SIMPLIFIED INDIAN LAWS

GENERAL LAWS

1. Arbitration and Conciliation Act, 1996
2. Cooperative Societies Act
3. Indian Contract Act
4. Indian Partnership Act, 1932
5. Indian Stamp Act, 1899
6. Indian Trusts Act, 1882
7. Information Technology Act, 2000
8. Limitation Act
9. Multi State Cooperative Societies Act, 2002
10. Negotiable Instruments Act, 1881
11. Registration Act, 1908
12. Sale of goods Act, 1930
13. Societies Registration Act, 1860
14. Specific Reliefs Act, 1963
15. Transfer of Property Act, 1882

ARBITRATION AND CONCILIATION ACT 1996

Purpose of Arbitration Act is to provide quick redressal to commercial dispute by private Arbitration. Quick decision of any commercial dispute is necessary for smooth functioning of business and industry. Internationally, it is accepted that normally commercial disputes should be solved through arbitration and not through normal judicial system. Hence, the need of Alternate Dispute Resolution. (ADR). There are four methods of ADR - negotiation, mediation, conciliation and arbitration. 'Negotiation' is cheapest and simplest method. If it does not work, mediation through a mediator can be tried. If it does not work, conciliation and arbitration will be useful. Arbitration Act makes provision for conciliation and arbitration as ADR mechanisms. An arbitrator is basically a private judge appointed with consent of both the parties. Object of arbitration is settlement of dispute in an expeditious, convenient, inexpensive and private manner so that they do not become the subject of future litigation between the parties.

Scheme of the Act - The Act is divided in to following parts : (*a*) Part I - Domestic arbitration. (*b*) Part II - Enforcement of foreign awards. (*c*) Part III - Conciliation procedures. (*d*) Part IV - Supplementary provisions. (*e*) First Schedule - Convention on recognition and enforcement of foreign arbitral award as per New York convention (*f*) Second Schedule - Protocol on Arbitration clauses (*g*) Third Schedule - Convention on the execution of foreign arbitral awards as per Geneva Convention.

LAW BASED ON UNCITRAL MODEL LAW - The present Act is based on model law drafted by United Nations Commission on International Trade Laws (UNCITRAL), both on domestic arbitration as well as international commercial arbitration, to provide uniformity and certainty to both categories of cases.

MATTERS NOT REFERABLE TO ARBITRATION - Certain matters which are not arbitrable are - * Suits for divorce or restitution of conjugal rights * Taxation * Non-payment of admitted liability * Criminal matters.

Arbitration Agreement - The foundation of an arbitration is the arbitration agreement between the parties to submit to arbitration all are certain disputes which have arisen or which may arise between them. Thus, the provision of arbitration can be made at the time of entering the contract itself, so that if any dispute arises in future, the dispute can be referred to arbitrator as per the agreement. It is also possible to refer a dispute to arbitration after the dispute has arisen. Arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The agreement must be in writing and must be signed by both parties. The arbitration agreement can be by exchange of letters, document, telex, telegram etc. [section 7].

Court must refer the matter to arbitration in some cases - If a party approaches court despite the arbitration agreement, the other party can raise objection. However, such objection must be raised ***before*** submitting his first statement on the substance of dispute. Such objection must be accompanied by the original arbitration agreement or its certified copy. On such application the judicial authority *shall*refer the parties to arbitration. Since the word used is “shall”, it is mandatory for judicial authority to refer the matter to arbitration. [section 8]. However, once first statement to court is already made by the opposite party, the matter has to continue in the court. Once an application is made by other party for referring the matter to arbitration, the arbitrator can continue with arbitration and even make an arbitral award.

APPOINTMENT OF ARBITRATOR - The parties can agree on a procedure for appointing the arbitrator or arbitrators. If they are unable to agree, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator who will act as a presiding arbitrator. [section 11(3)]. If one of the party does not appoint an arbitrator within 30 days, or if two appointed arbitrators do not appoint third arbitrator within 30 days, the party can request Chief Justice to appoint an arbitrator. [section 11(4)]. The Chief Justice can authorise any person or institution to appoint an arbitrator. [Some High Courts have authorised District Judge to appoint an arbitrator]. In case of international commercial dispute, the application for appointment of arbitrator has to be made to Chief Justice of India. In case of other domestic disputes, application has to be made to Chief Justice of High Court within whose jurisdiction the parties are situated. [section 11(12)]

CHALLENGE TO APPOINTMENT OF ARBITRATOR - An arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. [section 12(1)]. Appointment of Arbitrator can be challenged only if (a) Circumstances exist that give rise to justifiable doubts as to his independence or impartiality (b) He does not possess the qualifications agreed to by the parties. [section 12(3)]. Appointment of arbitrator cannot be challenged on any other ground.. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the proceedings can continue and the arbitrator can make the arbitral award. However, in such case, application for setting aside arbitral award can be made to Court. If the court agrees to the challenge, the arbitral award can be set aside. [section 13(6)]. Thus, even if the arbitrator does not accept the challenge to his appointment, the other party cannot stall further arbitration proceedings by rushing to court. The arbitration can continue and challenge can be made in Court only after arbitral award is made.

Conduct of Arbitral Proceedings - The Arbitral Tribunal should treat the parties equally and each party should be given full opportunity to present his case. [section 18]. The Arbitral Tribunal is not bound by Code of Civil Procedure, 1908 or Indian Evidence Act, 1872. [section 19(1)]. The parties to arbitration are free to agree on the procedure to be followed by the Arbitral Tribunal. If the parties do not agree to the procedure, the procedure will be as determined by the arbitral tribunal.

LAW OF LIMITATION APPLICABLE - Limitation Act, 1963 is applicable. For this purpose, date on which the aggrieved party requests other party to refer the matter to arbitration shall be considered. If on that date, the claim is barred under Limitation Act, the arbitration cannot continue. [section 43(2)]. If Arbitration award is set aside by Court, time spent in arbitration will be excluded for purpose of Limitation Act. [so that case in court or fresh arbitration can start].

FLEXIBILITY IN RESPECT OF PROCEDURE, PLACE AND LANGUAGE - Arbitral Tribunal has full powers to decide the procedure to be followed, unless parties agree on the procedure to be followed. [section 19(3)]. The Tribunal also has powers to determine the admissibility, relevance, materiality and weight of any evidence. [section 19(4)]. Place of arbitration will be decided by mutual agreement. However if the parties do not agree to the place, the same will be decided by tribunal. [section 20]. Similarly, language to be used in arbitral proceedings can be mutually agreed. Otherwise, Arbitral Tribunal can decide. [section 22].

SUBMISSION OF STATEMENT OF CLAIM AND DEFENCE - The claimant should submit statement of claims, points of issue and relief or remedy sought. The respondent shall state his defence in respect of these particulars. All relevant documents must be submitted. Such claim or defence can be amended or supplemented any time [section 23].

HEARINGS AND WRITTEN PROCEEDINGS - After submission of documents and defence, unless the parties agree otherwise, the Arbitral Tribunal can decide whether there will be oral hearing or proceedings can be conducted on the basis of documents and other materials. However, if one of the parties requests, the hearing *shall* be oral. Sufficient advance notice of hearing should be given to both the parties. [section 24]. [Thus, unless one party requests, oral hearing is not compulsory].

SETTLEMENT DURING ARBITRATION - It is permissible for parties to arrive at mutual settlement even when arbitration is proceeding. In fact, even the Tribunal can make efforts to encourage mutual settlement. If parties settle the dispute by mutual agreement, the arbitration*shall* be terminated. However, if both parties and the Arbitral Tribunal agree, the settlement can be recorded in the form of an arbitral award on agreed terms. Such Arbitral Award shall have the same force as any other Arbitral Award. [section 30].

Arbitral Award - Decision of Arbitral Tribunal is termed as 'Arbitral Award'. Arbitrator can decide the dispute *ex aequo et bono* (In justice and in good faith) if both the parties expressly authorise him to do so. [section 28(2)]. The decision of Arbitral Tribunal will be by majority. The arbitral award shall be in writing and signed by the members of the tribunal. [section 29]. The award must be in writing and signed by the members of Arbitral Tribunal. [section 31(1)].. It must state the reasons for the award unless the parties have agreed that no reason for the award is to be given. [section 31(3)]. The award should be dated and place where it is made should be mentioned. Copy of award should be given to each party. Tribunal can make interim award also. [section 31(6)].

Cost of Arbitration - Cost of arbitration means reasonable cost relating to fees and expenses of arbitrators and witnesses, legal fees and expenses, administration fees of the institution supervising the arbitration and other expenses in connection with arbitral proceedings. The tribunal can decide the cost and share of each party. [section 31(8)]. If the parties refuse to pay the costs, the Arbitral Tribunal may refuse to deliver its award. In such case, any party can approach Court. The Court will ask for deposit from the parties and on such deposit, the award will be delivered by the Tribunal. Then Court will decide the costs of arbitration and shall pay the same to Arbitrators. Balance, if any, will be refunded to the party. [section 39].

Intervention by Court - One of the major defects of earlier arbitration law was that the party could access court almost at every stage of arbitration - right from appointment of arbitrator to implementation of final award. Thus, the defending party could approach court at various stages and stall the proceedings. Now, approach to court has been drastically curtailed. In some cases, if an objection is raised by the party, the decision on that objection can be given by Arbitral Tribunal itself. After the decision, the arbitration proceedings are continued and the aggrieved party can approach Court only after Arbitral Award is made. Appeal to court is now only on restricted grounds. Of course, Tribunal cannot be given unlimited and uncontrolled powers and supervision of Courts cannot be totally eliminated.

ARBITRATION ACT HAS OVER-RIDING EFFECT - Section 5 of Act clarifies that notwithstanding anything contained in any other law for the time being in force, in matters governed by the Act, the judicial authority can intervene only as provided in this Act and not under any other Act..

Conciliation - Part III of the Act makes provision for conciliation proceedings. In conciliation proceedings, there is no agreement for arbitration. In fact, conciliation can be done even if there is arbitration agreement. The conciliator only brings parties together and tries to solve the dispute using his good offices. The conciliator has no authority to give any award. He only helps parties in arriving at a mutually accepted settlement. After such agreement they may draw and sign a written settlement agreement. It will be signed by the conciliator. However after the settlement agreement is signed by both the parties and the conciliator, it has the same status and effect as if it is an arbitral award. Conciliation is the amicable settlement of disputes between the parties, with the help of a conciliator.

OFFER FOR CONCILIATION - The conciliation proceedings can start when one of the parties makes a written request to other to conciliate, briefly identifying the dispute. The conciliation can start only if other party accepts in writing the invitation to conciliate. Unless there is written acceptance, conciliation cannot commence. If the other party does not reply within 30 days, the offer for conciliation can be treated as rejected. [section 62] All matters of a civil nature or breach of contract or disputes of movable or immovable property can be referred to conciliation. However, matters of criminal nature, illegal transactions, matrimonial matters like divorce suit etc. cannot be referred to conciliation.

Enforcement of Foreign Awards - The foreign awards which can be enforced in India are as follows : - (a) New York convention award (made after 11th October, 1960) (b) Geneva convention award - made after 28th July, 1924, but before the concerned Government signed the New York convention. Since most of the countries have signed New York convention, normally, New York convention awards are enforceable in India. New York convention was drafted and kept in United Nations for signature of member countries on

21st December, 1958. Each country became party to the convention on the date on which it signed the convention.

Party which intends to enforce a foreign award has to produce the arbitral award and agreement of arbitration [original or its certified copy] to the district court having jurisdiction over the subject matter of the award. [section 47]. The enforcement of award can be refused by court only in cases specified in section 48. Otherwise, the foreign award is enforceable through court as if it is a decree of the court. [section 49]. If the court declines to enforce the arbitral award, appeal can be made to the court where appeal normally lies from the district court. However, no further appeal can be made (except appeal to Supreme Court) - (section 50). [Probably, the aggrieved party may be able to approach International Court of Justice, as the convention is an international convention, signed by many of the member countries].

One advantage of foreign award, according to foreign parties, is that Indian courts come into picture only at the time of implementation of award. The courts can refuse to implement the award only on limited grounds.

COOPERATIVE SOCIETIES ACT

Cooperative Societies Act is a Central Act. However, 'Cooperative Societies' is a State Subject (Entry 32 of List II of Seventh Schedule to Constitution, i.e. State List). Though the Act is still in force, it has been specifically repealed in almost all the States and those States have their own Cooperative Societies Act. Thus, practically, the Central Act is mainly of academic interest. - - – As per preamble to the Act, the Act is to facilitate formation of cooperative societies for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means.

The Statement of Objects and reasons states as follows – (a) Cooperative Society can be established for purpose of credit, production or distribution. (b) Agricultural credit societies must be with unlimited liability. (c) Unlimited society is not best form of cooperation for agricultural commodities. However, the provision is continued as in several provinces (now States) such societies do exist and are working. It is not intended to give them undue encouragement, but to legalise their existence. (d) Unlimited society can distribute profits with permission of State Government.

Registration of Society - State Government will appoint Registrar of Cooperative Societies. State Government can appoint persons to assist Registrar and confer on such persons all or any of powers of Registrar. [section 3]. Function of Registrar starts with registration of a society. He has powers of general supervision over society. Returns of Society are to be filed with Registrar. He can order inquiry or inspection against society. He can order dissolution of society.

Societies which may be registered – A society which has as its object the promotion of economic interests of its members in accordance with cooperative principles can be registered as a Society. Similarly, a society established with the object of facilitating operation of such a society can also be registered under the Act. The society can be registered with limited or unlimited liability. However, unless State Government otherwise directs, (1) Liability of a society of which a member is a registered society shall be limited. (2) Liability of a society of which object is to creation of funds to be lent to members, and of which majority of members are agriculturists and of which no member is a registered society shall be unlimited [section 4]. Thus, a registered society can be member of another society, but liability of such other society must be limited, unless State Government otherwise directs.

Who can form a society – A society can be formed with at least 10 members of age above 18 years. If object of society is creation of funds to be lent to its members, all the members must be residing in same town, village or group of villages *or* all members should be of same tribe, class, caste or occupation, unless Registrar otherwise directs. - - The provision of minimum 10 members or residing in same town/village etc. is not applicable if a registered society is member of another society. - - The last word in name of society should be 'Limited'. If the Society is registered with limited liability. [section 6]. Registrar is empowered to decide whether a person is agriculturist or non-agriculturist or whether he is resident of same town/village or whether the members belong to same caste/tribe etc. and his decision will be final. [section 7].

Restrictions on society with limited liability – If a society has limited liability, any individual member of such society cannot have share capital more than one-fifth of total capital. An individual member cannot have interest in shares exceeding Rs 1,000. - - This restriction of 20% shares or Rs 1,000 shares value is not applicable to a registered society which is member of another society. [section 5]. - - Thus, if a registered society is member of another society, it can hold shares exceeding 20% or exceeding Rs 1,000 in value.

Amendment of bye-laws – Any Amendment to bye-laws shall be registered with Registrar. If Registrar is satisfied that the amendment is not contrary to Act or rules, he will register the amendment. He will issue a certificate of registration along with copy of amendment certified by him, which is conclusive evidence that the amendment has been duly registered. [section 11].

Rights and liabilities of members – If liability of members is not limited by shares, each member shall have one vote irrespective of amount of his interest in the capital. [section 13(1)]. If liability of members of a registered society is limited by shares, each member will have as many votes as may be prescribed in bye-laws. [section 13(2)]. If a registered society has invested in shares of other registered society, it can vote by appointing a proxy. [section 13(3)]. - - A member of registered society shall not exercise his rights as member, unless he has made payment to society in respect of membership or has acquired interest in society, as may be prescribed by rules or bye-laws. [section 12]. Thus, if there is any default in payment to society, the member cannot exercise his rights.

Management of society - Each society will be managed by Committee. - - Committee means the governing body of a registered society to whom the management of its affairs is entrusted. [section 2(b)]. Officer of society includes a Chairman, Secretary, treasurer, member of Committee or other person empowered under rules or bye-laws to give directions in regard to business of society. [section 2(e)].

Registered Society is body corporate – A registered cooperative society is a body corporate with perpetual succession and common sea. (just like a company). It can hold property, enter into contracts, institute and defend suit and other legal proceedings and to do all things necessary for the purposes of its constitution. [section 18].

Priority claim of society dues from member – A registered society is entitled to priority to other creditors and enforce outstanding demand due to society from any member. However, the priority is subject to prior claims of (a) Government dues in respect of land revenue or (b) Dues of landlord in respect of rent receivable by the landlord. The priority of society is in respect of following – (a) Supply of seed or manure or loan for purchase of seed or manure. The priority is upon the crops or other agricultural produce upto 18 months from date of supply of seed/manure or loan. (b) Supply of cattle or fodder of cattle, agricultural implements or machinery or raw materials or loan for these. The priority is upon the cattle/fodder/ machinery / raw materials supplied or any articles manufactured from raw materials supplied or purchased form loan given by society. [section 19].

Liability of past member – Liability of past members towards society as on the date he ceased to be member will continue for two years. [section 23].

Restrictions on loans – A registered society can give loans only to its members. However, it can give loan to another registered society with permission of Registrar. [section 29(1)]. A society with unlimited liability cannot lend money on security of movable property without sanction of registrar. [section 29(2)]. State Government, by issuing a general or special order, can prohibit or restrict lending of money on mortgage of immovable property by any registered society or class of registered society.

Inspection of affairs of society – Registrar can hold an enquiry or direct some person authorised by him to hold enquiry in following circumstances – (a) Of his own motion (b) Request of Collector (c) Application by majority of committee members of society or (d) At least one-third of members of society. [section 35(1)]. All officers and members of society shall furnish necessary information to registrar or person authorised by him. [section 35(2)].

Dissolution of society – Registrar, after inspection or inquiry, or on application received from 75% of members of society, may cancel the registration of society, if in his opinion, the Society should be dissolved. Any member can appeal against the order of Registrar within two months to State Government or other Revenue Authority authorised by State Government. If no appeal is filed within two months, the order of dissolution shall become effective. If appeal is filed, the order will become effective only after it is confirmed by appellate authority. [section 39].

Companies Act not applicable – Provisions of Companies Act are not applicable to registered cooperative society. [section 48].

INDIAN CONTRACT ACT

We enter into contracts so many times in a day that ‘contract’ has become an indispensable part of our life. When you purchase milk or newspaper in the morning or go to movie in the evening, you are entering into a contract. Indian Contract Act really codifies the way we enter into a contract, execute a contract, implement provisions of a contract and effects of breach of a contract. Basically, a person is free to contract on any terms he chooses. The Contract Act consists of limiting factors subject to which contract may be entered into, executed and breach enforced. It only provides a framework of rules and regulations which govern formation and performance of contract. The rights and duties of parties and terms of agreement are decided by the contracting parties themselves. The court of law acts to enforce agreement, in case of non-performance.

Section 1 of Contract Act provides that any usage or custom or trade or any incident of contract is not affected as long as it is not inconsistent with provisions of the Act. In other words, provision of Contract Act will prevail over any usage or custom or trade. However, any usage, custom or trade will be valid as long as it is not inconsistent with provisions of Contract Act. The Act extends to the whole of India except the State of Jammu and Kashmir; and came into effect on 1-9-1872.

It must be noted that contract need not be in writing, unless there is specific provision in law that the contract should be in writing. [e.g. * contract for sale of immovable property must be in writing, stamped and registered. * Contracts which need registration should be in writing * Bill of Exchange or Promissory Note must be in writing. * Trust should be created in writing * Promise to pay a time barred loan should be in writing, as per Limitation Act * Contract made without consideration on account of natural love and affection should be in writing]. A verbal contract is equally enforceable, if it can be proved.. A contract can be enforced or compensation/damages for breach of contract can be obtained through Civil Court

***Essential Ingredients of a contract* -** As per Contract Act, an agreement enforceable by law is a contract. [section 2(h)]. Hence, we have to understand first what is ‘agreement’.

Every promise and every set of promises, forming the consideration for each other, is an agreement. [section 2(e)]. - - A person makes a proposal (offer). When it is accepted by other, it becomes a promise. However, promise cannot be one sided. Only a mutual promise forming consideration for each other is ‘agreement’. - - For example, A agrees to pay Rs 100 to B and B agrees to give him a book which is priced at Rs 100. This is set of promises which form consideration for each other. However, if A agrees to pay Rs 100 to B, but B does not promise anything, it is not ‘set of promises forming consideration for each other’ and hence not an agreement.

It should be noted that the term ‘agreement’ as defined in Contract Act requires mutual consideration. - - Thus, if A invites B to dinner and B agrees to come, it is not an ‘agreement’ as defined in Contract Act.

MEANING OF ‘PROPOSAL’ - When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. [section 2(a)].- - Thus, a ‘proposal’ can be to do a positive act or abstinence from act (i.e. negative act). [English Act uses the word ‘offer’, while Indian Contract Act uses the word ‘proposal’. Generally, both words are used inter-changeably. This is not technically correct, as the word ‘offer’ is not used in Contract Act].

MEANING OF ‘PROMISE’ - When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A pro posal, when accepted, becomes a promise. [section 2(b)]. - - Thus, when a proposal (offer) is accepted, it becomes a ‘promise’. As is clear from the definition, only person to whom proposal is made can signify his assent. Other person cannot accept a proposal.

PROMISOR AND PROMISEE - The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee”. [section 2(c)].

RECIPROCAL PROMISES - Promises which form the consideration or part of the consideration for each other are called reciprocal promises. [section 2(f)].

Consideration for promise – The definition of ‘agreement’ itself states that the mutual promises should form consideration of each other. Thus, ‘consideration’ is essential for an agreement. A promise without consideration is not ‘agreement’ and hence naturally, it is not a ‘contract’.

DEFINITION OF ‘CONSIDERATION’ - When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consid eration for the promise. [section 2(d)].

Steps involved in contract - The steps involved in the contract are – * proposal and its communication * acceptance of proposal and its communication * Agreement by mutual promises * Contract * Performance of Contract. - - All agreements are not contract. Only those agreements which are enforceable by law are ‘contracts’. Following are essential requirements of a valid contract.

Offer and its acceptance

Free consent of both parties

Mutual and lawful consideration for agreement

It should be enforceable by law. Hence, intention should be to create legal relationship. Agreements of social or domestic nature are not contracts

Parties should be competent to contract

Object should be lawful

Certainty and possibility of performance

Contract should not have been declared as void under Contract Act or any other law

***Communication, acceptance and revocation of proposals* -** Communication of proposal/ revocation/acceptance are vital to decide validity of a contract. A ‘communication’ is complete only when other party receives it.

ACCEPTANCE MUST BE ABSOLUTE **-** In order to convert a proposal into a promise, the acceptance must - (1) be absolute and unqualified; (2) be expressed in some usual and reasonable manner, unless the proposal prescribed the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such a manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise; but if he fails to do so, he accepts the acceptance. [section 7].

Acceptance of offer is complete only when it is absolute and unconditional. Conditional acceptance or qualified acceptance is no acceptance.

PROMISES, EXPRESS OR IMPLIED **-** Insofar as the proposal or acceptance of any promise is made in words, the promise is said to be express. Insofar as such proposal or acceptance is made otherwise than in words, the prom ise is said to be implied. [section 9]. - - For example, if a person enters a bus, there is implied promise that he will pay the bus fair.

VOIDABLE CONTRACT - An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract. [section 2(i)]. - - (a) When consent is obtained by coercion, undue influence, misrepresentation or fraud is voidable at the option of aggrieved party i.e. party whose consent was obtained by coercion/fraud etc. However, other party cannot avoid the contract. (b) When a contract contains reciprocal promises and one party to contract prevents the other from performing his promise, the contract becomes voidable at the option of the party to prevented. (section 53). Obvious principle is that a person cannot take advantage of his own wrong (c) When time is essence of contract and party fails to perform in time, it is voidable at the option of other party (section 55). A person who himself delayed the contract cannot avoid the contract on account of (his own) delay.

VOID CONTRACT - A contract which ceases to be enforceable by law be comes void when it ceases to be enforceable. [section 2(j)]. - - Thus, initially a contract cannot be void, i.e. a contract cannot be void *ab initio.* The simple reason is that in such a case, it is not a contract at all to begin with. Hence, only a valid contract can become void contract due to some subsequent events. e.g. the person dies or property is destroyed or Government imposes a ban etc. - - A void agreement is void *ab initio*. It never becomes a contract. It is nullity and cannot create any legal rights.

What agreements are contracts **-** All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful considera tion and with a lawful object, and are not hereby expressly declared to be void. Nothing herein contained shall effect any law in force in India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents. [section 10].

Who are competent to contract **-** Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. [section 11].

Free consent – Consent of both parties must be free. Consent obtained through coercion, undue influence, fraud, misrepresentation or mistake is not a 'free consent'. - **-** Two or more persons are said to consent when they agree upon the same thing in the same sense. [section 13]. **- -** Consent is said to be free when it is not caused by - (*1*) coercion, as defined in section 15, or (*2*) undue influence, as defined in section 16, or (*3*) fraud, as defined in section 17, or (*4*) misrepresentation, as defined in section 18, or (*5*) mistake, subject to the provisions of sections 20, 21 and 22. - - Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake. [section 14].

Void agreements **-** An agreement not enforceable by law is said to be void. [section 2(g)]. **- -** Note that it is *not* 'void contract', as an agreement which is not enforceable by law does not become 'contract' at all. Following are void agreements - * Both parties under mistake of fact (section 20) * Unlawful object or consideration (section 24) * Agreement without consideration (section 25) * Agreement in restraint of marriage (section 26) * Agreement in restraint of trade (section 27) * Agreement in restraint of legal proceedings (section 28) * Uncertain agreement (section 29) * Wagering agreement (section 29) * Agreement to do an impossible Act (section 56). - - These are discussed below.

***Obligation of person who has received advantage under void agree ment or contract that becomes void* -** When an agreement is discovered to be void, or when a con tract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Contingent contract - A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. *Illustration* - A contracts to pay B Rs. 10,000 if B's house is burnt. This is a contingent contract. [section 31].

***Contracts which must be performed* -** The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract. - - *Illustrations* - (*a*) A promises to deliver goods to B on a certain day on payment of Rs. 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay Rs. 1,000 to A's representatives. (*b*) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representative or by B [section 37]. The performance can be 'actual performance' or 'attempted performance', i.e. 'offer to perform'.

Performance of reciprocal promises - Promises which form the consideration or part of the consideration for each other are called reciprocal promises. [section 2(f)]. A mutual promise can be of following types – (a) Mutual and independent – Where each party must perform his promise independently and irrespective of whether the other party has performed or willing to perform e.g. Seller agrees to deliver on 5th and Buyer agrees to pay on 15th. (b) Conditional and dependent – Performance of promise by one party depends on prior performance of promise by other party. e.g. Buyer agrees to pay for goods 15 days after delivery. Hence, unless seller delivers goods, buyer's liability does not arise. (c) Mutual and concurrent – Where the promises of both parties must be performed simultaneously. e.g. buyer agrees to pay immediately on delivery of goods i.e. cash payment.

Contracts which need not be performed - Normally, a contract is expected to be performed. The performance my be actual or by way of tender, i.e. attempted performance. However, in certain situations as stated below, the contract need not be performed. * Novation, rescission and alteration of contract * Promisee may dispense with or remit performance of promise * Effect of neglect of promisee to afford promisor reasonable facilities for performance * Merger of superior rights with inferior right under contract**.** This is usually termed as 'discharge of contract'.

Quasi Contracts - '*Quasi*' means 'almost' or 'apparently but not really' or 'as if it were'. This term is used when one subject resembles another in certain characteristics but there are intrinsic differences between the two. '*Quasi* contract' is not a 'contract'. It is an obligation which law created in absence of any agreement. It is based on equity. There are certain relations resembling those created by contract. These are termed as '*quasi* contracts'. These are – (a) Supply of necessaries (section 68) (b) Payment of lawful dues by interested person (section 69) (c) Person enjoying benefit of a gratuitous act (section 70) (d) Finder of goods (section 71) (d) Goods or anything delivered by mistake or coercion (section 72).

Consequences of Breach of Contract - Compensation is payable for breach of contract. Penalty is also payable if provided in contract. Breach of contract may be actual or anticipatory.

Summary of principles of compensation and damages - Following points are important - * Compensation for loss or damage is payable. Since the word used is 'compensation', punitive damages cannot be awarded. * These should be in usual course or known to parties i.e. both parties must be aware * No compensation for remote and indirect loss or damage * Same principle applies to *quasi contract* also.

GENERAL DAMAGES – General damages are those which result from 'direct and proximate' consequences from breach of contract. Normally, what can be awarded is compensation for loss or damage which can be directly or proximately attributed to the breach of contract. One way of assessing damages is the difference between the contract price and the market price on date of breach of contract, plus reasonable expenses incurred by him on account of the breach plus cost of suit in court of law.

CONSEQUENTIAL LOSS OR SPECIAL DAMAGE – Special damages or consequential damages arise due to existence of special circumstances. Such damages can be awarded only in cases where the special circumstances were foreseeable by the party committing the breach or were specifically known to the party. Consequential losses like loss of profit due to breach, which may occur indirectly due to breach cannot be normally awarded unless there are special circumstances which parties were aware. Loss of profit can be awarded only in cases where seller could have foreseen those losses and arose directly as result of breach.

