

**CLUSTER 5**

1. **Primus group of companies has three companies, viz., Primus Rolling Mills Ltd., Primus Steel Pipe Manufacturers Ltd. and Primus Marketing Company Ltd. All the three companies want to appoint Mr. Prem as their managing director. You are required to state with reference to the provisions of the Companies Act, 2013 whether such appointments are permissible. (CA (Final) May 2008)**

**Ans.** The given problem relates to Section 203 of the Companies Act, 2013, as discussed below:

**Provisions**

As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the following conditions:

- (a) Such person is the managing director or manager of one, and of not more than one, other company;
- (b) Such appointment or employment is approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting; and
- (c) Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

**Analysis**

- 1. It is proposed to appoint Mr. Prem as the managing director of 3 companies.
- 2. Section 203 permits a person to be a managing director of maximum 2 companies, subject to the fulfilment of certain Conditions as above
- 3. However, in no case, it is permissible for any person to be a managing director of more than 2 companies.

**Conclusion**

It is not permissible for the three companies to appoint Mr. Prem as their managing director. He can be appointed as a managing director in maximum 2 companies.

2. **Board of directors of Colourful Textiles Ltd. having an effective capital of Rs. 4 crores propose to appoint one of its directors, M. Shyam, as managing director for 5 years with effect from 1st December, 2016 on a consolidated monthly salary of Rs. 4,00,000 per month. M. Shyam is already the managing director of Unique Yarn Ltd, receiving a consolidated salary of Rs. 3,50,000 per month. The effective capital of Unique Yarn Ltd. is Rs. 2 crores. What are the legal requirements to be complied with by Colourful Textiles Ltd. to give effect to the proposed appointment? (CA (Final) Nov. 1996)**

**Ans.**

**Provisions**

- 1. As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be:
  - (a) approved by the Board of directors at a meeting;
  - (b) approved at a general meeting held immediately after the approval by the Board: and
  - (c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.
- 2. As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the fulfillment of the following conditions:
  - (a) Such person is the managing director or manager of one, and of not more than one, other company;
  - (b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board with the Consent of all the directors present at the meeting: and

(c) Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

3. As per Section V of Part II of Schedule V, a managerial person shall draw remuneration from one or both companies, provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person. The provisions of Section V of Part II of Schedule V are subject to the provisions of Sections I to IV of Part II of Schedule V.
4. As per Section II of Part II of Schedule V, the remuneration to a managing director depends upon the effective capital of the company. In case of a company having an effective capital of less than Rs. 5 crore, the remuneration payable to a managing director shall not exceed Rs. 60 lakh per year.

### Analysis

1. The Board of directors of Colourful Textiles Ltd. wants to appoint Mr. Shyam as the managing director of the company. Mr. Shyam is already the managing director of Unique Yarn Ltd. Since, Mr. Shyam is the managing director of only one other company and not more than one, the requirement of Section 203, has been fulfilled.
2. To make such appointment, a Board meeting of Colourful Textiles Ltd. shall be held. As per Section 203, the notice of such Board meeting shall contain a specific notice of the proposal of appointment of Mr. Shyam as the managing director of Colourful Textiles Ltd.
3. The appointment of Mr. Shyam as the managing director shall require approval of the Board. Such approval shall be granted by passing a unanimous resolution in a Board meeting i.e. all the directors present in the Board meeting must vote in favour
4. The terms and conditions of the appointment of Mr. Shyam and the remuneration payable to him shall be approved at a general meeting held immediately after the approval by the Board.
5. The terms and conditions of the appointment of Mr. Shyam and the remuneration payable to him shall be approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V, i.e. if he does not satisfy one or more of the eligibility conditions Contained in Part I of Schedule V.
6. The effective capital of Colourful Textiles Ltd. is Rs. 4 crores, i.e. less than Rs. 5 crore. As per Section II of Part I of Schedule V, Colourful Textiles Ltd. may pay a maximum of Rs. 60 lakh per year to Mr. Shyam. Similarly, the effective capital of Unique Yarn Ltd. is Rs. 2 crores, i.e. less than Rs. 5 crore. As per Section II of Part II of Schedule V, Unique Yarn Ltd. may pay a maximum of Rs. 60 lakh per year to Mr. Shyam.
7. As per Section V of Part I of Schedule V, Mr. Shyam may draw-(a) a maximum of Rs. 60 lakh per year from Colourful Textiles Ltd.; or  
(b) a maximum of Rs. 60 lakh per year from Unique Yarn Ltd.;  
(c) some remuneration from Colourful Textiles Ltd. and some remuneration from Unique Yarn Ltd., subject to the condition that total remuneration drawn from both these companies shall not exceed Rs. 60 lakh.
8. The payment of proposed remuneration of Rs. 4,00,000 per month to Mr. Shyam by Colourful Textiles Ltd. and Rs. 3,50,000 per month by Unique Yarn Ltd. shall result in payment of Rs. 90 lakh per year to Mr. Shyam, which is in not accordance with Section II and Section V of Part II of Schedule V. As per Part II Section II, special resolution is needed to pay an amount more than the limits i.e 60 lakh

### Conclusion

1. Colourful Textiles Ltd. can appoint Mr. Shayam as its managing director by complying with the above
2. As per Part II Section II, special resolution is needed to pay an amount more than the limits i.e 60 lakh

3. Even if Unique Yams Limited were a private company, the answer would have remained same, since the applicability of provisions contained in Section 196, Section 203, Section II of Part II of Schedule V and Section V of Part II of Schedule V does not depend upon the status of the company (i.e. public or private) in which Mr. Shyam was already a managing director.

**3. The managing director of M/s. Speculative Builders Ltd. has resigned, as the company was not doing well and also incurring losses. The Board of directors have decided to appoint Mr. Reliable aged 71 years as the new managing director, because of his proven track record of nearly 50 years, turning sick companies into profitable ones. The only condition put forth by Mr. Reliable is that he should be paid the maximum permissible salary and perquisites as provided in the Companies Act, 2013 without requiring the approval of Central Government.**

**The effective capital of the company is Rs. 20 crores. Advise the company about:**

**(i) The procedure to be followed for the appointment of Mr. Reliable; and**

**(ii) The quantum of remuneration payable to him. [CA (Final) May 1999]**

**OR**

**Advice M/s Super Specialties Ltd. in respect of appointment of managing director who is more than 70 years of age. [CA (Final) May 2005]**

**Ans.**

**Provisions**

1. As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be-
  - a) approved by the Board of directors at a meeting;
  - b) approved at a general meeting held immediately after the approval by the Board; and
  - c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.
2. Also, Section 196 provides that a person who has attained the age of 70 years may be appointed as managing director, whole-time director or manager, if-
  - a. Such appointment is made by passing a special resolution; and
  - b. the explanatory statement annexed to the notice shall indicate the justification for appointing such person.

**OR**

3. where no such special resolution is passed but votes cast in favor of the motion exceed the votes, if any, cast against the motion and the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company, the appointment of the person who has attained the age of seventy years may be made
4. Part I of Schedule V also provides that the appointment of a person who has attained the age of 70 years, as a managerial person requires approval by a special resolution.

**Analysis and conclusion**

1. If Mr. Reliable fulfils all the conditions contained in Part I of Schedule V, no approval of the Central Government is required and therefore Mr. Reliable may be appointed as a managing director for 5 years.
2. The company shall file a return with the registrar in Form No. MR. 1 within 60 days of such appointment.
3. If Mr. Reliable does not fulfil one or more of the conditions contained in Part I of Schedule V, he may be appointed as a managing director only with the approval of Central

Government.

4. Whether or not Mr. Reliable fulfils the conditions contained in Part I of Schedule V, he may be appointed as a managing director (since his age is more than 70 years), if –
  - (i) his appointment is made by passing a special resolution; and
  - (ii) the explanatory statement annexed to the notice indicates the justification for appointing him.
5. However, if no such special resolution is passed, the appointment of Mr. Smart may be made, if-
  - (i) votes cast in favour of the motion exceed the votes, if any, cast against the motion; and
  - (ii) the Central Government is satisfied, on an application made by the Board. that such appointment is most beneficial to the company.
  - (iii) Where a company does not make any profits or its profits are inadequate, it may pay remuneration to its managing director in accordance with Section II of Part II of Schedule V.
6. In the present case, the effective capital of the company is Rs. 20 crores. As per Section II of Part II of Schedule V, a company having effective capital between Rs. 5 crores and Rs. 100 crores may pay to its managerial person maximum remuneration of RS. 84 lakh per year. Thus, a maximum of Rs. 84 lakh per year can be paid to Mr. Reliable as assured remuneration. However, the company may pay to him an amount more than the limit i.e Rs. 84 lakh per year, if a special resolution is passed in this respect.
7. Mr. Reliable is also eligible to the following perquisites which shall not be included in the computation of ceiling on remuneration:
  - (a) Contribution to provident fund, superannuation fund, or annuity fund to the extent not taxable under Income-tax Act.
  - (b) Gratuity payable at a rate not exceeding half month's salary for each completed year of service.
  - (c) Encashment of leave at the end of the tenure.

**4. Advise M/s Super Specialties Ltd. in respect of payment of remuneration of Rs. 40,000 per month to the whole-time director of the company running in loss and having an effective capital of Rs. 95.00 lacs. (CA (Final) May 2005)**

**Ans.** Remuneration to a whole-time director or managing director may be paid by way of monthly payment or/and specified percentage of net profits. However, except with the approval of the company in general meeting, such remuneration shall not exceed-

- (a) 5% of net profits, if the company has one whole time director or managing director or manager or
- (b) 10% of net profits, if the company has more than one whole time director or managing director or manager, taken together.

Section II of Part II of Schedule V empowers a company to pay remuneration to its whole-time director, managing director or manager, even in case of inadequacy of profits or in case of a loss. As per Section II of Part II of Schedule V, the remuneration to a whole-time director depends upon the effective capital of the company. In case of a company having an effective capital of less than Rs. 5 crore, the remuneration payable to whole time director shall not exceed Rs. 60 lakh per year.

In the given case, M/s Super Specialties Ltd. has suffered a loss and so it may pay remuneration to its whole-time director in accordance with Section I of Part II of Schedule V. Since the effective capital of the M/s Super Specialties Ltd. is less than Rs. 5 crore, it may pay a maximum of Rs. 60 lakh per year to its whole-time director. Therefore, the payment of Rs. 40,000 per month (equivalent to Rs. 4.8 lakh for the entire financial year) to the whole-time director is within the limit specified under Section II of Part II of Schedule V, and is, therefore,

valid.

The payment of such remuneration shall be possible only if the following conditions are satisfied:

(a) The payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under Section 178(1) also by the Nomination and Remuneration Committee.

(b) If the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. However, in case of a default, this condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

(c) A special resolution has been passed at the general meeting of the company authorizing the payment of remuneration. Such special resolution shall remain valid for a period not exceeding 3 years.

(d) A statement shall be given to the shareholders along with the notice calling the general meeting. This is called informed decision-making process.

**5. Advise M/s Super Specialties Ltd. in respect of payment of commission of 4% of the net profits per annum to the ordinary directors of the company. (CA (Final) May 2005)**

**Ans.**

**Provisions**

An ordinary director means a director who is not a whole-time director or a managing director.

The provisions contained in Section 197 regulate the remuneration of ordinary directors.

1. The remuneration payable to a director who is neither a managing director nor a whole-time director shall not exceed-

(a) 1% of net profits, if the company has employed a managing director or whole-time director or manager; or

(b) 3% of net profits, if the company has not employed any managing director, whole time director and manager.

2. However, remuneration exceeding the aforesaid limits may be paid if-

(i) the approval of the company in general meeting is obtained by passing a special resolution; and

(ii) where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting by passing a special resolution.

**Analysis and conclusion**

1. M/s Super Specialties Ltd. intends to pay 4% of net profits per annum to its ordinary directors. Such payment shall exceed the limit specified under Section 197, whether or not the company has employed any managing director, whole time director or manager.

2. The payment of commission of 4% of net profits may be made to the ordinary directors only if the approval of the members is obtained in the general meeting by passing a special resolution. Further, if Super Specialties Ltd. has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by M/s Super Specialties Ltd. before obtaining the approval of the members in the general meeting



by passing a special resolution.

6. EF Chemicals Limited proposes to appoint one whole-time technical director on a consolidated monthly remuneration of Rs. 30,000 and one whole-time marketing director on a consolidated salary of Rs. 25,000 per month for a period of three years, with effect from 1<sup>st</sup> September, 2014. The company has got a managing director and he is getting Rs. 40,000 per month. Explain the requirements under the Companies Act, 2013 to be complied with by the company in connection with the proposed appointment of whole-time directors taking into account the following data collected from the balance sheet of the company as on 31st March, 2014.

