.5%.
15. Automated, unhindered flow of credit.
16. Statutory Forms will be eliminated(C-Form. F-Form etc.).
17. Interstate transactions would be tax neutral vis-a-vis Local.
18. Easy movement of goods across state borders
19. Composite contracts (Goods + Service)would become simpler.
20. Local manufacturing would become cost competitive vis-a-vis imports

5.16 DISADVANTAGES OF GST

1. Service businesses operating pan-India need to take state-wise registration leading to increased compliance.
2. Any supply (Ex: stock transfer, job-work) would be taxable (although fully creditable) leading to cash flows getting blocked.
3. Businesses operating in multiple states need to re-align their branch network / warehouse/ logistics strategy.
4. Input credit is subject to matching of invoices.
5. A number of exemptions would be removed.
6. Requirement to determine "Point of Supply'.
7. VAT and service tax on some products may become higher than the current levels.
8. Most developed economies use a single GST instead of a dual GST. Hence, it will still be a very complicated billing and reconciliation IT machinery.
9. Since the mechanism is still complicated, it cannot completely eliminate black money and tax evasion.
10. There is fierce opposition because the states will lose autonomy over how much they can charge. Some states are suggesting that the maximum GST should be capped at 18% and mentioned in the bill that is to be passed in the parliament. Businesses are opposing the bill as they will have to give detailed sales records at both, state and central level.
11. The Tax on services would go up substantially from 14% to 20%.
12. Tax on retails would be almost double.

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13. Imported goods would be taxed at higher rate by around 6%.
14. There will be dual control on every business by Central and State Government. So compliance cost will go up.
15. All credit will be available on from online connectivity with GST Network. Hence, small businesses may find it difficult to use the system.

5.17 GST LEGISLATION FOR INTRODUCTION OF GST IN INDIA

The entire GST legislation is based on thirty five separate acts/bills.

(A) List of Central GST Act

The GST Act was introduced in the Lok Sabha on 29th March, 2017, and came into effect from 1st July, 2017. The GST Act consists of the following four legislations to introduce single tax regime that will replace multiple state and central taxes to create one national market.

1. Constitution 101st amendment Act, 2016: This act was passed in September 2016 and comes into force in July 1,2017.
2. CGST Act, 2017 [174 Sections, III Schedules]
3. IGST Act, 2017 [25 Sections]
4. UTGST Act, 2017 [26 Sections]
5. GST (Compensation to States) Act, 2017 [14 Sections]

(B) List of States Passed State GST Act 2017

Telangana become the first State to pass the GST Bill while other States passing the Bill includes Bihar, Rajasthan, Jharkhand, Chhattisgarh, Uttarakhand, Madhya Pradesh, Haryana, Goa, Gujarat, Maharashtra and Arunachal Pradesh. The complete list is as follows:

1st- Telangana on April 9,2017

2nd - Bihar on April 24,2017

3rd - Rajasthan on April 26,2017

4th - Jharkhand on April 27,2017

5th - Chhattisgarh on April 28,2017

6th - Uttarakhand on May 2,2017

7th - Madhya Pradesh on May 3,2017

8th - Haryana on May 4,2017

9th- Gujarat May 9,2017

10th-Goa on May 9,2017

11th -Odisha May 11,2017

12th-Assam May 11,2017

13th - Arunachal Pradesh May, 12,2017

14th - Utter Pradesh on 16th May 2017

15th- Andhra Pradesh on 16th May, 2017

16th - Puducherry on 17th May, 2017

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17th - Maharashtra 22 May, 2017

18th-Tripura on 24 May, 2017

19th - Sikkim on 25th May, 2017

20th - Mizoram on 26th May, 2017

21 st - Nagaland on 27th May, 2017

22nd - Himachal Pradesh on 27th May, 2017

23rd - Delhi on 31st May,, 2017

24th - Manipur on 5th June, 2017

25th - Meghalaya on 12th June, 2017

26th - Karnataka on 16th June, 2017

27th - Punjab on 19th June, 2017

28th - Tamil Nadu on 19th June, 2017

29th - West Bengal take ordinance route for GST on 15th June 2017

30th - Kerala take ordinance route for GST on 21st June, 2017

31st- Jammu and Kashmir on July 5th, 2017

5.18 TYPES OF GST

(A) CGST : Central Goods and Service Tax

Under GST, CGST is a tax levied on Intra State supplies of both goods and services by the Central Government and will be governed by the CGST Act. SGST will also be levied on the same Intra State supply but will be governed by the State Government.

This implies that both the Central and the State governments will agree on combining their levies with an appropriate proportion for revenue sharing between them. However, it is clearly mentioned in Section 8 of the GST Act that the taxes be levied on all Intra-State supplies of goods and/or services but the rate of tax shall not be exceeding 14%, each.

It is levied on the Intra-State movement of goods and services. The revenue collected under Central Goods and Services Tax is for the Central Government. However, Input Tax Credit on it is given partly to the Centre and partly to the States as it will be utilized against the payment of both CGST and IGST.

(B) SGST : State Goods and Service Tax

Under GST, SGST is a tax levied on Intra State supplies of both goods and services by the State Government and will be governed by the SGST Act. As explained above, CGST will also be levied on the same Intra State supply but will be governed by the Central Government.