PROMISEE SHOULD TAKE STEPS TO MITIGATE THE LOSS OR DAMAGE – Explanation to section 73 specifically provides that in estimating loss or damage, the means available for remedying the inconvenience caused by breach of contract shall be taken into account. Thus, promisee should take all reasonable steps to mitigate the losses e.g. if promisor does not supply goods, he should make efforts to procure from alternate sources may be even at higher price, to reduce his losses arising out of breach of contract.

VINDICTIVE OR EXEMPLARY DAMAGES – Vindictive or exemplary damages cannot be awarded under Contract Act. However, these may be awarded by Court under tort under special circumstances e.g. * Dishonour of cheque by Bank when there was balance in account, as it causes loss of reputation of credit worthiness of person issuing cheque * Breach of contract to marry, as it hurts both feelings and reputation.

Quantum Meruit – '*Quantum meruit*' means 'as much as earned'. A contract may come to end by * breach of contract * contract becoming void or * Voidable contract avoided by party. In such case, if a party has executed part of contract, he is entitled to get a proportionate amount i.e. 'as much as earned by him'. This is not by way of 'damages' or 'compensation for loss'. **- -** The principle is that even when contract comes to a premature end, the party should get amount proportional to the work done/services provided/goods supplied by one party. One party should not get enriched at the cost of other.

Contract of indemnity **-** A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a 'contract of indem nity'. **- -** *Illustration* **-** A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity. [section 124].

Contract of guarantee **-** A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written. [section 126]. **- -** [Person giving guarantee is also called as 'guarantor'. However, Contract Act uses the word 'surety' which is same as 'guarantor']. **- -** Three parties are involved in contract of guarantee. Contract between any two of them is not a 'contract of guarantee'. It may be contract of indemnity. Primary liability is of the principal debtor. Liability of surety is secondary and arises when Principal Debtor fails to fulfill his commitments. However, this is so when surety gives guarantee at the request of principal debtor. If the surety gives guarantee on his own, then it will be contract of indemnity. In such case, surety has all primary liabilities.

CONSIDERATION FOR GUARANTEE **-** Anything done, or any promise made, for the benefit of the principal debtor, may be sufficient consideration to the surety for giving the guarantee. - - *Illustrations* - (*a*) B requests A to sell and deliver to him goods on cred it. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is sufficient consideration for C's promise. (*b) A selms and delivers goods to B. C afterwards requests A to gorbear to sue B for the debt for a year, and promises that if xe does so,`C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient considera tion for C's promise. (c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agree ment is void. [section 127].*

Bailment *- Bailment is another type of special contract. Since it is a 'contract', naturally all basic requirements of contract are applicable. - - Bailment means act of delivering goods for a specified purpose on trust. The goods are to be returned after the purpose is over. In bailment, possession of goods is transferred, but property i.e. ownership is not transferred. A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee".* **- -** *Explanation : If a person already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes the bailee, and owner becomes the bailor, of such goods, although they may not have been delivered by way of bailment. [section 148]. [Thus, initial possession of goods may be for other purpose, and subsequently, it may be converted into a contract of bailment, e.g. seller of goods will become bailee if goods continue in his possession after sale is complete].*

Bailment can be only of 'goods'. As per section 2(7) of Sale of Goods Act, 'goods' means every kind of movable property other than money and actionable claim. **- -** *Thus, keeping money in bank account is not 'bailment'. Asking a person to look after your house or farm during your absence is not 'bailment', as house or farm is not a movable property.*

Bailment of pledges *- Pledge is special kind of bailment, where delivery of goods is for purpose of security for payment of a debt or performance of a promise. Pledge is bailment for security. Common example is keeping gold with bank/money lender to obtain loan. Since pledge is bailment, all provisions applicable to bailment apply to pledge also. In addition, some specific provisions apply to pledge.The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called the "pawnor". The bailee is called the "pawnee". [section 172].*

Contract of Agency *- Agency is a special type of contract. The concept of agency was developed as one man cannot possibly do every transaction himself. Hence, he should have opportunity or facility to transact business through others like an agent. The principles of contract of agency are – (a) Excepting matters of a personal nature, what a person can do himself, he can also do it through agent (e.g. a person cannot marry through an agent, as it is a matter of personal nature) (b) A person acting through an agent is acting himself, i.e. act of agent is act of Principal. - - Since agency is a contract, all usual requirements of a valid contract are applicable to agency contract also, except to the extent excluded in the Act. One important distinction is that as per section 185, no consideration is necessary to create an agency.*

AGENT AND PRINCIPAL DEFINED **-** *An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal" [section 182].*

WHO MAY EMPLOY AGENT **-** *Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent. [section 183].* **- -** *Thus, any person competent to contract can appoint an agent.*

WHO MAY BE AN AGENT **-** *As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained. [section 184].* **- -** *The significance is that a Principal can appoint a minor or person of unsound mind as agent. In such case, the Principal will be responsible to third parties. However, the agent, who is a minor or of unsound mind, cannot be responsible to Principal. Thus, Principal will be liable to third parties for acts done by Agent, but agent will not be responsible to Principal for his (i.e. Agent's) acts.*

CONSIDERATION NOT NECESSARY **-** *No consideration is necessary to create an agency. [section 185]. Thus, payment of agency commission is not essential to hold appointment of Agent as valid.*

Authority of agent *– An agent can act on behalf of Principal and can bind the Principal.*

*AGENT'S DUTY TO PRINCIPAL - An agent has following duties towards principal. * Conducting principal's business as per his directions * Carry out work with normal skill and diligence * Render proper accounts [section 213]. * Agent's duty to communicate with principal [section 214] * Not to deal on his own account, in business of agency [section 215]. * Agent's duty to pay sums received for principal [section 218] * Agent's duty on termination of agency by principal's death or insanity* **-** *[section 209].*

REMUNERATION TO AGENT - Consideration is not necessary for creation of agency. However, if there is an agreement, an agent is entitled to get remuneration as per contract.

*RIGHTS OF PRINCIPAL - * Recover damages from agent if he disregards directions of Principal * Obtain accounts from Agent * Recover moneys collected by Agent on behalf of Principal * Obtain details of secret profit made by agent and recover it from him * Forfeit remuneration of Agent if he misconducts the business.*

*DUTIES OF PRINCIPAL - * Pay remuneration to agent as agreed * Indemnify agent for lawful acts done by him as agent * Indemnify Agent for all acts done by him in good faith * Indemnify agent if he suffers loss due to neglect or lack of skill of Principal.*

*TERMINATION OF AGENCY - An agency is terminated by the principal revoking his au thority; or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insol vent debtors. [section 201]. - - In following cases, an agency cannot be revoked – * Agency coupled with interest (section 202) * Agent has already exercised his authority (section 203) * Agent has incurred personal liability.*

INDIAN PARTNERSHIP ACT

The Indian Partnership Act was passed in 1932 to define and amend the law relating to partnership. Indian Partnership Act is one of very old mercantile law. Partnership is one of the special types of Contract. Initially, this was part of Indian Contract Act itself (Chapter IX - sections 239 to 266), but later converted into separate Act in 1932.

The Indian Partnership Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of partnership also. Basic requirements of contract i.e. legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc. apply to partnership contract also.

Partnership Contract is a 'concurrent subject' - 'Contract, including partnership contract' is a 'concurrent subject, covered in Entry 7 of List III (Seventh Schedule to Constitution). Indian Partnership Act is a Central Act, but State Government can also pass legislation on this issue. Though Partnership Act is a Central Act, it is administered by State Governments, i.e. work of registration of firms and related matters is looked after by each State Government. The Act is not applicable to Jammu and Kashmir.

UNLIMITED LIABILITY IS MAJOR DISADVANTAGE - The major disadvantage of partnership is the unlimited liability of partners for the debts and liabilities of the firm. Any partner can bind the firm and the firm is liable for all liabilities incurred by any firm on behalf of the firm. If property of partnership firm is insufficient to meet liabilities, personal property of any partner can be attached to pay the debts of the firm.

Partnership Firm is not a legal entity - It may be surprising but true that a Partnership Firm is not a legal entity. It has limited identity for purpose of tax law. As per section 4 of Indian Partnership Act, 1932, 'partnership' is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. - - Under partnership law, a partnership firm is not a legal entity, but only consists of individual partners for the time being. It is not a distinct legal entity apart from the partners constituting it -*Malabar Fisheries Co.* v. *CIT* (1979) 120 ITR 49 = 2 Taxman 409 (SC).

FIRM LEGAL ENTITY FOR PURPOSE OF TAXATION - For tax law, income-tax as well as sales tax, partnership firm is a legal entity - *State of Punjab* v. *Jullender Vegetables Syndicate* - 1966 (17) STC 326 (SC) * *CIT* v. *A W Figgies* - AIR 1953 SC 455 * *CIT* v. *G Parthasarthy Naidu* (1999) 236 ITR 350 = 104 Taxman 197 (SC). Though a partnership firm is not a juristic person, Civil Procedure Code enables the partners of a partnership firm to sue or to be sued in the name of the firm. - *Ashok Transport Agency* v. *Awadhesh Kumar*1998(5) SCALE 730 (SC). [A partnership firm can sue only if it is registered].

Partnership, partner, firm and firm name - "Partnership" is the relation between persons who have agreed to share the profits of business carried on by all or any to them acting for all. - - Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name". [section 4].

"Business" includes every trade, occupation and profes sion. [section 2(b)]. Thus, a 'partnership' can be formed only with intention to share profits of business. People coming together for some social or philanthropic or religious purposes do not constitute 'partnership'.

PARTNERS ARE MUTUAL AGENTS - The business of firm can be carried on by all or any of them for all. Any partner has authority to bind the firm. Act of any one partner is binding on all the partners. Thus, each partner is 'agent' of all the remaining partners. Hence, partners are 'mutual agents'.

ORAL OR WRITTEN AGREEMENT - As per normal provision of contract, a 'partnership' agreement can be either oral or written. - - Agreement in writing is necessary to get the firm registered. Similarly, written agreement is required, if the firm wants to be assessed as 'partnership firm' under Income Tax Act. A written agreement is advisable to establish existence of partnership and to prove rights and liabilities of each partner, as it is difficult to prove an oral agreement. - - However, written agreement is not essential under Indian Partnership Act.

SHARING OF PROFIT NECESSARY - The partners must come together to share profits. Thus, if one member gets only fixed remuneration (irrespective of profits) or one who gets only interest and no profit share at all, is not a 'partner'. - - Similarly, sharing of receipts or collections (without any relation to profits earned) is not 'sharing of profit' and the association is not 'partnership'. For example, agreement to share rents collected or percentage of tickets sold is not 'partnership', as sharing of profits is not involved. - - The share need not be in proportion to funds contributed by each partner. - - Interestingly, though sharing of profit is essential, sharing of losses is not an essential condition for partnership . - - Similarly, contribution of capital is not essential to become partner of a firm.

NUMBER OF PARTNERS - Since partnership is 'agreement' there must be minimum two partners. The Partnership Act does not put any restrictions on maximum number of partners. However, section 11 of Companies Act prohibits partnership consisting of more than 20 members, unless it is registered as a company or formed in pursuance of some other law.

Mode of determining existence of partnership **-** In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. [section 6].

MUTUAL AGENCY IS THE REAL TEST **-** The real test of 'partnership firm' is 'mutual agency', i.e. whether a partner can bind the firm by his act, i.e. whether he can act as agent of all other partners.

Partnership at will **-** Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will". [section 7]. **- -** Partnership 'at will' means any partner can dissolve a firm by giving notice to other partners (or he may express his intention to retire from partnership) **- -** Partnership deed may provide about duration of partnership (say 10 years) or how partnership will be brought to end. In absence of any such term, the partnership is 'at will'. **- -** In case of 'particular partnership', the partnership comes to end when the venture for which it was formed comes to end.

Determination of rights and duties of partners by contract be tween the partners **-** Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by con tract between the partners, and such contract may be express or may be implied by a course of dealing. **- -** Such contract may be varied by consent of all the partners, and such consent may be express or may be implied by a course of dealing. [section 11(1)]. **- -** Thus, partners are free to determine the mutual rights and duties by contract. Such contract may be in writing or it may be implied by their actions.

Dutiesand mutual rights of partners **-** Subject to contract to contrary, partners have duties and mutual rights as specified in Partnership Act-

EVERY PARTNER HAS RIGHT TO TAKE PART IN BUSINESS **-** Subject to contract between partners (to the contrary), every partner has right to take part in the conduct of the business. [section 12(a)]. **- -** Thus, every partner has equal right to take active part in business, unless there is specific contract to the contrary. Even if authority of a partner is restricted by contract, outside party is not likely to be aware of such restriction. In such case, if such partner acts within the apparent authority, the firm will be liable for his acts.

The property of the firm **-** Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm, and includes also the goodwill of the business. **- -** Unless the contrary intention appears, property and rights and interests in property acquired with money belonging to the firm are deemed to have been acquired for the firm [section 14].

***Partner to be agent of the firm* -** Subject to the provisions of this Act, a partner is the agent of the firm for the purposes of the business of the firm. [section 18].

***Implied authority of partner as agent of the firm* -** Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority". [section 19(1)]. -

PARTNERS JOINTLY AND SEVERALLY LIABLE ACTS OF THE FIRM **-** Every partner is liable, jointly with all the other partners and also severally, for all acts of the firm done while he is a part ner. [section 25]. 'An act of a firm' means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm [section 2(a)]. 'Joint and several' means each partner is liable for all acts. Thus, if amount due cannot be recovered from other partners, any one partner will be liable for payment of entire dues of the firm.

***Partner by Holding out* -** 'Holding out' means giving impression that a person is partner though he is not. This is principle of 'estoppel'. If a person gives an impression to outsiders that he is partner of firm though he is not partner, he will he held liable as partner, if third party deals with the firm on the impression that he is a partner. Similarly, if a person retires from the firm but does not give notice of retirement, he will be liable as a partner, if some third party deals with the firm on the assumption that he is still partner.

***Minors admitted to the benefits of partnership* -** A person who is a minor according to the law to which he is subject may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership. [section 30(1)].

RIGHTS OF MINOR **-** Minor (who is admitted to benefit of partnership) has a right to such share of the property and of the profits of the firm as may be agreed upon and he *may* have access to and inspect and copy any of the accounts of the firm. [section 30(2)]. [Since the word used is 'may', it seems that right of minor to inspect accounts can be restricted by agreement among partners].

MINOR'S SHARE LIABLE BUT NOT MINOR HIMSELF **-** Such minor's share is liable for the acts of the firm, but the minor is not personally liable for any such act. [section 30(3)].

***Reconstitution of a Partnership Firm* -** A partnership firm is not a legal entity. It has no perpetual existence as in case of a company incorporated under Companies Act. However, the Act gives the partnership limited rights of continuity of business despite change of partners. In absence of specific provision in partnership deed, death or insolvency of a partner means dissolution of the firm. However, partnership can provide that the firm will not dissolve in such case.

Change in partners may occur due to various reasons like death, retirement, admission of new member, expulsion, insolvency, transfer of interest by partner etc. After such change, the rights and liabilities of each partner are determined afresh. This is termed as reconstitution of a firm.

***Dissolution of a Firm* -** A partnership firm is an 'organisation' and like every 'organ' it has to either grow or perish. Thus, dissolution of a firm is inevitable part in the life of partnership firm some time or the other.

Dissolution of a firm without intervention of Court can be (a) By agreement (section 40) (b) Compulsory dissolution in case of insolvency (section 41) (c) Dissolution on happening of certain contingency (section 42) (d) By notice if partnership is at will (section 43).

A firm can also be dissolved by Court u/s 44.

DISSOLUTION OF PARTNERSHIP AND DISSOLUTION OF FIRM **-** The dissolution of partnership between all the partners of a firm is called the dissolution of the firm. [section 39]. **- -** . As per section 4, Partnership is the relation between persons who have agreed to share profits of business carried on by all or any of them acting for all. **- -** Thus, if some partner is changed/added/ goes out, the 'relation' between them changes and hence 'partnership' is dissolved, but the 'firm' continues. Hence, the change is termed as 'reconstitution of firm'. However, complete breakage between relations of all partners is termed as 'dissolution of firm'. After such dissolution, the firm no more exists. Thus, 'Dissolution of partnership' is different from 'dissolution of firm'. 'Dissolution of partnership' is only reconstruction of firm, while 'dissolution of firm' means the firm no more exists after dissolution.

Mode of dissolution of firm **-** Following are various modes of dissolution of firm. * Dissolution by agreement **-** [section 40]. * Compulsory dissolution in case of insolvency **-** [section 41] * Dissolution on the happening on certain contingencies [section 42] * Dissolution by notice of partnership at will [section 43(2)] * Dissolution by the court

Consequences of dissolution of firm - After firm is dissolved, business is wound up and proceeds are distributed among partners. The Act specifies what are the consequences of dissolution of a firm.

Sale of goodwill of firm after dissolution - Business is attracted due to reputation of a firm. It creates a 'brand image' which is valuable though not tangible. 'Goodwill' is the value of reputation of the business of the firm. Goodwill of a firm is sold after dissolution either separately or along with property of firm. - - As per section 14, property of partnership firm includes goodwill of the firm. - - Goodwill is the reputation and connections which the firm establishes over time, together with circumstances which make the connections durable. This reputation enable to earn profits more than normal profits which a similar business would have earned. Goodwill is an intangible asset of the firm. - -

In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm. [section 55(1)].

Settlement of accounts after dissolution - Accounts are settled after a firm is dissolved as provided in the Act. A firm is said to be 'wound up' only after accounts are fully settled.

Registration of Firms - Registration of firm is not compulsory, though usually done as registration brings many advantages to the firm. Since 'partnership contract' is a 'Concurrent Subject' as per Constitution of India, registration of firms and related work is handled by State Government in each State. Section 71 authorises State Government to make rules for * prescribing fees for filing documents with registrar * prescribing forms of various statements and intimations are to be made to registrar and * regulating procedures in the office of Registrar.

PARTNER CANNOT SUE IF FIRM IS UNREGISTERED - No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any court by or on behalf of any person suing as a partner in a firm against the firm or an{ person alleged to be or to`have been a Ápartner in the fir} unless the firm is registered and the person suing!is or has been shown iø the Register of Firms as a partner in the firm.$ [section 69(1)]. - - Thus, a partner cannot sue the firm or any otheÄ " partner if firm is unregistered. - - If third party files suit against a partner, he cannot claim of set off or institute other proceeding to enforce a right arising from a contract. - - Suit or claim or set off upto Rs 100 can be made as per section 69(4)(b), but it is negligible in today's standards. - - Criminal proceedings can be filed, but civil suit is not permissible.

UNREGISTERED FIRM CANNOT SUE THIRD PARTY - No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm. [section 69(2)]. - - If third party files suit against the unregistered firm, the firm cannot claim set off or institute other proceeding to enforce a right arising from a contract. - - Suit or claim or set off upto Rs 100 can be made as per section 69(4)(b), but it is negligible in today's standards. - - Criminal proceedings can be filed, but civil suit is not permissible.

INDIAN STAMP ACT

The basic purpose of Indian Stamp Act, 1899 is to raise revenue to Government. However, over a period of time, the stamped document has obtained so much value that a 'stamped document' is considered much more authentic and reliable than an un-stamped document.

Power of Parliament in respect of stamp duty - Parliament can make law in respect of Stamp Duty. It can prescribe rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bill of exchange, cheques, transfer of shares etc. will prevail all over India. However, other stamp duty rates prescribed by Parliament in Indian Stamp Act, 1899 (e.g. stamp duty on agreements, affidavit, articles of association of a company, partnership deed, lease deed, mortgage, power of attorney, security bond etc.) are valid only for Union territories. In case of States, the rates prescribed by individual States will prevail in those States.

Powers of State Government of Stamp Duty - State Government has powers to fix stamp duties on all documents except bill of exchange, cheques etc. Rates prescribed by State Government will prevail in that State. State Government can make law for other aspects of stamp duty also (i.e. matters other than quantum of duty). However, if there is conflict between State law and Union law, the Union law prevails [Article 254 of Constitution].

Instruments chargeable to stamp duty - Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded [section 2(17) of Indian Stamp Act]. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule [section 3]. The list includes all usual instruments like affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the schedule, no stamp duty is payable. 'Instrument' does not include ordinary letters. Similarly, an unsigned draft of an agreement is not an 'instrument'.

Duty payable when several instruments - In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable [section 4(1)]. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments [section 5]. However, it may happen that one instrument covering only one matter can come under more than one descriptions given in Schedule to Stamp Act. In such case, highest rate specified among the different heads will prevail [section 6].

Powers to reduce stamp duty - Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies [section 9(1)]. 'Government' means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and 'State Government' in case of stamp duties on other documents [section 9(2)].

Mode of payment of stamp duty - The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution (section 17). Instrument executed out of India can be stamped within three months after it is first received in India [section 18(1)]. However, in case of bill of exchange or promissory note made out of India, it should be stamped by first holder in India before he presents for payment or endorses or negotiates in India [section 19].

Valuation for stamp duty - In some cases, stamp duty is payable on *ad valorem* basis i.e. on basis of value of property etc. In such cases, value is decided on prescribed basis.

Adjudication as to stamp duty payable - Adjudication means determining the duty payable. Normally, the person paying the duty himself may decide the stamp duty payable and pay accordingly. However, in cases of complex documents, the person paying the duty may not be sure of the stamp duty payable. In such case, he can apply for opinion of Collector. He has to apply with draft document and prescribed fees. Collector will determine the stamp duty payable as per his judgment [section 31(1)].

What is meant by 'duly stamped' - 'Duly stamped' means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India [section 2(11)]. In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that it cannot be used for other instrument and stamp appears on face of instrument. If stamp is not so used, the instrument is treated as 'un-stamped'. Similarly, when stamp duty paid is not adequate, the document is treated as 'not duly stamped'.

Instrument cannot be accepted as evidence if not duly stamped - An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorised to receive evidence. However, the document can be accepted as evidence in criminal court.

Case when short payment is by mistake - If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid [section 41].

Stamp duty on Receipt - Stamp Duty on receipt is Re. 1 for receipt above Rs. 5,000. Receipt includes any note, memorandum or writing [whether signed by any person or not] (*a*) where any money, or any bill of exchange or promissory note is acknowledged to have been received or (*b*) where any other movable property is acknowledged to have been received in satisfaction of a debt or (*c*) whereby any debt or demand is acknowledged to have been satisfied or discharged or (*d*) which signifies or indicates any such acknowledgment [section 2(23)].

Stamp duty on transfer of shares in a company or body corporate - It is 50 Paise for every hundred rupees or part thereof of the value of share. [It is 75 Ps as per Article 62 of Schedule I to Stamp Act, reduced to 50 Ps per Rs 100 vide notification No. SO 198(E) dated 16.3.1976]. As per section 21, the duty has to be calculated on the basis of market price prevalent on date of instrument and not on the face value of shares.

Stamp Duty on transfer in Depository Scheme - If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped. [section 8A(a) of Stamp Act]. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a 'duplicate certificate' has been issued. [section 8A(1)(b) of Indian Stamp Act]. If securities are purchased or sold under depository scheme, no stamp duty is payable.

INDIAN TRUSTS ACT

Trust and trustees is a concurrent subject [Entry 10 of List III of Seventh Schedule to Constitution]. - - Thus, the Act will apply all over India except when specifically amended / altered by any State Government.

The Indian Trusts Act was passed in 1882 to define law relating to private trusts and trustees. - - A trust is not a 'legal person'. Property of trust is held in name of trustee for benefit of beneficiary.

WHAT IS A TRUST - A trust is an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. [section 3 para 1]. The person who reposes the confidence is called 'author of trust' (testator), the person who accepts the confidence is called 'trustee' and the person for whose benefit the confidence is accepted is 'beneficiary'. The subject matter of trust is called 'trust property' or ‘trust-money. The ‘beneficial interest’ or ‘interest of the beneficiary’ is his right against the trustee as the owner of trust-property. The instrument by which trust is declared is called as ‘instrument of trust’. [section 3 para 2].

Thus, when a property is held by one person as trustee for the benefit of another, it can be regarded as a trust. Trusts are governed by Indian Trust Act, as may be modified by State Governments.

A trust can be created for any lawful purpose. [section 4]. A trust can be created by deed, will or even word of mouth. However, trust of immovable property can be created only by non-testamentary instrument signed by author of trust and is registered, *or* by will of author. [section 5]. Thus, ‘will’ is not required to be registered, even if it pertains to immovable property.

DUTIES OF TRUSTEES - Trustee is not bound to accept the trust. [section 10]. However, once accepted, he cannot renounce it except permission of civil court or beneficiary (if he is major) or by virtue of special power in the instrument of trust. [section 46]. - Once trustee accepts trust, he is bound to fulfil the purpose of trust and to obey directions given at the time of creation of the trust. It can be modified with consent of beneficiary. [section 11]. His duties are - * Inform himself of state of trust property (section12) * Protect title to trust property (section 13) * Not to set up title adverse to beneficiary (section 14) * Take care of property as a man of ordinary prudence would deal with such property as own property (section 15) Conversion of perishable property to permanent and immediately profitable character (section 16) * To be impartial (section 17) * To prevent waste (section 18) * Keep proper accounts and information (section 19) and * Invest trust-money in prescribed securities and not others (section 20). - - Trustee is liable for breach of trust. [section 23]. ‘Breach of trust’ means a breach of duty imposed on a trustee, as such, by any law for the time being in force. [section 3 para 3].

RIGHTS AND POWERS OF TRUSTEE – Trustee has following powers - * Rights to title deed (section 31) * Right to reimbursement of expenses (section 32) * Right to indemnify from gainer by breach of trust (section 33) * Right to apply to court for opinion on management of trust property (section 34) * Right to settlement of accounts (section 35) * All acts necessary and reasonable and proper for trust property or protection of beneficiary (section 36). * Power to covey property when he is authorised to sell (section 39) * Power to vary investments (from one security to another (section 40) * Power to apply property of minors for their maintenance (section 41) * Power to give receipts (section 42) * Power to compound or compromise (section 43).

RIGHTS AND LIABILITIES OF BENEFICIARY – The beneficiary has * rights to rent and profits (section 55) * Right to specific execution of intention of author of trust (section 56) * Right to inspect and take copies of instrument of trust, accounts etc. (section 57) * Right to transfer beneficial interest (section 58) * Right to sue for execution of trust (section 59) * Right to proper trustees (section 60) * Right to compel trustee to perform an act of duty * Follow trust property into hands of third persson and into which it has been converted (section 63). - - A beneficiary is liable if he joins in breach of trust. [section 68].

REVOCATION OF TRUST - A trust created by will can be revoked at the pleasure of testator. A trust created otherwise by will can be revoked (a) by consent of all beneficiaries if they are competent to contract (b) In exercise of power of revocation expressly reserved by author of trust, if the trust has been declared by a non-testatory instrument or by word of mouth or (c) At pleasure of author of trust, if the trust is for payment of debts and the author of trust has not communicated to the creditors. [section 78].

INFORMATION TECHNOLOGY ACT

New communication systems and digital technology have made dramatic changes in way of transacting business. Use of computers to create, transmit and store information is increasing. Computer has many advantages in e-commerce. It is difficult to shift business from paper to electronic form due to two legal hurdles **-** (a) Requirements as to writing and (b) Signature for legal recognition. Many legal provisions assume paper based records and documents and signature on paper.

The General Assembly of the United Nations by resolution dated the 30th January, 1997 adopted the Model Law on Electronic Commerce and recommended that all States should give favourable consideration to the Model Law when they enact or revise their laws.

The Information Technology Act has been passed to give effect to the UN resolution and to promote efficient delivery of Government services by means of reliable electronic records.

As per preamble to the Act, the purpose of Act is (a) to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information and (b) to facilitate electronic filing of documents with the Government agencies. **- -** The Act came into effect on 17.10.2000.

The Act does not apply to — *(a)* a negotiable instrument as defined in section 13 of the Negotiable Instruments Act, except cheque *(b)* a power-of-attorney as defined in section 1A of the Powers-of-Attorney Act (c) a trust as defined in section 3 of the Indian Trusts Act*(d)* a will as defined in section 2(h) of the Indian Succession Act, including any other testamentary disposition by whatever name called *(e)* any contract for the sale or conveyance of immovable property or any interest in such property *(f)* any such class of documents or transactions as may be notified by the Central Government in the Official Gazette. **- -** Broadly, documents which are required to be stamped are kept out of the provisions of the Act.

Overview of the Act **-** The Act provides for **-** * Electronic contracts will be legally valid * Legal recognition of digital signatures * Digital signature to be effected by use of asymmetric crypto system and hash function * Security procedure for electronic records and digital signature * Appointment of Certifying Authorities and Controller of Certifying Authorities, including recognition of foreign Certifying Authorities * Controller to act as repository of all digital signature certificates * Certifying authorities to get License to issue digital signature certificates * Various types of computer crimes defined and stringent penalties provided under the Act * Appointment of Adjudicating Officer for holding inquiries under the Act * Establishment of Cyber Appellate Tribunal under the Act * Appeal from order of Adjudicating Officer to Cyber Appellate Tribunal and not to any Civil Court * Appeal from order of Cyber Appellate Tribunal to High Court * Act to apply for offences or contraventions committed outside India * Network service providers not to be liable in certain cases * Power of police officers and other officers to enter into any public place and search and arrest without warrant * Constitution of Cyber Regulations Advisory Committee who will advice the Central Government and Controller

What does IT Act enable? - The Information Technology Act enables:* Legal recognition to Electronic Transaction / Record * Facilitate Electronic Communication by means of reliable electronic record * Acceptance of contract expressed by electronic means * Facilitate Electronic Commerce and Electronic Data interchange * Electronic Governance * Facilitate electronic filing of documents * Retention of documents in electronic form * Where the law requires the signature, digital signature satisfy the requirement * Uniformity of rules, regulations and standards regarding the authentication and integrity of electronic records or documents * Publication of official gazette in the electronic form * Interception of any message transmitted in the electronic or encrypted form * Prevent Computer Crime, forged electronic records, international alteration of electronic records fraud, forgery or falsification in Electronic Commerce and electronic transaction.