1. Paid-up Share Capital	80,00,000
2. Debentures redeemable after three years	90,00,000
3. Investments	20,00,000
4. Accumulated Loss	70,00,000
5. Preliminary expenses not written off	15,00,000

(CA (Final) May 2006 (Modified))

Ans. The given problem may be discussed as follows:

#### Computation of effective capital of the company

The 'effective capital' shall be computed as follows:

#### Items to be added

- Paid-up share capital (excluding share application money or advances against shares)
- Securities premium account
- Reserves and surplus (excluding revaluation reserve)
- Long-term loans
- Deposits repayable after 1 year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc., and other short-term arrangements)

#### Items to be deducted:

- Investments (except in the case of an investment company)
- Accumulated losses
- Preliminary expenses not written off.

The effective capital shall be calculated as on the last day of the financial year preceding the financial year in which the appointment of the managerial person is made.

The effective capital of EF Chemicals Limited shall be calculated as on 31.03.2014. Accordingly, the effective capital of EF Chemicals Limited is Rs. 80,00,000+ 90,00,000- 20,00,000 -70,00,000 15,00,000 = Rs. 65,00,000.

#### (B) Conditions prescribed under Part I of Schedule V are complied with

**1. Eligibility for appointment:** The proposed whole-time directors must satisfy all the conditions prescribed under Part I of Schedule V. These conditions are briefly summed up as under:

- He has not been sentenced to imprisonment for any period, or to a fine exceeding Rs. 1,000 for the conviction of any of the 16 offences specified in this behalf.
- He has not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.
- He has completed the age of 21 years and has not attained the age of 70 years, subject to certain exceptions.
- He must be resident in India.

It may be assumed that the proposed whole-time technical director and whole-time marketing director fulfil all these Conditions.

**2. Remuneration of whole-time directors:** Section II of Part of Schedule V prescribes various slabs of monthly remuneration depending on the effective capital of the company.

Accordingly, a company having an effective capital of less than Rs. 5 crore may pay maximum remuneration of Rs. 60 lakh to each of its managerial person.

Therefore, it is permissible to pay monthly remuneration of Rs. 30,000 to the whole-time technical director and monthly remuneration of Rs. 25,000 to whole-time marketing director, as well as monthly remuneration of Rs. 40,000 to the already appointed managing director. The payment of remuneration as per Section II of Part II of Schedule V is possible if the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders of any other secured creditor. However, in case the company has made such a default, this condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-Convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

7. **M/s Supreme Technologies Limited proposes to appoint Mr. E and Mr. F as whole-time directors for a period of three years with effect from 1<sup>st</sup> June, 2018. The company proposes to pay a consolidated salary of Rs. 80,000 per month to each of them.**

**Mr. D, the managing director of the company, has been appointed for a period of five years with effect from 1<sup>st</sup> January 2016 on a remuneration payable in the form of commission at the rate of five per cent of net profits subject to a minimum remuneration of Rs. 80,000 per month. The effective capital of the company at the end of the financial year ending 31<sup>st</sup> March, 2018 is Rs. 4.5 crores and it has been increased to Rs. 5.5 crores on 1<sup>st</sup> April, 2018 by way of right issue of equity shares. The company failed to pay the dues of a bank on 1<sup>st</sup> January, 2018 and the default is still continuing. The company seeks your advice on the steps to be taken to comply with the requirements of Section 196 read with Schedule V of the Companies Act, 2013 with regard to the proposed appointment of Mr. E and Mr. F as whole-time directors. Advise explaining the relevant provisions. (CA (Final) May 2003 (Modified))**

OR

**Neemuch Pharma Limited having an "Effective Capital" of Rs. 4 crore as on 31<sup>st</sup> March, 2018 raised Rs. 2 crore by way of issue of right shares in May, 2018 during the current Financial Year 2018-2019. The company is managed by Mr. Chandrasekhar, the Managing Director, and he is getting a minimum remuneration of Rs. 80,000 per month. The company proposes to appoint two whole time Directors in July, 2018 on a consolidated minimum salary of Rs. 60,000 per month to each of them.**

**What is the "Effective Capital" for the purpose of determining the minimum remuneration payable to the proposed whole-time directors? State the requirements to be complied with under Schedule V to the Companies Act, 2013 to give effect to the proposed appointments. (CA (Final) Nov, 2012 (Modified))**

**Ans.** The given problem may be discussed as follows:

**(A) Effective capital of the company**

The effective capital shall be calculated as on the last day of the financial year preceding the financial year in which the appointment of the managerial person is made.

Therefore, the effective capital of M/s Supreme Technologies Limited shall be calculated on 31.03.2018 and so the right shares issued on 1<sup>st</sup> April, 2018 shall be ignored. As on 31.03.2018, the effective capital of M/s Supreme Technologies Limited was Rs. 4.5 crores.

**(B) Conditions prescribed under Schedule V are complied with**

**1. Eligibility for appointment**

The proposed whole-time director must satisfy all the conditions prescribed under Part I of Schedule V. These conditions are briefly summed up as under:

(a) The managerial person has not been sentenced to imprisonment for any period, or to a fine exceeding Rs. 1,000, for the conviction of any of the 19 offences specified in this behalf.

(b) The managerial person has not been detained for any period under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

(c) The managerial person has completed the age of 25 years and has not attained the age of 70 years, subject to certain exceptions.

(d) The managerial person must be resident in India.

It may be assumed that Mr. E and Mr. F fulfil all these conditions.

### **2. Remuneration of Mr. E and Mr. F**

Section II of Part II of Schedule V contains various slabs of remuneration depending on the effective capital of the company. Accordingly, a company having an effective capital of less than Rs. 5 crores may pay a maximum of Rs. 60 lakh per year to each of its managerial person.

Hence, M/s Supreme Technologies Limited can pay monthly remuneration of Rs. 80,000 each to Mr. E and Mr. F, as well as to Mr. D, who already holds the office of managing director. However, the payment of such remuneration shall be possible only if the following conditions are satisfied.

(a) The payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-Section (1) of Section 178 also by the Nomination and Remuneration Committee.

(b) The payment of remuneration as per Section II of Part II of Schedule V is possible if the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. However, in case the company has made such a default, this condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

In the present case, the company failed to pay the dues of a bank on 1st January, 2018 and the default is still continuing. Therefore, the company is required to obtain the prior approval of the bank concerned before obtaining the approval of the members in the general meeting.

(c) A special resolution has been passed at the general meeting of the company authorizing the payment of remuneration. Such special resolution shall remain valid for a period not exceeding 3 years.

(d) A statement shall be given to the shareholders along with the notice calling the general meeting.

### **3. Procedure for appointing Mr. E and Mr. F as whole-time directors**

We can appoint Mr. E and Mr. F as the whole-time directors in accordance with Schedule V. The company shall take the following steps to appoint Mr. E and Mr. F as whole-time directors:

(a) The company shall obtain the consents of Mr. E and Mr. F to act as directors.

(b) The draft agreement for the appointment of Mr. E and Mr. F shall be prepared in conformity with Schedule v read with Section 196. The remuneration of Mr. E and Mr. F shall be fixed at Rs. 80,000 per month each.

(c) The terms and conditions of the appointment of Mr. E and Mr. F shall be approved by the Board of directors at a Board meeting.

(d) The terms and conditions of the appointment of Mr. E and Mr. F shall be approved by the members in the general meeting held immediately after the approval by the Board.

(e) The notice of the Board meeting and of the general meeting called for the purpose of approving the appointment of Mr. E and Mr. F shall include –

(i) the terms and conditions of such appointments;

(ii) remuneration payable to them; and

(iii) such other matters (including interest, of a director or directors in such appointments, if any).

(f) Within 60 days of appointment of Mr. E and Mr. F, the company shall file with the Registrar a return of appointment in Form No. MR.1.



(g) The particulars of Mr. E and Mr. F including the details of securities held by them shall be entered in the register of directors and key managerial personnel and their shareholding maintained under Section 170.

- 8. Examine whether the payment of following remuneration to non-executive directors (directors who are neither in the whole-time employment of the company nor managing director) is in accordance with the provisions of the Companies Act, 2013: Sitting fee payable to directors is increased from Rs. 30,000 to Rs. 60,000 per meeting. (CA (Final) Nov. 2003)**

**Ans.** As per first proviso to Section 197(5) sitting fees payable to a director shall not exceed such sum as may be prescribed. As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the sum prescribed is Rs. 1 lakh for every meeting of the Board or any committee of the Board. The said Rule 4 further states that the amount of sitting fees shall be such as may be decided by the Board of directors of the company.

In the present case it is proposed to increase the sitting fees payable to directors from Rs. 30,000 to Rs. 60,000 per meeting. Since, the amount proposed is within the ceiling limits prescribed, the increase in sitting fees from Rs. 30,000 to Rs. 60,000 per meeting is valid. Such increase in sitting fees shall require a resolution of the Board.

- 9. Case I. A listed company has fixed payment of sitting fee for each meeting of directors at Rs. 75,000. In view of increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to Rs. 1,00,000 per meeting. Advise the company about the requirements under the Companies Act, 2013 to give effect to this proposal. (CA (Final) Nov. 2006)**

**Case II. The articles of association of a listed company provides for fixed payment of sitting fee for each meeting of directors subject to maximum of Rs. 30,000. In view of the increased responsibilities of independent directors of listed companies, the company proposes to increase the sitting fee to Rs.45,000 per meeting. Advise the company about the requirement under the companies Act, 2013 to give effect to the Proposal. (CA Final Nov. 2018)**

**Ans.** As per first proviso to Section 197(5) sitting fees payable to a director shall not exceed such sum as may be prescribed. As per Rule 4 of the companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the sum prescribed is Rs. 1 lakh for every meeting of the Board or any committee of the Board. The said Rule 4 further states that the amount of sitting fees shall be such as may be decided by the Board of directors of the company.

**Case I**

In the present case it is proposed to increase the sitting fees payable to directors from Rs. 75,000 to Rs. 1,00,000 per meeting. Since, the amount proposed (i.e. Rs. 1 lakh per meeting) is within the ceiling limit prescribed by the Central Government (i.e. Rs. 1 lakh per meeting). Such increase is permitted and shall require a resolution of the Board.

**Case II**

In the present case, IT is proposed to increase the sitting fees payable to directors from Rs. 30,000 to Rs. 45,000 per meeting. Since, the amount proposed (i.e. Rs. 45,000 per meeting) is within the ceiling limit prescribed by the Central Government (i.e. Rs. 1 lakh per meeting), such increase is permitted. Such increase in sitting fees shall require-

- (a) a resolution of the Board; and
- (b) amendment of articles (to provide that sitting fees upto Rs. 45,000 can be paid by the company) by passing a special resolution.

10. M/s Star Health Specialties Limited owns a multi-specialty Hospital in Chennai. Dr. Hamilton, a practicing Heart Surgeon, has been appointed by the company as its non-executive ordinary director and it wants to pay him fee, on case to case basis, for surgery performed on the patents at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013.

**Advise the company, which seeks to ensure that the same does not contravene any provision of the Companies Act, 2013. (CA Final Nov 2006 (Modified))**

**Ans.** As per Section 197(4), the remuneration paid to a director for rendering services in any other capacity shall also be covered in 'remuneration payable to the directors' under the provisions of Section 197(1).

However, remuneration paid to a director for rendering services in any other capacity shall not be so included, if –

- (i) the services rendered are of a professional nature; and
- (ii) in the opinion of the Nomination and Remuneration Committee if the company is required to constitute Nomination and Remuneration Committee under Section 178) or the Board of directors (in any other case), the director concerned possesses requisite professional qualifications.

In the given case, M/s Star Health Specialties Limited intends to pay fees for surgery performed by Dr. Hamilton, its non-executive director, on case to case basis. It means that the services rendered by Dr. Hamilton are of a professional nature. Such payment of fees shall not be included in the limits of managerial remuneration specified under Section 197(1), if the Nomination and Remuneration Committee (or in its absence, the Board of directors) passes a resolution to the effect that Dr. Hamilton possesses requisite professional qualifications.

11. **Case I. A Ltd. wants to include the following clause in its articles of association: Each director shall be entitled to be paid out of the funds of the company for attending meetings of the Board or a committee thereof including adjourned meetings such sum as sitting fees as shall be determined from time to time by the directors, but not exceeding a sum of Rs. 1,50,000 for each such meeting to be attended by the director."**

**You are required to advise the company as to the validity of such a clause and the correct legal position. (CA (Final) may 2004, June 2009, May 2007 (Modified))**

OR

**Case II. B Ltd. wants to include the following clause in its articles of association:**

**Each director shall be entitled to be paid out of the funds of the company for attending meetings of the Board or a committee thereof including adjourned meetings such sum as sitting fees as shall be determined from time to time by the directors, but not exceeding a sum of Rs. 80,000 for each such meeting to be attended by the director.**

**You are required to advise the company as to the validity of such a clause and the correct legal position.**

OR

**Case III. The articles of C Ltd. do not contain any provision with respect to payment of sitting fees. State, with reference to the provisions of the Companies Act, 2013, whether the directors are entitled to receive any sitting fees.**

**Ans.** The provisions relating to payment of sitting fees to the directors are contained in Section 197(2) and 197(15) read with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014. Following points are worth noting regarding payment of sitting fees to directors:

(a) Sitting fees may be paid to a director for attending a Board meeting as well as for attending a meeting of a committee of directors.