It is levied on the Intra- State/Union Territory movement of goods and services. The revenue collected under State Goods and Services Tax is for the State Government/Union Territory. However, Input Tax Credit on it is given partly to the Centre and partly to the States as it will be utilized against the payment of both SGST and IGST.

(C) UTGST : Union Territory Goods and Service Tax

If any supply of goods and services takes place in Union Territories like Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Delhi (National Capital Territory of Delhi), Lakshadweep, Puducherry etc., than the same is accounted under UTGST.

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A separate Act is being implemented for Union Territory states to impose and administer GST in India in the name of UTGST Act. Under UTGST Act, the details of GST rates payable against the movement of goods and services in Union territories are explained.

An example for CGST and SGST/UTGST:

Let's suppose Rajesh is a dealer in Bhubaneswar who sold goods to Ramesh in Cuttack in Odisha worth ₹ 20,000/-. The GST rate is 18% comprising of CGST rate of 9% and SGST rate of 9%. In such case, the dealer collects ₹ 3600/- of which ₹ 900/- will go to the Central Government and ₹ 900/- will go to the Odisha Government.

(D) IGST: Integrated Goods and Service Tax

IGST refers to the Integrated Goods and Services Tax which is a part of GST under the concept of one nation one tax. It is charged on the goods and services supplied from one state to another.

IGST is a tax levied on all Inter-State supplies of goods and/or services and will be governed by the IGST Act. IGST will be applicable on any supply of goods and/or services in both cases of import into India and export from India.

5.19 GST COUNCIL

As per Article 279A (1) of the amended Constitution, the GST Council has to be constituted by the President within 60 days of the commencement of Article 279A. The notification for bringing into force Article 279A with effect from 12th September, 2016 was issued on 10th September, 2016.

As per Article 279A of the amended Constitution, the GST Council which will be a joint forum of the Centre and the States, shall consist of the following members:

(a) Union Finance Minister - Chairperson

(b) The Union Minister of State, in-charge of Revenue of finance - Member

(c) The Minister In-charge of finance or taxation or any other Minister nominated by each State Government - Members

As per Article 279A (4), the Council will make recommendations to the Union and the States on important issues related to GST, like the goods and services that may be subjected or exempted from GST, model GST Laws, principles that govern Place of Supply, threshold limits, GST rates, special rates for raising additional resources during natural calamities/ disasters, special provisions for certain States, etc.

The Union Cabinet under the Chairmanship of Prime Minister Shri Narendra Modi approved setting up of GST Council on 12th September, 2016 and also setting up its Secretariat as per the following details:

(a) Creation of the GST Council as per Article 279A of the amended Constitution;

(b) Creation of the GST Council Secretariat, with its office at New Delhi;

(c) Appointment of the Secretary (Revenue) as the Ex-officio Secretary to the GST Council;

(d) Inclusion of the Chairperson, Central Board of Excise and Customs (CBEC), as a permanent invitee (non-voting) to all proceedings of the GST Council;

(e)Create one post of Additional Secretary to the GST Council in the GST Council Secretariat (at the level of Additional Secretary to Government of India), and four posts of Commissioner in the GST Council Secretariat (at the level of Joint Secretary to the Government of India).

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The Cabinet also decided to provide for adequate funds for meeting the recurring and non-recurring expenses of the GST Council Secretariat, the entire cost shall be borne by the Central Government. The GST Council Secretariat shall be manned by officers taken on deputation from both the Central and State Governments.

Power and Functions of the GST Council

The GST council shall make recommendation to the Union and State on the following matters:

(a) The taxes, cesses and such charges levied by the union, the states and the local bodies which may be subsumed in the goods and service tax.

(b) Details of services and goods that will be subjected to GST or which will be exempted from GST.

(c) On Threshold limit below which services and goods will be exempted from GST.

(d) On GST rates including floor rate with bands of GST and any special rate for time being to arrange resources to face any natural calamity.

(e) Making special provisions for the following states: Arunachal Pradesh, Assam, Jammu and Kashmir, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, Tripura, Himachal Pradesh and Uttarakhand.

(f) Determination of place of supply.

(g) The GSTC is vested with powers to regulate all aspects relating to GST, though the role is only recommendatory.

5.20 SUMMARY

- Tax deducted at source is a means of collecting income tax in India, under the Indian Income tax Act of 1961.
- Tax deducted at source (TDS), as the very name implies aims at collection of revenue at the very source of income. It is essentially an indirect method of collecting tax which combines the concepts of “pay as you earn” and “collect as it is being earned.”
- According to Goods and Services Tax (GST) Act, 2017, “GST is a tax on goods and services with value addition at each stage having comprehensive and continuous chain of set of benefits from the producer’s / service provider’s point up to the retailer’s level where only the final consumer should bear the tax.”
- The Central Goods and Services Tax Bill, 2017 was introduced in Lok Sabha on March 27, 2017. The Bill provides for the levy of the Central Goods and Services Tax (CGST).
- Under GST, SGST is a tax levied on intrastate supplies of both goods and services by the Stage Government and will be governed by the SGST Act. CGST will also be levied on the same Intra State supply but will be governed by the Central Government.
- A separate Act is being implemented for Union Territory to impose and administer GST in India in the name of UTGST Act.
- IGST refers to the Integrated goods and services tax which is a part of GST under the concept of one nation one tax. It is charged on the goods and services supplied from one state to another.