DIGITAL SIGNATURE - Any subscriber may authenticate an electronic record by affixing his digital signature. [section 3(1)]. “Subscriber" means a person in whose name the Digital Signature Certificate is issued. [section 2(1)(zg)]. "Digital Signature Certificate" means a Digital Signature Certificate issued under section 35(4) [section 2(1)(q)].

"Digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3. [section 2(1)(p)].

"Affixing digital signature" with its grammatical variations and cognate expressions means adoption of any methodology or procedure by a person for the purpose of authenticating an electronic record by means of digital signature. [section 2(1)(d)].

***Authentication of records* -** The authentication of the electronic record shall be effected by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record. [section 3(2)].

***Verification of digital signature* -** Any person by the use of a public key of the subscriber can verify the electronic record. [section 3(3)]. The private key and the public key are unique to the subscriber and constitute a functioning key pair. [section 3(4)].

The idea is similar to locker key in a bank. You have your ‘private key’ while bank manager has ‘public key’. The locker does not open unless both the keys come together match.

***Electronic records acceptable unless specific provision to contrary* -** Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is **-** (a) rendered or made available in an electronic form; and *(b)* accessible so as to be usable for a subsequent reference. [section 4]. **- -** Unless there is specific provision in law to contrary, electric record or electronic return is acceptable. **- -** Soon, it will be possible to submit applications, income tax returns and other returns through internet.

DEPARTMENT OR MINISTRY CANNOT BE COMPELLED TO ACCEPT ELECTRONIC RECORD **-** Section 8 makes it clear that no department or ministry can be compelled to accept application, return or any communication in electronic form.

***Legal recognition of digital signatures* -** Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the Central Government. **- -** "Signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly. [section 5].

Secure digital signature - If, by application of a security procedure agreed to by the parties concerned, it can be verified that a digital signature, at the time it was affixed, was **-** (a) unique to the subscriber affixing it *(b)* capable of identifying such subscriber (c) created in a manner or using a means under the exclusive control of the subscriber and is linked to the electronic record to which it relates in such a manner that if the electronic record was altered the digital signature would be invalidated, **- -** then such digital signature shall be deemed to be a secure digital signature. [section 15].

Certifying digital signature - The digital signature will be certified by ‘Certifying Authority’. The ‘certified authority’ will be licensed, supervised and controlled by ‘Controller of Certifying Authorities’.

LIMITATION ACT

It is for general welfare that a period be put on litigation. Further, it is a general principle of law that law is made to protect only diligent and vigilant people. Equity aids the vigilant and not the indolent. Law will not protect people who are careless about their rights. (*Vigilantibus non domientibus jur A subventiunt*). Moreover, there should be certainty in law and matters cannot be kept in suspense indefinably. It is, therefore, provided that Courts of Law cannot be approached beyond fixed period. In civil matters, the limit is provided in*Limitation Act, 1963*.

BAR OF LIMITATION – Subject to provisions of sections 4 to 24 of the Act (i.e. Limitation Act),every suit instituted, appeal preferred and application made after the 'prescribed period' shall be dismissed, although limitation has not been set up as a defence. [section 3(1)]. - - 'Period of limitation' means the period of limitation prescribed for any suit, appeal or application by the schedule to the Act and 'prescribed period' means the period of limitation computed as per provisions of the Act. [section 2(j)].

PERIOD AS PRESCRIBED IN SCHEDULE TO THE ACT – The period has been prescribed in Schedule to the Act. Generally, it is as follows – (a) 3 years for a suit relating to accounts, contracts, declarations, decrees, suits relating to movable property, recovery of law suit under a contract etc. (b) 12 years for suits relating to possession of immovable property and 30 years for mortgaged property (c) One year for suit relating to torts (3 years for compensation in certain cases (d) 30 to 90 days in case of appeals under Civil Procedure Code and Criminal Procedure Code. - - Period of filing appeal and application can be extended if proper cause is shown (but not the suit) [section 5].

IF COURT IS CLOSED ON LAST DAY – If court is closed on last day of limitation, suit, appeal or application can be filed on next day when Court reopens. [section 4].

CONTINUOUS RUNNING OF TIME – When once period of limitation starts running, it continues even if there is any subsequent disability or inability to institute a suit or make an application. [section 9]. - - However, if at the time when person is entitled to file a suit or make application, if a person was disabled (as he was minor or insane), the period of limitation will start after the disability is removed. [section 6(1)].

In case of appeals against any judgment, if limitation is provided in any statute, that will prevail.

COMPUTATION OF PERIOD OF LIMITATION – (a) First day or day of judgment is to be excluded. [section 12(1)]. (b) Time for getting copy of judgment or decree or order or award (against which appeal or application has to be filed is to be excluded. [section 12(3)]. (c) Time when leave to sue or appeal as pauper is applied for and is pending [section 13]. (d) Time spent (by mistake or misunderstanding) in proceeding *bona fide* in the Court without jurisdiction [section 14]. (e) If stay or injunction was granted, that period will be excluded. [section 15(1)]. (f) If consent/sanction of Government or some authority was required to be obtained for filing suit/application or notice was required to be given to Government in accordance with law, the period spent in obtaining the consent/sanction or time in giving notice is excluded. [section 15(2)].

EFFECT OF FRAUD OR MISTAKE – Period of limitation starts only after fraud or mistake is discovered by affected party. [section 17(1)]. In *Vidarbha Veneer Industries Ltd.* v. *UOI* - 1992 (58) ELT 435 (Bom HC) , it was held that limitation starts from the date of knowledge of mistake of law. It may be even 100 years from date of payment. - - - - The cardinal principal enshrined in section 17 of Limitation Act is that fraud nullifies everything. Thus, appeal against the party can be admitted beyond limitation, if party has committed fraud (in submitting non-genuine documents at adjudication in this case) – *CC* v. *Candid Enterprises* 2001(130) ELT 404 (SC 3 member bench).

EFFECT OF ACKNOWLEDGMENT IN WRITING – If acknowledgment of any property is right or liability is obtained in writing duly signed by the party against whom such property, right or liability is claimed, before the expiration of period of limitation, a fresh period of limitation is computed from date of acknowledgment. [section 18(1)], Acknowledgment can be signed either personally or by an agent duty authorised in this behalf. [section 18(2)]. [That is why Banks and Financial Institutions insist on confirmation of balance every year].

CONTINUING BREACHES AND TORTS – In case of continuous breaches and torts, a fresh period of limitation begins to run at every moment of time during which the breach or tort continues. [section 22].

Limitation is a question of law and can be raised at any stage i.e. even at the time of appeal.

LAW OF LIMITATION ONLY BARS REMEDY, BUT DOES NOT EXTINGUISH THE RIGHT - In *Bombay Dyeing and Mfg Co. Ltd.* v. *State of Bombay* AIR 1958 SC 328 = 1958 SCR 1122 (SC Constitution Bench), it was held that the law of limitation only bars the remedy of approaching the court of law. *However, it does not extinguish the right as such.*

Law of Limitation is applicable only to courts and not to tribunals. - *Nityanand M Joshi* v. *LIC* - AIR 1970 SC 209 = (1970) 1 SCR 396 = 36 FJR 324 (SC) * *Sakura* v. *Tanaji* - AIR 1985 SC 1279 * *Birla Cement Works* v. *G M Western Railway* (1995) 2 JT 59 (SC).

LIMITATION IN CRIMINAL MATTERS - As per section 468 of Cr PC, Court cannot take cognizance of offence after expiry of following limitation period - (a) Six months, if the offence is punishable only with fine (b) One year, if the offence is punishable with imprisonment for a term not exceeding one year (c) three years, if the offence is punishable with imprisonment for a term not exceeding three years. However, in case of economic offences, there is no time limit.

MULTI STATE CO-OPERATIVE SOCIETIES ACT

Since 'Cooperative Societies' is a State Subject (Entry 32 of List II of Seventh Schedule to Constitution, i.e. State List), the cooperative societies formed under State Acts have to restrict their activities to only one State. This hinders growth of cooperative societies. Hence, Multi State Cooperative Societies Act was passed in 1942. It was later replaced by 1984 Act. This 1984 Act is now being replaced by 2002 Act. The 2002 Act has already been passed but has not yet been made effective. The 2002 Act makes special provision for registration and functions of Federal Cooperative Societies.

Object of the Act – As per preamble to the Act, the Act is consolidate and amend the law relating to cooperative societies, with objects not confined to one State and serving the interests of members in more than one State, to facilitate the voluntary formation and democratic functioning of cooperatives as people's institutions based on self-help and mutual aid and to enable them to promote their economic and social betterment and to provide financial autonomy and for matters connected therewith and incidental thereto.

Multi-State Cooperative Society can be formed under Multi State Cooperative Societies Act. Multi-State Cooperative Societies Act, 2002 has received President's assent. The Act will supersede 1984 Act when brought into force. Under the Act, there will be a Central Registrar overseeing and regulating multi-state cooperative societies. Under the Act, a quasi-judicial authority titled the Cooperative Disputes Settlement Authority will be set up to replace existing system of such settlement by Central Registrar. This is intended to ensure quicker and more judicious settlement of disputes.

The Act applies to all cooperative societies with objects not confined to one State. It includes societies which were incorporated under Cooperative Societies Act 1912 & earlier Muti-Cooperative Societies formed under 1942 or 1984 Act.

Which society can be registered - No multi-state cooperative society can be registered under the Act unless - (a) its main objects are to serve interests of members in more than one State and (b) Its bye-laws provide for social and economic betterment of its members through self-help and mutual aid in accordance with the cooperative principles. [section 5(1)]. The word 'limited' or its equivalent in any Indian language shall be affixed to the name of every multi-State cooperative society registered under the Act with limited liability. [section 5(2)].

Cooperative Principles - Cooperatives work on basic concept of 'mutual assistance' and 'one man one vote'. - - The bye-laws of multi-state cooperative society should provide for cooperative principles, as given in First Schedule to the Act.

Society is a body corporate - Every multi-state cooperative society is a body corporate with name under which it is registered. It will have common seal and perpetual succession. It can acquire and dispose of property (movable as well as immovable), enter into contracts, institute and defend suits by the name it which it is registered. [section 9(1)].

Federal Cooperative - 'Federal Cooperative' means a federation of cooperative societies registered under this Act and whose membership is available only to a cooperative society or a multi-state cooperative society. [section 3(k)].

***Registration of multi-state cooperative society* -** Central Government will appoint a Central Registrar of Cooperative Societies. He will register the multi-state cooperative society. [section 4(1)]. Some of his powers can be delegated to other officers of Central or State Government, but powers of registration cannot be delegated. Powers in relation to a national cooperative society cannot be delegated to State Government. [section 4(2)].

***Bye-laws of society* -** Each multi-state cooperative society must have bye-laws for its internal management. The 'bye-laws' are comparable to 'Articles of Association of a company'.

***Conversion, amalgamation or division of society* -** The Act makes provisions for conversion, amalgamation etc. in certain cases.

***Duties, rights and liabilities of members* -** Cooperative Principle is based on the concept of mutual assistance. Hence, provisions have been made for rights, duties and liabilities of members.

Duty of every member - It is duty of every member of multi-state cooperative society to promote and protect interests and objects of the society. [section 25(5)].

Voting by members - Every member, including member who is employee shall have one vote, irrespective of his shareholding. An employee is not entitled to vote in respect of elections to members of board or amendment to bye-laws. Chairperson will have casting vote in case of equality. If person other than individual are members (e.g. Government, other cooperative society, NCDC etc.) voting power to its nominee will be one vote only. [section 31].

NO VOTING BY PROXY - Voting must be done in person. Proxy is not permitted. A multi-state cooperative society or cooperative society which is a member can appoint its representative to vote on its behalf. [section 32].

***Management of Society* -** Management of a multi-state cooperative society will be a three tier structure. General body will consist of all members. A smaller body consisting of delegates of members can be formed and some powers can be delegated to the small body. They will elect Board of Directors to exercise overall control over operations. Day to day control will be exercised by 'Chief Executive' who will be employee of the multi-state cooperative society.

Chairperson/President of society - A multi-state cooperative society can have Chairperson/President and Vice Chairperson/Vice President. [It appears that his election will be made by Board of Directors]. A person who is Minister in central or State Government cannot be elected to the post. - - A person can be elected as Chairperson/President only for two consecutive terms, full or part. However, after a gap of one full term, he can again be elected as Chairperson/President. [section 44]. - - Each full term is of five years.

OFFICE BEARER ONLY IN TWO SOCIETIES - A person can be Chairperson/President or Vice Chairperson/Vice President of at the most two multi-state cooperative societies at a time. [section 46].

Election of directors - Election of directors will be responsibility of existing Board. [section 45(1)]. Only a person who is member of society can contest elections. [section 45(7)]. Elections will be held at the time of general meeting and by secret ballot. Elected members are eligible for re-election, if bye-laws permit. Term of elected members shall be five years at a time. However, the Board will continue till successors are elected or nominated as per provisions of the Act and bye-laws. [section 45(5)]. If Board does not hold elections, same will be held by Central Registrar. [section 45(6)].

Powers and functions of Board - The Board of Directors may exercise all powers as may be necessary to carry out its functions under the Act. [section 49(1)].

Chief Executive - Each multi-state cooperative society will have Chief Executive (by whatever name called).he will be full time employee. Chief Executive will be appointed by Board. [section 51(1)]. He will be member of Board and of executive committee and other committees of Board. [section 51(2)]. - - If Central/State Government holds 51% or more equity capital of multi-state cooperative society, his salary and service conditions will be as prescribed by rules. [section 51(3)].

***Privileges of multi-state cooperative society* -** Certain privileges are granted to multi-state cooperative society so that it can function effectively.

Winding up of society - Winding up can be ordered by Central Registrar after audit, inquiry or inspection, after giving opportunity of hearing to society. [section 86(1)]. Winding up can also be ordered if number of members fall below 50 or where society has ceased to function or has not commenced business within 6 months. [section 86(2)]. Cooperative Bank cannot be wound up without previous sanction of RBI. [section 86(5)]. Cooperative Bank will be wound up if RBI so directs. [section 87].

NEGOTIABLE INSTRUMENTS ACT

The Negotiable Instruments Act was passed in 1881. Some provisions of the Act have become redundant due to passage of time, change in methods of doing business and technology changes. However, the basic principles of the Act are still valid and the Act has stood test of time. The Act extends to the whole of India. There is no doubt that the Act is to regulate commercial transactions and was drafted to suit requirements of business conditions then prevailing.

The instrument is mainly an instrument of credit readily convertible into money and easily passable from one hand to another.

LOCAL USAGE PREVAILS UNLESS EXCLUDED **-** The Act does not affect any local usage relating to any instrument in an oriental language. However, the local usage can be excluded by any words in the body of the instrument, which indicate an intention that the legal relations of the parties will be governed by provisions of Negotiable Instruments Act and not by local usage. [section 1]. **- -** Thus, unless specifically excluded, local usage prevails, if the instrument is in regional language.

BILL OF EXCHANGE AND PROMISSORY NOTES EXCLUDED FROM INFORMATION TECHNOLOGY ACT **-** Section (1)(4)(a) of Information Technology Act provides that the Act will not apply to Bill of Exchange and Promissory Notes. Thus, a Bill of Exchange or Promissory Note cannot be made by electronic means. However, cheque is covered under of Information Technology Act and hence can be made and / or sent by electronic means.

CHANGES MADE BY AMENDMENT ACT, 2002 **-** (a) Definition of 'cheque' and related provisions in respect of cheque amended to facilitate electronic submission and/or electronic clearance of cheque. Corresponding changes were also made in Information Technology Act. (b) Bouncing of cheque **-** Provisions amended * Provision for imprisonment upto 2 years against present one year * Period for issuing notice to drawer increased from 15 days to 30 days * Government Nominee Directors excluded from liability * Court empowered to take cognizance of offence even if complaint filed beyond one month * Summary trial procedure permitted for imposing punishment upto one year and fine even exceeding Rs 5,000 * Summons can be issued by speed post or courier service * Summons refused will be deemed to have been served * Evidence of complainant through affidavit permitted * Bank's slip or memo indicating dishonour of cheque will be *prima facie* evidence unless contrary proved * Offence can be compounded. ***- - The amendments have been made effective from 6-2-2003.***

Transferee can get better title than transferor – Normal principle is that a person cannot transfer better title to property that he himself has. For example, if a person steals a car and sells the same, the buyer does not get any legal title to the car as the transferor himself had no title to the car. The real owner of car can anytime obtain possession from the buyer, *even if* the buyer had purchased the car in good faith and even if he had no idea that the seller had no title to the car. This provision is no doubt sound, but would make free negotiability of instrument difficult, as it would be difficult to verify title of transferor in many cases. Hence, it is provided that if a person acquires 'Negotiable Instrument' in good faith and without knowledge of defect in title of the transferor, the transferee can get better title to the negotiable instrument, even if the title of transferor was defective. This is really to ensure free negotiability of instrument so that persons can deal in the instrument without any fear.

DIFFERENCE BETWEEN NEGOTIATION AND TRANSFER/ASSIGNMENT **-** Difference between "Negotiation' and assignment/transfer is that in case of negotiation, the transferee can get title better than transferor, which can never happen in assignment/transfer.

STATUTORY DEFINITION OF NEGOTIABLE INSTRUMENT **-** A "negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer. *Explanation (i)* : A promissory note, bill of exchange or cheque is payable to order which is expressed to be so payable or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it shall not be transferable. *Explanation (ii)* : A promissory note, bill of exchange or cheque is payable to bearer which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank. *Explanation (iii)* : Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option. [section 13(1)]. **- -** A negotiable instrument may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. [section 13(2)].

***Promissory Note* -** A "promissory note" is an instrument in writing (not being a bank-note or a currency-note) containing an unconditional under taking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument. [Section 4].

***Bill of Exchange* –** As per statutory definition, "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. [Para 1 of section 5]. A cheque is a special type of Bill of Exchange. It is drawn on banker and is required to be made payable on demand.

DRAWER, DRAWEE AND PAYEE **-** The maker of a bill of exchange or cheque is called the "drawer"; the person thereby directed to pay is called the "drawee" [section 7 para 1]. **- -** The person named in the instrument, to whom, or to whose order the money is by the instrument directed to be paid, is called the "payee" [section 7 para 5]. **- -** However, a drawer and payee can be one person as he can order to pay the amount to himself.

AT SIGHT, ON PRESENTMENT, AFTER SIGHT **-** In a promissory note or bill of exchange the expressions "at sight" and "on presentment" mean 'on demand'. The expression "after sight" means, in a promissory note, after presentment for sight, and, in a bill of exchange, after acceptance, or noting for non-acceptance, or protest for non-acceptance. [section 21]. **- -** Thus, in case of document 'after sight', the countdown starts only after document is 'sighted' by the concerned party.

Stamp duty on Negotiable Instrument – A negotiable instrument is required to be stamped. Stamp duty on Bill of Exchange and Promissory Note is a Union Subject. Hence, stamp duty is same all over India.

Hundi – a local instrument – *Hundi* is an indigenous instrument similar to Negotiable Instrument. The term is derived from Sanskrit word 'hund' which means 'to collect'. If it is drawn in local language, it is governed by local usage and customs.

***Provisions in respect of Cheques* -** A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand. 'Cheque' includes electronic image of a truncated cheque and a cheque in electronic form. [section 6]. The definition is amended by Amendment Act, 2002, making provision for electronic submission and clearance of cheque. The cheque is one form of Bill of Exchange. It is addressed to Banker. It cannot be made payable after some days. It must be made payable 'on demand'.

Crossing of Cheque – The Act makes specific provisions for crossing of cheques.

CHEQUE CROSSED GENERALLY **-** Where a cheque bears across its face an addition of the words "and company" or any abbreviation thereof, between two parallel transverse lines, or of two parallel transverse lines simply, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally. [section 123]

CHEQUE CROSSED SPECIALLY **-** Where a cheque bears across its face an addition of the name of a banker, either with or without the words "not negotiable", that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed specially, and to be crossed to that banker. [section 124].

PAYMENT OF CHEQUE CROSSED GENERALLY OR SPECIALLY **-** Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to a banker. Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection. [section 126].

CHEQUE BEARING "NOT NEGOTIABLE" **-** A person taking a cheque crossed generally or specially, bearing in either case the words "not negotiable", shall not have, and shall not be capable of giving, a better title to the cheque than that which the person form whom he took it had. [section 130]. Thus, mere writing words ‘Not negotiable’ does not mean that the cheque is not transferable. It is still transferable, but the transferee cannot get title better than what transferor had.

***Electronic Cheque* -** Provisions of electronic cheque has been made by Amendment Act, 2002. As per *Explanation* I(a) to section 6, ‘A cheque in the electronic form’ means a cheque which contains the exact mirror image of a paper cheque, and is generated, written and signed by a secure system ensuring the minimum safety standards with the use of digital signature (with or without biometrics signature) and asymmetric crypto system.

***Truncated Cheque* -** Provisions of electronic cheque has been made by Amendment Act, 2002. As per *Explanation* I(b) to section 6, ‘A truncated cheque’ means a cheque which is truncated during the clearing cycle, either by the clearing house during the course of a clearing cycle, either by the clearing house or by the bank whether paying or receiving payment, immediately on generation of an electronic image for transmission, substituting the further physical movement of the cheque in writing.

***Penalty in case of dishonour of cheques for insufficiency of funds* -** If a cheque is dishonoured even when presented before expiry of 6 months, the payee or holder in due course is required to give notice to drawer of cheque within 30 days from receiving information from bank.. The drawer should make payment within 15 days of receipt of notice. If he does not pay within 15 days, the payee has to lodge a complaint with Metropolitan Magistrate or Judicial Magistrate of First Class, against drawer within one month from the last day on which drawer should have paid the amount. The penalty can be upto two years imprisonment or fine upto twice the amount of cheque or both. The offense can be tried summarily. Notice can be sent to drawer by speed post or courier. Offense is compoundable.

It must be noted that even if penalty is imposed on drawer, he is still liable to make payment of the cheque which was dishonoured. Thus, the fine/imprisonment is in addition to his liability to make payment of the cheque.

Return of cheque should be for insufficiency of funds - The offence takes place only when cheque is dishonoured for insufficiency of funds or where the amount exceeds the arrangement. Section 146 of NI Act only provides that once complainant produces bank’s slip or memo having official mark that the cheque is dishonoured, the Court will presume dishonour of the cheque, unless and until such fact is disproved.

***Calculation of date of maturity of Bill of Exchange* -** If the instrument is not payable on demand, calculation of date of maturity is important. An instrument not payable on demand is entitled to get 3 days grace period.

Presentment of Negotiable Instrument - The Negotiable Instrument is required to be presented for payment to the person who is liable to pay. Further, in case of Bill of Exchange payable ‘after sight’, it has to be presented for acceptance by drawee. ‘Acceptance’ means that drawee agrees to pay the amount as shown in the Bill. This is required as the maker of bill (drawer) is asking drawee to pay certain amount to payee. The drawee may refuse the payment as he has not signed the Bill and has not accepted the liability.

In case of Promissory Note, such acceptance is not required, as the maker who has signed the note himself is liable to make payment. However, if the promissory note is payable certain days ‘after sight’ [say 30 days after sight], it will have to be presented for ‘sight’.

If the instrument uses the expressions “on demand”, “at sight” or “on presentment”, the amount is payable on demand. In such case, presentment for acceptance is not required. The Negotiable Instrument will be directly presented for payment.

Acceptance and payment for honour and drawee in need - Provisions for acceptance and payment for honour have been made in case when the negotiable instrument is dishonoured. Bill is accepted for honour when it is dishonoured when presenting for acceptance, while payment for dishonour is made when Bill is dishonoured when presented for payment.

Negotiation of Instrument - The most salient feature of the instrument is that it is negotiable. Negotiation does not mean a mere transfer. After negotiation, the holder in due course can get a better title even if title of transferor was defective. If the instrument is 'to order', it can be negotiated by making endorsement. If the instrument is 'to bearer', it can be negotiated by delivery. As per definition of 'delivery', such delivery is valid only if made by party making, accepting or indorsing the instrument or by a person authorised by him.

An instrument can be negotiated any number of times. As per section 118(e), endorsements appearing on the negotiable instrument are presumed to have been made in the order in which they appear on the instrument, unless contrary is proved. [There is no mandatory provision to put date while signing, though advisable to do so]. Section 118(d) provides that there is presumption that the instrument was negotiated before its maturity, unless contrary is proved. As per section 60, Bill can be negotiated even after date of maturity by persons other than maker, drawee or acceptor after maturity. However, person getting such instrument is not 'holder in due course' and does not enjoy protections available to 'holder in due course'.

Liability of parties - Basic liability of payment is as follows – (a) Maker in case of Promissory Note or Cheque and (b) Drawer of Bill till it is accepted by drawee and acceptor after the Bill is accepted . They are liable as 'principal debtors' and other parties to instrument are liable as sureties for maker, drawer or acceptor, as the case may be. When document is endorsed number of times, each prior party is liable to each subsequent party as principal debtor. In case of dishonour, notice is required to be given to drawer and all earlier endorsees.

PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENTS - Until the contrary is proved, the following presumptions shall be made :— (a) *of consideration* - that every negoticble instrument was made or drawn for consideration, and that every such instrument, when it has been $ accepted, indorsed, negotiated or transferrgd, was accepted, indorsed, negotiated or transferred for consideration; - - (b) *as to date* - that every negotiable instrument bearing a date was oide or drawn on such date; - - (c) *as to time of acceptance* - that every accepted bill of exchange was accepted within a reasonable time after its date and before its maturity; - - (d) *as to time of transfer* - - that every transfer of a negotiable instrument was made before its maturity; - - (e) *as to order of indorsements* - that the indorsements appearing upon a negotiable instrument were made in the order in which they appear thereon; (f) *as to stamps* - that a lost promissory note, bill of exchange or cheque was duly stamped; - - (g) *that holder is a holder in due course* - that the holder of a negotiable instrument is a holder in due course : provided that, where the instrument has been obtained from its lawful owner, or from any person in lawful custody thereof, by means of an offence or fraud, or has been obtained from the maker or acceptor thereof by means of an of fence or fraud, or for unlawful consideration, the burden of proving that the holder in due course lies upon him. [section 118]

INDIAN REGISTRATION ACT

The main purpose for which the Act was designed was to ensure information about all deals concerning land so that correct land records could be maintained. The Act is used for proper recording of transactions relating to other immovable property also. The Act provides for registration of other documents also, which can give these documents more authenticity. Registering authorities have been provided in all the districts for this purpose.

Note that this registration is entirely different from registration of charge done by Registrar of Companies under Companies Act. If the charge relates to immovable property, registration with Registrar (appointed by State Government) under Registration Act and registration under Companies Act with ROC are both required.

Documents of which registration is compulsory - Registration of documents relating to immovable property is compulsory. Registration of will is optional.

Documents not requiring registration - Some documents though related to immovable property are not required to be registered. These are given in section 17(2) of the Act.

Time of presentation for registration - Document should be submitted for registration within 4 months from date of execution [section 23]. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within 4 months from date of each execution [section 24]. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India [section 26].

RE-REGISTRATION - If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within 4 months from the date he became aware of the fact that registration of document is invalid [section 23A].

Where document should be registered - Document relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated [section 28]. Other document can be registered in the office of Sub-Registrar where all persons executing the document desire it to be registered [section 29]. A Registrar can accept a document which is registerable with sub-registrar who is subordinate to him [section 30(1)]. Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will [section 31].

All persons executing document must appear before Registrar - All persons executing the document or their representatives, assigns or agents holding power of attorney must appear before registering officer [section 34(1)]. They have to admit execution and sign the document in presence of Registrar, as required under section 58(1)(*a*). Appearance may be simultaneous or at different times [section 34(2)]. If some of the persons are unable to appear within 4 months, further time upto additional 4 months can be given on payment of fine upto 10 times the proper registration fee [proviso to section 34(1)].

If document relates to transfer of ownership of immovable property, passport size photograph and finger prints of each buyer and seller of such property shall be affixed to document. [proviso to section 32A]. The Registrar is required to ensure that these are endorsed on the document.

Registration by Registering Officer - If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document [section 35(1)]. He will make necessary entries in the Register maintained by him.

Certification of registration - After all formalities are complete, the Registering Officer will endorse the document with word 'Registered', and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document [section 61].

Effective date of document - A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date [section 47].

Document registered has priority over oral agreement - Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are : (*a*) If possession of property (movable or immovable) is delivered on basis of such oral agreement and such delivery of possession is valid transfer under any law (*b*) Mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to same property [section 48].

Effect of non-registration - If a document which is required to be registered under section 17 or under provisions of Transfer of Property Act, 1882 is not registered, the effect is that such un-registered document * does not affect any immovable property comprised therein * cannot be received as evidence of any transaction affecting such property. - - - Thus, the document becomes redundant and useless for all practical purposes. It can be accepted as evidence in criminal proceedings.