(b) Sitting fees may be paid whether or not the meeting proceeds or is adjourned for want

of quorum or any other reason.

(c) The amount of sitting fees shall not exceed the sum prescribed. As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the sum prescribed is Rs. 1 lakh for every meeting of the Board or any committee of the Board.

(d) The amount of sitting fees shall be such as may be decided by the Board of directors of the company:

(e) Where a Board meeting is adjourned for want of quorum or any other reason, the directors who were present to attend such Board meeting shall be entitled to receive the sitting fees.

(f) An adjourned meeting is a continuation of the original meeting. Therefore, where a Board meeting is held and is adjourned to a later date, the sitting fees cannot be paid twice, since it is counted as one Board meeting only.

#### Case I

(a) The proposed clause purports payment of sitting fees at the rate of Rs. 1,50,000 per meeting. Since the amount proposed exceeds the prescribed sum of Rs. 1,00,000 per meeting, such clause is not valid.

(b) Therefore, each director of A Ltd. shall be entitled to receive such amount as sitting fees as may be determined by the Board, but such amount shall not exceed Rs. 1 lakh per meeting of the Board or any committee of the Board.

#### Case II

(a) The proposed clause purports payment of sitting fees at the rate of Rs. 80,000 per meeting. Since the amount proposed is within the prescribed sum of Rs. 1,00,000 per meeting, such clause is valid.

(b) Articles may specify the maximum amount of sitting fees which can be paid to the directors. If such maximum limit specified in the articles (i.e. Rs. 80,000 per meeting. In this case) does not exceed the amount prescribed by the Central Government (i.e. Rs. 1 lakh per meeting), the sitting fees payable to directors shall not exceed the maximum limit specified in the articles.

(c) Therefore, each director of B Ltd. shall be entitled to receive such amount as sitting fees as may be determined by the Board, but such amount shall not exceed Rs. 80,000 per meeting of the Board or any committee of the Board.

(d) However, if B Ltd. intends to pay sitting fees exceeding Rs. 80,000 per meeting but not exceeding Rs. 1 lakh per meeting, it shall require-

(i) a resolution of the Board; and

(ii) amendment of articles by passing a special resolution.

#### Case III

(a) The Act does not require any company to specify in its articles any amount or maximum amount with respect to amount of sitting fees.

(b) As per Section 197(5) read with Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the amount of sitting fees shall be such as may be decided by the Board of directors of the company, but it shall not exceed Rs. 1 lakh for every meeting of the Board or any committee of the Board.

(c) Therefore, each director of C Ltd. shall be entitled to receive such amount as sitting fees as may be determined by the Board, but such amount shall not exceed Rs. 1 lakh per meeting of the Board or any committee of the Board.

**12. X, a Director of MJV Ltd., was appointed on 1<sup>st</sup> April, 2014. One of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31<sup>st</sup> March, 2015, the company suffered heavy losses. The company paid him a remuneration of Rs. 50 lacs for the financial year 2014-15.**

OR

The effective capital of the company is Rs. 150 crores. Referring to the provisions of Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to X. (CA (Final) Nov. 2010 (Modified))

OR

X, a director of Sunrise Limited, was appointed on 1<sup>st</sup> April, 2014. One of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. The company suffered heavy losses during the financial year ended 31<sup>st</sup> March, 2018. The company was not in a position to pay any remuneration but he was paid Rs. 50 lakhs for the year, as paid to other directors. The effective capital of the company is Rs. 150 crores. Referring to provisions of the Companies Act, 2013, as contained in Schedule V, examine the validity of the above payment of remuneration to Mr. X. (CA (Final) Nov. 2018)

Ans.

#### Provisions

1. Section II of Part II of Schedule V prescribes a company to pay remuneration to its whole-time director, managing director or manager, even in case of inadequacy of profits or in case of a loss.
2. As per Section I of Part II of Schedule V, the remuneration of a whole-time director, managing director or manager is dependent on the effective capital of the company.
3. In case of a company having an effective capital of Rs. 100 crore or more but less than Rs. 250 crore, the remuneration payable to the whole time director, managing director or manager shall not exceed Rs. 120 lakh per year. However, the remuneration in excess of Rs. 120 lakh per year may be paid if the resolution passed by the shareholders approving the remuneration, is a special resolution.
4. The payment of remuneration as per Section II of Part I of Schedule V is possible if the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. However, in case the company has made such a default, this Condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

#### Analysis

1. The effective capital of MJV Ltd. is Rs. 150 crores. As per Section II of Part II of Schedule V, MJV Ltd. may, without passing any special resolution, pay to its managerial person, a maximum remuneration of Rs. 120 lakh per year.
2. MJV Ld. has paid a remuneration of Rs. 50 lakhs to Mr. X, it managing director.

#### Conclusion

The payment of Rs. 50 lakhs to Mr. X for the financial year 2014-15 is within the limit specified under Section II of Part II of Schedule V, and is, therefore, valid.

14. Mr. Ram was appointed as managing director of Prudential Company Limited In accordance with Schedule V for a period of 5 years with effect from 1<sup>st</sup> April, 2014 on a remuneration of Rs. 30,00,000 per year. The Board of directors of the company propose to increase the remuneration of the managing director to Rs. 40,00,000 per year. Advise the Board of directors about the legal requirements under the Companies Act, 2013 to give effect to the proposal. State whether the increased remuneration can be paid as minimum remuneration in the event of loss or inadequacy of profit. (CA (Final) Nov. 1997 (Modified))

Ans.

Increasing the remuneration to Rs. 40 lakh per year



As per Section 197, a company is empowered to increase the remuneration of its managerial person provided such increase is within the limits laid down in Section II of Part II of Schedule V.

As per Section II of Part II of Schedule V, in the absence of inadequacy of profits, a company having an effective capital of less than Rs. 5 crore may pay a maximum of Rs. 60 lakh as the managerial remuneration. However, if the effective capital of the company is Rs. 5 crore or more but less than Rs. 100 crore, the maximum remuneration shall not exceed Rs. 84 lakh. However, the remuneration in excess of these limits may be paid, if the resolution passed by the shareholders is a special resolution.

In the present case, -

- (a) the effective capital of Prudential Company Limited is not given;
- (b) Prudential Company Limited proposes to pay to its managing director a sum of Rs. 40 lakh as remuneration for the entire financial year.

Irrespective of the amount of effective capital of Prudential Company Limited, the payment of remuneration of Rs. 40 lakh to the managing director for the entire financial year is in accordance with the provisions of Section II of Part II of Schedule V, and is therefore, valid.

**Increased remuneration paid as minimum remuneration?**

Section II of Part II of Schedule V empowers a company to pay remuneration to its whole-time director, managing director or manager, even in case of inadequacy of profits or in case of a loss. Thus, remuneration of Rs. 40 lakh per year can be paid to Mr. Ram as minimum remuneration, even if Prudential Company Limited does not make any profits or its profits are inadequate.

**15. Mr. Mania is the managing director of S Limited (and nowhere else), which is a subsidiary of H Limited. Seeing the success of S Limited, the directors of H Limited (which is a listed company) decided and approached Mr. Mania to act as the managing director of H Limited. Mr. Mania agreed with the directors of H Limited subject to a condition that he will continue to act as the managing director of S Limited also. In this direction, the directors of H Limited propose to appoint him by means of a resolution (containing the terms and conditions of appointment excluding remuneration) by circulation. Referring to and analyzing the relevant provisions of the Companies Act 2013, decide whether the decision of appointing and the proposed mode of appointment of Mr. Mania as the managing director of H Limited is valid. Will your answer differ in case S Limited is not a subsidiary of H Limited? [CA (Final) May 2019]**

**Ans.**

**Provisions**

1. As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the fulfilment of the following conditions:

- (a) Such person is the managing director or manager of one, and of not more than one, other company;
- (b) Such appointment or employment is made or approved by a resolution passed at a meeting of the Board With the consent of all the directors present at the meeting; and
- (c) Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

2. As per Section 196(4), the terms and conditions of the appointment of a managing director and the remuneration payable to him shall be –

- (a) approved by the Board of directors at a meeting;
- (b) approved at a general meeting held immediately after the approval by the Board; and
- (c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

**Analysis**

The Board of directors of H Limited intends to appoint Mr. Mania as the managing director of the company. Mr. Mania is already the managing director of S Limited. Since, Mr. Mania is the managing director of only one other company, the requirement of Section 203, that the person should not be managing director of more than one other company, has been fulfilled. For the purpose of appointing Mr. Mania as the managing director, a resolution by circulation is proposed to be passed by the Board of directors of H Limited. Further, it is proposed that such resolution shall not contain the provisions with respect to remuneration of Mr. Mania, but shall contain other terms and conditions of appointment of Mr. Mania.

If the proposed mode of appointment is adopted, the provisions of Section 196(4) and Section 203 shall be contravened, since-

(a) it shall be made by passing a resolution by Circulation, but such appointment can be made only by passing a resolution at a Board meeting as per Section 196 and 203:

(b) It requires a unanimous resolution of the Board as per Section 203, but in the proposed mode of appointment, unanimous resolution shall not be passed;

(c) Specific notice of the Board meeting and resolution proposed for appointing Mr. Mania as the managing director is required to be given to all the directors as per Section 203, but no such notice shall be given as per the proposed mode of appointment: and

(d) The Board shall not approve the remuneration payable to Mr. Mania as per the proposed mode of appointment, but Section 196(4) requires approval of remuneration by the Board.

**Conclusion**

If Mr. Mania is appointed as the managing director as per the proposed mode of appointment, it would result in contravention of the provisions of Section 196(4) and 203. Accordingly, the proposed mode / manner of appointment of Mr. Mania as the managing director of H Limited, is not valid.

Even if S Limited were not a subsidiary of H Limited, the answer would have remained same, since the provisions of Section 196(4) and Section 203 would still be applicable to the appointment of Mr. Mania.

**16. Mr. X is a Whole Time Director (WTD) in a Super Ltd. He is also Whole Time Director (WTD) in its subsidiary company. Discuss the validity of Mr. X as WTD in its subsidiary company. [CMA (Final) Dec. 2018]**

**Ans.** The given problem relates to Section 203 of the Companies Act, 2013.

As per Section 203, a whole-time key managerial personnel shall not hold office in more than one company except in its Subsidiary company at the same time. For example, a person can be the manager in a company as well as the manager in its Subsidiary Company, or a person can be a managing director in a company and the manager in its subsidiary company.

As per Section 2(94), 'whole-time director' includes a director in the whole-time employment of the company.

Though Section 203 permits a whole-time key managerial personnel to become a whole-time key managerial personnel in its subsidiary company at the same time, yet it is not possible for a person to become a whole time director in a company as well as in its subsidiary company. This is so because the definition of whole-time director clearly implies that a whole-time director is a whole-time employee, and a person cannot become a whole-time employee in more than once company at the same time.

Thus, Mr. X Cannot validly hold the position of whole-time director in Super Ltd. as well as in its Subsidiary, at the same time.

**17. Which of the key managerial personnel are required to be appointed by the following companies?**

(a) A Ltd. which is a listed company.

- (b) B Ltd. is an unlisted company having a paid-up share capital of Rs. 12 crore.
- (c) C Ltd. is an unlisted company having a paid-up share capital of Rs. 8 crore.
- (d) D Ltd. is an unlisted company having a paid-up share capital of Rs. 4 crore.
- (e) E Pvt. Ltd. having a paid-up share capital of Rs. 6 crore.
- (f) F Pvt. Ltd. having a paid-up share capital of Rs. 3 crore.

OR

**The Companies Act, 2013 has made it mandatory for all companies having a paid-up capital of Rs. 5 crore or more to have a whole-time company secretary. Comment.**

**Ans.** Section 203 of the Companies Act, 2013 and Rule 8 and Rule 8A of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 have to be analysed As per Section 203, 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
- (iii) Chief Financial Officer.

As per Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following classes of Companies shall have the whole-time key managerial personnel:

- (a) Every listed company
  - (b) Every other public company having a paid-up share capital of Rs. 10 crore or more.
- As per Rule 8A of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, a company (whether public or private) shall have a whole-time company secretary, if-

- (a) it is not covered Rule 8: and
- (b) if the paid-up share capital of the company is Rs. 5 crore or more.