SALE OF GOODS ACT

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of Contract. Initially, this was part of Indian Contract Act itself in chapter VII (sections 76 to 123). Later these sections in Contract Act were deleted, and separate Sale of Goods Act was passed in 1930.

The Sale of Goods Act is complimentary to Contract Act. Basic provisions of Contract Act apply to contract of Sale of Goods also. Basic requirements of contract i.e. offer and acceptance, legally enforceable agreement, mutual consent, parties competent to contract, free consent, lawful object, consideration etc. apply to contract of Sale of Goods also.

***Contract of Sale* -** A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another. [section 4(1)]. A contract of sale may be absolute or conditional. [section 4(2)].

Thus, following are essentials of contract of sale **-** * It is contract, i.e. all requirements of 'contract' must be fulfilled * It is of 'goods' * Transfer of property is required * Contract is between buyer and seller * Sale should be for 'price' * A part owner can sale his part to another part-owner * Contract may be absolute or conditional.

***How Contract of sale is made* -** A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. [section 5(1)]. Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. [section 5(2)]. Thus, credit sale is also a 'sale'. **- -** A verbal contract or contract by conduct of parties is valid. e.g. putting goods in basket in super market or taking food in a hotel.

***Two parties to contract* -** Two parties are required for contract. **- -** "Buyer" means a person who buys or agrees to buy goods. [section 2(1)]. "Seller" means a person who sells or agrees to sell goods. [section 2(13)]. A part owner can sale his part to another part-owner. However, if joint owners distribute property among themselves as per mutual agreement, it is not 'sale' as there are no two parties.

***Contract of Sale includes agreement to sale* -** Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereaf ter to be fulfilled, the contract is called an agreement to sell. [section 4(3)]. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred. [section 4(4)]. The provision that contract of sale includes agreement to sale is only for the purposes of rights and liabilities under Sale of Goods Act and not to determine liability of sales tax, which arises only when actual sale takes place.

***Transfer of property* -** "Property" means the general property in goods, and not merely a special property. [section 2(11)]. In layman's terms 'property' means 'ownership'. 'General Property' means 'full ownership'. Thus, transfer of 'general property' is required to constitute a sale. If goods are given for hire, lease, hire purchase or pledge, 'general property' is not transferred and hence it is not a 'sale'.

POSSESSION AND PROPERTY - Note that 'property' and 'possession' are not synonymous. Transfer of possession does not mean transfer of property. e.g. - if goods are handed over to transporter or godown keeper, possession is transferred but 'property' remains with owner. Similarly, if goods remain in possession of seller after sale transaction is over, the 'possession' is with seller, but 'property' is with buyer.

Goods - "Goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. [section 2(7)].

Price - "Price" means the money consideration for a sale of goods. [section 2(10)]. Consideration is required for any contract. However, in case of contract of sale of goods, the consideration should be 'price' i.e. money consideration.

Ascertainment of price - The price in a contract of sale may be fixed by the con tract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. [section 9(1)]. Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. [section 9(2)].

Conditions and Warranties - Opening para of section 16 makes it clear that there is no implied warranty or condition as to quality of fitness of goods for any particular purpose, except those specified in Sale of Goods Act or any other law. - - This is the basic principle of caveat emptor' i.e. buyer be aware. However, there are certain stipulations which are essential for main purpose of the contract of sale of goods. These go the root of contract and non-fulfilment will mean loss of foundation of contract. These are termed as 'conditions'. Other stipulations, which are not essential are termed as 'warranty'. These are collateral to contract of sale of goods. Contract cannot be avoided for breach of warranty, but aggrieved party can claim damages. - - A breach of condition can be treated as breach of warranty, but vice versa is not permissible.

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [section 12(1)]. A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. [section 12(2)]. A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. [section 12(3)]. Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the con tract. A stipulation may be a condition, though called a warranty in the contract. [section 12(4)].

Where a particular stipulation in contract is a condition or warranty depends on the interpretation of terms of contract. Mere stating 'Conditions of Contract' in agreement does not mean all stipulations mentioned are 'conditions' within meaning of section 12(2).

When condition to be treated as warranty - Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warran ty and not as a ground for treating the contract as repudiated. [section 13(1)]. Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the con tract, express or implied, to that effect. [section 13(2)]. Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise. [section 13(3)].

Time of payment is not essence of contract but time of delivery of goods is, unless specified otherwise **-** Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipula tion as to time is of the essence of the contract or not depends on the terms of the contract. [section 11]. As a general rule, time of payment is not essence of contract, unless there is specific different provision in Contract. In other words, time of payment specified is 'warranty'. If payment is not made in time, the seller can claim damages but cannot repudiate the contract.

Caveat Emptor **-** The principle termed as '*caveat emptor'* means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him. This principle in basic form is embodied in section 16 that subject to provisions of Sale of Goods Act and any other law, there is no implied condition or warranty as to quality or fitness of goods for any particular purpose. As per section 2(12), "Quality of goods" includes their state or condition.

Transfer of property as between seller and buyer **-** Transfer of general property is required in a sale. 'Property' means legal ownership. It is necessary to decide whether property in goods has transferred to buyer to determine rights and liabilities of buyer and seller. Generally, risk accompanies property in goods i.e. when property in goods passes, risk also passes. If property in goods has already passed on to buyer, seller cannot stop delivery of goods even if in the meanwhile buyer has become insolvent. - - - Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. [section 18].

Property passes when intended to pass **-** Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. [section 19(1)]. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. [section 19(2)]. Unless a different intention appears, the rules contained in sections 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. [section 19(3)].

Specific goods in a deliverable state **-** Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immate rial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. [section 20].

Auction sale **-** Auction sale is special mode of sale. The sale is made in open after making public announcement. Buyers assemble and make offers on the spot. Person offering to pay highest price gets the goods. Usually, auctioneer is appointed to conduct auction. Higher and higher bids are offered and sale is complete when auctioneer accepts a bid.- - - In the case of a sale by auction— (1) where goods are put up for sale in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale; (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary man ner; and, until such announcement is made, any bidder may retract his bid; (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so re served, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction; (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person; and any sale contravening this rule may be treated as fraudulent by the buyer; (5) the sale may be notified to be subject to a reserved or upset price; (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer. [section 64].

***Delivery of goods to buyer* -** The Act makes elaborate provisions regarding delivery of goods to buyer. It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale. [section 31]. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods. [section 32]. **- -** Note that this is '*unless otherwise agreed*', i.e. buyer and seller can agree to different provisions in respect of payment and delivery.

Acceptance of goods by buyer - Contract of Sale is completed not by mere delivery of goods but by acceptance of goods by buyer. 'Acceptance' does not mean mere receipt of goods. It means checking the goods to ascertain whether they are as per contract. - - - Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conform ity with the contract. [section 41(1)]. **- -** Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. [section 41(2)].

Buyer's and Seller's duties - The Act casts various duties and grants certain rights on both buyer and seller.

***Rights of unpaid seller against the goods* - A**fter goods are sold and property is transferred to buyer, the only remedy with seller is to approach Court, if the buyer does not pay. Seller has no right to take forceful possession of goods from buyer, once property in goods is transferred to him. However, the Act gives some rights to seller if his dues are not paid.

***Suits for breach of the contract* -** Unpaid seller can exercise his rights to the extent explained above. In addition, seller can exercise following rights in case of breach of contract. Buyer has also rights in case of breach of contract.

Measure for compensation and damages – The Sale of Goods Act does not specify how to measure damages. However, since the Act is complimentary to Contract Act, measure of compensation and damages will be as provided in sections 73 and 74 of Contract Act.

Societies Registration Act

Purpose of the Act is to provide for registration of literary, scientific and charitable societies.

Societies Registration Act is a Central Act. However, 'unincorporated literary, scientific, religious and other societies and associations' is a State Subject (Entry 32 of List II of Seventh Schedule to Constitution, i.e. State List). Thus, normally, there should have been only State Laws on this subject. However, Societies Registration Act was passed in 1860, i.e. much before bifurcation of power between State and Centre was specified. Though the Act is still in force, it has been specifically repealed in many States and those States have their own Acts. Thus, practically, the Central Act is mainly of academic interest.

SOCIETIES TO WHICH THE ACT APPLIES – Following societies can be registered under the Act - * Charitable societies * Military orphan funds or societies * Societies established for promotion of science, literature, or for fine arts * Societies established for instruction and diffusion of useful knowledge, diffusion of political education * Societies established for maintenance of libraries or reading rooms for general public * Societies established for Public museums and galleries for paintings or other works of art, collections of natural history, mechanical and philosophical inventions, instruments or designs [section 20]

REGISTRATION – Any seven or more persons associated for literary, scientific or charitable purpose can register a trust by subscribing their names to memorandum of association. [section 1]. [The Act envisages filing the memorandum with Registrar of Joint Stock Companies. Practically, the memorandum will have to be filed with Registrar appointed under corresponding State Act]. - - The memorandum of association shall contain name and objects of society and names and addresses of governors/council/ directors or other governing body. - - Copy of rules and regulations of society will also have to be filed along with memorandum. [section 2].

ANNUAL LIST OF MANAGING BODY TO BE FILED – Annual list of managing body should be filed within 14 days after AGM. [section4]. If there is no provision of AGM, then list should be filed in January every year. [section 4]. - - The governing body may be termed as governors, council, directors, committee, trustees or other body to whom by rules and regulations of society, the management of the affairs of society is entrusted. [section 16].

SOCIETY IS NOT A BODY CORPORATE – Society is not a body corporate. This is evident from following – (a) Entry 32 in List II of Schedule to Constitution itself uses the words 'unincorporated' (b) As per section 4, property of society vests in governing body, if not vested in trustees. Thus, property does not vest in society as such. (c) Section 6 states that suit by or against society can be only in name of President, Chairman, Principal Secretary or Trustees, as determined by rules of society. Thus, suit cannot be in name of society as such.

OFFICE BEARERS NOT PERSONALLY LIABLE – Section 8 makes it clear that though suit against society is instituted in name of some person, he is not personally liable, but property of society will be liable.

MEMBERS OF SOCIETY – A member is a person who is admitted according to rules and regulations of society and who pays subscription, or signed the roll or list of members, and who has not resigned from membership. [section 15]. A member can be sued as stranger for arrear in subscription or if he injures or destroys property of society. [section 10]. Member guilty of offence of stealing, embezzlement or wilful destruction of society property can be punished as stranger, i.e. not a member. [section 11].

ALTERATION, EXTENSION OF PURPOSES, AMLAGAMATION OR DISSOLUTION – Society can alter, extend or abridge is purposes, or amalgamate with other society after approval of general meeting of members. [section 12]. Society can be dissolved if three-fifths of members determine to do so. [section 13]. Upon dissolution, balance amount should be given to other society and not to any member. [section 14].

SPECIFIC RELIEF ACT

Specific Reliefs Act is complimentary to provisions of Contract Act and Transfer of Property Act, as the Act applies both to movable property and immovable property. The Act applies in cases where Court can order specific performance of a contract or act. As per section 4, specific relief can be granted only for purpose of enforcing individual civil rights and not for the mere purpose of enforcing a civil law.

'Specific performance' means Court will ask the party to perform his part of agreement, instead of asking him to pay damages to other party.

Recovering possession of immovable property – * A person who is entitled to possession of a specific immovable property may recover it in the manner provided in Code of Civil Procedure. (section 5) * If any person is disposed without his consent, of immovable property otherwise than by course of law, he can recover possession, even if any other title is set up in such suit. Such suit shall be brought within 6 months. No suit can be filed against Government for recovery of possession. [section 6]. **- -** ***That is why it is termed as 'possession is 9 points in law'. Even an unlawful possession of immovable property can be taken away only by lawful means and not forcefully.***

Recovering possession of specific movable property – * A person who is entitled to possession of a specific movable property may recover it in the manner provided in Code of Civil Procedure. (section 7) * If any person is in possession or control of a specific movable property of which he is not owner, he can be compelled to specifically deliver it to the person entitled to immediate possession, in cases specified in section 6. **- -** Thus, if a person holding the movable property is owner of goods, he cannot be compelled to deliver it to other. However, in other cases, he can be compelled to deliver it, even if other person is not owner, as long as he is entitled to its immediate possession.

Specific performance of contract – Specific performance of contract can be ordered, at discretion of Court, in following cases – (a) Where there exists no standard for ascertaining damage caused by the non-performance of act agreed to be done or (b) When the act agreed to be done is such that compensation in money for non-performance will not give sufficient relief. [section 10]. As per explanation (ii) to section 10, breach of contract in respect of movable property can be relieved (by paying damages) unless the property is not an ordinary article of commerce or is of specific value or interest to the tariff, or consists of goods which are not easily available in the market. **- -** In other words, Court may order to deliver specific article only if it is special or unique article, not available in market. In other cases, Court will order damages but not order specific performance of contract. **- -** In case of immovable property, normally, specific performance will be ordered, as such property is usually unique. **- -** Section 12(1) states that Court shall not order performance of part of contract, except in cases specified in that section.

Contracts which cannot be specifically enforced – Following contracts cannot specifically enforced – (a) Where compensation is adequate relief (b) Contract runs into such minute or numerous details or depends on personal qualifications of parties or is such that Court cannot enforce specific performance of its material terms (c) Contract which in its nature is determinable (d) Contract, performance of which involves a continuous duty, which Court cannot supervise. [section 14]. **- -** In other words, in case of movable articles or contract of intricate nature, specific performance will normally not be ordered by Court. **- -** Specific performance of contract of personal nature cannot be ordered.

Discretionary powers of Court – Jurisdiction of Court to decree specific performance is discretionary. Court will not order specific performance merely because it is lawful to do so. [section 20(1)]. Court will consider various aspects before issuing decree for specific performance. **- -** Court can grant compensation in lieu of even in addition to specific performance. [section 21].

Other cases when Court can order specific performance – (a) Order rectification of instrument if it does not reflect real intention of parties. This may happen through fraud or mutual mistake. [section 26] (b) Order rescission of contract (section 27) (c) Cancellation of instrument by getting declared that it is void (section 31).

TRANSFER OF PROPERTY ACT

Entry 6 of List III (Concurrent List) of Seventh Schedule to Constitution reads 'Transfer of property other than agricultural land; registration of deeds and documents'. Thus, transfer of property is a 'Concurrent Subject'. Both Central and State Government can take legislative action in respect of transfer of property except that relating to agricultural land. [Transfer of agricultural land is a State subject under Entry 18 of List II (State List)]

The Act proposes to prescribe law relating to transfer of property by act of parties. Thus, the Act applies only to voluntary transfer or property. It does not cover transfer of property by 'will'.

Section 4 of the Act clarifies that the part of the Act which relates to contracts shall be taken as part of Indian Contract Act and some specified sections shall be read as supplemental to Indian Registration Act. Thus, the Act is complimentary to Indian Contract Act and Registration Act. The Act applies both to movable and immovable property.

TRANSFER OF PROPERTY – 'Transfer of Property' means an act by which a living person conveys property, in present or future, to one or more living persons, or to himself or to himself and one or more other living persons. 'Living person' includes a company or association or body of individuals, whether incorporated or not. [section 5]. -- The property may be movable or immovable, present or future. - - Such transfer can be made orally, unless transfer in writing is specifically required under any law. [section 9]. - - Any person competent to contract and entitled to transferable property, or authorised to dispose of transferable property on his own, is competent to transfer such property. The property can be transferred wholly or in part. It can be transferred either absolutely or conditionally. Such transfer can be only to the extent and in manner allowed and prescribed by law. [section 7].

SALE OF IMMOVABLE PROPERTY – 'Sale' is a transfer of ownership in exchange for a price paid or promised or part-paid and part promised. Such transfer in case of tangible immovable property of value of Rs 100 or more can be made only by a registered instrument. Delivery of tangible immovable property is made when seller places the buyer, or such person as he directs, in possession of property. Thus, delivery of immovable property can be only by handing over actual possession to buyer or to a person authorised by buyer. [section 54].

MORTGAGE – 'Mortgage' is the transfer of an interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced, by way of loan or an existing or future debt. The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured are called as 'mortgage money' and the instrument by which transfer is effected is called a mortgage-deed. [section 58(a)]. Mortgage can be * simple mortgage * Mortgage by conditional sale * Usufructuary mortgage * English Mortgage * Mortgage by deposit of title deeds or * Anomalous mortgage.

WHEN MORTGAGEE CAN TAKE POSSESSION OF MORTGAGED PROPERTY IN CASE OF DEFAULT - Under provisions of section 69 of Transfer of Property Act, mortgagee can take possession of mortgaged property and sale the same without intervention of Court only in case of English mortgage, if there is default of payment of mortgage money. In addition, mortgagee can take possession of mortgaged property where there is specific provision in mortgage deed and the mortgaged property is situated in towns of Kolkata, Chennai or Mumbai. In other cases, possession of property can be taken only with intervention of Court. [English Mortgage is where mortgagor binds himself to repay the mortgaged money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a *proviso* that he will re-transfer the property to the mortgagor upon payment of the mortgage-money as agreed. - section 58(e) of Transfer of Property Act].

CHARGE – Where immovable property of one person is, by act of parties or by operation of law, made security for payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all provisions in respect of 'simple mortgage' will apply to such charge. [section 100]. [Mortgage is not a 'charge' as per section 100 of Transfer of Property Act, but it will be a 'charge' for purpose of registration under Companies Act, as per section 124 of Companies Act].

A 'charge' is not 'mortgage'. In every mortgage, there is 'charge', but every charge is not a mortgage. Section 100 of Transfer of Property Act states that if immovable property is made as security for payment of money and if it does not amount to mortgage, then the later person is said to have a charge on property. However, a 'charge' does not create an interest in the property. - *Dattatreya Mote* v. *Anand Datar* - (1994) 2 SCC 799. Thus, no particular form is necessary to create 'charge'. [However, for purpose of registration under Companies Act, ‘charge’ includes mortgage].

LEASE OF IMMOVABLE PROPERTY – A lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity. Such transfer of right should be in consideration of a price paid or promised, or of money, or a share of crops, or service or anything of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. [section 105]. Lease of property from year to year or for any term exceeding one year can be made only by registered instrument. [section 107].

EXCHANGE – When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an ‘exchange’. [section 118].

ACTIONABLE CLAIM – ‘Actionable claim’ means a claim to any debt or to any beneficial in movable property not in possession (either actual or constructive) of the claimant. The debt should be other than a debt secured by mortgage of immovable property or pledge of movable property. The claim should be such be such as Civil Court would recognise as affording grounds for relief. Such debt or beneficial interest be existent, accruing, conditional or contingent. [section 3 para 6]. Such transfer of an actionable claim shall be effected only by execution of an instrument is writing. [section 130]. - - One normal example is that receivable from a person is ‘actionable claim’, which can be transferred to another (e.g. one bank may transfer some of its receivables to another).

ECONOMICS LAWS

1. Air (Prevention and Control of Pollution) Act, 1981
2. Competition Act, 2002
3. Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)
4. Consumer Protection Act
5. Copyright Act, 1957
6. Designs Act, 2000
7. Environment (Protection) Act, 1986
8. Essential Commodities Act, 1955
9. Foreign Contribution (Regulation) Act, 1976
10. Foreign Exchange Management Act, 1999
11. Foreign Trade (Development and Regulation) Act
12. Indian Stamp Act, 1899
13. Industries (Development and Regulation) Act, 1951
14. Patents Act, 1970
15. Prevention of Money Laundering Act
16. Registration Act, 1908
17. Standards of Weights and Measures Act, 1976
18. Trade Marks Act, 1999
19. Water (Prevention and Control of Pollution) Act, 1974

Air (Prevention and Control of Pollution) Act, 1981

The Act is designed to prevent and control air pollution. It is applicable all over India.

The Act defines Air Pollution as presence in the atmosphere of 'air pollutant' [section 2(*b*)]. 'Air Pollutant' means any solid, liquid or gaseous substance, including noise, present in atmosphere in such concentration as may tend to be injurious to human beings, living creatures or plants or property or environment [section 2(*a*)]. Thus, it covers noise pollution also. Emission has been defined as any solid or liquid or gaseous substance, coming out of chimney, duct or fuel or any other outlet [section 2(*j*)]. Chimney is any structure with an opening or outlet form or through which any air pollutant may be emitted [section 2(*h*)].

Control Equipment means any apparatus, device, equipment or system to control the quality and manner of emission of any air pollutant. It includes any device used for securing the efficient operation of any industrial plant [section 2(*i*)]. 'Industrial Plant' means any plant used for any industrial or trade purpose and emitting any air pollutant into the atmosphere [section 2(k)]. Thus, even an equipment used for trade or business is covered if it emits air pollutant.

AIR POLLUTION CONTROL AREAS - State Government, after consultation with State Board, by notification, can declare any area as 'air pollution control area'. Such area can be added, deleted or altered by notification. State Government can prohibit burning of any material (other than fuel) in such area; if it is likely to cause air pollution. It can also order that (*a*) only approved fuel should be used in such area (*b*) only approved appliance be used for burning of any fuel or for generating or consuming any fume, gas or particulate matter. Such approval of fuel or appliance can be given by State Board [section 19 of Air Act].

INSTRUCTIONS TO VEHICLE REGISTRATION AUTHORITIES - State Government, after consulting State Board, may give necessary instructions to the registering authorities under Motor Vehicles Act in connection with maintenance of standards for emission of air pollutants. Such authority is bound to act on such instructions [section 20].

RESTRICTIONS ON ESTABLISHMENT OF INDUSTRIAL PLANTS - No person can establish any industry in air pollution control area without previous consent of the State Board. Application should be in prescribed form, accompanied by necessary fees. A person already operating industry in the control area, has to apply for the permission with the necessary fees to the state board within three months. After making necessary enquiries, the board may grant the consent subject to certain conditions or the consent may be refused. The consent can be subject to conditions. Such permission or refusal should be within four months. The State Board can cancel this consent, if the person fails to fulfil the conditions, only after giving the opportunity to the person of being heard.

RESTRAINING PERSON FROM CAUSING AIR POLLUTION - Person operating any industrial plant shall not allow emission of air pollutants in excess of the standards laid down by State Board [section 22 of Act]. State Board can apply to court (Judicial Magistrate or Metropolitan Magistrate) for restraining persons form causing air pollution. The court can give the order as it deems fit. Court can order a person restraining him from discharging air pollutants. Court can authorise Board to implement the said direction [section 22A of Act].

PERSON TO INFORM BOARD IF POLLUTION IS IN EXCESS - Where in any area, the emission of air pollutants is in excess or the standards laid down by State Board (or is likely to increase), the person in charge of the premises, shall inform the fact to State Board or agencies or authorities necessary. The Board shall take necessary remedial measures to mitigate the emission of such air pollutants. The expenses incurred for mitigating the emission can be recovered from the person concerned [section 23 of Act].

APPROVED LABORATORIES - State Government can establish approved State Air Laboratories. It can also appoint persons with prescribed qualifications as 'Government Analysts'. State Board can also appoint persons with prescribed qualifications as 'Board Analysts' for analysis of samples.

Authorities under the Air Pollution Act - The Act envisages Central Board as well as State Pollution Control Boards in each State. [In Union Territories, Environment Control Committees have been formed, which also have Chairman & Secretary].

Competition Act, 2002

Competition Act, 2002 proposes to control aspects of anti-competitive agreements, abuse of dominant position and regulation of competitions. All over the world, it was found that private monopolies can be detrimental to national economy and control is required. It is now felt that fair and free competition is required for growth of healthy economy.

The Act is to provide, keeping in view of the economic development of the country, for the establishment of a Commission to pre vent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Thus, main purpose of Act is to ensure free and fair competition in market.

Overall scheme - The Act is designed for following purposes **-** (a) Prohibition of anti-competitive agreements (b) Prohibition of abuse of dominant position and (c) Regulation of combinations. A quasi-judicial authority named 'Competition Commission of India' will be constituted. The Commission will consist of judicial as well as non-judicial persons to give Competition Commission of India (CCI) an overall perspective. On receipt of complaint or reference, CCI can issue order to Director General to investigate. His report will then be considered by CCI. The CCI will hear the concerned parties and then pass necessary orders. CCI will sit in benches. Each bench will consist of at least one judicial person of rank of Judge of High Court. CCI is empowered to recommend division of dominant enterprises. It can order de-merger in case of merger/amalgamation that adversely affects competition. Suitable powers are given to Commission and penalties are prescribed to ensure that orders of Commission are obeyed. Jurisdiction of Civil Court is barred and only appeal to Supreme Court only if substantial question of law are involved.

Anti-competitive agreements void - No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. [section 3(1)]. Any agreement entered into in contravention of the provisions contained in section 3(1) shall be void. [section 3(2)].

Prohibition if anti-competitive practice affects competition - Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including **-** (*a*) tie-in arrangement (*b*) exclusive supply agreement (*c*) exclusive distribution agreement (*d*) refusal to deal (*e*) re-sale price maintenance, **- -** shall be an agreement in contravention of section 3(1), if such agreement causes or is likely to cause an appreciable adverse effect on competition in India. [section 3(4)]. **- -** Thus, there is no presumption that the act is adversely affecting competition. In other words, burden is on complainant to prove that the act is adversely affecting competition.

Prohibition of abuse of dominant position - No enterprise shall abuse its dominant position. [section 4(1)]. **- -** Note that 'dominant position' itself is not prohibited. What is prohibited is its misuse. "Dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to **-** (*i*) operate independently of competitive forces prevailing in the relevant market; or (*ii*) affect its competitors or consumers or the relevant market in its favour. [*Explanation* (a) to section 4(2)].

Combinations - Take over is one of the ways of increasing market dominance. The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be treated as 'combination' of such enterprises and persons or enterprises in prescribed cases. Broadly, 'combination' can be either by acquisition or merger in one enterprise or an enterprise which belongs to a group. Various limits of assets/turnover have been fixed, depending on whether the enterprise being acquired/merged has similar product/services or dissimilar product/services.

***Regulation over combinations* -** No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. [section 6(1)]. The definition and heading of the section itself means that it is 'regulation of combination'. Thus, combination in itself is not prohibited. It will be held void only if it adversely affects competition.

***Competition Commission of India* -** Central Government may, by notification, appoint, a Commission to be called the "Competition Commission of India". [section 7(1)]. The Commission shall consist of a Chairperson and not less than two and not more than ten other Members to be appointed by the Central Government. **Provided** that the Central Government shall appoint the Chairper son and a Member during the first year of the establishment of the Commission. [section 8(1)].

Director General and Registrar - The Director General will investigate the complaints/references on receipt of orders from Commission and then submit his report to Commission. He will also conduct the cases before CCI. The Director General cannot conduct investigation*suo motu*. DG will be appointed by Central Government.

***Abolition of MRTP Commission and transitory Provisions* -** MRTP Commission will be abolished. [section 66(1)]. Chairman and members will be paid three months pay as compensation. Staff will go back to parent cadre. [section 66(2)]. Cases pending in respect of Monopolistic Trade Practices or Restrictive Trade Practices will be transferred to Competition Commission. [section 66(3)]. All cases of Unfair Trade Practices (except those relating to disparaging of goods) will be transferred to National Commission constituted under Consumer Protection Act. National Commission can transfer the cases to State Commission. [section 66(4)]. Cases in respect of disparaging of goods [section 36A(1)(x) of MRTP Act] will be transferred to Competition Commission. [section 66(5)]. Investigation pending with Director General of Investigation and Registration [DGIR] will be transferred to Competition Commission/National Commission under Consumer Protection Act, as applicable. Other cases, if pending, will abate. [section 66(9)].

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA)

COFEPOSA was passed in 1974 when foreign exchange position of India was bleak and smuggling was beyond control. In view of recent liberalisation, the Act has lost its significance. The Act gives wide powers to executive to detain a person on mere suspicion of smuggling. The Act has been given special protection by including the same in 9th Schedule to Constitution.

Preventive detention – Power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to any offence. It is not parallel proceeding. It does not overlap with prosecution.

***Detention of a person under Act* -** Under provisions of the Act, a Government officer, not below rank of Joint Secretary in case of Central Government and Secretary in case of State Government, who is specifically authorised by Central or State Government for that purpose, is authorised to order detention of a person (including a foreigner) with a view to prevent him from acting in any manner prejudicial to conservation or augmentation of foreign exchange, or to prevent him from smuggling or abetting smuggling of goods, or transporting, keeping, concealing or dealing in smuggled goods or harbouring persons engaged in smuggling of goods. [section 3]. Where an order of detention is made by State Government officer, it should be reported to Central Government within 10 days. [section 3(2)].

***Communication of detention order to person detained* -** As per Article 22(5) of Constitution, a person detained under any law providing for preventive detention, grounds for order must be communicated to him by authority making the order. However, Article 22(6) provides that facts need not be disclosed if the authority considers it against public interest. Section 3(3) of COFEPOSA provides that such communication must be done within 5 days and in exceptional circumstance, within 15 days (after recording the reasons for delay in writing).

Article 22(5) of Constitution gives right to detenue to make a representation. Such representation can be made to Officer who made the order of detention (who is specially authorised by Government for this purpose) as well as to Advisory Board. The Officer making order of detention must consider the representation. The detenue must be informed that he can make representation to the Officer ordering detention as well as the authority who has powers to revoke the orders.

Order of detention can be served on a person anywhere in India in the manner for execution of warrants of arrest under Code of Criminal Procedure. (section 4).