The given cases are discussed as under:

Name of the company	Rule 8 applicability	Rule 8A applicability	Appointment of which key managerial personnel is mandatory?
A Ltd.	Yes, since A Ltd. is a listed company	No. since A Ltd. is covered under Rule 8.	(i) Managing director, or Chief Executive Officer or manager or whole-time director;  (ii) Company Secretary; and  (iii) Chief Financial Officer.
B. Ltd	Yes, since B Ltd. is a public company and its paid-up share capital exceeds Rs. 10 crore	Same as above.	Same as above.

C Ltd.	No, since its paid-up share capital is less than Rs. 10 crore	Yes, since its paid-up share capital exceeds Rs. 5 crore.	Whole-time Company Secretary
D Ltd.	No, since its paid-up share capital is less than Rs. 10 crore	No, since its paid-up share capital is less than Rs. 5 crore.	None
E Pvt. Ltd.	No, since E Pvt. Ltd. is not a public company	Yes, since its paid-up share capital exceeds Rs. 5 crore.	Whole-time Company Secretary
F Pvt. Ltd.	No, since E Pvt. Ltd. is not a public company and also because its paid-up share capital is less than Rs. 10 crore	No, since its paid-up share capital is less than Rs. 5 crore.	None

**Conclusion:** Every company (whether listed or unlisted, and whether public or private) shall have to appoint a whole-time company secretary if its paid up share capital is Rs. 5 crore or more.

**18. Mr. W has been appointed as a whole-time director in X Ltd., a public company having a paid-up share capital of Rs. 20 crores. He met with an accident which resulted in vacation of office of whole time key managerial personnel. State the provisions of the Companies Act, 2013 with regard to filling of casual vacancy of KMP. What will be the answer if Mr. W had been appointed as whole-time director in a Government Company?**

**Ans.**

**Provisions**

1. As per Section 203, 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

(iii) Chief Financial Officer.

2. As per Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following classes of companies shall have the whole-time key managerial personnel:

(i) Every listed company

(ii) Every other public company having a paid-up share capital of Rs. 10 crore or more.

3. If the office of any whole-time key managerial personnel is vacated, the resulting vacancy shall be filled-up by the Board at a meeting of the Board within a period of 6 months from the date of such vacancy.



4. The provisions of Section 203 and Rule 8 shall not apply to a managing director or Chief Executive Officer or manager and in their absence, a whole-time director of the Government Company if such Government company has not committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92 [Notification No. G.S.R. 463(E) dated 5th June, 2015].

**Analysis**

The office of whole-time director held by Mr. W in X Ltd. is vacated.

Company is covered in the class of companies prescribed by the Central Government, which are required to appoint whole-time key managerial personnel. Therefore, X Ltd. is required to fill the casual vacancy in the office of whole-time key managerial personnel in accordance with the provisions contained in Section 203.

**Conclusion**

The vacancy in the office of Mr. X shall be filled by the Board within a period of 6 months from the date of creation of such vacancy. Such vacancy can be filled up only by passing a resolution in a Board meeting.

However, if the company in which Mr. X was appointed as a whole-time director had been a Government company, there would not be any requirement for such Government company to fill the casual vacancy in the office of Mr. X.

**19. Explaining the provisions of the Companies Act, 2013, examine whether the following companies are required to get the Secretarial Audit conducted:**

**(i) ABC Company Limited is a company listed at Bombay Stock Exchange and has a paid-up share capital of Rs. 40 crore.**

**(ii) DEF Company Limited is a company which has a paid-up equity share capital of Rs. 100 crore but has a turnover of Rs. 100 crore during the financial year 2014-15. The company is not listed on any of the Stock Exchanges. (ICAI, RTP)**

**Ans.**

**Provisions**

Secretarial audit is mandatory if a company satisfies any of the following 3 conditions:

- (a) It is a listed company. or
- (b) It is a public company having a paid-up share capital of Rs. 50 crore or more.
- (c) It is a public company having a turnover of Rs. 250 crore or more.

**Analysis and Conclusion**

(i) ABC Company Ltd. is a listed company. Since secretarial audit is mandatory for every listed company irrespective of its paid-up share capital, ABC Company Ltd. is required to get the secretarial audit conducted.

(ii) DEF Company Ltd. is not a listed company. Also, its turnover is less than Rs. 250 crore. However, it satisfies the condition "It is a public company having a paid-up share capital of Rs. 50 crore or more". Therefore, DEF Company Ltd. is required to get the secretarial audit conducted.

20. M/s. Asian Ltd., a public limited company has a paid-up share capital of Rs. 55 crore.

Answer the following:

- (i) Whether it is obligatory for the company to get the secretarial audit conducted?
- (ii) Will it make any difference if the paid-up share capital of M/s Asian Ltd. is Rs. 35 crore.
- (iii) State as to whether M/s Asian Ltd. is required to appoint whole time key managerial personnel. (ICAI, RTP (Modified))

**Ans.**

**Provisions**

1. As per Section 204 read with Rule 9, secretarial audit is mandatory if a company satisfies any of the following 3 conditions:

- (a) It is a listed company. or
  - (b) It is a public company having a paid-up share capital of Rs. 50 crore or more.
  - (c) It is a public company having a turnover of Rs. 250 crore or more.
2. As per Section 203, every company belonging to such class or classes of companies as may be prescribed shall have the following whole-time key managerial personnel:
- (a) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director:
  - (b) Company Secretary; and
  - (c) Chief Financial Officer.
3. As per Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following classes of companies shall have the whole-time key managerial personnel:
- (a) Every listed company
  - (b) Every other public company having a paid-up share capital of Rs. 10 crore or more.

### Analysis and Conclusion

(i) M/s Asian Ltd. satisfies the conditions "It is a public company having a paid-up share capital of Rs. 50 crore or more".

Therefore, M/s Asian Ltd. is required to get the secretarial audit conducted.

(ii) If the paid-up share capital of M/s Asian Ltd. is Rs. 35 crore, it would not be required to get the secretarial audit conducted unless it is a listed company or its turnover is Rs. 250 crore or more.

(iii) M/s Asian Ltd. satisfies the condition "it is a public company having a paid-up share capital of Rs. 10 crore or more".

Therefore, M/s Asian Ltd. is required to appoint following whole-time key managerial personnel:

- (a) Managing director, or Chief Executive Officer or manager and in their absence, a whole-time director:
- (b) Company Secretary; and
- (c) Chief Financial Officer.

**21. There are four directors in Two Squares Ltd. Mr. Rao being the director in station, has been authorized to draw and endorse cheque or other negotiable instruments on account of the company and also to direct registration of transfer of shares and signing the share certificates etc., Whether as per provisions of Companies Act, 2013, he will be treated as managing director of the company? Also narrate the procedure of appointment of a managing director in a company. (CA (Final) May, 2017)**

**Ans.** As per Section 2(54) of the Companies Act 2013, as discussed below:

1. As per Section 2(54), '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.

As per the Explanation to Section 2(54), the power to do administrative acts of a routine nature when so authorized 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.

2. Companies Act, 2013 does not explain what amounts to 'substantial powers of management'. Hence it depends on the facts and circumstances of the case.

3. Mr. Rao has been authorised to do certain acts on behalf of the company, which are essentially of administrative nature. Because of the mere fact that Mr. Rao has been

exercising certain administrative powers, he cannot be considered as the managing director of the company.

4. Mr. Rao shall be regarded as managing director only if he is entrusted with substantial powers of management. However, no fact given in the question so suggests. Therefore, Mr. Rao cannot be considered as the managing director of the company.

### Procedure for appointment of managing director

#### 1. Appointment as a director first

(a) Appointment should be made as per 152(2) Ordinary resolution by following the procedure laid down under Section 160

(b) Before appointment, disqualification has to be checked under Section 164

(c) Consent of the director has to be obtained under Section 152(5)

#### 2. Approval for appointment of managing director

The terms and conditions of the appointment of a managing director and his remuneration shall be –

(a) approved by the Board of directors at a meeting:

(b) approved at a general meeting held immediately after the approval by the Board; and

(c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part 1 of Schedule V.

As per Rule 7 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the application for obtaining approval of the Central Government shall be made by the company in Form No. MR.2. The application shall be made within 90 days of such appointment.

#### 3. Notice of meetings to contain disclosures

The notice of the Board meeting and of the general meeting called for the purpose of approving the appointment of the managing director shall include –

(a) the terms and conditions of such appointment;

(b) remuneration payable to him; and

(c) such other matters (including interest, of a director or directors in such appointments, if any).

#### 4. Filing of return with the Registrar

Within 60 days of appointment of the managing director, the company shall file with the Registrar a return of appointment in Form No. MR.1.

**22. Prince was appointed as additional director by the Board of directors of John Ltd. on 1st March, 2015. He was simultaneously appointed as the company's managing director by majority voting at the same Board meeting. Referring to the provisions of the Companies Act, 2013, examine the validity of the appointment of Prince as additional director and as the managing director at the same time. What shall be your answer in case Prince failed to get appointed at the company's annual general meeting? (CA (Final) Dec 2015)**

**Ans.**

#### Provisions

1. As per Section 2(54), '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.

2. A person may be appointed as a managing director only if he is already a director of the company.

3. Thus, a person shall first be appointed as a director, and only then he may be appointed

as a managing director. But provisions of Section 196(4) have to be followed

4. As per Section 161(1), a person may be appointed as an additional director only if the articles of the company authorize the Board of directors to appoint the additional directors.

5. As per Section 161(1), an additional director shall hold office upto the next annual general meeting.

6. As per Explanation to Section 152(7), a retiring director means a director retiring by rotation. Since an additional director does not retire by rotation, he is not a retiring director. Therefore, a person appointed as an additional director can continue in office after the next annual general meeting only if he is appointed as a director in the annual general meeting by complying with the provisions of Section 160.

7. As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be –

(a) approved by the Board of directors at a meeting;

(b) approved at a general meeting held immediately after the approval by the Board; and

(c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part 1 of Schedule V.

#### Analysis

1. Prince was appointed as the additional director and then, in the same Board meeting he was appointed as a managing director.

2. There is no requirement that the appointment of a person as an additional director and as a managing director has to be made in separate Board meetings. Thus, the company has not contravened any provision of the Act by appointing Prince as an additional director and also as a managing director in the same Board meeting. But provisions of Section 196(4) have to be followed

#### Conclusion

1. Assuming that the articles of John Ltd. authorize the Board to appoint the additional directors, the appointments of Prince as additional director as well as managing director are valid.

2. If Prince fails to get appointed as a director in the annual general meeting, he shall cease to be the additional director. Also, he shall simultaneously cease to be the managing director since a person cannot be a managing director unless he is a director.

**23. A Complaint was received by the Central Government from some shareholders of a public company that a person had been appointed as the Managing Director of the company without seeking the approval of the Central Government when such approval was required. State as to what action can be taken by the Central Government under the Companies Act, 2013. Also examine the validity of the acts of the Managing Director, if the complaint is found true. (CA (Final) Nov 2011)**

**Ans.**

#### Provisions

As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be –

(a) approved by the Board of directors at a meeting;

(b) approved at a general meeting held immediately after the approval by the Board; and

(c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part 1 of Schedule V.

#### Analysis

1. A Public company has appointed a person as the managing director without seeking the approval of the Central Government, though the approval of the Central Government was required for such appointment.

2. There is contravention of the provisions of Section 196(4).



3. Companies Act, 2013 does not contain any provision with respect to the consequences in such a case.
4. As per Section 439, the Central Government may authorize any person to make a complaint in writing to a Court, and on such a complaint being made the Court shall take cognizance of the offence committed by the company.

### Conclusion

If the Court makes an order that the appointment of the managing director was made without seeking the approval of the Central Government, though the approval of the Central Government was required for such appointment, the consequences shall be as follows:

(a) Since no specific penalty or punishment is provided under the Companies Act, 2013 for contravention of Section 196(4), the provisions of Section 450 shall get attracted, according to which the company shall be punishable with fine up to Rs. 10,000 plus a fine up to Rs. 1,000 per day where the offence is of continuing nature.

(b) The appointment of the managing director shall not be valid.

(c) As per Section 196(5), where an appointment of a managing director, whole-time director or manager is not approved by the company at a general meeting, no prior act done by him shall be deemed to be invalid. By applying the provisions contained in Section 196(5) to the given situation, an inference may be drawn that the acts done by the managing director shall remain valid even though his appointment was made without seeking the approval of the Central Government.