Place and conditions of detention under COFEPOSA - A person can be detained at any place and under any condition as to maintenance, interviews or communication with others, discipline and punishment for breach of discipline, as the Central or State Government may specify. He can be removed from one place to another and from one State to another. [section 5].

***Advisory Board under COFEPOSA* -** The detention can be further extended only if Advisory Board reports before three months that there is sufficient cause for detention. Members of such advisory board should have been High Court judges or qualified to be High Court judges. Accordingly, Central and State Governments will form advisory board consisting of Chairman and two other members. {section 8(a)}. The Government will make a reference to the Advisory Board within 5 weeks of detention of the person. The advisory board will consider material placed before them, hear the person detained if he so desires, and give report within 11 weeks from detention. Person detained can only personally appear and not through any legal practitioner. [section 8(e)]. If the Advisory Board reports that there is sufficient cause for detention, it may continue detention. Otherwise, the person has to be released. Even if he is detained, maximum detention can be one year from date of detention. [section 10]

Consumer Protection Act

Consumer Protection Act can be described as common man's Civil Court and MRTP Act for the poor. The Act is designed to make available cheap and quick remedy to a small consumer. The Act was passed in 1986 and was made effective in 1987. Amendments were made in 1991 to provide for situations of absence of President of Forum. Major changes were made in 1993 (effective from 18-6-1993). - - On getting further experience of implementation of the Act, substantial changes have been made by Amendment Act, 2002. Major changes made in the Amendment Act are - * Enhancement in monetary limit of District Forum from Rs 5 lakhs to 20 lakhs and of State Commission from Rs 20 lakhs to Rs one crore * Payment of fees for filing complaint/appeal * Complaint/appeal will have to be admitted first * Reason to be recorded if decision not given within specified time * Cost of adjournment can be imposed * Interim orders can be passed * In absence of President, senior most member can discharge functions of President * Pre-deposit of certain amount before appeal is entertained * Notice can be sent by Fax/courier. ***The amendments have been made effective from 15-3-2003.***

***Procedure under CPA* -** Section 12(1) provides that a complaint in relation to any goods sold or delivered or to be sold or delivered or any service provided or agreed to be provided may be filed with consumer forum.

The Act envisages setting up of 'Consumer Disputes Redressal Agency' at local, i.e., district level, state level and national (Central) level. District Forum has jurisdiction to decide consumer disputes where value of goods or services and the compensation claimed does not exceed Rs. 20 lakhs. State Commission has jurisdiction to decide the cases where value of goods and services plus compensation is over Rs. 20 lakhs but not over Rs. 100 lakhs. In addition, it decides appeals filed against order of District Forum. National Commission (HQ at New Delhi) has original jurisdiction where matter is over Rs. 100 lakhs. It also has appellate jurisdiction over State Commission. Appeal against order of State Commission can be filed only in case of original order by State Commission i.e. when matter was over Rs. 20 lakhs. No appeal can be filed to National Commission in case where State Commission has passed order in appeal against original order of District Forum.

Appeal against order of National Commission lies with Supreme Court only in matters where it exercises original jurisdiction, i.e., when matter is over Rs. 100 lakhs. There is no provision of appeal in cases where National Commission decides under its appellate jurisdiction, i.e., when it decides appeal against order of State Commission.

Thus, in all cases, only one appeal has been provided.[However, revision petition to National Commission, which is second appeal by back door, can be filed].

Complaint can be filed by a consumer, a voluntary consumer association or Central/State Government. Class Action i.e., some consumers filing complaint on behalf of many consumers is also permitted. Complaint can be filed against (*a*) deficiency in goods or service (*b*) unfair trade practice or restrictive trade practice (c) charging of higher prices (d) Supplying hazardous goods or services. Fees are required to be paid along with the complaint. Complaint must be filed within two years from 'cause of action'. This period can be extended on showing sufficient cause. Appeal against order of District Forum/State Commission/National Commission must be filed within 30 days from date of order. Penalty upto Rs. 10,000 can be imposed on a complainant, if it is found that he has made frivolous (bogus) complaint. Persons not complying with order of redressal authorities can be punished with imprisonment upto three years and/or fine upto Rs. 10,000.

Provisions are made for enforcement of order and imposition of penalty in case order of consumer forum is disobeyed.

***Complaint to consumer forum* -** Section 12(1) provides that a complaint in relation to any goods sold or delivered or to be sold or delivered or any service provided or agreed to be provided may be filed with consumer forum.

District, State Commission and National Commission are consumer forums, termed as Consumer Dispute Redressal Agencies. It is necessary to understand meaning of 'complaint' and who can file the same.

Defect - The word 'defect' means any fault, imperfection or shortcoming in the quality, quantity potency, purity or standard that is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods (Section 2(1)(*f*) of CPA).

Consumer Dispute - 'Consumer Dispute' means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint [section 2(1)(*e*)]. - - Obviously, if the person against whom complaint is made agrees to the complaint, there is no 'consumer dispute'.

Who is 'Complainant' - Section 2(1)(*b*) of CPA defines that "Complainant" means (*i*) a consumer; or (*ii*) any voluntary consumer association registered under the Companies Act, or under any other law for the time being in force; or (*iii*) the Central Government or any State Government, who or which makes a complaint or (*iv*) One or more consumers, where there are numerous consumers having the same interest or *(v)* in case of death of a consumer, his legal heir or representative; - - who or which makes a complaint.

Exclusion if goods or services for Commercial purpose - A person who buys goods for resale or commercial purposes or avails services for commercial purposes is specifically excluded from definition of 'consumer'.

Trader - Complaint can be lodged against a trader in case of goods and against service provider in case of services. 'Trader' includes manufacturer.

***Deficiency in service* -** Complaint can be lodged against service provider if there is deficiency in service, or if he charges higher prices or provides services which are hazardous or where service provider follows unfair or restrictive trade practice.

Deficiency - 'Deficiency' means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard, which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. [section 2(1)(*g*) of CPA].

***Restrictive and Unfair Trade Practices* -** Consumer Protection Act makes specific provisions in respect of Restrictive Trade Practices (RTP) and Unfair trade Practices (UTP).

Restrictive Trade Practice **-** Section 2(1)(nnn) of CPA [As amended by Amendment Act, 2002] define Restrictive Trade Practice ('RTP') as one which tends to bring about manipulation of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include— *(a)* delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price; (b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as condition precedent to buying, hiring or availing of other goods or services.

***Unfair Trade Practice* -** Unfair Trade Practice is defined under section 2(1)(*r*) of CP Act. "Unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

Copyright Act, 1957

Copyright is right of artist, author, producer of films etc. who have created a work by use of their artistic skills. On the other hand, Patents Act, 1970 is designed to protect inventions in respect of manufacture, machine or process of manufacture. Copyright Act has provisions to protect copyrights of foreign work also. This Act has attained special significance in view of GATT agreement. Under this international agreement, all signatory nations have to take steps to protect intellectual property rights (IPRs). It may be noted that registration of patent is compulsory, while registration of copyright or trade mark is optional. Rights in a patent can be availed only if it is registered, but copyrights or rights to trade mark are available even if the work is not registered.

Copyright protection is limited to an author's particular expression of idea, process and concept in a tangible medium. However, the law permits fair use.

Copyright is only in expression of an idea. There is no copyright in an idea. Copyright protects skill, labour and capital employed by the author. Its object is to protect the writer and author from the unlawful reproduction, plagiarism, piracy, copying and imitation. Thus, copyright is negative in nature. It is not a right in novelty of ideas.

***Works in which copyright subsists* -** Section 13(1) of Copyright Act provides that copyright subsists in (*a*) original literary, dramatic, musical and artistic works (*b*) cinematograph films and (*c*) sound recording.

Artistic work - 'Artistic Work' means (*i*) a painting, sculpture, a drawing (including a diagram, map, chart or plan), an engraving or photograph. It does not matter whether or not any such work possesses artistic quality and (*ii*) work of architecture [section 2(*c*)]. 'Work of Architecture' means any building or structure having an artistic character or design, or any model for such building or structure [section 2(*b*)]. Note that a trade mark designed in an artistic way can be protected under Trade Mark Act (as Trade Mark) as well as under Copyright Act (as artistic work).

Dramatic work - 'Dramatic Work' includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise; but does not include a cinematograph film.

Literary Work - The term 'Literary Work' includes computer programmes, tables and compilations including computer databases [section 2(o)].

Computer programme - It means set of instructions expressed in words, codes, schemes or in any other form including a machine readable medium capable of causing computer to perform a particular task or achieve a particular result [section 2(*ffc*)]. Computer includes any electronic or similar device having information processing capabilities [section 2(*ffb*)].

Musical work - ‘Musical work’ means a work consisting of music and includes any graphical notation of such work, but does not include any words or any action intended to be sung, spoken or performed with the music [section 2(p)]. Composer means a person who composes the work whether or not it is recorded in form of graphical notation [section 2(*ffa*)].

Rights of a copyright owner - As per section 14, Copyright means exclusive right to do or authorise doing any of the following acts in respect of a work or any substantial part thereof (this right is subject to provisions of the Copyright Act).

RIGHTS IN LITERARY, DRAMATIC OR MUSICAL WORK - (*i*) To reproduce the work in any material form including the storing of it in any medium by electronic means (*ii*) to issue copies of work to the public - this clause does not apply to copies which are already in circulation (*iii*) to perform work in public or communicate to public (*iv*) to make any cinematograph film or sound recording (*v*) to make translation (*vi*) to make adaptation of work (*vii*) to do, in relation to translation or an adaptation of work, any of the aforesaid acts mentioned in clause (*i*) to clause (*vi*).

RIGHTS IN COMPUTER PROGRAMME - (*i*) To do any of the acts specified above in relation to literary work (*ii*) to sell or give on commercial rental or offer to sale or for commercial rental any copy of the computer programme. However, such 'commercial rental' does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.]. [proviso to section 14(b)(ii)]

RIGHTS IN ARTISTIC WORK - (*i*) to reproduce in any material form including depiction in two dimensions from three dimensions or *vice versa* (*ii*) to communicate work to public (*iii*) to issue copies of work to the public which are not already in circulation (*iv*) to include the work in any cinematograph film (*v*) to make any adaptation of the work (*vi*) to do in relation to an adaptation of the work, any of the acts specified in clause (*i*) to (*iv*) above.

RIGHTS IN CINEMATOGRAPH FILM - (*i*) To make a copy of the film, including a photograph of any image forming part thereof (*ii*) to sell or give on hire of offer for sale or hire, any copy of the film. It does not matter whether or not such copy was sold or given on hire on earlier occasions. (*iii*) to communicate the work to public.

RIGHTS IN SOUND RECORDING - (*i*) To make any other sound recording embodying it (*ii*) to sell or give on hire of offer for sale or hire, any copy of the film. It does not matter whether or not such copy was sold or given on hire on earlier occasions (*iii*) to communicate the sound recording to public.

Ownership of Copyright - Normally, author of work is the first owner (section 17). Author means (*a*) author of literary or dramatic work (*b*) composer of musical work (*c*) artist of artistic work (*d*) person taking the photograph (*e*) producer of cinematographic film or sound recording [section 2(*d*)]. Right of author is subject to some limitations.

Assignment of Copyright - The owner of copyright can assign the copyright to a work. Such assignment can be partial or full or subject to limitations and for limited term or full term. Even rights of future work can be assigned, but the assignment becomes effective only when the work comes into existence. [Some leading and popular authors sell their work at fat price even before it is complete.] After assignment, the assignee gets rights assigned and balance rights remain with the assignor (section 18).

Term of copyright - Normal term of copyright is throughout the lifetime of author plus 60 years from beginning of calendar year next following the year in which the author dies. In case of joint authorship, the author who dies last will be considered (section 22).

Compulsory licensing - If owner does not grant permission for re-publication, performance or communication to public, Copyright Board can direct Registrar of Copyrights to grant compulsory licence to complainant on such terms and conditions as it deems fit [section 31(1)].

Registration of Copyright is optional - Copyright *may* be registered with Registrar of Copyrights (section 44). Registration is not compulsory. The register will contain details like name or title of work, name and addresses of authors, publishers and owners of copyright. Application for registration has to be made in prescribed form with fees.

Infringement of Copyright - The Act provides for remedies in case of infringement of Copyright.

Civil and Criminal Remedies under Copyright Act - Owner of copyright has civil remedies against Infringement of Copyright Offences are also punishable.

Designs Act, 2000

This Act was earlier known as 'Indian Patents and Designs Act, 1911'. After passing of Patents Act in 1970, the provisions in respect of patents were removed from this Act, and the Act was re-christened as 'Designs Act, 1911'. Designs Act, 2000 has been passed, and made effective from 11-5-2001.

The work in respect of registration of designs is looked after only by Designs Office located within Patents Office at Kolkata, in respect of all applicants from India.

Design as per Designs Act - Section 2(d) of Designs Act defines that 'design' means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction of anything which is in substance a mere mechanical device, and does not include any trade mark defined in section 2(1)(v) of Trade and Merchandise Marks Act or property mark as defined in section 479 of Indian Penal Code or 'artistic work' as defined in section 2(c) of Copyright Act.

The Act covers only 'artistic designs' and not 'engineering designs'. Design cannot be registered under Trade Marks Act as well as under Designs Act.

Nature of design - Every product has a physical aspect and a psychological aspect. In consumer's mind, psychological aspects tend to assume priority. Design creates a favourable impression on customer, which induces him to buy the goods. Thus, design covers whole body of goods. Design must be applied to an article, has an appeal to eye and is novel and original, i.e. eye appeal is very important. Functional designs are not registrable under Designs Act. Design registration is obtained for novelty in the external appearance only. The registrable design is not the article itself, but a feature, an idea or characteristic look applied to an article. e.g. novel shape of a pager or cellular phone. The design can be registered only with respect to an article or set of articles. The registrable design must be capable of being applied to an article by an industrial process or means. The article must be movable. Thus, design of buildings, permanent structures and naturally occurring unprocessed objects are not registrable.

Design can be of some article like motor car, wash basin, shoe etc. It should have individuality of appearance.

Protection to Designs - The 'copyright protection' to the design is for ten years from date of application of registration of a design. This can be extended for one further term of five years each (i.e. total fifteen years), if application is made and necessary fees are paid. [section 11]. 'Copyright' means the exclusive right to apply a design to any class in which the design is registered. [section 2(c)].

Design is registrable only if it is new, novel and not published before. If it is published before, the novelty is lost. [section 19]. If the designer has to publish it in exhibition, fashion show etc., he has to inform Controller of Patents (in Design office) in advance. Application should be made within 6 months from date of exhibition. Otherwise, the designer may lose his right for registration of design. [section 21].

Environment (Protection) Act, 1986

Air Pollution Act and Water Pollution Act deal with specific aspects of Environment. Moreover, Water Pollution Act is not applicable all over India. Hence, need of a general legislation for environmental protection was felt, to coordinate activities of various regulatory agencies. Need was felt to create authority with adequate powers for environment protection, regulation of discharge, handling of hazardous substances, speedy response to accidents threatening environment and deterrent punishment to those who endanger human environment, safety and health.

The Act has been passed in pursuance of decisions taken at the United Nations Conference on the Human Environment held at Stockholm in June 1972. The Act is applicable all over India.

Some definitions under the Environment Act - The Act defines some words, which are important. Environment includes water, air and land and the inter-relationship which exists among and between water, air and land, and property [section 2(*a*)]. Environmental Pollution means the presence in the environment of any environmental pollutant [section 2(*c*)]. Environmental Pollutant means any solid, liquid or gaseous substance present in such concentration as may be or tend to be injurious to environment [section 2(*b*)]. Hazardous substance means any substance or preparation which, by reason of its chemical or physico-chemical properties or handling, is liable to cause harm to human beings, other living creatures, plants, micro-organism, property or the environment [section 2(*e*)]. Handling has been defined as manufacture, treatment, package, storage, transportation, use, collection, destruction, conversion, offering for sale, transfer or the like of such substance.

Powers under the Environment Act - Central Government has been given powers to take all necessary measures for purpose of protecting and improving the quality of environment and preventing, controlling and abating environmental pollution [section 3(1) of Act]. In particular, Central Government has been given powers to take various measures under section 3.

POWER TO ISSUE DIRECTIONS - Central Government can issue directions, in writing, to any person, officer or authority for purposes of Act. Such direction can cover direction for closure, prohibition or regulation of industry or process or stoppage or regulation of supply of electricity, water or any other service [section 5]. However, any direction cannot be given without giving him opportunity of being heard and to file objections etc.

Responsibilities of persons under the Environment Act - Following responsibilities have been cast on persons connected with environmental pollution.

NOT TO EXCEED STANDARDS OF POLLUTION - Any person carrying on any industry, operation or process shall not discharge or emit any environmental pollutant in excess of standards prescribed by Central Government under rules [section 7 of Act].

SAFEGUARDS IN HANDLING HAZARDOUS SUBSTANCES - Any person handling hazardous substance will do so only as per prescribed procedure and after following safeguards prescribed by Central Government [section 8].

FURNISHING INFORMATION OF ACCIDENT - Where any discharge of environmental effluent occurs in excess of limits by accident or other unforeseen event, the person in charge of the place where such discharge occurs must immediately take steps to mitigate the environmental pollution and intimate the fact to concerned authorities. He should render all assistance to the authorities in remedial measures. Expenses of such measures can be recovered from the person concerned [section 9].

Rules under the Act - Under the powers granted under the Act, Central Government has made Environment (Protection) Rules, 1986. The rules specify standards of effluent permissible in different industries. Rules also specify authorities to be notified in case of accident or unforeseen event of environmental pollution. The rules specify the factors to be taken into consideration while prohibiting or restricting location of industries and carrying on any process and operations in different areas.

Environmental clearance – Clearance is required in certain cases to set up an industry.

Essential Commodities Act, 1955

The Act is designed to ensure that essential commodities are made available to common man at reasonable prices and distribution of the essential commodities is equitable. The Act is given special protection by including it in 9th Schedule to our Constitution.

Powers of Government - The powers of Government are as follows : (*a*) Power to issue orders u/s 3(1) for regulating or prohibiting production, supply and distribution of essential commodities. (*b*) Power to fix prices for sale to Government etc. u/s 3(3). (*c*) Power to fix prices for sale to control rise in prices and prevent hoarding u/s (3A) (*i*). (*d*) Fixing procurement price for food grains and edible oils u/s (3B). (*e*) Fixing price of sugar to be paid to producer u/s 3(3C). (*f*) Power to appoint Controller u/s 3(4).

Power to issue orders - Central Government can issue orders for regulating or prohibiting production, supply and distribution of essential commodity or trade and commerce in essential commodity.

Fixing of price to be paid - Various modes of fixing prices to be paid for Essential Commodities have been prescribed.

Drugs (Price Control) Order, 1995 - As per Drugs Policy 1994, control over prices of drugs will be retained only if its total turnover exceeds Rs. 4 crore per annum. However, if there are at least five bulk drug producer or 10 formulators with none of them having more than 40% market share, these will be out of price control, even if turnover exceeds Rs. 4 crores (57 drugs are covered under this criteria). Further, if there is only a single manufacturer with 90% market share in bulk drug, it will be considered as a monopoly situation. Such drugs will be brought under price control even if its turnover exceeds Rs. 1 crore per annum (19 bulk drugs have been covered as per this criteria).

Sugar - Manufacturers of sugar have to surrender fixed percentage of their production to Government for 'public distribution system' (PDS). Remaining sugar can be sold in open market. There is also control over movement of sugar, sugarcane etc.

Foreign Contribution (Regulation) Act, 1976

Purpose of the Act is to regulate acceptance and utilisation of foreign contribution or foreign hospitality by certain persons. As per preamble of the Act, the purpose of the Act is to regulate acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations, with a view to ensuring that parliamentary institutions, political associations and academic and other voluntary organisations as well as persons working in important areas of national life may function in a manner consistent with values of a sovereign democratic republic.

It has been made clear that the Act does not apply to transactions between Government of India and Government of any foreign country or territory [section 32]. The Act prescribes various restrictions on accepting foreign contribution.

Applicability of Act - As per section 3, the Act is in addition to and not in derogation of any other law in India. Since the Act is a special Act, its provisions will prevail over provisions of FEMA. Thus, even if there is permission for certain transactions (like scholarship, donation, gift etc.), permission under FCRA will be required if the transaction is covered under provisions of the FCRA.

What is 'Foreign Contribution' - Foreign contribution means donation, delivery or transfer made by any foreign source of any article (above value of Rs. 1,000), currency or foreign security [section 2(*c*)].

Foreign Source - Foreign source means Foreign Government, international agency (but not UN, World Bank, IMF etc.), foreign company, multi-national corporation, company where more than 50% capital is held by foreigner or foreign company, foreign trust, foreign citizen etc. [section 2(*e*)].

Who cannot accept foreign contribution - Following persons are prohibited from accepting foreign contribution [section 4(1)] : (*a*) candidate for election of any legislature (*b*) correspondent, columnist, cartoonist, editor, printer or publisher of any newspaper (*c*) Judge, Government servant or employee of any Government controlled corporation or Government company (*d*) member of any legislature (*e*) political party or its office bearer.

Exemptions from provisions of section 4 - Following are exempt from provisions of section 4 : (*a*) salary, wages received (*b*) payment in course of international trade or commerce (*c*) transaction made by foreign source with Government (*d*) gift as a member of any delegation if it is as per regulations made by Central Government (*e*) foreign contribution received as per permission of Central Government (*f*) Remittance received as per provisions of FEMA (section 8).

Organisation of political nature cannot accept foreign contribution - Any organisation of political nature (which is not a political party) cannot accept any foreign contribution without prior approval of Central Government [section 5(1)]. Any person cannot accept foreign contribution on behalf of such organisation.

Restrictions on acceptance of foreign hospitality - A member of legislature, office bearer of political party, judge, Government servant or employee of Government company or Government corporation cannot accept foreign hospitality without prior permission of Central Government (section 9).

Foreign Exchange Management Act, 1999

Foreign Exchange Management Act (FEMA), 1999 has been enacted as part of liberalisation process initiated by Government of India. The Act is implemented w.e.f. 1st June, 2000 . As per Statement of Objects to the FEMA Bill, the object of FEMA is to consolidate and amend the law relating to foreign exchange with the object of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange markets in India. - - Reserve Bank of India is the overall controlling authority in respect of FEMA.

SALIENT PROVISIONS OF FEMA - FEMA provides * Free transactions on current account subject to reasonable restrictions that may be imposed * RBI control over capital account transactions * Control over realisation of export proceeds * Dealing in foreign exchange through 'Authorised Persons' like Authorised Dealer /Money Changer / Off-shore banking unit * Adjudication of Offences * Appeal provisions including Special Director (Appeals) and Appellate Tribunal * Directorate of Enforcement.

Enforcement of FEMA - Though RBI exercises overall control over foreign exchange transactions, enforcement of FEMA has been entrusted to a separate ‘Directorate of Enforcement’ formed for this purpose. [section 36].

Overall scheme of FEMA - Basically, FEMA makes provisions in respect of dealings in foreign exchange. Broadly, all current account transactions are free. However, Central Government can impose reasonable instructions by issuing rules. [section 3 of FEMA]. Capital Account Transactions are permitted to the extent specified by RBI by issuing regulations. [section 6].

FEMA envisages that RBI will have a controlling role in management of foreign exchange. Since RBI cannot directly handle foreign exchange transactions, it authorises ‘Authorised Persons’ to deal in foreign exchange as per directions issued by RBI. [section 10 of FEMA]. RBI is empowered to issue directions to such ‘Authorised Persons’ u/s 11. These directions are issued through AP(DIR) circulars.

FEMA also makes provisions for enforcement, penalties, adjudication and appeals.

Person resident in India - Person resident in India is defined in section 2(v). Broadly, ‘person resident of India’ includes persons of India (except those staying abroad for work or business or other purpose) and foreign persons who come to India or stay in India for employment, carrying out business or other purpose. - - ***Person resident outside India*** - It means a person who is not resident in India. [section 2(*w*)].

Non-Resident Indian - 'Non Resident Indian (NRI)' means a person resident outside India who is a citizen of India or is a person of Indian origin.

Permitted Currency/ Convertible currency/Hard Currency - As per regulation 2(v) of FEM (Manner and Receipt and Payment) Regulations, 2000, 'permitted currency' means a foreign currency which is freely convertible.

Foreign Exchange- Section 2(*n*) states that foreign exchange means foreign currency *and includes* (*i*) deposits, credits, and balances payable in any foreign currency (ii) drafts, traveller's cheques, letter of credit or bill of Exchange expressed or drawn in Indian currency but payable in foreign currency. (*iii*) drafts, traveller's cheques, letter of credit or bill of Exchange drawn by banks, institutions or persons outside India, but payable in Indian currency.

***Authorised Persons* -** Section 2(c) states that 'authorised person' means an authorised dealer, money changer, off-shore banking unit or any other person authorised u/s 10(1) to deal in foreign exchange and foreign securities. These are authorised by RBI under section 10 of FEMA to deal in foreign exchange.

Foreign Trade (Development and Regulation) Act

Foreign Trade (Development and Regulation) Act (FTDR Act) is designed to develop and regulate foreign trade by facilitating imports into India and augmenting exports from India; and for matters connected therewith.

Central Government has been authorised to make provisions for development and regulation of foreign trade by facilitating imports and increasing exports. It can prohibit, restrict and regulate exports and imports, in all or specified cases and subject to exemptions. Central Government has to issue order by publishing the same in Official Gazette. All goods to which such order applies are deemed to be goods the import or export of which has been prohibited under section 11 of Customs Act, 1962 and all provisions of that Act (regarding punishment etc.) are applicable [section 3 of FTDR Act].

Import/Export Code Number - Every importer and exporter must obtain a 'Importer Exporter Code Number' (IEC) from DGFT (Director General of Foreign Trade) or officer authorised by him, by applying in prescribed form (section 7 of FTDR Act).

Import/Export Licence - Application for licence for import or export has to be made to DGFT. Application fees are payable as prescribed.

Reasons for refusing licence - Licence can be refused for following reasons : (*a*) Applicant has contravened any law relating to customs or foreign exchange or has obtained any export benefits by fraudulent means (*b*) Application does not conform to rule or EXIM policy (*c*) Application or documents attached are false or fraudulent (*d*) Action against applicant is pending under FTDR Act, rules or orders issued under the Act (*e*) Applicant is or was managing partner or Director of private limited company against which action under the Act is pending (*f*) Applicant has not paid penalty imposed (*g*) Applicant has tampered with licence or has been a party to any corrupt or fraudulent practice for obtaining licence (*h*) Applicant has not produced documents required (*i*) Application is signed by person who is not authorised (Rule 7 of FTRR).

Director General of Foreign Trade (DGFT) - Central Government can appoint Director General of Foreign Trade (DGFT) and other officers like Additional Director, Joint Director, Deputy Director, Assistant Director, Export Commissioner etc. The DGFT advise Central Government in formulating policy and exercise specified powers under the Act [section 6 of FTDRA].

EXIM POLICY - Section 5 of Act authorises Central Government to formulate and announce Export and Import Policy and also amend the same from time to time, by notification in Official Gazette. Presently, Import Export Policy 1997-2002 (often called EXIM policy) is in force w.e.f. 1st April, 1997. This is amended from time to time by issuing orders.

Liberal Export Import Policy - The EXIM Policy 2002-07 was introduced w.e.f. 1st April, 2002. The EXIM policy 1997-2002 continues the liberalisation started with earlier 1992-97 policy.

Indian Stamp Act, 1899

The basic purpose of Indian Stamp Act, 1899 is to raise revenue to Government. However, over a period of time, the stamped document has obtained so much value that a 'stamped document' is considered much more authentic and reliable than an un-stamped document.

Power of Parliament in respect of stamp duty - Parliament can make law in respect of Stamp Duty. It can prescribe rates of stamp duty. The stamp duty rates prescribed by Parliament in respect of bill of exchange, cheques, transfer of shares etc. will prevail all over India. However, other stamp duty rates prescribed by Parliament in Indian Stamp Act, 1899 (e.g. stamp duty on agreements, affidavit, articles of association of a company, partnership deed, lease deed, mortgage, power of attorney, security bond etc.) are valid only for Union territories. In case of States, the rates prescribed by individual States will prevail in those States.

Powers of State Government of Stamp Duty - State Government has powers to fix stamp duties on all documents except bill of exchange, cheques etc. Rates prescribed by State Government will prevail in that State. State Government can make law for other aspects of stamp duty also (i.e. matters other than quantum of duty). However, if there is conflict between State law and Union law, the Union law prevails [Article 254 of Constitution].

Instruments chargeable to stamp duty - Instrument includes every document by which any right or liability, is, or purported to be created, transferred, limited, extended, extinguished or recorded [section 2(17) of Indian Stamp Act]. Any instrument mentioned in Schedule I to Indian Stamp Act is chargeable to duty as prescribed in the schedule [section 3]. The list includes all usual instruments like affidavit, lease, memorandum and articles of company, bill of exchange, bond, mortgage, conveyance, receipt, debenture, share, insurance policy, partnership deed, proxy, shares etc. Thus, if an instrument is not listed in the schedule, no stamp duty is payable. 'Instrument' does not include ordinary letters. Similarly, an unsigned draft of an agreement is not an 'instrument'.

Duty payable when several instruments - In case of sale, mortgage or settlement, if there are several instruments for one transaction, stamp duty is payable only on one instrument. On other instruments, nominal stamp duty of Re. 1 is payable [section 4(1)]. If one instrument relates to several distinct matters, stamp duty payable is aggregate amount of stamp duties payable on separate instruments [section 5]. However, it may happen that one instrument covering only one matter can come under more than one descriptions given in Schedule to Stamp Act. In such case, highest rate specified among the different heads will prevail [section 6].

Powers to reduce stamp duty - Government can reduce or remit whole or part of duties payable. Such reduction or remission can be in respect of whole or part of territories and also can be for particular class of persons. Government can also compound or consolidate duties in case of issue of shares or debentures by companies [section 9(1)]. 'Government' means Central Government in respect of stamp duties on bills of exchange, cheque, receipts etc. and 'State Government' in case of stamp duties on other documents [section 9(2)].

Mode of payment of stamp duty - The payment of stamp duty can be made by adhesive stamps or impressed stamps. Instrument executed in India must be stamped before or at the time of execution (section 17). Instrument executed out of India can be stamped within three months after it is first received in India [section 18(1)]. However, in case of bill of exchange or promissory note made out of India, it should be stamped by first holder in India before he presents for payment or endorses or negotiates in India [section 19].

Valuation for stamp duty - In some cases, stamp duty is payable on *ad valorem* basis i.e. on basis of value of property etc. In such cases, value is decided on prescribed basis.

Adjudication as to stamp duty payable - Adjudication means determining the duty payable. Normally, the person paying the duty himself may decide the stamp duty payable and pay accordingly. However, in cases of complex documents, the person paying the duty may not be sure of the stamp duty payable. In such case, he can apply for opinion of Collector. He has to apply with draft document and prescribed fees. Collector will determine the stamp duty payable as per his judgment [section 31(1)].

What is meant by 'duly stamped' - 'Duly stamped' means that the instrument bears an adhesive or impressed stamp not less than proper amount and that such stamp has been affixed or used in accordance with law in force in India [section 2(11)]. In case of adhesive stamps, the stamps have to be effectively cancelled so that they cannot be used again. Similarly, impressed stamps have to be written in such a way that it cannot be used for other instrument and stamp appears on face of instrument. If stamp is not so used, the instrument is treated as 'un-stamped'. Similarly, when stamp duty paid is not adequate, the document is treated as 'not duly stamped'.

Instrument cannot be accepted as evidence if not duly stamped - An instrument not 'duly stamped' cannot be accepted as evidence by civil court, an arbitrator or any other authority authorised to receive evidence. However, the document can be accepted as evidence in criminal court.

Case when short payment is by mistake - If non-payment or short payment of stamp duty is by accident, mistake or urgent necessity, the person can himself produce the document to Collector within one year. In such case, Collector may receive the amount and endorse the document that proper duty has been paid [section 41].

Stamp duty on Receipt - Stamp Duty on receipt is Re. 1 for receipt above Rs. 5,000. Receipt includes any note, memorandum or writing [whether signed by any person or not] (*a*) where any money, or any bill of exchange or promissory note is acknowledged to have been received or (*b*) where any other movable property is acknowledged to have been received in satisfaction of a debt or (*c*) whereby any debt or demand is acknowledged to have been satisfied or discharged or (*d*) which signifies or indicates any such acknowledgment [section 2(23)].

Stamp duty on transfer of shares in a company or body corporate - It is 50 Paise for every hundred rupees or part thereof of the value of share. [It is 75 Ps as per Article 62 of Schedule I to Stamp Act, reduced to 50 Ps per Rs 100 vide notification No. SO 198(E) dated 16.3.1976]. As per section 21, the duty has to be calculated on the basis of market price prevalent on date of instrument and not on the face value of shares.

Stamp Duty on transfer in Depository Scheme - If the company issues securities to one or more depositories, it will have to pay stamp duty on total amount of security issued by it and such securities need not be stamped. [section 8A(a) of Stamp Act]. If an investor opts out of depository scheme, the securities surrendered to Depository will be issued to him in form of a certificate. Such share certificate should be stamped as if a 'duplicate certificate' has been issued. [section 8A(1)(b) of Indian Stamp Act]. If securities are purchased or sold under depository scheme, no stamp duty is payable.

Industries (Development and Regulation) Act, 1951

IDR makes various provisions for regulating industries, by making provisions for licensing, registration and takeover of industries. The purpose of the IDR Act is to implement the industrial policy. It provides for the development and regulation of major industries. IDR Act envisages balanced industrial growth all over India and optimum use of available resources and infrastructure. IDR Act also sees that the industries do not suffer due to financial mismanagement or technical inefficiency or operational defects. In certain cases Act provides for investigation by Central Government in cases of mismanagement and mis-administration.

Scheduled Industries - In exercise of the aforesaid powers, Parliament has declared, *vide* section 2 of IDR Act, that 'it is expedient in the public interest that the Union takes under its control the industries specified in the First Schedule to IDR Act. This Schedule (First Schedule to IDR Act) contains list of 38 industries. The industries in this list are called 'Scheduled Industries'. These **include** : Metallurgical

Industries, Fuels, Boilers, Prime Movers, Electrical Equipment, Telecommunications, Transportation Equipment, Industrial Machinery, Machine Tools, Agricultural Machinery, Earth Moving Machinery, Commercial and Office Equipment, Medical and Surgical Appliances, Instruments, Fertilisers, Chemicals, Drugs and Pharmaceuticals, Textiles, Paper, Sugar, Food Processing, Vegetable Oils and Vanaspati, Soaps, Rubber goods, Leather and Leather goods, Glass, Ceramics, Cement, Timber products, defence industry etc.

Compulsory licensing in some cases - Section 11 of IDR Act envisages compulsory licensing of all industries. Licensing is required for new industry, new article in existing industry and also for substantial expansion. Substantial expansion means expansion of an industrial undertaking which substantially increases production capacity or which virtually amounts to a new undertaking. However, this does not include normal expansion [*Explanation* to section 13(2) of IDR Act]. As per clarification of Department of Industrial Development, increase in production capacity by more than 25% is treated as 'substantial expansion'.

Exemption from industrial licensing - Section 29B(1) authorises Central Government to exempt any industry or class of industries from any of provisions of the Act. Presently, Central Government has exempted most of the industries from the provisions of licensing. There are only few industries which require licence. Licence is not required for any other industry. Some industries are reserved for public sector. No licence is required for any other industry. However, the conditions are (*a*) prescribed locational restrictions as explained below should be observed (*b*) the product should not be reserved for small scale sector. Units in SEZ do not require licensing even if the product is reserved for SSI.

What is a small scale industry - Small Scale Industrial Undertaking means an undertaking which, in accordance with the requirements specified under sub- sec (1) of sec. 11B, is entitled to be regarded as S.S.I. undertaking for the purpose of this Act [section 3(j) of IDR Act]. Section 11B of IDR Act authorises Central Government to specify conditions for deciding whether a unit can be treated as small scale or ancillary industry. The purpose is to provide supportive measures, exemptions or other favourable treatment to them to maintain their viability and strength.

The investment limit and conditions for eligibility are given in notification No SO 857(E) dated 10th December, 1997 of Ministry of Industry, Govt of India. At present, industry having investment upto Rs. one crore in plant and machinery is defined as 'small scale industry'. Same limit is applicable to ancillary industries also. However, such SSI unit should not be subsidiary of, or owned or controlled by any other industrial undertaking.

Regulating supply and prices - Central Government can provide for regulating supply and distribution any industrial article by issuing a notified order [section 18G(1) of IDRA].

Investigation of Scheduled Industries - Central Government can order full and complete investigation of any industry or industrial undertaking, if it is of the opinion that in that industry or industrial undertaking (*i*) there has been substantial fall in the volume of production for which there is no justification considering prevailing economic conditions (*ii*) there is a marked deterioration in the quality of product, which can be or could have been avoided (*iii*) there is or there is likely to be rise in price for which there is no justification or (*iv*) action is necessary for conserving any resources of national importance (*v*) the industrial undertaking is being managed in a manner highly detrimental to the industry or in public interest. Central Government can appoint suitable persons for this purpose [section 15 of IDRA].

Take-over of Management of industries - IDR Act makes elaborate provisions for take-over of management of industries in various cases.

ANCILLARY INDUSTRY - The limit of investment is Rs. one crore in case of ancillary industry also. Such ancillary unit should supply at least a specified portion of its production to other units for production of other articles. Such specified portion should not be more than 50% of total production of the unit or proposed production in case of new unit [proviso to section 11B(1)].

<u>Patents Act, 1970</u>

Patents Act, 1970 is designed to protect inventions in respect of manufacture, machine or process of manufacture. On the other hand, the Copyright Act, 1957 is to protect rights of artists, authors, producers of films, computer software owners etc. Patent is an exclusive rights granted to the patent holder, for a limited period, as a reward for creative work based on his private initiative. ‘Creativity’ is accorded the status of ‘property’ which can be bought, sold, licensed or hired like any other commodity. The principle behind patent protection is that creativity will not get encouragement if it cannot be protected from pirating or copying.

Major changes have been made by Patents (Amendment) Act, 2002, which was passed on 25-6-2002 aligning it to TRIPS in many aspects. Highlights are - * It provides for uniform protection for 20 years. * Appellate Authority is provided. Appeal against order of Controller and Central Government and application for rectification of register of patents will be to appellate Board and not to High Court. [However, suit for infringement of Patent or revocation of patent will lie with Court only] * Person other than patent holder to obtain marketing approval from regulatory authorities within 3 years before expiration of terms of patent * Provisions for protection of bio-diversities of traditional knowledge * Reversal of burden in case of process patent * Procedural simplifications.

The amendments have not yet been brought into force. However, these have been incorporated in this write up at appropriate places.

What is a Patent - Section 2(1)(m) merely states ‘Patent’ means a patent granted under this Act’. - - Thus, word ‘patent’ is not defined under the Act, though what can be patented and what cannot has been specified. - - A patent, generally speaking, is a grant from Government, which confers on the grantee for a limited period of time the exclusive privilege of making, selling and using the invention for which a patent has been granted and also of authorising others to do so.

Varieties of Patents - Three kinds of patents are granted under the provisions of the Act : (*a*) Ordinary patent (*b*) Patent of Addition (*c*) Patent in respect of convention

International Application - Patents Act allows grant of patents to persons out of India, on the basis of international arrangements. Such grant is available only if there is a convention, treaty or arrangement with the foreign country for grant of patents on reciprocal basis i.e., if that country also agrees to grant patents to Indian applicants (section 133). Government has to specify such countries by issue of notification in official gazette. India has signed Paris Convention in August 1998. Hence, any country which is signatory to Paris convention is a convention country.

What can be patented - Requirements of patent are : (*a*) The subject matter should be new. This is test of ‘novelty’. (*b*) It should be useful. This is test of ‘utility’. (*c*) It should be an ‘invention’. It should be non-obvious. (*d*) It should be a manner of manufacture, i.e. it should be capable of industrial application. (*e*) ‘Vendibility’ test (i.e. test of marketability) is important - the subject matter should have commercial purpose. Any invention which satisfies the definition of the ‘invention’ given in the Act may be patented.

Invention means a new product or process involving an inventive step and capable of industrial application. [section 2(1)(j)]. - - ‘Inventive step’ means a feature that makes the invention not obvious to a person skilled in that art. [section 2(1)(ja). ‘Capable of industrial application’, in relation to invention, means that the invention is capable of being made or used in an industry. [section 2(1)(ac)].

Life of Patent - Subject to the payment of prescribed renewal fee within the prescribed period, the term of every patent granted under the Act is do years from date of filing the application for patent. [section 53(1)]. [The period was 5 or 7 years for process of manufacture of food/medicine/drug and 14 years in other cases, prior to Amendment Act, 2002].

Rights of a patentee - Patentee has following rights (*a*) where the patent is for a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India (*b*) where the subject matter of patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product directly obtained from that process, in India. However, that product should not be such that no patent can be granted for that product in India. [section 48].

Working of patent and compulsory licensing - The general principle is that patents are granted to encourage inventions. *However, Patent is for use and not for hoarding or exploitation*.

Infringement of Patent - Patentee and his agents and licensees have exclusive rights to make, use, exercise or distribute the invention in India under section 48. Infringement means violating the statutory rights of patentee. Innocent infringement, i.e. infringement without knowledge that a patent exists does not require payment of damages and a share of profit (section 111). Suit for infringement can be filed only in District Court (section 104). The reliefs that can be claimed are (*a*) damages and a share of profit to patentee. (*b*) Injunction on infringee on the terms the Court may deem fit [section 108(1)]. Court can also order that the infringing goods shall be seized, forfeited or destroyed, as the Court deems fit. [section 108(2)].

Prevention of Money Laundering Act

The Act is to prevent money laundering. Money is generated in a very large scale due to crimes. These cover trade in narcotics, smuggling, trade in banned/prohibited articles, antics, corruption, counterfeiting currency, gambling, trade in prohibited arms/ammunition, selling national secrets etc. This money is required to be converted into untainted money so that it can be used. [In common terminology it is called converting black money or Number Two money into white money or Number One money]. In brief, converting tainted money into untainted money is called 'money laundering'.

What is money laundering - Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime and projecting it as untainted property shall be guilty of offence of money-laundering. [section 3]. - - Interestingly, a person may be held guilty even if he unknowingly assists a party in money laundering.

'Proceeds of crime' means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence, or the value of such property. [section 2(1)(u).

Schedules offense - The definition of 'proceeds to crime' applies when criminal activity is relating to 'scheduled offence'. 'Scheduled Offence' means (i) Offences specified under Part A of Schedule to the Act (ii) Offenses specified under Part B of Schedule to the Act if the total value involved in such offense is Rs thirty lakhs or more.

Punishment for offense - The punishment for offence of money laundering shall be imprisonment upto seven years (10 years in case of offenses relating to narcotics drugs) and fine upto Rs five lakhs. [section 4]. In addition, the tainted property is confiscated by Central Government. [section 8(6)]. - - Note that the person who has actually committed the offense will be punished as per provisions of the particular Act. The punishment specified in this Act is only to person who was involved or who assisted in converting tainted money into untainted money.

***Obligations of banking companies, FI and intermediary* -** Money laundering will naturally be done through banking company, financial institutions or intermediary of share market. Hence, responsibility has been cast on them to keep prescribed records and inform doubtful transactions to 'Authority' under the Act. [section 12].

KEEPING RECORDS AND INFORMING AUTHORITY - The bank, FI and intermediary should maintain record of all transactions of nature and value as prescribed, whether such transactions comprise of a single transaction or a series of transactions integrally connected to each other when such series of transactions take place within a month. The information should be informed to Director (authority under the Act) within prescribed time. The records should be maintained and identity of clients should be verified. - - The records should be maintained for 10 years. [section 12(2)]. Manner and procedure of furnishing information will be prescribed by Central Government. [section 15].

Authorities under the Act - Central Government will appoint special authorities to investigate the crimes under the Act. The department will be headed by Director who will be assisted by Deputy Director, Assistant Director etc. [section 48]. The Director will have powers of s Civil Court while trying a suit. [section 50(1)]. The director, joint director etc. have power to summon any person. [section 50(2)]. He will be examined and the proceeding will be deemed to be judicial proceeding. [section 50(4)]. They can impound the records produced before them. [section 50(5)]. The jurisdiction of officers will be decided by Central Government. [section 51]. Officers of other departments are empowered and required to assist the authorities under the Act. [section 54].

Registration Act, 1908

The main purpose for which the Act was designed was to ensure information about all deals concerning land so that correct land records could be maintained. The Act is used for proper recording of transactions relating to other immovable property also. The Act provides for registration of other documents also, which can give these documents more authenticity. Registering authorities have been provided in all the districts for this purpose.

Note that this registration is entirely different from registration of charge done by Registrar of Companies under Companies Act. If the charge relates to immovable property, registration with Registrar (appointed by State Government) under Registration Act and registration under Companies Act with ROC are both required.

Documents of which registration is compulsory - Registration of documents relating to immovable property is compulsory. Registration of will is optional.

Documents not requiring registration - Some documents though related to immovable property are not required to be registered. These are given in section 17(2) of the Act.

Time of presentation for registration - Document should be submitted for registration within 4 months from date of execution [section 23]. Decree or order of Court can be submitted within four months from the day it becomes final. If document is executed by several persons at different times, it may be presented for registration within 4 months from date of each execution [section 24]. If a document is executed abroad by some of the parties, it can be presented for registration within four months after its arrival in India [section 26].

RE-REGISTRATION - If a person finds that a document has been filed for registration by a person who is not empowered to do so, he can present the document for re-registration within 4 months from the date he became aware of the fact that registration of document is invalid [section 23A].

Where document should be registered - Document relating to immovable property should be registered in the office of Sub-Registrar of sub-district within which the whole or some portion of property is situated [section 28]. Other document can be registered in the office of Sub-Registrar where all persons executing the document desire it to be registered [section 29]. A Registrar can accept a document which is registerable with sub-registrar who is subordinate to him [section 30(1)]. Document should be presented for registration at the office of Registrar/Sub-Registrar. However, in special case, the officer may attend residence of any person to accept a document or will [section 31].

All persons executing document must appear before Registrar - All persons executing the document or their representatives, assigns or agents holding power of attorney must appear before registering officer [section 34(1)]. They have to admit execution and sign the document in presence of Registrar, as required under section 58(1)(*a*). Appearance may be simultaneous or at different times [section 34(2)]. If some of the persons are unable to appear within 4 months, further time upto additional 4 months can be given on payment of fine upto 10 times the proper registration fee [proviso to section 34(1)].

If document relates to transfer of ownership of immovable property, passport size photograph and finger prints of each buyer and seller of such property shall be affixed to document. [proviso to section 32A]. The Registrar is required to ensure that these are endorsed on the document.

Registration by Registering Officer - If the Registering Officer is satisfied about identity of persons and if they admit about execution of documents, and after registration fees are paid, the registering officer will register the document [section 35(1)]. He will make necessary entries in the Register maintained by him.

Certification of registration - After all formalities are complete, the Registering Officer will endorse the document with word 'Registered', and sign the same. The endorsement will be copied in Register. After registration, the document will be returned to the person who presented the document [section 61].

Effective date of document - A document takes effect from its date of execution and not from date of registration. However, if the document states that it will be effective from a particular date, it will be effective from that date [section 47].

Document registered has priority over oral agreement - Any non-testamentary document registered under the Act takes effect against any oral agreement relating to the property. The only exceptions are : (*a*) If possession of property (movable or immovable) is delivered on basis of such oral agreement and such delivery of possession is valid transfer under any law (*b*) Mortgage by deposit of title deeds takes effect against any mortgage deed subsequently executed and registered which relates to same property [section 48].

Effect of non-registration - If a document which is required to be registered under section 17 or under provisions of Transfer of Property Act, 1882 is not registered, the effect is that such un-registered document * does not affect any immovable property comprised therein * cannot be received as evidence of any transaction affecting such property. - - - Thus, the document becomes redundant and useless for all practical purposes. It can be accepted as evidence in criminal proceedings.

Standards of Weights and Measures Act, 1976

Standards of Weights and Measures Act was passed to establish standards of weights and measures and regulate its use. Packaging Commodities Rules were framed under the Act to regulate packaging commodities. Standards of Weights and Measures (Enforcement) Act, 1985 was passed with a view to enable State Governments to enforce provisions of Standards of Weights and Measures Act, 1976. The Act is administered by Ministry of Civil Supplies and is primarily to protect the consumers.

The Act can be termed as '3 in 1' Act as it is designed to (*a*) standardise weights and measures (*b*) Control manufacture and sale of weights and measures to ensure accuracy (*c*) Control over packaging commodities.

Provisions regarding packaging commodities applicable to all sales - Provisions in the Act regarding packaged goods have been made applicable only to Inter-State trade and commerce. However, section 33 of Standards of Weights and Measures (Enforcement) Act, 1985 has extended these provisions to sale, distribution etc. within the State also. Thus, effectively, these provisions are applicable to all sales i.e. within State as well as Inter-State sales.

Standard units - The Act specifies that metric system will be used for weight or measure of any unit [section 4(1)]. The Act gives specifications of base units i.e. Metre (for length), kilogram (for mass), second (for time), ampere (for electric current), Kelvin [for thermo-dynamic temperature), candela (for luminous intensity), mole (for amount of substance) and international form of Indian numerals (for basis of numeration). Act provides that derived, supplementary or other units will be prescribed by Central Government by rules [section 12].

National prototypes and standards - Central Government will prepare national prototype of kilogram and Metre certified by International Bureau of Weights and Measures (section 15). For other units, Central Government will prepare national standards, which will be certified periodically by International Bureau of Weights and Measures (section 16). Reference standards, secondary standards and working standards will also be made and kept as prescribed by Central Government (section 18). Reference standards will be supplied by Central Government to State Government. The secondary and working standards will be verified and stamped by prescribed authority [section 26].

Prohibition of non-standard weight or measure - Use of non-standard weight or measure and non-standard numeral is prohibited (section 21). Manufacture of non-standard weight and measure is also prohibited [section 22]. Inscription on weight, measures or other goods will be only in accordance with standard unit such as weight, measure or numeration (section 23). Non-standard weight and measure can be manufactured or inscribed only with permission of Central Government for scientific investigation or exports. [Thus, use of units like inch, foot, pound, acre etc. is indeed prohibited]. Use of such non-standard units in any notification, rule, contract, deed or any instrument is prohibited under section 80. Such contract or agreement shall be void - *a very harsh provision not known to many* [section 80(3)]. Even use of numerals in Devnagri is prohibited. Numerals must be only in Roman i.e. international form, i.e. 1, 2, 3, 4 etc.

Department of Legal Metrology - Central Government has formed Department of Legal Metrology. Director, Additional Director, Asst. Director and other staff will be appointed by Central Government for exercising the powers and duties under the Act [section 28]. Powers to these officers will be assigned by Central Government. Powers exercisable by these officers can also be delegated to State Government officers by Central Government. The Director and other officers of department of Legal Metrology will be 'public servants' within the meaning of section 21 of IPC.

Manufacturer to have licence - Manufacturers of weights and measures should have a licence (section 37). They have to get their models of weight and measures approved by Central Government before obtaining licence for manufacture.

Verification and stamping of weights - Weights and measures sent from one State to another for sale or use will be verified and stamped before despatch. Weights which are dispatched as it is i.e. without any dismantling before despatch are called 'weights and measures of first category'. Weights which are required to be dismantled before despatch and re-assembled and installed at other end, are called 'weights and measures of second category'. The weights and measures of second category will have to be again verified and stamped at other end [section 41].

Provisions regarding commodities packed for sale or distribution - Most of the provisions discussed so far relate to standardisation of weights and measures, manufacture and export of them etc. Only limited number of persons are affected by these provisions. However, many manufacturers and dealers are affected by provisions in respect of packaging commodities. Provisions regarding packaging commodities apply to a person who (*a*) make, manufacture, pack, sell or cause to be packed or sold or (*b*) distribute, deliver, or cause to be distributed or delivered or (*c*) offer, expose or possess for sale : any commodity in packaged form [section 39]. The package or label securely attached to such packing must contain declaration on a package or on label as prescribed.

Standards of Weights and Measures (Packaged Commodities) Rules, 1977 - These rules have been framed by Central Government as per powers given under the Act. These rules are applicable for inter-State sales as well as sale within State.

Trade Marks Act, 1999

A 'trade mark' is a very important and valuable asset of a company in a market oriented economy. The Act is designed to protect this valuable property. Customers identify a product by its trade mark. Value and importance of trade mark increases as business grows. Trade Marks Act, 1999 is enacted (in place of earlier 1958 law) with an intention to protect rights of trade marks of business. It is a self-contained and comprehensive code to deal with both the civil and criminal law relating to trade and merchandise marks. Procedures and forms are prescribed in Trade Mark Rules, 2002.

The 1999 Act has not yet been made effective.

Trade Mark under Common law as well as Trade Mark Act - Protection to Trade Marks was first introduced in India in 1940. Prior to that, the law relating to trade mark was based on common law. At common law, right to property in trade mark was in the nature of monopoly enabling the holder of the said right to restrain others from using the trade mark. The trade mark had to be distinctive.

After passing of the Act, registration of trade mark is provided. However, registration of trade mark is not compulsory.

What is a 'Trade mark' **-** Trade mark means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours and (i) in relation to chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the trade mark. (ii) in relation to other provisions of the Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark, whether with or without any indication of the identity of that person (i.e. proprietor or registered user). - - It also includes 'certification trade mark' or 'collective mark. [section 2(1)(zb)].

Mark can be in respect of goods or services. It should be capable of distinguishing the goods or services of one person from those of others. The mark should indicate a connection in the course of trade between the goods or services and some person having the right to use the mark.

USE IN COURSE OF TRADE - If mark is not used 'in course of trade', the protection is not available. e.g. 'Red Cross' or 'Ashok Pillar' is not used in course of trade. It cannot be a 'trade mark', though protection may be available under some other law.

CAPABLE OF BEING REPRESENTED GRAPHICALLY - Major requirement is that the mark should be capable of being represented graphically. Trade mark may be (a) letter mark - e.g. IBM, Coca Cola etc. (b) Symbol mark - The symbol mark may be (i) brand name identifying the product or (ii) Logo- visual depiction of the company and it identifies the company. e.g. Maharaja of Air India.

Even shape of goods their packaging and combination of colours can be a 'trade mark'. e.g. liquor bottle packed in a fancy size bottle.

What is 'Mark' - Mark includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, packaging or combination of colours or any combination thereof [section 2(1)(*m*)].

Registration of trade mark **-** Registration of trade mark is not mandatory, though highly desirable when stakes are high. The trade marks are to be registered with Controller General of Patents, Designs and Trade Marks who will be Registrar for purposes of this Act. [section 3(1)]. Trade Mark Registry has been established u/s 5(1) of the Act. Its offices can be established at different places. Register of trade Marks will be maintained at Head Office. The register can be maintained in electronic form. Copy of Register will be maintained at each branch office of Registrar. [section 6].

Registration does not confer absolute right - Registration of trade mark does not confer absolute rights on the owner. The registration of trade mark under section 28(1) is subject to other provisions of the Act. Registration of Trade Mark does not confer any new right to the mark claimed or any greater right than that already existed. Thus, even if a trade mark is registered, a 'passing off' action can be initiated against the person who has registered the trade mark.

TRADE MARK HAS TO BE DISTINCTIVE **-** Trade mark should be such as to distinguish the goods of owner of trade mark from goods of other persons.

Registration in case of honest concurrent use - It may happen that there is honest concurrent use of identical or similar trade mark by different proprietors. In such cases, Registrar can grant registration to both, subject to conditions and limitations as may be prescribed by Registrar. This can be done even if one mark was already registered. [section 12]

Foreign Trade marks not registered in India also protected - Foreign Trade marks like McDonalds, Whirlpool etc. have gained international recognition. In view of this, such trade marks can get protection in India under ‘passing off’ action, even if the trade marks are not registered in India. This is so even if the trade marks do not have any significant presence in India.

Rights conferred by Registration - Registration, if valid, grants exclusive right to use of trade mark to the proprietor in relation to goods or services in respect of which the trade mark is registered,, subject to conditions and limitations prescribed, if any, and subject to other provisions of thee Act. [section 28(1)]. In case same or similar trade mark is registered in name of more than one proprietors, they do not have any right against each other, but have equal rights against third persons. [section 28(3)]. - - The registration and its assignments and transmissions are *prima facie* evidence of its validity in any legal proceedings [section 31(1)].

Infringement of Trade Mark - A registered trade mark is ‘infringed’ when a person other than registered proprietor or a person using by way of permitted use, uses in course of trade, in following cases -

USE DECEPTIVELY SIMILAR MARK - Use of a mark which is identical with or deceptively similar to trade mark in relation to goods or services in respect of which the trade mark is registered and in such a manner as to render the use of the mark likely to be taken as being used as a trade mark. [section 29(1)].

LIKELY TO CAUSE CONFUSION BECAUSE OF IDENTITY/SIMILARITY - Use which, because of identity or similarity with registered trade mark and identity or similarity of goods or services covered by registered trade mark, is likely to cause confusion on the part of public. [section 29(2)].

USE EVEN ON DISSIMILAR GOODS - Use of identical or similar registered trade mark on goods which are not similar, if the mark has reputation in India and use of the mark without due cause is taking undue advantage or is detrimental to the distinctive character or repute of the registered trade mark. [section 29(4)].

USE AS TRADE NAME - Use of registered trade mark as a trade name or name of business concern or part of name of his business concern dealing in goods or services in respect of which the trade mark is registered. [section 29(5)].

APPLYING TRADE NAME ON LABELS OR PACKING GOODS - Unauthorised use the trade mark on material intended to be used for labeling or packing of goods, as a business paper or for advertising goods or services. [section 29(7)]

USE IN ADVERTISING - Use in advertisement, taking unfair advantage or is detrimental to its distinctive character or is against reputation of the trade mark. [section 29(8)].

Meaning of ‘deceptively similar’ - A mark shall be deemed to be ‘deceptively similar’ to another mark if it so nearly resembles that other mark as to be likely to deceive or cause confusion. [section 2(1)(h)].

Assignment, transmission and registered user - A trade mark can be assigned or transmitted. A registered trade mark can be assigned by registered proprietor to another and to give effectual receipts for any consideration for such assignment. [section 37]. Registered trade mark can be assigned or transmitted with or without goodwill of business concerned, in respect of all goods or services or of only some of the goods or services. [section 38]. An unregistered trade mark can also be assigned or transmitted with or without goodwill of business concerned [section 39]. Assignment or transmission shall be registered with registrar. [section 45(1)].