### 24. Case 1

**'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2016.**

**Examine in this connection, can 'X' be appointed for life as Managing Director? (ICAI, Practice Manual)**

OR

**Mr. Pawan is proposed to be appointed as manager for life by the articles of association of Sri Ram private company incorporated on 1st June, 2015. Examine in the light of the Companies Act, 2013, whether such an appointment is valid. (ICAI, RTP)**

### Case II

**'X' was appointed as Managing Director for life by the Articles of Association of a private company incorporated on 1st June, 2005. The articles also empowered 'X' to appoint a successor. 'X' appointed by will 'G' to succeed him after his death. Examine in this connection**

**(a) Can 'G' succeed 'X' as Managing Director after the death of 'X'?**

**(b) Is it possible for the company in general meeting to remove 'X' from his office of directorship during his life time? (ICAI, Practice Manual)**

**Ans.**

### Provisions

1. As per Section 196(2), no company shall appoint or re-appoint any person as its managing director, whole-time director or manager for a term exceeding 5 years at a time. This condition applies to all companies, whether public or private.

2. As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be-

(a) approved by the Board of directors at a meeting;

(b) approved at a general meeting held immediately after the approval by the Board; and

(c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

However, the provisions of Section 196(4) shall not apply to private company if it has not committed any default in filing with the Registrar its financial statements under Section 137 or

annual return under Section 92 (Notification No. G.S.R. 464(E) dated 5th June, 2015].

**Case 1.**

**Analysis**

1. Mr. X was appointed as the managing director for life in accordance with the articles of a private company.
2. This appointment is in contravention of Section 196(2).
3. Also, if the private company which has appointed Mr. X as the managing director has committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92, there would be contravention of Section 196(2) as well as Section 196(4).

**Conclusion**

The appointment of Mr. X as the managing director for life is not valid.

**Case II**

**Analysis**

1. Mr. X was appointed as the managing director for life in accordance with the articles of a private company.
2. This appointment is in contravention of Section 196(2).
3. Also, if the private company which has appointed Mr. X as the managing director has committed any default in filing with the Registrar its financial statements under Section 137 or annual return under Section 92, there would be contravention of Section 196(2) as well as Section 196(4).
4. The appointment of Mr. X as the managing director for life is not valid.
5. Since the appointment of Mr. X as the managing director is not valid, he is not entitled to name Mr. G as his successor for the position of managing director.

**Conclusion**

- (i) Mr. G cannot succeed Mr. X as the managing director, after the death of Mr. X.
- (ii) Had Mr. X been validly appointed as the managing director, it would have been possible for the company to remove him before the expiry of his term, in accordance with the provisions of Section 169.

Section 169 empowers a company (whether public or private) to remove any director (including a managing director) by passing an ordinary resolution and after giving a reasonable opportunity heard to the director concerned. A special notice (in accordance with the provisions of Section 115 has to be given to the company for such removal.

**25. ABC Ltd. wants to appoint a Managing Director for the company. Out of the following persons, who can be appointed as a Managing Director in the company as per the provisions of the Companies Act. 2013?**

- (i) Mr. Rahul, a director of the company having the age of 71 years.
- (ii) Mr. Johnson who been sentenced for a period of 2 months for the conviction of an offence under the Income-tax Act. 1961.
- (iii) Mr. Suraj who is an undischarged insolvent.

**Ans.** The given problem relates to Section 196 and Schedule V, as discussed below:

**Provisions**

1. As per Section 196(3), no company shall appoint or continue the employment of any of the following persons as its managing director, whole-time director or manager:
  - (a) A person who is below the age of 21 years or has attained the age of 70 years.However, a person who has attained the age of 70 years may be appointed as managing director, whole-time director or manager, if-
  - (i) Such appointment is made by passing a special resolution; and
  - (ii) the explanatory statement annexed to the notice shall indicate the justification for appointing such person.

Further, even if no such special resolution is passed, the appointment of a person who has attained the age of 70 years may be made, if –

(i) the votes cast in favour of the motion exceed the votes, if any, cast against the motion; and

(ii) the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company.

(b) A person who is an undischarged insolvent or has at any time been adjudged as an insolvent.

(c) A person who has at any time suspended payment to his creditors or makes, or has at any time made a composition with them.

(d) A person who has at any time been convicted by a court (whether in India or outside India) of any offence and sentenced for a period of more than 6 months.

2. As per Part I of Schedule V, a person shall not be eligible to be appointed as a managing director, whole Time director or manager, without obtaining the approval of the Central Government if he has been sentenced to imprisonment for any period, or to a fine exceeding Rs. 1,000, for the conviction of an offence under any of the 19 Acts specified in Part I of Schedule V.

3. As per Part I of Schedule V, the appointment of a person who has attained the age of 70 years, as a managerial person requires approval' by a special resolution.

4. As per Section 196(4), the terms and conditions of the appointment of a managing director, whole-time director or manager and the remuneration payable to him shall be-

(a) approved by the Board of directors at a meeting;

(b) approved at a general meeting held immediately after the approval by the Board; and

(c) approved by the Central Government, in case such appointment is at variance to the conditions specified in Part I of Schedule V.

#### **Analysis and conclusion**

(i) Mr. Rahul has attained the age of 71 years. Therefore, he can be appointed as a managing director only if 196(4) as above is followed

Further, if Mr. Rahul does not fulfil one or more conditions contained in Part I of Schedule V, his appointment as the managing director shall require the approval of the Central Government.

However, if Mr. Rahul fulfils all the conditions contained in Part I of Schedule V, no approval of the Central Government shall be required.

Whether or not Mr. Rahul fulfils the conditions contained in Part I of Schedule V., his appointment as the managing director shall require –

(a) approval of the Board of directors at a meeting of the Board; and

(b) approval of the members at a general meeting held immediately after obtaining the approval of the Board.

(ii) Mr. Johnson has been sentenced for a period of 2 months for the conviction of an offence under the Income-tax Act, 1961.

Income-tax Act, 1961 is one of the 19 Acts specified in Part I of Schedule V, and so Mr. Johnson cannot be appointed as a managing director in accordance with Part I of Schedule V.

However, Mr. Johnson shall not be disqualified for appointment as a managing director as per Section 196(3), since he has been sentenced to imprisonment for 2 months only, and not for more than 6 months.

Since Mr. Johnson does not fulfil the conditions specified in Part I of Schedule V, he may be appointed as the managing director with the approval of the Central Government. Before making an application to the Central Government, his appointment shall have to be –

(a) approved by the Board of directors at a meeting of the Board; and

(b) approved by the members at a general meeting held immediately after obtaining the approval of the Board.

(iii) Mr. Suraj is an undischarged insolvent. So, he is disqualified for appointment as a managing as per Section 196(13).  
Accordingly, he cannot be appointed as a managing director.

**26. International Technologies Limited, a listed company, being managed by a Managing Director proposes to pay the following managerial remuneration:**

**(i) Commission at the rate of five percent of the net profits to its Managing Director, Mr. Kamal.**

**(ii) The directors other than the Managing Director are proposed to be paid monthly remuneration of Rs. 50,000 and also commission at the rate of one percent of net profits of the company subject to the condition that overall remuneration payable to ordinary directors including monthly remuneration payable to each of them shall not exceed two percent of the net profits of the company. The commission is to be distributed equally among all the directors.**

**(iii) The company also proposes to pay suitable additional remuneration to Mr. Bhatt, a director, for professional services rendered as software engineer, whenever such services are utilized.**

**You are required to examine with reference to the provisions of the Companies Act, 2013 the validity of the above proposals. (CA (Final) May 2016)**

**Ans.**

(i) As per Section 197(1) second proviso, where a company has appointed only one managing director or one whole time director or manager, it can pay a maximum of 5% of the net profits to him.

However, payment of remuneration exceeding 5% of net profits may be made if-

(a) the approval of the company in general meeting is obtained by passing a special resolution; and

(b) where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting by passing a special resolution.

As per Sub-section (6) of Section 197, remuneration may be paid to any director (whether whole time director or managing director or non-executive director) or manager by way of-

(a) Monthly payment; or

(b) specified percentage of net profits; or

(c) partly by monthly payment and partly by specified percentage of net profits.

In the given case, International Technologies Limited intends to pay 5% of the net profits as remuneration to its managing director, Mr. Kamal. Such payment does not exceed the limit specified under Section 197, and is therefore, permissible without requiring any approval by way of a special resolution in the general meeting and without requiring approval of any bank or public financial institution or non-convertible debenture holders or any other secured creditor.

(ii) As per Second Proviso to Sub-Section (1) of Section 197, where a company has employed a managing director or whole-time director or manager, it can pay a maximum of 1% of the net profits as remuneration to its ordinary directors.

However, remuneration exceeding 1% of the net profits may be paid to the ordinary directors if-

(a) the approval of the company in general meeting is obtained by passing a special resolution; and

(b) where the company has defaulted in payment of dues to any bank or public financial

institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining the approval in the general meeting by passing a special resolution.

In the given case, International Technologies Limited intends to pay to its ordinary directors-

- (a) 1% of the net profits as commission; and
- (b) Rs.50.000 per month in addition to commission,

Subject to the condition that total remuneration paid to ordinary directors shall not exceed 2% of the net profits.

Since the total remuneration for all the ordinary directors would exceed 1% of the net profits, such payment of remuneration is permissible if the approval of the members is obtained in the general meeting by passing a special resolution. Further, if International Technologies Limited has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by International Technologies Limited before obtaining the approval of the members in the general meeting by passing a special resolution.

(iii) The given problem relates to Section 197(4) of the Companies Act, 2013.

As per Section 197 (4), remuneration payable to a director for rendering services in any other capacity shall also be covered in 'managerial remuneration'. However, the remuneration paid for rendering services in any other capacity shall not be so included, if-

- (a) the services rendered are of professional nature; and
- (b) the director possesses the requisite qualification for the practice of the profession, as opined by-

(i) the Nomination and Remuneration Committee, if the company is covered under Section 178(1):

(ii) the Board of Directors, if the company is not covered under Section 178(1).

In the given case, Mr. Bhatt, an ordinary director has rendered professional services as a software engineer to International Technologies Limited, and International Technologies Limited intends to pay additional remuneration for Such professional services. Such payment of additional remuneration shall be permissible since the services rendered by Mt. Bhatt are of professional nature. However, the Nomination and Remuneration Committee constituted by International Technologies Limited (or in its absence. the Board of directors) shall have to express an opinion that Mr. Bhatt possesses requisite professional qualifications.

**27. Mr. Smart, a technocrat aged 71 years and reputed to be a specialist in reviewing sick companies is being considered to be appointed as Managing Director of Downhill Industries Limited. The company has been incurring losses for the past several years and its 'effective capital is Rs. 500 crores. Referring to the provisions of the Companies Act, 2013, discuss:**

- (i) Can Mr. Smart be appointed as Managing Director of the company despite being over 70 years of age? If so, what is the process to be followed to enable this?**
- (ii) What is "effective capital" as per Schedule V of the Act?**
- (iii) What is the maximum permissible remuneration under the Companies Act, 2013? (CA (Final) Nov. 2016)**

OR

**Advise M/s Super Specialties Ltd. in respect of appointment of managing director who is more than 70 years of age. (CA (Final) May 2005)**

Ans.



**(i) Appointment of Mr. Smart as the managing director**

As per Section 196(3), a person who has attained the age of 70 years may be appointed as a managing director, whole time director or manager, if-

- (i) such appointment is made by passing a special resolution: and
- (ii) the explanatory statement annexed to the notice shall indicate the justification for appointing such person.

Part I of Schedule V also provides that the appointment of a person who has attained the age of 70 years, as a managerial person requires approval by a special resolution.

In the given case, Mr. Smart has completed the age of 70 years. Thus, the conditions required to be fulfilled for appointment of Mr. Smart as the managing director are

If Mr. Smart fulfils all the conditions contained in Part I of Schedule V. no approval of the Central Government is required and therefore Mr. Smart may be appointed as managing director for 5 years.

The company shall file a return with the registrar in Form No. MR.1 within 60 days of such appointment.

If Mr. Smart does not fulfil one or more of the conditions contained in Part 1 of Schedule V, he may be appointed as a managing director only with the approval of the Central Government.

Whether or not Mr. Smart fulfils the conditions contained in Part of Schedule V, he may be appointed as a managing director (since his age is more than 70 years), if-

- (i) his appointment is made by passing a special resolution; and
- (ii) the explanatory statement annexed to the notice indicates the justification for appointing him.

However, even if no such special resolution is passed, the appointment of Mr. Smart may be made, if-

- (i) the votes cast in favour of the motion exceed the votes, if any, cast against the motion; and
- (ii) the Central Government is satisfied, on an application made by the Board, that such appointment is most beneficial to the company.

**(ii) Meaning of effective capital**

Section IV of Part II of Schedule V defines the term 'effective capital' as follows:

'Effective capital' means the aggregate of the paid-up share capital (excluding share application money or advances against shares): amount, if any, for the time being standing to the credit of share premium account; reserves and surplus (excluding revaluation reserve); long-term loans and deposits repayable after one year (excluding working capital loans, overdrafts, interest due on loans unless funded, bank guarantee, etc.. and other short-term arrangements) as reduced by the aggregate of any investments (except in case of investment by an investment company whose principal business is acquisition of shares, stock, debentures or other securities), accumulated losses and preliminary expenses not written off.