Appellate Board - An ‘Intellectual Property Appellate Board’ shall be established by Central Government. [section 83]. The Board will exercise powers which were exercised by High Court under 1958 Act. Matters presently pending in High Court will also be transferred to the Board. [section 100]. [However, matters relating to infringement, passing off, offenses and penalties will continue to District Court/Magistrate only as at present]

Infringement -Falsifying trade mark and falsely applying trade mark is a criminal offense for which punishment can be imposed by criminal courts. In addition, suit for infringement or passing off can be filed by aggrieved party. It is a civil action. The suit is required to be instituted before District Court. [section 134(1)].

Distinction between Infringement and passing off - Unauthorised use of registered trade mark is 'infringement of trade mark'. Damages can be claimed under common law also, even when trade mark is not registered. This is called '*passing off*' action. - - Thus, in India, trade mark protection is available both under the statute law and the common law.

***Court's powers to grant interim reliefs* -** Courts can grant damages for wrongful use of a trade mark. However, this takes time. In the meanwhile, Courts can grant following immediate reliefs : (*a*) Interim injunction (*b*) Anton pillar order - i.e. order for search and seizure (*c*) Mareva injunctions i.e. freezing of assets.

Water (Prevention and Control of Pollution) Act, 1974

The problem of pollution of rivers and streams has assumed considerable importance and urgency in recent years as a result of growth of industries. Domestic and industrial effluents should not be allowed to be discharged into the water without adequate treatment, as otherwise, water becomes unsuitable for human consumption, irrigation and fish life. The Act was passed in 1974. The Act covers fields of water and irrigation, which are State subjects. Hence, it is applicable only to States which have approved or adopted the same.

Pollution under Water Pollution Act - Pollution means such contamination of water or such alteration of the physical, chemical or biological properties of water or such discharge of any sewage or trade effluent or of any other liquid, or solid substance into water as may, or is likely to create a nuisance or render such water harmful to public health or to domestic, commercial, industrial, agricultural or other legitimate uses or to the life of animals and plants or of aquatic organisms [section 2(*e*) of Water Pollution Act].

Sewer, effluent etc. under Water Pollution Act - Trade effluent includes any liquid, gaseous or solid substance which is discharged from any premises used for carrying on any industry, operation, or process or treatment and disposal system, other than domestic sewage [section 2(*k*) of the Act.]. Sewage effluent means effluent from any sewage system or sewage disposal works and includes sullage from open drains [section 2(*g*)]. Sewer has been defined as any conduit pipe or channel, open or closed, carrying sewage or trade effluent [section 2(*gg*)]. 'Stream' includes river, water course, inland water, subterranean water, sea or tidal water [section 2(*j*) of Water Pollution Act].

***Prevention and control of water pollution* -** The Act envisages following steps for prevention and control of water pollution. Provisions of appeal and revision have also been made.

Measures to control water pollution - Following measures can be taken.

WATER POLLUTION CONTROL AREAS - State Government, after consulting with the state boards, can declare some area as 'water pollution control areas' and in such case, State Government may restrict the application of this Act to those specified area, by notification in the Official Gazette. The water pollution, prevention and control area may be declared either with reference to a map or line of any watershed. The area declared can be altered, added or deleted [section 19 of Water Pollution Act].

PROHIBITION ON USE OF STREAM OR WELL FOR DISPOSAL OF POLLUTING WATER - Section 24 of Water Pollution Act prohibits use of stream or well for disposal of any poisonous, noxious or polluting matter by any person knowingly.

RESTRICTION ON PUTTING OBSTRUCTIONS IN THE STREAM - A person is prohibited from knowingly putting any matter in stream which may obstruct its flow due to which pollution may be aggravated. This restriction is not applicable for (*a*) constructing improving in or across or on the bank of river, any building, bridge, dam, sluice, drain or sewer which he has right to construct (*b*) depositing any materials on the bank for reclaiming the land or for supporting the bed of stream, if such materials do not pollute the stream (*c*) putting into any stream any sand or natural deposit which has flown from such current of the stream (*d*) deposit material in stream with consent of Board [section 24(2)]. State Government or Board can exempt any person from these provisions.

CONSENT NECESSARY FOR NEW OUTLETS AND DISCHARGES - No person shall, without the previous consent of state board, (*a*) establish or take any steps to establish any industry, operation, or process which is likely to discharge sewage into a stream or well (*b*) bring into use any new or altered outlet for discharge of sewage (*c*) begin to make new discharge of sewage [section 25]. Application for consent should be made in prescribed form. Consent can be granted by State Board subject to conditions and restrictions. Consent can be refused or withdrawn for reasons to be recorded in writing. In case of industries established without obtaining such consent, State Board can ask such industry to obtain consent and conditions may be imposed. Consent shall be deemed to have been granted unless it is given or refused within four months of making an application. State Board shall maintain a register of consents given by it and the conditions placed for such consents [section 25(6) of Water Pollution Act]. The conditions for consent can be varied later or consent can be revoked.

LABORATORIES AND ANALYSTS - Central Government can establish Central Water Laboratory and specify its functions [section 51]. State Government can establish State Water Laboratory or authorise any laboratory or institute for that purpose [section 52]. Government Analysts with requisite qualifications can be appointed by Central Government or State Government. State Board can also appoint Board Analysts [section 53]. Report of such approved analysts can be used as evidence in Court.

WATER CESS - Specified industries and local authorities like municipalities, municipal corporations etc. have to pay water cess at prescribed rates. This cess is to meet expenses of Central Board and State Boards. The cess has been imposed under Water (Prevention and Control of Pollution) Cess Act, 1977.

Central Board and State Boards - Provisions for setting up Central Board and State Boards under the Water Pollution Act are similar to provisions under Air Pollution Act. Water Pollution Act also makes provisions for formation of Joint Boards by two or more Governments of contiguous States or Central Government, State Governments and Union territories.

LABOUR LAWS IN INDIA

1. Apprentices Act
2. Contract Labour (Regulation and Abolition) Act, 1970
3. Employees Provident Funds Act, 1952
4. The Employees State Insurance Act (ESI Act)
5. Equal Remuneration Act
6. Factories Act, 1948
7. Labour Laws (Exemption From furnishing returns and maintaining registers by Certain Establishments) Act, 1988
8. Payment of Bonus Act, 1965
9. Payment of Gratuity Act, 1972
10. Industrial Disputes Act
11. Industrial Employment (Standing Orders) Act
12. Minimum Wages Act
13. Payment of Wages Act
14. Trade Unions Act, 1926
15. Workmen’s Compensation Act, 1923
16. Punishment to Employee

LABOUR LAWS

Apprentices Act

The main purpose of the Act is to provide practical training to technically qualified persons in various trades. The objective is promotion of new skilled manpower. The scheme is also extended to engineers and diploma holders.

The Act applies to areas and industries as notified by Central government. [section 1(4)].

Obligation of Employer - Every employer is under obligation to take apprentices in prescribed ratio of the skilled workers in his employment in different trades. [section 11]. In every trade, there will be reserved places for scheduled castes and schedules tribes. [section 3A]. Ratio of trade apprentices to workers shall be determined by Central Government. Employer can engage more number of apprentices than prescribed minimum. [section 8(1)]. - - The employer has to make arrangements for practical training of apprentice [section 9(1)]. Employer will pay stipends to apprentices at prescribed rates. If the employees are less than 250, 50% of cost is shared by Government. If employer is employing more than 250 workers, he has to bear full cost of training.

WHO CAN BE APPRENTICE - Apprentice should be of minimum age of 14 years and he should satisfy the standard of education and physical fitness as prescribed. [section 3].

DURATION OF TRAINING - Duration of training period and ratio of apprentices to skilled workers for different trades has been prescribed in Apprenticeship Rules, 1991. Duration of Apprenticeship may be from 6 months to 4 years depending on the trade, as prescribed in Rules. Period of training is determined by National Council for training in Vocational Trades (established by Government of India).

CONTRACT WITH APPRENTICE – Apprentice appointed has to execute an contract of apprenticeship with employer. The contract has to be registered with Apprenticeship Adviser. If apprentice is minor, agreement should be signed by his guardian. [section 4(1)]. - - Apprentice is entitled to casual leave of 12 days, medical leave of 15 days and extraordinary leave of 10 days in a year.

Legal Position of Apprentices - An apprentice is not a workman during apprentice training. [section 18]. Provisions of labour law like Bonus, PF, ESI Act, gratuity, Industrial Disputes Act etc. are not applicable to him. However, provisions of Factories Act regarding health, safety and welfare will apply to him. Apprentice is also entitled to get compensation from employer for employment injury. [section 16].

An employer is under no obligation to employ the apprentice after completion of apprenticeship. [section 22(1)]. However, in *UP State Road Transport Corpn* v. *UP Parivahan Nigam Shishukh Berozgar Sangh* AIR 1995 SC 1114 = (1995) 2 SCC 1 , it was held that other things being equal, a trained apprentice should be given preference over direct recruits. It was also held that he need not be sponsored by the employment exchange. Age bar may also be relaxed, to the extent of training period. The concerned institute should maintain a list of persons already trained and in between trained apprentices, preference should be given to those who are senior. – same view in *UP Rajya Vidyut Parishad* v. *State of UP* 2000 LLR 869 (SC).

Stipend payable - The minimum rate of stipend payable per month is as follows - (a) Engineering graduates - Rs 1,970 p.m. for post-institutional training (b) Sandwich course students for degree examination - Rs 1,400 p.m. (c) diploma holders - Rs 1,400 p.m. for post-institutional training (d) Sandwich course students for degree examination - Rs 1,140 p.m. (e) Vocational certificate holder - Rs 1,090 p.m. [w.e.f. May 2001]

In case of 4 year training, the stipend is as follows – first year – Rs 820 pm. Second year – Rs 940 pm. Third year – Rs 1,090 pm. Fourth year – Rs 1,230 pm. [From May 2001].

Test and Proficiency certificate - On completion of training, every trade apprentice has to appear for a test conducted by National Council. If he passes, he gets a certificate of proficiency.

Apprenticeship Adviser - Government is empowered to appoint Apprenticeship Adviser, Dy Apprenticeship Adviser etc. to supervise the scheme. Various powers have been conferred on them under the Act.

Contract Labour (Regulation and Abolition) Act, 1970

Purpose of the Act is to regulate employment of contract labour and to provide for abolition of contract labour in certain cases.

Establishment to which Act applies - The Act is applicable to every establishment in which 20 or more workmen are *employed as contract labour* or were so employed anytime during last 12 months. [section 1(3)(a)] . ct will not apply to establishment where work of an intermittent or casual nature is performed. [section 1(5)(a)].

'Establishment' means any office or department of Government or a local authority or any place where any industry, trade, business, manufacturing or occupation is going on. [section 2(1)(e)]. - - Every such establishment is required to get itself registered under the Act. [section 7].

Manager or occupier of factory or head of department of Government/local authority is termed as 'Principal Employer'. [section 2(1)(g)].

Principal Employer should maintain register of contractors in prescribed form. [section 29]. He is required to ensure that contractor makes adequate provision for canteen, rest rooms, supply of drinking water, latrines, urinals, wash rooms etc. to contract labour. If contractor fails to do so within prescribed time, the Principal Employer shall provide the amenities. can recover from contractor the cost incurred by him in providing these amenities. [section 20].

Contract Labour – A workman is deemed to be employed as 'contract labour' in or in relation to work of the establishment, if he is hired for such work by or through a contractor, with or without knowledge of principal employer. [section 2(1)(b)].

Contractor - The Act applies to every contractor who employs 20 or more workmen. [section 1(3)(b)]. The contractor sill be licensed. [section 12]. Contractor is required to maintain muster roll and register of wages. [section 29]. - - He is required to follow other provisions as my be contained in Rules made by Appropriate Government. Contractor is required to pay wages to workmen on time, in presence of authorised representative of principal employer. [section 21]. - - He should issue wage slips to workman and obtain signature or thumb impression on wage register. - - if contractor fails to make payment of wages, Principal Employer is liable to make payment of wages to contract labour. He can recover this amount from contractor. [section 21(4)].

Contractor is required to provide canteen facilities, first-aid, rest rooms, drinking water, latrines and washing facilities, as per rules made by State Government. [sections 16 and 17].

Controlling authority – Control over contract labour will be exercised by 'Appropriate Government'. - - Appropriate Government means * Central Government in case of railways, docks, IFCI, ESIC, LIC, ONGC, UTI, Airport Authority, industry carried on by or under authority of Central Government * State Government in case of other industrial disputes [section 2(1)(a)]. - - Appropriate Government can make rules. It will appoint inspecting staff to ensure that the provisions of Act are being followed. [section 28].

Other laws applicable to contract labour – Besides Contract Labour (Regulation and Abolition)

Act, various other Acts are applicable to contract labour – (a) Factories Act – The Act makes no distinction between persons directly employed and employed through contractor (b) Employees Provident Funds Act (c) ESIC (d) Payment of Wages Act (e) Minimum Wages Act (f) Industrial Disputes Act (g) Workmen's Compensation Act.

Prohibition of employment of contract labour – Appropriate Government can prohibit employment of contract labour in any process, operation or work in any establishment, by issuing a notification. Such order can be issued after consultation with Advisory Board. [section 10(1)]. Before issuing such order in respect of any establishment, Government will consider aspects of conditions of work and benefits provided to contract labour, whether process operation or work is incidental or necessary for the industry/trade/business, perennial nature, whether it is done ordinarily through regular workmen in other similar establishment. [section 10(2)].

In *Steel Authority of India* v. *National Union Water Front* 2001(5) SCALE 626 = 2001 LLR 961 = AIR 2001 SC 3527 = JT 2001(5) SC 602 = 2001 III CLR 349 = (2001) 7 SCC 1 = 2001 LLN 135 = 2001 AIR SCW 3574 (SC 5 member Constitution bench), it was held that Central / State Government can issue notification u/s 10 abolishing contract labour only after following prescribed procedure regarding consultation etc. It was also held that even if such a notification is issued, the employees with contractor will not be automatically absorbed in the employment of the company, if the contact was genuine. However, company will give preference to them. However, if the contract was not genuine but a mere camouflage, the so called contract labour will have to be treated as employees of principal employer.

Employees Provident Funds Act, 1952

As per Preamble to the Act, the EPF Act is enacted to provide for the institution of provident funds, pension fund and deposit lined insurance fund for employees in factories and other establishments. - - The Employees' Provident Funds and Miscellaneous Provisions Act is a social security legislation to provide for provident fund, family pension and insurance to employees. Employee has to pay contribution towards the fund. Employer also pays equal contribution. The employee gets a lump sum amount when he retires, which will be useful to him after retirement. The Act covers three schemes i.e. PF (Provident Fund scheme), FPF (Family Pension Fund scheme) and EDLI (Employees Deposit Linked Insurance scheme).

The EPF Act contains basic provisions in respect of applicability, eligibility, damages, appeals, recovery etc. The three schemes formed by Central Government under the Act make provisions in respect of those schemes.

Applicability of the Act - The Act applies to (a) Every establishment which is a factory engaged in industry specified in Schedule I to the Act and in which 20 or more persons are employed and (b) any other establishment or class of establishment employing 20 or more persons which may be specified by Central government by notification in official gazette. - - Central Government can also apply provisions of the Act to any establishment even if it employs less than 20 persons. [section 1(3)].

In *RPFC* v. *T S Hariharan* 1971 Lab IC 951 (SC), it was held that temporary workers should not be counted to decide whether the Act would apply.

Even if the provisions of PF Act are not applicable in a particular establishment, if employer and majority of employees agree, the Central Provident Fund Commissioner can apply the provisions to that establishment by issuing a notification in Official Gazette. [section 1(4)]. Once the provisions of Act become applicable, it continues to be applicable even if number of employees fall below 20. [section 1(5)].

Coverage of Act - The Act has been extended to * Factories * Mines other than coal mines * Hotels and restaurants * Plantation of tea, coffee, rubber [Tea factories in Assam have been excluded vide para 1(3)(a) of EPF Scheme] * Trading and commercial establishments engaged in purchase, sale or storage of goods * Establishments of exporters, importers, advertisers, stock exchanges * Canteens * Establishments of Attorneys, CA, ICWAs, Engineers and Contractors, architects and medical practitioners * Hospitals * Travel agencies * Banks doing business only in one State * General Insurance * Expert services * Clubs and societies rendering services to their members * Agricultural farms * Financial Establishments other than banks * Building and construction Industry * Poultry farming * University, college or schools. - - The Act has been extended w.e.f. 1.4.2001 vide notification dated 22.3.2001, to * courier services * Aircraft or airlines other than aircraft or airline owned or controlled by Government * Establishment engaged in rendering cleaning and sweeping services.

Once an establishment is covered under PF, all its departments and branches wherever they are situated are also covered.

OTHER NON-FACTORY ESTABLISHMENTS COVERED - Besides factories, other establishments employing 20 or more persons can be covered under the Act u/s 1(3)(b). Various notifications have been issued extending the provisions of PF Act to non-factory establishments. Some major among them are - plantation, mines, coffee, hotels and restaurants, cinema and theatres, trading and commercial establishments, laundry, canteens, establishments of attorneys/CA/ ICWA/engineers/ architects/medical practitioners, hospitals, financial establishments (other than IFCI, UTI, IDBI, SFC), building and construction industry, poultry, university, college, schools, scientific institutions etc.

TRANSITORY PROVISIONS WHEN ACT IS EXTENDED **-** It is possible that when PF Act is extended to certain establishment, some PF scheme may be already in existence. Such scheme will continue and the balance amount in such scheme to credit of the employee will be transferred to the Provident Fund under statutory scheme of PF Act. [section 15].

Establishment to include all departments and branches **- W**here an establishment consists of different departments or has branch es, whether situate in the same place or in different places, all such departments or branches shall be treated as parts of the same establishment. [section 2A]. **- -** Thus, if factory is covered, the head office and branches will also be covered under the Act.

Act not applicable to certain establishments **-** As per section 16(1), the PF Act does not apply to (a) any establishment registered under Cooperative Societies Act or State law relating to cooperative societies, employing less than 50 persons and working without paid of power (b) to any establishment belonging to or under Control of Central Government or a State Government and whose employees are entitled to benefit of contributory provident fund or old age pension. (c) to any establishment set up under any Central or State Act and whose employees are entitled to benefit of contributory provident fund or old age pension..

Where PF Act is not applicable - The PF Act is not applicable to certain establishments—* Factories or establishments employing less than 20 employees. However, once Act becomes applicable, it continues to apply even if subsequently, the number is lower than 20 * Banks doing business in more than one State * Coal mines * Units established under Cooperative Societies Act employing less than 50 workers and working without aid of power * Other establishments belonging to or under control of Central Government or State Governments and whose employees are entitled to benefits of contributory provident fund or pension. * Tea factories in Assam * Exemption granted by Central Government by a special notification.

Administration of the Fund - Both employer and employee have to pay contribution at prescribed rates.. These amounts are credited to a fund. The fund vests in and is administered by Central Board. [section 5(1A)].

Employees covered under the scheme **-** As per section 2(f), “employee” means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment, and who gets his wages directly or indirectly from the employer. It includes any person - (*i*) employed by or through a contractor in or in connection with the work of the establishment (*ii*) engaged as an apprentice, not being an apprentice engaged under the

Apprentices Act, 1961 or under the standing orders of the establishment.

Thus, (a) Persons employed through contractor in connection with work of establishment are covered (b) Apprentices employed under Apprentices Act or under standing orders of establishment are excluded, i.e. they are not employees. [The model standing orders merely state that an ‘apprentice’ is a learner who is paid an allowance during the period of his training].

Non-Eligible employees under PF - * Employee whose ‘pay’ is more than Rs. 6,500 per month are not eligible. (It may be noted that limit of pay was Rs 5,000 upto 31.5.2001 and Rs. 3,500 upto 30th Sept., 94) * Apprentices as per certified standing orders or under Apprentices Act * Casual employees. However, employees employed through contractors have also to be covered under PF.

Employee to become member of Fund immediately on joining – Every employee employed in or in connection with work of a factory or establishment to which the Act applies is entitled and required to become member of Provident Fund, unless he is an excluded employee. [para 26(1) of EPF Scheme]. An employee who is drawing ‘pay’ above prescribed limit (presently Rs 6,500) can become member with permission of Assistant PF Commissioner, if he and his employer agree. [para 26(6) of EPF Scheme].

***Contribution by employer and employee* -** As per section 2(c) “contribution” means a contribution payable in respect of a member under a Scheme or the contribution payable in respect of an employee to whom the Insurance Scheme applies.

As per section 6, contribution shall be paid by employer @ 10% of basic wages plus dearness allowance plus retaining allowance. This amount is defined as ‘pay’ as per explanation to para 2(f)(ii) of EPF Scheme.

Equal contribution is payable by employee also. This contribution can be increased to 12% by Central Government and in fact, has been increased to 12% in most of the cases.

A person who is already a member continues to be a ‘member’ even if his ‘pay’ exceeds Rs 6,500. However, the contribution is limited to Rs 6,500 only. [para 26A(2) of EPF Scheme].

RPFC is liable under Consumer Protection Act - The Regional Provident Fund Commissioner is providing service under the Act and hence he is liable under Consumer Protection Act. - *RPFC* v. *Shiv Kumar Joshi* (1996) 4 CTJ 805 = 1996 LLR 641 (NCDRC 5 member bench) - confirmed in *RPFC* v. *Shiv Kumar Joshi* 1999 AIR SCW 4456 = 1999(7) SCALE 453 = 2000 LLR 217 = AIR 2000 SC 331 = 99 Comp Cas 347 = (2000) CLA-BL Supp 26 = 24 SCL 46 (SC).

Employees Provident Fund Scheme - This is the main scheme under the Act. Both employer and employee have to pay contribution to Provident Fund. The employer has to deduct contribution of employee from the salary of employee and has to pay both employees’ contribution as well as employer’s contribution by a challan in prescribed form. The amount has to be paid in approved bank.

EMPLOYEE CAN PAY HIGHER CONTRIBUTION - Employee has to contribute 12/10% of his 'pay' as contribution. The employee can voluntarily pay higher contribution above the statutory rate. However, employer does not have to match the voluntary contribution, over and above the statutory rate. [para 26(2) of EPF Scheme].

Contribution payable ***under PF Scheme*** - The Principal Employer is liable to pay contribution of his own employees as well as employees employed through contractor. Principal Employer can recover from contractor the amount paid by him on behalf of contractor. The contribution is 12% of ‘pay’ i.e. basic wages, plus dearness allowance, cash value of food concession and retaining allowance. Contribution of both employer and employee is same i.e. 12% each. [para 29 of EPF

Scheme].

Employer has to pay his contribution to EPF. He cannot deduct his contribution from wages of the employee. [Para 31 of EPF Scheme]. However, he has to deduct employee's share from his salary and pay the same in EPF scheme. This deduction can be only from the wages pertaining to period for which contribution is paid. However, if there is accidental omission, the amount can be recovered later. Amount deducted from salary of employees is held in trust by the employer or contractor. [Para 32 of EPF Scheme].

Out of employer's contribution of 12/10%, the Employer's contribution of 8.33% will be diverted to Employees' Pension Scheme. The balance will be retained in the EPF scheme. Thus, on retirement, the employee will get his full share plus the balance of Employer's share retained to his credit in EPF account. [This diversion is only w.e.f. 16th November, 95. Earlier Employer's contribution to their credit will continue to remain to their credit].

Lower contribution in certain cases - The employer's and employee's contribution is 12% each. This is applicable to many of industries and establishments. However, this contribution is not applicable to - * any establishment employing less than 20 persons * any establishment registered with Board for Industrial and Financial Reconstruction (BIFR) as a sick company - the lower rate of contribution continues till its net worth is positive * any other establishment which has accumulated loss equal to or more than its assets and has also suffered cash loss in last two years. * Jute industry * Beedi industry * Brick industry * Coir industry other than the spinning sector * Guar gum factories. In these cases, the contribution is 10%.

Interest on account – PF Commissioner shall maintain account of each member of EPF scheme. [Para 59 of Scheme]. Interest is credited to the account of employee. The Interest is calculated on monthly running balance basis. Amount standing to credit at end of the month is considered for calculation of interest for the following month. The interest rate is declared every year by Central Government in consultation with Central Board of Trustees of Provident Fund. [Para 60 of EPF Scheme].

Employees' Pension Scheme - This scheme has been introduced w.e.f. 16th November, 95. The Scheme is applicable to all subscribers of Employers' Provident Fund. It is also compulsory to persons who were subscribers as on 16.11.95.

CONTRIBUTION - The employer's contribution of 8.33% will be diverted to the fund of Pension Scheme. Employee does not have to make any contribution. Employer's contribution is 12%/ 10%. In such cases, 8.33% is diverted to Pension scheme and balance 1.67%/3.67% as the case may be, will be in credit of employee's name in Provident Fund account. The 8.33% is on maximum salary of Rs. 6,500. If some employers are paying contribution on salary in excess of Rs. 6,500, the excess contribution will be credited to Provident Fund account and not to Pension scheme.

No separate administration charges or inspection charges are payable, as these are already paid along with Provident Fund contribution.

BENEFITS UNDER THE SCHEME - Members will get pension on superannuation or retirement from service and upon disablement during employment. Family pension will be available to widow/widower for life or till he/she remarries. In addition, children will be entitled to pension, upto 25 years of their age. In case of orphans, pension at enhanced rate is available upon death of widow/widower or ceasing payment of widow pension. Benefit of pension to children or orphan is only restricted for two children/orphans.

If the person is unmarried or has no family, pension is available to nominee for a specified period.

COMMUTATION OF PENSION - The member can commute 33.33% of the pension, so as to receive hundred times the monthly pension so commuted as commuted value of pension. Balance will be paid on monthly basis.

Employees Deposit Linked Insurance Scheme - The purpose of the scheme is to provide life insurance benefits to employees who are already covered under PF/FPF. The employer has pay contribution equal to 0.50% of the total wages of employees In addition, administrative charges of 0.1% of total wages. [Notification No. AO 503(E) dated 28-7-1976 issued u/s 6C(2) of PF Act].

The employee does not contribute any amount to the scheme. The salary limit for coverage of employees is same as that of Provident Fund.

Exemption from the scheme can be obtained from RPFC if LIC Group Gratuity scheme is adopted by employer. If exemption is granted, only inspection charges @ 0.005% are payable to PF authorities.

Benefit to nominee of employee - If an employee dies during employment, his nominee or family member gets an amount equal to average balance in the Provident Fund Account of the deceased employee during last 12 months. If such balance is more than Rs. 35,000, the insurance amount payable is Rs. 35,000 plus 25% of the amount in excess of Rs. 35,000, subject to overall limit of Rs. 60,000. If the employees are covered under another life insurance scheme whose benefits are better than this scheme, an exemption from this scheme can be obtained. [Increased to 35,000 and 60,000 w.e.f. 13.6.2000]

The Employees State Insurance Act (ESI Act)

The ESI Act has been passed to provide for certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for related matters. As the name suggests, it is basically an 'insurance' scheme i.e. employee gets benefits if he is sick or disabled.

ESIC - Employees State Insurance Corporation (ESIC) has been formed to supervise the scheme under section 3 of the Act. The Corporation supervises and controls the ESI scheme.

NO DISMISSAL OR PUNISHMENT DURING PERIOD OF SICKNESS - Section 73 of the Act provides that no employer shall dismiss, discharge or reduce or otherwise punish an employee during the period employee is in receipt of sickness benefit or maternity benefit. He also cannot dismiss, discharge or otherwise punish employee when he is in receipt of disablement benefit or is under medical treatment or is absent from work due to sickness.

This gives protection to employee when he is in receipt of sickness benefit or maternity benefit. Employer cannot take disciplinary action against employee in such cases. This provision is grossly misused by employees.

However, in *Buckingham & Carnatic Co* v. *Venkatayya* - AIR 1964 SC 1272 = 1963(7) FLR 343 = (1964) 4 SCR 265 = (1963) 2 LLJ 638 = 25 FJR 25 (SC), it was rightly held that this provision (of section 73) is applicable only in case of punitive action for all kinds of misconduct during which employee has received sickness benefits. This protection is not applicable in case of abandonment of employment or when termination is automatic as per contract. – followed in R*ajveer Singh* v. *Judge* 1996 LLR 61 (Raj HC), where it was hold that provisions of section 73 are not applicable when termination of an employee is automatic.

Applicability of ESI Scheme - The scheme is applicable to all factories. [section 1(4)]. The Appropriate Government can also make it applicable to any other industrial, commercial, agricultural or other establishments, by issuing notification and giving 6 month notice. [section 1(5)].

Thus, ESI Act can be made applicable to 'shops' also. However, since Government has to provide for hospitals and medical facilities, the Act can be made applicable to different parts of State at different dates. Thus, if a factory is at a place where ESIC is unable to provide medical facilities, ESI Act may not be made applicable to that area. Government can exempt a factory or establishment or persons or class of persons from provisions of ESI Act, if the employees are getting better medical facilities/ [e.g. if Government is convinced that the factory itself is providing very good medical facilities e.g. like TISCO].