**(iii) Maximum permissible remuneration of Mr. Smart under the Companies Act, 2013**

**(a) Maximum permissible remuneration as per Section 197**

If Downhill Industries Limited has made adequate profits, and it has not employed any whole-time director and manager, then it can pay a maximum of 5% of net profits of that financial year as the remuneration to Mr. Smart.

However, payment of remuneration exceeding 5% of net profits may be made if-

- (i) the approval of the company in general meeting is obtained by passing a special resolution, and

- (ii) where the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior

approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be shall be obtained by the company before obtaining the approval in the general meeting by passing a special resolution.

**(b) Maximum permissible remuneration as per Section II of Part I of Schedule V**

If Downhill Industries Limited has made no profits or its profits are inadequate, it can pay to Mr. Smart a maximum of Rs. 120 lakhs plus 0.01% of the effective capital in excess of Rs. 250 crores.

Thus, the maximum remuneration payable to Mr. Smart can be –

- (i) Rs. 120 lakhs; and
- (ii) 0.01% of Rs. 250 crores, i.e. Rs. 2.5 lakh.

Total: Rs. 122.5 lakh.

However, the remuneration in excess of Rs. 122.5 lakh may be paid if the resolution passed by the shareholders approving the remuneration of Mr. Smart, is a special resolution.

**This remuneration will be in addition to the perquisites that the Mr. Smart will get under Section IV Part II of Schedule V.**

Also,

It is given that Downhill Industries Limited has been making losses continuously during past several years. So, if it is a sick company, the remuneration payable to Mr. Smart can exceed the limits specified in Section II of Part II of Schedule V, if –

- (i) a scheme of revival or rehabilitation has been ordered by the Board for Industrial and Financial Reconstruction;
- and
- (ii) the remuneration is paid for a period of 5 years from the date of sanction of scheme of revival or rehabilitation.

**28. Mr. Weldon was appointed as a director of Esquire Engineering Ltd. with effect from 1st April, 2018. Since the company, namely Esquire Engineering Ltd. wanted to take full advantage of the wisdom and expertise of Mr. Weldon, it offered him remuneration payable on monthly basis. Esquire Engineering Ltd. started paying such remuneration from the date of appointment and continued to do so till 31st March, 2019.**

**On scrutiny of the accounts, it was established that the company, till 31st March, 2019, has paid to Mr. Weldon a total sum of Rs. 1.20 lakhs in excess of the remuneration permissible under Section 197. You are required to state with reference to the provisions of Companies Act, 2013 in respect of recovery and waiver of recovery of the excess remuneration so paid, whether Mr. Weldon can keep the excess remuneration so received and under what conditions. (CA (Final) Nov. 2004, Nov. 2007, Nov. 2009 (Modified))**

**Ans.** The given problem relates to Section 197(9) and (10) of the Companies Act, 2013.

**Provisions**

1. As per Section 197(9), if any director draws or receives, directly or indirectly, by way of remuneration any sum in excess of the limit prescribed under Section 197 or without the approval required under Section 197, he shall refund the excess remuneration drawn by him to the company, within 2 years or such lesser period as may be allowed by the company. Until such sum is refunded, he shall hold the excess remuneration in trust for the company.
2. As per Section 197(10), the company shall not waive the recovery of any excess remuneration drawn or received by a director, unless approved by the company by passing a special resolution within 2 years from the date the sum becomes refundable.
3. But, if the company has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior

approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by the company before obtaining approval of such waiver by passing a special resolution.

### Analysis

1. Rs. 1.20 lakh is the amount of excess remuneration paid to Mr. Weldon by Esquire Engineering Ltd. for the financial year 2018-2019. Mr. Weldon is required to refund to the company this amount of Rs. 1.20 lakh within 2 years or such lesser period as may be allowed by the company. Until such sum is refunded, he shall hold it in trust for the company.
2. Esquire Engineering Ltd. cannot waive the recovery of such excess remuneration unless such waiver is approved by passing a special resolution within 2 years from the date the sum becomes refundable.
3. But, if Esquire Engineering Ltd has defaulted in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor, the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, shall be obtained by if before obtaining approval of such waiver by passing a special resolution.

**29. X was appointed as the managing director of MJV Ltd. on 1<sup>st</sup> April, 2014. One of the terms of appointment was that in the absence of adequacy of profits or if the company had no profits in a particular year, he will be paid remuneration in accordance with Schedule V. For the financial year ended 31<sup>st</sup> March, 2015, the company suffered heavy losses. The company paid him a remuneration of Rs. 50 lacs for the financial year 2014-15.**

**The effective capital of the company is Rs. 150 crores. Referring to the provisions of Companies Act, 2013, as contained in Schedule V. examine the validity of the above payment of remuneration to X. (CA (Final) Nov. 2010 (Modified))**

**Ans.** Where a company does not make any profits or its profits are inadequate, it may pay remuneration to this managing director or whole-time director or manager in accordance with Section II of Part II of Schedule V.

The payment of remuneration as per Section II of Part II of Schedule V is possible if the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. However, in case the company has made such a default, this condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

In the present case, the effective capital of MJV Ltd. is Rs. 150 crores. As per Section II of Part II of schedule V, a company having effective capital of Rs. 100 crore or more, but less than Rs. 250 crore may pay to its managerial person, a maximum remuneration of Rs. 120 lakh per year. Thus, payment of remuneration of Rs. 50 lakh to Mr. X by MJV Ltd. for the financial year 2014-15 is within the limit specified under Section II of Part II of Schedule V, and is, therefore, valid.

**30. Venus Limited is a widely held, listed company having two executive directors who are technocrats. The company has suffered losses in the last four years. The company wants to enhance the remuneration of the executive directors to Rs. 6,00,000 per month from existing remuneration of Rs. 4,00,000. The audited balance sheet as on 31<sup>st</sup> March 2016 reveals that the paid-up capital of the company is Rs. 15 crores accumulated losses Rs. 11 crores and secured long term borrowings Rs. 5 crores. Besides, the company has long term investments of Rs. 11 crores. The company's remuneration committee has recommended the proposal and the company is regular in repayment of its debts.**

**Analyze the proposition with reference to the provisions of the Companies Act, 2013. (CA (Final) Nov. 2017)**

**Ans.**

As per Section 197, where the proposed increase in remuneration is within the limits laid down in item (A) of Section II of Part II of Schedule V (based upon the effective capital of the company), the company is Competent to increase the remuneration of the managerial person.

For the purpose of Section II of Part II of Schedule V, the 'effective capital' shall be computed as follows:

**Following should be added**

- a) Paid-up share capital (excluding share application money or advances against shares)
- b) Securities premium account
- c) Reserves and surplus (excluding revaluation reserve)
- d) Long-term loans
- e) Deposits repayable after 1 year (excluding working capital loans, overdrafts, interest due on loans Unless funded, bank guarantee, etc., and other short-term arrangements)

**Following should be deducted**

- a) Investments (except in the case of an investment company)
- b) Accumulated losses
- c) Preliminary expenses not written off.
- d) The effective capital shall be calculated as on the last day of the financial year preceding the financial year in which the appointment of the managerial person is made.

The effective capital of Venus Limited shall be calculated as on 31.03.2016. Accordingly, the effective capital of Venus Limited is Rs. 15 crore +Rs. 5 crore - Rs. 11 crore - Rs. 11 crore Rs. 2 crore (negative).

As per Item (A) of Section II of Part II of Schedule V, in the absence of inadequacy of profits, a company having negative effective capital or effective capital of less than Rs. 5 crore may pay a maximum of Rs. 60 lakh per financial year as the managerial remuneration to each managerial person. Thus, based upon the effective capital (viz. negative effective capital of Rs. 2 crore). Venus Limited can pay a maximum of Rs. 60 lakh to each of the two executive directors.

However, the remuneration in excess of Rs. 60 lakh may be paid, if the resolution passed by the shareholders is a special resolution. Thus, Venus Limited shall be entitled to pay Rs. 72 lakh each to the two executive directors, if it is so authorised by the shareholders by passing a special resolution.

**Conditions to be satisfied for payment of remuneration as per Sec II of Part II of Schedule V**

The payment of remuneration of Rs. 72 lakh each to the two executive directors is possible only if the following conditions are satisfied:

(a) The payment of remuneration is approved by a resolution passed by the Board and, in the case of a company covered under sub-section (1) of Section 178 also by the Nomination and Remuneration Committee.

This condition has been satisfied as the given problem states that company's remuneration committee has recommended the proposal to increase the remuneration.

(b) The payment of remuneration as per Section II of Part II of Schedule V is possible if the company has not committed any default in payment of dues to any bank or public financial institution or non-convertible debenture holders or any other secured creditor. However, in case the company has made such a default, this condition shall be deemed to be complied with if the company obtains the prior approval of the bank or public financial institution concerned or the non-Convertible debenture holders or other secured creditor, as the case may be, before obtaining the approval in the general meeting.

This condition has been satisfied as the given problem states that the company is regular in repayment of its debts.

(c) A special resolution has been passed at the general meeting of the company authorising the payment of remuneration.

Such special resolution shall remain valid for a period not exceeding 3 years.

(d) A statement shall be given to the shareholders along with the notice calling the general meeting. The statement shall contain the following information:

- (i) General Information
- (ii) Information about the appointee
- (iii) Other information
- (iv) Disclosures.

**31. CTC Limited is an unlisted public company having a paid up capital of Rs. 100 crores as on 31st March, 2017. The company made a turnover of Rs. 300 crores for the financial year ended 31st March, 2017. The Articles of Association of the company provides for payment of sitting fee to Directors for each Board Meeting/Committee thereof subject to a maximum of Rs.40,000 per meeting. The Board of Directors is comprised of Independent Directors and Women Directors also. The Company is having 7 directors in its Audit Committee. Shri PKV, working as Financial Advisor of the company, was designated as Chief Financial Officer from 1st April, 2015.**

**He retired from service on superannuation on 31st March, 2016. He is in receipt of monthly pension of Rs. 80,000 from the company. It is proposed to appoint Shri PKV as Independent Director of the Company. The Board of Directors proposes to fix sitting fee of Rs. 50,000 per meeting to Independent Director and Rs. 30,000 per meeting to Woman Director, taking into consideration their experience and qualification.**

**In the light of the provisions of the Companies Act, 2013, advise the Board of Directors in the following matters:**

- (1) Appointment of Mr. as Independent Director.**
- (2) Fixing sitting fee of Rs. 50,000 to Independent Director and Rs. 30,000 to Woman Director.**
- (3) Minimum number of Independent Directors.**
- (4) Maximum sitting fee to a Director.**

**Assuming CTC Ltd. is a Government Company, what will be your advice in the matter of appointment of Mr. PKV as Independent Director. (CA (Final May 2018))**

**Ans.**

**Provisions**

1. As per Section 149(4) read with Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014, the following class (es) of companies shall have at least 2 directors as independent directors:

- (i) Public Companies having paid up share capital of Rs. 10 crore or more.
- (ii) Public Companies having turnover of Rs. 100 crore or more.
- (iii) Public Companies which have, in aggregate, outstanding loans, debentures and deposits, exceeding Rs. 50 crore.

However, the following classes of unlisted public companies shall not be required to have any independent director:

- (a) A joint venture
- (b) A wholly owned subsidiary
- (c) A dormant company as defined under Section 455 of the Act.

The paid-up share capital or turnover or outstanding loans, debentures and deposits, as the case may be, existing on the last date of latest audited financial statements shall be taken into account.



Further, if the company covered in any of the prescribed class(es) of companies, is required to appoint a higher number of independent directors due to composition of its audit committee, such higher " number of independent directors shall be applicable to it.

2. As per Section 177, the Audit Committee shall consist of a minimum of 3 directors, and the majority of members of the Audit Committee shall be the independent directors.

3. As per Section 149 (6), a person can be appointed as an independent director only if he is not a managing director, whole-time director or nominee director and who satisfies the criteria given under clauses (a) to (f) of sub-Section (6) of Section 149.

4. As per Section 149(6)(c), a person cannot be appointed as an independent director if he has or had any pecuniary relationship (other than remuneration as such director or having transaction not exceeding 10% of his total income or such amount as may be prescribed) with the company, its holding, subsidiary or associate company, or their promoters, or directors, during the 2 immediately preceding financial years or during the current financial year.

5. As per Section 149(6) (e) (i), a person cannot be appointed as an independent director if he or any of his relatives holds or has held the position of a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the 3 financial years immediately preceding the financial year in which he is proposed to be appointed. However, in case of a relative who is an employee, this restriction shall not apply for his employment during preceding 3 financial years.

6. As per Section 2(51), Chief Financial Officer is a Key Managerial Personnel.

7. AS per Section 197(5), the amount of sitting fees shall not exceed such amount as may be prescribed.

8. As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014-

(a) A Company may pay sitting fees to a director for attending meetings of the Board or committees thereof.

(b) The amount of sitting fees shall be such as may be decided by the Board of directors of the company.

(c) The amount of sitting fees shall not exceed Rupees 1 lakh per meeting of the Board or any committee of the Board.

(d) The amount of sitting fees payable to Independent Directors and Women Directors shall not be less than the sitting fees payable to other directors.

### **Analysis and Conclusion**

#### **(1) Appointment of Mr. PKV as Independent Director.**

Mr. PKV cannot be appointed as an independent director since-

(i) Mr. PKV is not qualified for appointment as an independent director as per Section 149(6)(c) as he had pecuniary relationship with the company viz. CTC Limited) during the immediately preceding financial year: and

(ii) Mr. PKV is not qualified for appointment as an independent director as per Section 149(6)(e) (i), as he himself held the position of a key managerial personnel (viz. Chief Financial Officer) of the company (viz. CTC Limited) in the preceding financial year.

#### **(2) Fixing sitting fee of Rs. 50,000 to Independent Director and Rs. 30,000 to Woman Director.**

(i) Fixing sitting fees of Rs. 50,000 for independent directors is valid since it is not less than the sitting fees payable to other directors (viz. Rs. 40,000), provided the articles of CTC Limited are amended by passing special resolution to provide that sitting fees up to Rs. 50,000 may be paid to independent directors.

Fixing sitting fees of Rs. 30,000 for woman director is not valid since it is less than the sitting fees

(ii) payable to other directors (viz. Rs. 40,000). In other words, the sitting fees for woman director shall be Rs. 40,000 or more. However, the articles can prescribe different sitting fee for different directors

**(3) Minimum number of Independent Directors.**

CTC Limited is an unlisted public company. The paid up capital of CTC Limited is Rs. 100 crore (i.e. the criterion of paid up capital of Rs. 10 crore or more is satisfied). The turnover of CTC Limited is Rs. 300 crore (i.e. the criterion of turnover of Rs. 100 crore or more is satisfied). Rule 4 of the Companies (Appointment and Qualification of Directors) Rules, 2014 is attracted if a public company satisfies any 1 or more of the 3 criteria contained in Rule 4. Since CTC Limited has satisfied 2 criteria contained in Rule 4, it is required to appoint independent directors in accordance with said Rule 4.

As per Rule 4, a company shall have at least 2 independent directors. However, CTC Limited has 7 directors in the Audit Committee, and as per Section 177, the majority of its directors (i.e. 4 directors shall be independent directors. Since a higher number of independent directors (i.e. 4 directors) are required to be independent directors due to the (4) composition of Audit Committee. CTC Limited shall have to appoint at least 4 directors as independent directors.

**(4) Maximum sitting fee to a Director.**

As per Rule 4 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the amount of sitting fees shall not exceed Rupees 1 lakh per meeting of the Board or any committee of the Board. However, at present, the articles of CTC Ltd. provide for a maximum of Rs. 40,000 per meeting. Thus, CTC Ltd. can pay only up to Rs. 40,000 per meeting. However, if the articles of CTC Ltd. are amended by special resolution to provide that sitting fees up to Rs. 1 lakh per meeting may be paid, it shall be entitled to pay up to Rs. 1 lakh per meeting.

Rule 4 further states that the amount of sitting fees shall be such as may be decided by the Board of directors of the company. Accordingly, any increase in sitting fees shall require a resolution of the Board.

**(5) Appointment of Mr. PKV as independent director if CTC Limited were a Government company**

Even if CTC Ltd. were a Government company, Mr. PKV would have been disqualified for appointment as independent director, since exemption vide Notification No. G.S.R. 463(E) dated 5th June, 2015 is available w.r.t. condition of pecuniary relationship with the company', but no exemption is available to a person who held the position of key managerial person in the company.

**32. Guarantee commission has been paid to one of the non-executive directors for having guaranteed the term loans obtained from a financial institution. Examine whether the payment of such guarantee commission to non-executive directors (directors who are neither in the whole-time employment of the company nor managing director) is in accordance with the provisions of the Companies Act, 2013. (CA (Final) Nov 03, May 2010)**

OR

**Whether guarantee commission paid to a director is remuneration to director when the amount of such commission exceeds the limit prescribed under Section 197 of the Companies Act, 2013. (CA (Final) May 2008)**

OR

**A company wants to pay guarantee commission to directors for guaranteeing overdraft/cash credit limits obtained by the company. Will this be termed as remuneration under Section 197 of the Companies Act, 2013 and, if so, will it come under overall ceiling of managerial remuneration under Section 197 of the Act? (CS (Final) June 1997; June 1998; June 2001)**

**Ans.** Payments made to the directors need not necessarily be managerial remuneration. If a director of a company gives guarantee on the behalf of the company, he has given personal

service to the company other than the one normally required of a director.

In **Suessen Textile Bearings Ltd. v Union of India (1984) 55 Comp Cas 492**, it was held that guarantee commission paid by a company to its director for standing surety for loans and credit facilities taken by the company was not remuneration for services rendered within the meaning of Section 197. The director giving a guarantee does not render manual, clerical, technical, supervisory or administrative service. He gets the commission for the risk which he bears and that has nothing to do with his directorship. Guarantee commission received by the director is for personal liability which he undertakes.

Therefore, when a director guarantees an advance made by a bank, he renders service to the company in his individual capacity and not in his capacity as a director. In view of the above, the commission payable by the company to its directors for guaranteeing the overdraft and cash credit limits obtained by the company cannot be treated as remuneration payable to the directors for services rendered by them within the meaning of Section 197. Therefore, such commission will not form part of the managerial remuneration and not be subject to the provisions of Section 197 of the Act.

Accordingly, guarantee commission (for having guaranteed the term loans obtained from a financial institution) can be paid to a non-executive director and such payment shall be in addition to the remuneration to which he is entitled under the Companies Act, 2013.

**33. Arc Ltd. has two managing directors, three whole-time directors, and two part-time directors. Referring to the provisions of the Companies Act, 2013, state the extent to which the managing directors, whole-time directors and part-time directors can be paid remuneration, when the company has sufficient profits.**

**Further, what advice would you render when company's profits are inadequate? Can the company continue to make payment of remuneration? (CA (Final) Dec 2015)**

**Ans.** We need to refer to Section 197 and Section II of Part II of Schedule V of the Companies Act, 2013.

1. As per Section 197, a company having profits may pay remuneration to its directors and manager as follows:

(a) Where the company has appointed 2 or more managing directors and whole-time directors, the remuneration payable to them shall not exceed 10% of the net profits of the company for that year.

(b) Where the company has employed one or more managing director, whole time director or manager, the remuneration payable to all the non-executive directors shall not exceed 1% of net profits of the company for that year. A non-executive director means a director who is neither a managing director nor a whole time director. Non-executive directors are also termed as 'part time directors'.

(c) The total remuneration payable to all the directors and manager shall not exceed 11% of net profits of the company for that year.

2. Where a company has no profits or its profits are inadequate, the company may pay remuneration to its managing directors, whole time directors or manager, such remuneration as is within the limits specified under Section II of Part II of Schedule V. As per Section II of Part II of Schedule V, the remuneration is based on the effective capital, of the company.

3. In the given case, Arc Ltd. can pay a maximum of 10% of net profits to the 2 managing directors and 3 whole time directors. The payment of remuneration to the 2 part time directors shall not exceed 1% of net profits.

4. In case the profits are inadequate, Arc Ltd. can pay remuneration to the 2 managing directors and 3 whole time directors in accordance with Section II of Part II of Schedule V depending upon its effective capital. Remuneration as per Section II of Part II of Schedule V cannot be paid to the 2 part time directors.

5. In addition to remuneration based on profits or Section II of Part II of Schedule V, Arc Ltd.

can pay sitting fees to its directors, but sitting fees shall not exceed Rs. 1 lakh per Board meeting for each director.

**34. Mr. Balu is a CEO in a public company. State whether the limits on managerial remuneration under Section 197 of the Companies Act 2013 and Schedule V apply to Mr. Balu. (CMA (Final) Dec. 2018)**

**Ans.** Section 197 contains certain limits with respect to remuneration of directors (including managing director and whole-time director) and manager. However, these limits do not apply to other key managerial personnel, viz. the Chief Executive Officer (CEO), the Chief Financial Officer (CFO) and the Company Secretary (CS).

Similarly, Schedule V contains certain limits with respect to remuneration of managing director, whole time director and manager. However, these limits also do not apply to other key managerial personnel, viz. the Chief Executive Officer (CEO), the Chief Financial Officer (CFO) and the Company Secretary (CS).

Thus, the limits on managerial remuneration as contained in Section 197 and Schedule V shall not apply to Mr. Balu.

**35. Excel limited is a listed company with a turnover of Rs. 60 crores in the FY 2016-2017. The company appoints Ms. R as the woman director on 1<sup>st</sup> March, 2017. Ms. R is already a director in twelve companies including ten public companies. Also, Ms. R is a chartered accountant in practice.**

**Further, Ms. R, is a director in Supreme Ltd. where she is acting in a professional capacity. Since lots of proposals for the holding of directorship in various Companies are lined up before Ms. R, so in order to retain her, Remuneration and Nomination Committee proposed to enhance the remuneration of Ms. R from Rs. 4 Lac per month to Rs. 6 Lac per month. However, Supreme Limited was running in losses for last 2 years.**

**Evaluate, in the light of the given facts, the following situations with reference to the provisions of the Companies Act, 2013.**

**(1) The validity of appointment of Ms. R in Excel Limited.**

**(2) Analysis the proposition of enhancement of the remuneration of Ms. R in Supreme Ltd. (ICAI, RTP, May 2018)**

**Ans.**

**(i) Validity of appointment of Ms. R as a woman director in Excel Limited**

1. As per Section 165-

(a) No person shall hold office as a director (including alternate directorships) in more than 20 companies, whether public or private.

(b) No person shall hold office as a director (including alternate directorships) in more than 10 public companies (including any private company which is either a holding company or a subsidiary company of a public company).

2 As per Section 164, a person shall be disqualified for appointment as a director in any company if he has not complied with the requirement of Section 165, as stated in Point (1) above.

3. In the given case, Ms. R is already a director in 10 public companies. Her appointment as a woman director in Excel Limited would result in holding of 11 directorships in public companies, which is not permitted in view of the provisions contained in Section 164 and Section 165. Accordingly, appointment of Ms. R as a woman director in Excel Limited is not valid.

**(ii) Enhancement of remuneration of Ms. R in Supreme Ltd.**

Section II of Part II of Schedule V empowers a company to pay remuneration to its whole-time director, managing director or manager, even in case of inadequacy of profits or in case of a loss. As per Section II of Part II of Schedule V, the remuneration to a whole-time



director depends upon the effective capital of the company. In case of a company having an effective capital of less than Rs. 5 crore, the remuneration payable to whole time director shall not exceed Rs. 60 lakh per year.

In the given case., Supreme Ltd. has suffered losses during the last 2 years. Assuming that Supreme Ltd. has also incurred loss during the financial year for which remuneration is to be paid to Ms. R, and further assuming that Ms. R is a whole time director, managing director or manager in Supreme Ltd., the company (i.e. Supreme Ltd.) can pay remuneration to Ms. R in accordance with Section II of Part I of Schedule V.

The effective capital of Supreme Ltd. has not been given.

If it is assumed that the effective capital of Supreme Ltd. is less than Rs. 5 crore, then, as per Section II of Part II of Schedule V, Supreme Ltd. can pay a maximum of Rs. 60 lakh per year to Ms. R. However, remuneration in excess of Rs. 60 lakh per year may be paid if the resolution passed by the shareholders approving the remuneration, is a special resolution. Thus, remuneration of Ms. R can be increased from Rs. 4 lakh per month to Rs. 6 lakh per month only if the resolution passed by the shareholders approving the remuneration is a special resolution.

If it is assumed that the effective capital of Supreme Ltd. is Rs. 5 crore or more, then, as per Section II of Part I of Schedule V, Supreme Ltd. can increase the remuneration of Ms. R from Rs. 4 lakh per month to Rs. 6 lakh per month, and the approval of increase in such remuneration from the shareholders shall require an ordinary resolution.

**36. Mr. Doubtful was appointed as the managing director of Carefree Industries Ltd. for a period of five years with effect from 1.4.2015 on a salary of Rs. 12 lakhs per annum with other perquisites. The Board of Directors of the company, on coming to know of certain questionable transactions, terminated the services of the managing director from 1.3.2018. Mr. Doubtful termed his removal as illegal and claimed compensation from the company. Meanwhile the company paid a sum of Rs. 5 lakhs on ad hoc basis to Mr. Doubtful pending settlement of his dues. Discuss whether:**

**(i) The company is bound to pay compensation to Mr. Doubtful, and, if so, how much.**

**(ii) The company can recover the amount of Rs. 5 lakhs paid on the ground that Mr. Doubtful is not entitled to any compensation, because he is guilty of corrupt practices.  
(CA (Final) May 2001, Nov. 2004 (Modified))**

**Ans.** As per Section 202 –

Compensation can be paid only to a managing director or whole-time director or manager. The compensation payable shall not exceed the remuneration which he would have earned if he had been in office for the unexpired term or 3 years, whichever is shorter.

Where the director has been guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company, he shall not be paid any compensation.

#### **Analysis and conclusion**

(i) The company is not bound to pay compensation to Mr. Doubtful if he has been found guilty of any fraud or breach of trust. However, it is not proper for the company to withhold the payment of compensation on the basis of allegations, unless there is a proper finding on the involvement of Mr. Doubtful in corrupt practices.

If it is found that Mr. Doubtful was not guilty of fraud or breach of trust, he shall be entitled to compensation. The compensation payable to him shall not exceed Rs. 25 lakhs calculated at the rate of Rs. 12 lakhs per annum for unexpired period of 25 months.

(ii) As per the decision in **Bell v Lever Bros [1932] AC 161 House of Lords**, the compensation of Rs. 5 lakh already paid by the company to Mr. Doubtful cannot be recovered back if the company later comes to know that Mr. Doubtful was guilty of serious breaches of duty and corrupt practices which would have entitled the company to end the employment of Mr. Doubtful without any compensation. It was also held that the managing director was under



no obligation to disclose to the company the breach of duty so as to give an opportunity to the company to remove him without paying any compensation.

**37. Mr. X was appointed as the Managing Director of ABC Ltd. for a period of 5 years w.e.f. 1st January, 2006. Since his work was found unsatisfactory, his services were terminated from 15th August, 2007 by paying compensation for the loss of office as provided in the agreement entered into by the company. Later, the company discovered that during his tenure of office Mr. Y was guilty of many corrupt practices and that he should have been removed without payment of compensation. Advise the company whether the services of the Managing Director can be terminated without payment of compensation as provided in the agreement and whether the company can recover the amount already paid to Mr. X by filing a suit.**

**Ans.** As per Section 202-

Compensation can be paid only to a managing director or whole-time director or manager. The compensation payable shall not exceed the remuneration which he would have earned if he had been in office for the unexpired residue of his term or for 3 years, whichever is shorter. Where the director has been guilty of fraud or breach of trust or gross negligence in the conduct of the affairs of the company, he shall not be paid any compensation.

In the given case, the company removed its managing director and paid compensation to him. Afterwards, the company discovers that the managing director was guilty of corrupt practices, and that he could have been removed without paying any compensation.

The facts of the given case are exactly similar to the facts in **Bell v Lever Bros [1932] AC 161 House of Lords**. In this case, Bell was employed by Lever Bros for a period of 5 years. Afterwards, the company removed him by paying compensation of £30.00. However, Lever Bros later came to know that Bell was guilty of serious breaches of duty and corrupt practices which would have entitled Lever Bros to end his employment without any compensation. Accordingly, Lever Bros brought an action against Bell for recovery of compensation on the ground that compensation was paid by mistake. It was held that compensation once paid cannot be recovered back by the company. Also, the managing director was under no obligation to disclose to the company the breach of duty so as to give an opportunity to the company to remove him without paying any Compensation.

Thus, the answers to the questions asked in the given problem are as follows:

(a) If compensation has already been paid to Mr. X by ABC Ltd., the compensation cannot be recovered back, as per the decision in Bell v Lever Bros.

(b) If the breach of duty and corrupt practices of Mr. X come to light at the time when his services are terminated and before he is paid the compensation, the company is not liable to pay any compensation to him.

**38. Mr. Gopi is the managing director of LGB Limited. The company wants to vacate the post of managing director on March 31, 2018 and appoint Mr. Lakshmikant in place of Mr. Gopi due to hands on experience and better track records. The tenure of appointment of Mr. Gopi is upto 30<sup>th</sup> June, 2022 with the condition that he will get compensation in case of early vacation of his office due to the company's requirements. Mr. Gopi was drawing following remuneration during the last five financial years:**

Financial Year	Remuneration (Rs. in lakhs)
2013-14	30
2014-15	35
2015-16	40
2016-17	45
2017-18	50

**Mr. Gopi approaches you to know the amount of compensation he will be eligible to get from LGB Limited as per the provisions of the Companies Act, 2013. Advise.**

**What will be your answer if a person is only an ordinary director but neither the managing director nor a whole-time director nor a manager of the company? (CA (Final) Nov. 2018)**

**Ans.** As per Section 202-

Compensation for loss of office can be paid only to a managing director or whole time director or manager.

The compensation payable shall not exceed the remuneration which he would have earned if he had been in office for the unexpired term or for 3 years, whichever is shorter.

The compensation shall be based on the 'average remuneration'. Average remuneration shall be calculated taking into account the remuneration actually earned by the director/manager during 3 years immediately preceding the date of cessation of office.

**Analysis and conclusion**

**(i) Maximum amount of compensation to which Mr. Gopi is entitled**

Average remuneration drawn by Mr. Gopi during 3 years immediately preceding the date of cessation office = (Rs. 40 lakh + Rs. 45 lakh + Rs. 50 lakh) /3 = Rs. 45 lakh.

The unexpired residue of term of office of Mr. Gopi (as on 31.3.2018) was 4 years and 3 months. The compensation shall be admissible for unexpired term (i.e. 4 years and 3 months) or 3 years, whichever is lower. The lower period is 3 years.

Thus, the maximum amount of compensation to which Mr. Gopi is entitled Rs. 45 lakh x3 = Rs. 1 crore and 35 lakhs.

**(ii) Whether Mr. Gopi has the right to claim compensation, if he had been an ordinary director?**

Had Mr. Gopi been an ordinary director, he would not have been entitled to any compensation, since compensation can be paid only to a managing director or whole-time director or manager, i.e. Section 202 prohibits payment of compensation to an ordinary director.

**39. Mr. Raman is a Managing Director of X company. He resigns from his office as a result of amalgamation of the X company with the other body corporate. Further he is appointed as the Managing director of the body corporate resulting from the amalgamation. State in the light of the Companies Act, 2013 whether in this situation, is company liable towards Managing Director to compensate for the loss of office after his resignation? (ICAI, (Revision Test Paper, May 2016)**

**Ans.**

**Provisions**

1. Compensation can be paid to a managing director or whole-time director or manager.
2. However, no compensation can be paid to a managing director or whole-time director or manager where such person resigns because of the reconstruction or amalgamation of the company and is appointed as managing director, manager or other officer of the reconstructed or amalgamated company.

**Analysis and conclusion**

1. Mr. Raman, the managing director of X Company, resigned from his office as a result of amalgamation of X Company with a body corporate. Mr. Raman is appointed as the managing director of the body corporate resulting from the amalgamation.
2. The provisions contained in Section 202 prohibiting the payment of compensation are attracted in this case. Therefore, the company is neither bound nor entitled to make payment of any compensation to Mr. Raman.

40. Explain the concept of KMP (Key Managerial Person) as introduced by the Companies Act 2013. Explain the classes of companies which are required to appoint whole time Key Managerial Person under the provision of the said Act. (CA (Final) May 2015)

OR

What are the legal requirements to be complied with by a public company where it proposes to appoint a person as a managing director without remuneration in accordance with the conditions specified in Schedule V to the Companies Act, 2013 when he is already holding position of a managing director in a private company? (CA (Final) May 1995)

OR

A, the managing director of Z Ltd. is also appointed as the managing director of Y Ltd., wants to draw remuneration from both the companies, Advise. (CS (Final) June 1999; Dec. 1997)

OR

ABC Limited, an unlisted company having a paid up share capital of Ten crores of Rupees during the preceding financial year has appointed Shri X, a fellow member of the Institute of Chartered Accountants of India as Chief Financial Officer of the company who is appointed as Key Managerial Personnel under Section 203 of the Companies Act, 2013. Shri X is also a fellow member of the Institute of Company Secretaries of India. The Company Secretary post has become vacant. In order to reduce the administrative expenses, the company proposes to appoint Shri X as Company Secretary in addition to Chief Financial Officer post. Whether the proposal is legally valid under the provisions of the Companies Act, 2013? (CA (Final) May 2018)

**Ans.**

**Provisions**

1. As per Section 203, 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

(iii) Chief Financial Officer.

2. As per Rule 8 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014, the following classes of companies shall have the whole-time key managerial personnel;

(a) Every listed company

(b) Every other public company having a paid-up share capital of Rs. 10 crore or more.

**Analysis and Conclusion**

1) The paid-up share capital of ABC Limited is Rs. 10 crore, and so it is covered by the provisions contained in Rule 8.

2) Since Rule 8 applies to ABC Limited, it is required to appoint 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

iii. Chief Financial Officer.

3) Shri X, who is a fellow member of the Institute of Chartered Accountants of India has been appointed as the Chief Financial Officer of ABC Limited.

4) Shri X is also a fellow member of the Institute of Company Secretaries of India.

5) A person who is member of the Institute of Company Secretaries of India is qualified to be appointed as the Company Secretary.

6) If Shri X is also appointed as the Company Secretary, Shri X would simultaneously hold the

position of Chief Financial Officer as well as the position of Company Secretary of ABC Limited.

- 7) Applying reasonable interpretation, the words 'whole-time' as well as 'and' used in Section 203 read with Rule 8 imply that the Company is required to appoint one person as Managing director, or Chief Executive Officer or manager or whole-time director, appoint another person as Company Secretary and appoint some other person as the Chief Financial Officer. In simple words, for the three positions specified in Rule 8, there has to be three different individuals. It would not be reasonable / logical to draw an interpretation that one person can be appointed at all the three positions since in such a case he would not be able to fulfil the responsibilities and duties attached with these three positions.
- 8) Thus, if a person who already holds the position of Chief Financial Officer of the company is also appointed as the Company Secretary of the company, it does not amount to compliance of Section 203 read with Rule 8.
- 9) The proposal of ABC Limited to appoint Shri X as the Company Secretary, when he is already holding the office of Chief Financial Officer, is not valid since it would result in non-compliance of the provisions of Section 203 read with Rule 8.

**41. Mr. AMIT is the managing director of ANJ Limited, which is a non-government public company. The directors of CHH Limited decided to appoint Mr. AMIT as the managing director of the company, even though Mr. AMIT decided not to vacate his place of office of managing director of ANJ Limited. A notice for a Board meeting specifying a resolution containing the proposal of appointment of Mr. AMIT was served to all the eligible directors of CHH Limited. Out of eight directors of the company, six directors attended the meeting and out of them four directors gave consent to the resolution, one director voted against the said appointment and another director abstained from voting. The Board of directors seek your opinion whether Mr. AMIT can be appointed as the managing director of the company in this situation. Referring to the applicable provisions of the Companies Act, 2013, advise them. (CA (Final) May 2018)**

**Ans.**

**Provisions**

1. As per Section 203, a company may appoint or employ a person as its managing director if such person is already the managing director or manager in any other company, subject to the fulfilment of the following conditions:

- (a) Such person is the managing director or manager of one, and of not more than one, other company;
- (b) The appointment or employment is made or approved by a resolution passed at a meeting of the Board with the consent of all the directors present at the meeting; and
- (c) Specific notice of such meeting, and of the resolution to be moved thereat, has been given to all the directors then in India.

**Analysis**

1. The Board of directors of CHH Limited intends to appoint Mr. Amit as the managing director of the company. Mr. Amit is already the managing director of ANJ Limited. Since, Mr. Amit is the managing director of only one other company, the requirement of Section 203, that the person should not be managing director of more than one other company, has been fulfilled.
2. The requirement of Section 203, that specific notice of the Board meeting and of the resolution to be moved thereat, has been fulfilled.
3. In such Board meeting, 6 out of total 8 directors were present. The quorum, as required by Section 174 (1.e. 3 directors, in this case), was present. The proposal for appointment of Mr. Amit as managing director was supported by 4 directors, and 1 director voted against the resolution, and 1 director abstained from voting.

4. As per Section 203, appointment of Mr. Amit as the managing director requires voting in favour by all the 6 directors present in the Board meeting. However, all the 6 directors have not voted in favour of his appointment. Therefore, the requirement of Section 203 has not been fulfilled

**Conclusion**

Since the appointment of Mr. Amit as the managing director has not been approved in accordance with the requirements of Section 203 (viz. approval by all the 6 directors present in the Board meeting), the proposal for his appointment has failed. Accordingly, Mr. Amit cannot be appointed as the managing director of CHH Limited.