REGIONAL OFFICES / BRANCH OFFICES GET COVERED - Regional offices of a factory, which have their connection to the factory and where the Principal Employer has control over the regional offices, the regional offices will be covered under *ESIC - Hyderabad Asbestos Cement Products* v. *ESIC* - AIR 1978 SC 356 = (1978) 2 SCR 345 = (1978) 1 SCC 194. If head office is covered under ESIC, branch offices are also covered when branch and principal office are inter-dependent and there is unity of relationship. - *Transport Corporation of India* v. *ESIC* 1999(7) SCALE 63 = 2000 LLR 113 = 83 FLR 970 = 1999 AIR SCW 4340 = AIR 2000 SC 238 (SC 3 member bench).

OUTSIDE AGENCIES CAN BE COVERED - In *PM Patel* v. *UOI* (1986) 1 SCC 32 = AR 1987 SC 447 = 1985 II CLR 322 (SC), workers were given work of making 'bidis' as home. Right of rejection of bidis was with employer. It was held that test of control and supervision lies in the right of rejection. It was held that employees working outside can be covered under ESIC, if there is master servant relationship.

Definition of 'factory' as per ESI Act - The 'Factory' means any premises where manufacturing process is carried out. If manufacture is without aid of power, the Act is applicable if persons employed are at least 20. If manufacture is with aid of power, the Act applies if persons employed are at least 10. [section 2(12)]. - - However, 'mines' have been excluded. - - 'Manufacturing process' has same meaning as defined under Factories Act. [section 2(14AA)].

One a factory or establishment is covered, it continues to be covered even if number of employees reduce. [section 1(6)]

CONSTRUCTION WORKERS NOT COVERED – Construction workers employed in construction activities are not covered under ESIC. – ESIC circular No. P-12(11)-11/27/99 Ins.IV dated 14-6-1999. - - However, if administrative office employs 20 or more eligible employees, that establishment and employees working in administrative office will be covered.

Employer under ESI Act – 'Principal Employer' means * owner or occupier of factory * Head of department in case of Government department and * Person responsible for supervision and control, in case of any other establishment. [section 2(17)]. - - Employees working though contractor are also covered. 'Contractor' is termed as 'Immediate Employer'. 'Immediate employer' means a person who has undertaken the execution, on the premises of factory or establishment to which this Act applies. He may do on his own or under the supervision of Principal Employer. The work should be part of work of factory or establishment of principal employer or is preliminary or incidental to the work of factory or establishment. [section 2(13)]. Primary liability of ESI contribution is of Principal Employer. [section 40(1)]. He can recover the contribution paid by him from the 'immediate employer' i.e. contractor. [section 41].

Employee under ESI Act - 'Employee' means any person employed for wages in or in connection with work of a factory or establishment to which the ESI Act applies. Employees drawing wages upto Rs. 10,000 per month can be presently covered under the ESI Act scheme. [section 2(9)] [The limit was Rs 7,500 upto 30-9-2006, which is enhanced to Rs 10,000 w.e.f. 1-10-2006]

Employees include * persons employed through contractor * Apprentices *other than* those covered under 'Apprentices Act' * Persons employed in administration office, department or branch for purchase or sale of products. * Casual workers engaged in work incidental to or connected with work of factory or establishment * Employees working at head office when factory is located at different place * Canteen staff, watch and ward staff are employees * Staff in hospital attached to factory are employees. - - Members of Indian Naval, Military or Air Forces are excluded.

If an employee is drawing wages less than Rs. 7,500 per month at the beginning of his 'contribution period', his contributions are payable for whole period of contribution period of six months even if in between his wages go above Rs. 7,500 p.m. [*proviso* to section 2(9)].

FOLLOWING ARE NOT EMPLOYEES - * Persons drawing wages over Rs. 7,500 per month * member of Army, Navy or Air Force. * Partners of firm are not employees even if they are drawing wages - *RD, ESIC* v. *Ramanuja Match Industry* AIR 1985 SC 278 = 1985(1) SCC 218 = 1998(6) SCALE 38 * Persons employed in Government establishments. * construction workers engaged in raising additional building subsequent to initial set up of factory.

Contribution to ESIC Fund - Both employee and employer have to make contribution to ESIC. The employer has to deduct contribution from wages of employee and pay to ESIC both the employer's contribution as well as employees' contribution. [section 39(1)].

The contribution is payable for 'wage period' i.e. the period in respect of which wages are payable to employee. [section 39(2)]. Normally, 'wage period' is a month. The employee's contribution is 1.75% of wages. It should be rounded off to next 5 paise. Employees contribution is not payable when daily wages are below Rs 15/-.

Employer's contribution is 4.75% of total wage bill of all employees in respect of every wage period. Thus, it is not necessary to calculate employer's contribution separately for each employee. 4.75% of gross wages should be calculated and rounded off to next 5 paise. Employees drawing wages lower than Rs 25 per day do not have to pay employee's share. The contribution has to be paid within 21 days from close of the month. It is payable by a challan in authorised bank. - - If the contribution is not paid in time, interest @ 12% is payable. [section 39(5)(a)].

In addition, ESIC authorities can impose 'damages' varying between 5% to 25% of arrears of contribution u/s 85B.

Employer cannot deduct employer's contribution from the salary of employee. [section 40(3)].

LIABILITY OF PRINCIPAL EMPLOYER – In case of employees of contractor, liability is of Principal Employer. In *Britannia Industries* v.*ESIC* (2001) 98 FJR 520 (Mad HC), it was held that Principal Employer will be liable to penalty and damages also if contribution is not paid on due date. – same view in *Padmini Products* v. *ESIC* 2000(2) Kar LJ 369 (Karn HC).

Wage for purpose of ESI Act - 'Wages' means all remuneration paid or payable in cash to employee according to terms of contract of employment and includes any payment made to an employee in respect of period of authorised leave, lock-out, lay-off, strike which is not illegal and other additional remuneration paid at interval not exceeding two months. It does not include * contribution paid by employer to any pension fund or provident fund * Travelling allowance * Reimbursement of expenses made by nature of employment of the employee * gratuity. [section 2(22)].

Thus, wages include basic pay, dearness allowance, city compensatory allowance, payment of day of rest, overtime wages, house rent allowance, incentive allowance, attendance bonus, meal allowance and incentive bonus. However, wages do not include annual bonus, unilateral rewards scheme *(inam*), *ex gratia* payments made every quarter or every year travelling allowance, retrenchment compensation, encashment of leave and gratuity.

Contribution period and Benefit period - Contribution period is (*a*) 1st September to 31st March (*b*) 1st April to 30th September. The corresponding benefit period is (*a*) following 1st July to 31st December (*b*) following 1st January to 30th June. Thus, 'benefit period' starts three months after the 'contribution period' is over. The relevance of this definition is that sickness benefit and maternity benefit is available only during 'benefit period'. Thus, an employee gets these benefits only after 9 months after joining employment and paying contribution. However, other benefits are available during contribution period also.

Benefits to employees covered under ESI Act - An employee is entitled to get benefits which are medical benefits as well as cash benefits. He also can get disablement benefit.

Equal Remuneration Act

As the name of the Act suggests, the object of the Act is to provide for payment of equal remuneration to men and women workers and to prevent discrimination on the ground of sex against women in employment. - - The Act has overriding effect over other Acts. [section 3]

DUTY OF EMPLOYER TO PAY EQUAL REMUNERATION – It is duty of each employer not to make any discrimination while paying remuneration to any worker of opposite sex. He should pay same wages to workmen of both sex for performing same work or work of a similar nature. [section 4].

Same work or work of similar nature' means work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions, by a man or woman and the difference, if any, between the skill, effort and responsibility required of a man and those required of a woman are not of practical importance in relation to the terms and conditions of employment. [section 2(h)].

NO DISCRIMINATION WHILE RECRUITMENT OR PROMOTION – There should be no discrimination on recruitment, promotion, training or transfer, except where employment of women is restricted. [section 5]. - - These provisions are not applicable when priority is to be given to schedules castes, schedules tribes, ex-servicemen or retrenched employees.

Factories Act, 1948

This is one of the earliest welfare legislation. The object is to secure to workers health, safety, welfare, proper working hours and other benefits.- - In *Bhikusa Yamasa Kshatriya* v. *UOI* AIR 1963 SC 1591, it was observed that Factories Act is enacted primarily with object to of protecting workers employed in factories against industrial and occupational hazards. - - The Act requires that workers should work in healthy and sanitary conditions and for that purpose it provides that precautions should be taken for safety of workers and prevention of accidents. - - Incidental provisions have also been made'.

In *S M Datta* v. *State of Gujarat* 2001(5) SCALE 457 = 100 FJR 26 = 2001 AIR SCW 3133, it was observed, 'First Factories Act was passed in 1880. Factories Act, 1948 was engrafted in the Statute Book where emphasis had been on the welfare of the workers. Factory Inspectors have been placed with heavy responsibility on them. - - The Act undoubtedly is a welfare legislation and cannot be termed to be a complete code in itself. - - In this case, it was held that if a workman is found working during period not notified beforehand, prosecution can be launched.

'Factory' means any premises where 10 or more workers are working and a manufacturing process is carried out with aid of power (20 if manufacture is without aid of power). [section 2(m)]. 'Manufacturing process' means process of altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing or otherwise treating or adopting any article or substance. It also includes * pumping oil, water, sewage or any other substance * Generating, transforming or transmitting power * Composing, typing, printing * Constructing, repairing, breaking of ships or vessels * Preserving articles in cold storage. [section 2(k)]. - - Worker means a person employed in any manufacturing process or cleaning or any work incidental to manufacturing process. It includes persons employed through contractor. [section 2(l)].

If the employment is less than these numbers, the unit gets covered under Shop & Establishment Act. - - In *ESIC* v. *Jaihind Roadways* 2001 LLR 570 = 101 FJR 38 (Kar HC), it was held that transportation of goods on contract basis from one place to another is not ‘manufacturing process’.

'Factory' should be licensed / registered with Chief Inspector of Factories (termed as Director of Industrial Health & Safety in some States). [section 6]. The license / registration has to be renewed every year by paying prescribed fees.

OCCUPIER OF THE FACTORY – ‘Occupier’ of a factory means the person who has ultimate control over the affairs of factory. It includes a partner in case of firm and director in case of a company. In case of Government company, 'occupier' need not be a director. In that case, person appointed to manage affairs of the factory shall be ‘occupier’. [section 2(n)]. - - Name of 'occupier' of the factory should be informed to Factories Inspector. The 'occupier' will be held responsible if provisions of Factories Act are not complied with. - - He has to give notice 15 days before he begins to occupy the premises as a factory, giving details as prescribed in section 7.

Besides 'occupier', name of 'Manager' should also be informed. Any change in name of Manager shall also be informed. [section 7(4)].

DUTIES OF OCCUPIER – The occupier shall ensure, as far as possible, health, safety and welfare of workers while they are working in factory. [section 7A].

DUTIES OF EVERY MANUFACTURER – Every manufacturer or importer of ay article or substance in factory shall design it in such a way that it is safe to use and carry. Adequate safety information about the article should be given. [section 7B].

FACILITIES AND CONVENIENCES - The factory should be kept clean. [section 11]. There should be arrangement to dispose of wastes and effluents. [section 12]. Ventilation should be adequate. Reasonable temperature for comfort of employees should be maintained. [section 13]. Dust and fumes should be controlled below permissible limits. [section 14]. Artificial humidification should be at prescribed standard level. [section 15]. Overcrowding should be avoided. [section 16]. Adequate lighting, drinking water, latrines, urinals and spittoons should be provided. [sections 17 to 19]. Adequate spittoons should be provided. [section 20].

WELFARE - Adequate facilities for washing, sitting, storing cloths when not worn during working hours. [section 42]. If a worker has to work in standing position, sitting arrangement to take short rests should be provided. [section 44]. Adequate First aid boxes shall be provided and maintained [section 45].

FACILITIES IN CASE OF LARGE FACTORIES - Following facilities are required to be provided by large factories - * Ambulance room if 500 or more workers are employed * Canteen if 250 or more workers are employed. It should be sufficiently lighted and ventilated and suitably located. [section 46]. * Rest rooms / shelters with drinking water when 150 or more workmen are employed [section 47] * Crèches if 30 or more women workers are employed. [section 48] * Full time Welfare Officer if factory employs 500 or more workers [section 49] * Safety Officer if 1,000 or more workmen are employed.

SAFETY - All machinery should be properly fenced to protect workers when machinery is in motion. [section 21 to 27]. Hoists and lifts should be in good condition and tested periodically. [section 28 and 29]. Pressure plants should be checked as per rules. [section 31]. Floor, stairs and means of access should be of sound construction and free form obstructions. [section 32]. Safety appliances for eyes, dangerous dusts, gas, fumes should be provided. [sections 35 and 36]. Worker is also under obligation to use the safety appliances. He should not misuse any appliance, convenience or other things provided. [section 111]. In case of hazardous substances, additional safety measures have been prescribed. [sections 41A to 41H]. - - Adequate fire fighting equipment should be available. [section 38]. - - Safety Officer should be appointed if number of workers in factory are 1,000 or more. [section 40B].

WORKING HOURS - A worker cannot be employed for more than 48 hours in a week. [section

51]. Weekly holiday is compulsory. If he is asked to work on weekly holiday, he should have full holiday on one of three days immediately or after the normal day of holiday. [section 52(1)]. He cannot be employed for more than 9 hours in a day. [section 54]. At least half an hour rest should be provided after 5 hours. [section 55]. Total period of work inclusive of rest interval cannot be more than 10.5 hours. [section 56]. A worker should be given a weekly holiday. Overlapping of shifts is not permitted. [section 58]. Notice of period of work should be displayed. [section 61].

OVERTIME WAGES - If a worker works beyond 9 hours a day or 48 hours a week, overtime wages are double the rate of wages are payable. [section 59(1)]. A workman cannot work in two factories. There is restriction on double employment. [section 60]. However, overtime wages are not payable when the worker is on tour. Total working hours including overtime should not exceed 60 in a week and total overtime hours in a quarter should not exceed 50. Register of overtime should be maintained. - - An employee working outside the factory premises like field workers etc. on tour outside headquarters are not entitled to overtime. – *R Ananthan* v. *Avery India* 1972(42) FJR 304 (Mad HC) * *Director of Stores* v. *P S Dube* 1978 Lab IC 390 = 52 FJR 299 = 1978 I LLN 464 = 36 FLR 420.

EMPLOYMENT OF WOMEN - A woman worker cannot be employed beyond the hours 6 a.m. to 7.00 pm. State Government can grant exemption to any factory or group or class of factories, but no woman can be permitted to work during 10 PM to 5 AM. Shift change can be only after weekly or other holiday and not in between. [section 66].

RECORD OF WORKMEN - A register (muster roll) of all workers should be maintained. No worker should be permitted to work unless his name is in the register. Record of overtime is also required to be maintained. [section 62].

LEAVE - A worker is entitled in every calendar year annual leave with wages at the rate of one day for every 20 days of work performed in the previous calendar year, provided that he had worked for 240 days or more in the previous calendar year. Child worker is entitled to one day per every 15 days. While calculating 240 days, earned leave, maternity leave upto 12 weeks and lay off days will be considered, but leave shall not be earned on those days. [section 79]. – Leave can be accumulated upto 30 days in case of adult and 40 days in case of child. Leave admissible is exclusive of holidays occurring during or at either end of the leave period. Wage for period must be paid before leave begins, if leave is for 4 or more days. [section 81]. Leave cannot be taken for more than three times in a year. Application for leave should not normally be refused. [These are minimum benefits. Employer can, of course, give additional or higher benefits].

WAGES FOR OT AND LEAVE SALARY - 'Wages' for leave encashment and overtime will include dearness allowance and cash equivalent of any benefit. However, it will not include bonus or overtime.

CHILD EMPLOYMENT - Child below age of 14 cannot be employed. [section 67]. Child above 14 but below 15 years of age can be employed only for 4.5 hours per day or during the night. [section 71]. He should be certified fit by a certifying surgeon. [section 68]. He cannot be employed during night between 10 pm to 6 am. [section 71]. A person over 15 but below 18 years of age is termed as ‘adolescent’. He can be employed as an adult if he has a certificate of fitness for a full day's work from certifying surgeon. An adolescent is not permitted to work between 7 pm and 6 am. [section 70]. There are more restrictions on employment of female adolescent. - - Register of child workers should be maintained. [section 73].

DISPLAY ON NOTICE BOARD - A notice containing abstract of the Factories Act and the rules made thereunder, in English and local language should be displayed. Name and address of Factories Inspector and the certifying surgeon should also be displayed on notice board. [section 108(1)].

NOTICE OF ACCIDENTS, DISEASES ETC. - Notice of any accident causing disablement of more than 48 hours, dangerous occurrences and any worker contacting occupational disease should be informed to Factories Inspector. [section 88]. Notice of dangerous occurrences and specified diseases should be given. [sections 88A and 89].

NO PUNISHMENT TO WELFARE OFFICER WITHOUT SANCTION - No punishment can be imposed on Welfare Officer without prior sanction of Chief Commissioner. However, a simple order of termination as per terms of appointment is not a 'punishment' and such termination order is valid. – *Arun Kumar Bali* v. *Government of NCT of Delhi* 2002 LLR 359 (Del HC) – relying on *Associated Cement Co Ltd*. v. *P N Sharma* AIR 1965 SC 1595.

OBLIGATION REGARDING HAZARDOUS PROCESSES / SUBSTANCES - Information about hazardous substances / processes should be given. Workers and general public in vicinity should be informed about dangers and health hazards. Safety measures and emergency plan should be ready. Safety Committee should be appointed.

Labour Laws (Exemption From furnishing returns and maintaining registers by Certain Establishments) Act, 1988

The Act has been passed to give relief to establishments employing small number of persons from furnishing returns and maintaining registers under certain labour laws.

'Small establishment' means an establishment in which not less than ten and not more than nineteen persons are employed or were employed during past 12 months. [section 2(e)]. 'Very Small establishment' means an establishment in which not more than nine persons are employed or were employed during past 12 months. [section 2(f)].

Such establishments are expected to submit only a 'core return' in prescribed form as on 31st December every year. The return should be filed on or before 15th February of succeeding year. In addition, a 'small establishment' is required to maintain registers in prescribed form B, C and D. A 'very small establishment' is required to maintain only register in form E. [section 4(1)].

In addition, employer is required to issue wage slips to workmen. Returns relating to accidents are required under Factories Act and Plantation Labour Act are required to be submitted.

Once such annual return is filed and registers are maintained, no further return or records are required under any of following laws - * Payment of Wages Act * Weekly Holidays Act * Minimum Wages Act * Factories Act * Plantations Labour Act * Working Journalists and Other Newspaper Employees Act * Contract Labour (Regulation and Abolition) Act * Sales Promotion Employees (Conditions of Service) Act * Equal Remuneration Act. [First Schedule to the Act]. [section 4(3)].

Payment of Bonus Act, 1965

Bonus is really a reward for good work or share of profit of the unit where the employee is working. Often there were disputes between employer and employees about bonus to be paid. It was thought that a legislation will solve the problem and hence Bonus Act was passed. Unfortunately, in the process, bonus has become almost as deferred wages due to provision of payment of minimum 8.33% and maximum 20% bonus. Bonus Act has not in any way reduced the disputes.

The Act is applicable to (a) any factory employing 10 or more persons where any processing is carried out with aid of power (b) Other establishments (established for purpose of profit) employing 20 or more persons. Minimum bonus payable is 8.33% and maximum is 20%. Bonus is payable annually within 8 months from close of accounting year. Bonus is payable to all employees whose salary or wages do not exceed Rs 3,500 per month provided they have worked for at least 30 days in the accounting year. However, for calculation of bonus, maximum salary of Rs 2,500 is considered.

Once the Act is applicable, it continues to apply even if number of employees fall below 20. The Act is applicable to Government companies and corporations owned by Government which produces goods or renders services in competition with private sector. However, the Act is not applicable to Government employees, the employees of Municipal Corporation or Municipality, railway employees, university and employees of educational institutions, public sector insurance employees, employees of RBI and public sector financial institutions, charitable hospitals, social welfare organisations and defense employees. The Act does not apply to any institution established not for purposes of profit.

***Establishments to which the Act is applicable* - The Act applies to— (*a*) every factory; *and* (*b*) every other establishment in which twenty or more persons are employed on any day during an accounting year. [section 1(3)].**

'Factory' has same meaning as per Factories Act. [section 2(17) of Bonus Act].

The words used are 'number of persons employed'. Hence, all persons employed are to be considered, including those who are not eligible for bonus. Thus, all employees including those, whose salary or wages exceed Rs 3,500 per annum will have to be considered for purpose of deciding eligibility.

MEANING OF 'ESTABLISHMENT' - The word 'establishment' is not defined in the Act. Normally, 'establishment' is a permanently fixed place for business. The term 'establishment' is much wider than 'factory'. It covers any office or fixed place where business is carried out.

ESTABLISHMENT IN PUBLIC SECTOR COVERED ONLY IN CERTAIN CASES - The Act applies to establishment in public sector only if the establishment in public sector sells the goods or renders services in competition with an establishment in private sector, and the income from such sale or services or both is not less than twenty per cent, of the gross income of the establishment in public sector for that year. [section 20(1)]. In other cases, the provisions of this Act do not apply to the employees employed by any establishment in public sector. [section 20(2)]. As per section 32(v)(c), the Act does not apply to any institution established not for purposes of profit.

Establishment in public sector means an establishment owned, controlled or managed by— (*a*) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956) (*b*) a corporation in which not less than forty per cent of its capital is held (whether singly or taken together) by the Government; or the Reserve Bank of India; or a corporation owned by the Government or the Reserve Bank of India. [section 2(16)]. Establishment which is not in public sector is 'establishment in private sector' [section 2(15)].

"Corporation" means any body corporate established by or under any Central Provincial or State Act but does not include a company or a co-operative society. [section 2(11)].

ESTABLISHMENTS TO INCLUDE DEPARTMENTS, UNDERTAKINGS AND BRANCHES - Where an establishment consists of different departments or undertakings or has branches, whether situated in the same place or in different places, all such departments or undertakings or branches shall be treated as parts of the same establishment for the purpose of computation of bonus under this Act. [section 3]

***Who are eligible for bonus* -** Employees drawing salary or wages upto Rs 3,500 per month are entitled to bonus, if he has worked for at least 30 working days in an accounting year. Even a worker working in seasonal factory is eligible if he has worked for at least 30 working days. Apprentices are not eligible for bonus.

Salary above Rs. 2,500 is not considered for calculation of Bonus. [section 12]. Employee drawing salary/wage exceeding Rs 3,500 is not entitled to any bonus under the Act.

Thus, minimum bonus @ 8.33% will be Rs 2,500 and maximum @ 20% will be Rs 6,000 for the year, when salary of employee exceeds Rs 2,500 but is less than Rs 3,500.

ELIGIBILITY FOR BONUS IF WORKED FOR MINIMUM 30 DAYS - **E**very employee shall be entitled to be paid be his employer in an accounting year, bonus, in accordance with the provisions of this Act, provided he has worked in the establishment for not less than thirty working days in that year. [section 8]

***Computation of amount available for distribution as bonus* -** The establishment has to prepare a balance sheet and profit and loss account of the year and calculate the 'gross profit', 'available surplus' and 'allocable surplus' as per method and formula given in Bonus Act.

The first step is to calculate 'Gross Profit'. As per section 4, the gross profit in respect of any accounting year is required to be calculated as per First Schedule to Act in case of banking company and as per second schedule in case of other establishments. After calculation of 'Gross Profit' as per section 4, next step is to calculate 'Available Surplus'. As per section 5, 'available surplus' is calculated by deducting sums as specified in section 6 from 'gross profit' arrived at as per section 6 and adding difference equal to income tax on the bonus paid in the preceding year.

Thus, Available Surplus is equal to Gross Profit [as per section 4] *less* prior charges allowable as deduction u/s 6 *plus* amount equal to income tax on bonus portion calculated as per proviso (b) to section 5.

Allocable surplus is equal to 60% of 'available surplus' calculated as per provisions of section 5. [In case of company which does not deduct tax at source as per provisions of section 194 of Income Tax Act, 'allocable surplus' will be 67% of 'available surplus'. Frankly, I am not able to visualise a situation where a company can legally ignore provisions of section 194 of Income Tax Act]. - - This 'allocable surplus' has to be distributed as bonus among employees in proportion to the salary or wages actually earned by each employee during the year. However, this is subject to minimum 8.33% and maximum 20% as explained below.

***Set off and set on provisions* -** It may happen that in some years, the allocable surplus is more than the amount paid to employees as bonus calculating it @ 20%. Such excess 'allocable surplus' is carried forward to next year for calculation purposes. This is called 'carry forward for being set on in succeeding years'. The ceiling on set on that is required to be carried forward is 20% of total salary and wages of employees employed in the establishment. In other words, even if actual excess is more than 20% of salary/wages, only 20% is required to be carried forward. The amount set on is carried forward only upto and inclusive of the fourth accounting year. If the amount carried forward is not utilised in that period, it lapses [section 15(1)].

Similarly, in a particular year, there may be lower 'allocable surplus' or no 'allocable surplus' even for payment of 8.33% bonus. Such shortfall is also carried to next year. This is called 'carry forward for being set off in succeeding years'. Thus, in every year, 'allocable surplus' is calculated. To this amount, set on from previous years is added. Similarly, set off, if any, from previous years is deducted. This gives amount which is available for distribution as bonus. The amount set off is carried forward only upto and inclusive of the fourth accounting year. If the amount carried forward is not set off in that period, it lapses. [section 15(2)]

***Minimum bonus* -** Every employer shall be bound to pay to every employee in respect of any accounting year, a minimum bonus which shall be 8.33 per cent of the salary or wage earned by the employee during the accounting year or one hundred rupees, whichever is higher, whether or not the employer has any allocable surplus in the accounting year. Where an employee has not completed fifteen years of age at the beginning of the accounting year, the minimum bonus payable is 8.33% or Rs 60 whichever is higher. [section 10].

While computing number of working days, an employee shall be deemed to have worked in an establishment even on the days on which (a) He was laid off (b) He was on leave with salary/wages(c) He was absent due to temporary disablement caused by accident arising out of and in course of employment and (d) Employee was on maternity leave with salary/wages. [section 14].

***Payment of maximum bonus* -** Where in respect of any accounting year, the allocable surplus exceeds the amount of minimum bonus payable to the employees, the employer shall, in lieu of such minimum bonus, be bound to pay to every employee in respect of that accounting year bonus which shall be an amount in proportion to the salary or wage earned by the employee during the accounting year subject to a maximum of twenty per cent of such salary or wage. [section 11(1)]. **- -** In computing the allocable surplus under this section, the amount set on or the amount set off under the provisions of section 15 shall be taken into account in accordance with the provisions of that section. [section 11(2)].

Thus, maximum bonus payable to employee is 20% in any accounting year.

***Salary or wages for calculating bonus* -** Where the salary or wage of an employee exceeds Rs 2,500 per month, the bonus payable to such employee under sections 10 or 11 shall be calculated as if his salary or wages were Rs 2,500 per month. [section 13]. In other words, employees drawing salary or wages between Rs 2,500 to Rs 3,500 per month, are entitled to bonus on the basis of Rs 2,500 per moth salary only.

Payment of Gratuity Act, 1972

Gratuity is a lump sum payment to employee when he retires or leaves service. It is basically a retirement benefit to an employee so that he can live life comfortably after retirement. However, under Gratuity Act, gratuity is payable even to an employee who resigns after completing at least 5 years of service.

In *DTC Retired Employees* v. *Delhi Transport Corporation* 2001(4) SCALE 30 = 2001 AIR SCW 2005, it was observed that gratuity is essentially a retiring benefit which as per Statute has been made applicable on voluntary resignation as well. Gratuity is reward for good, efficient and faithful service rendered for a considerable period.

ACT PROVIDES FOR MINIMUM GRATUITY ONLY – The Gratuity Act provides only for minimum gratuity payable. If employee has right to receive higher gratuity under a contract or under an award, the employee is entitled to get higher gratuity. [section 4(5)].

***Employers liable under the scheme* -** The Act applies to every factory, mine, plantation, port, and railway company. It also applies to every shop and establishment where 10 or more persons are employed or were employed on any day in preceding 12 months. [section1(3)]. Since the Act is also applicable to all shops and establishments, it will apply to motor transport undertakings, clubs, chambers of commerce and associations, local bodies, solicitor's offices etc. , if they are employing 10 or more persons.

***Employees eligible for gratuity* –** 'Employee' means any person (other than apprentice) employed on wages in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether terms of such employment are express or implied, and whether such person is employed in a managerial or administrative capacity. However, it does not include any Central/State Government employee. [section 2(e)]. Thus, the Act is applicable to all employees - workers as well as persons employed in administrative and managerial capacity.

Gratuity is payable to a person on (*a*) resignation (*b*) termination on account of death or disablement due to accident or disease (*c*) retirement (d) death. Normally, gratuity is payable only after an employee completes five years of continuous service. In case of death and disablement, the condition of minimum 5 years' service is not applicable. [section 4(1)].

The Act is applicable to all employees, irrespective of the salary.

***Amount of gratuity payable* -** Gratuity is payable @ 15 days wages for every year of completed service. In the last year of service, if the employee has completed more than 6 months, it will be treated as full year for purpose of gratuity. - - In case of seasonal establishment, gratuity is payable @ 7 days wages for each season. [section 4(2)].

Wages shall consist of basic plus D.A, as per last drawn salary. However, allowances like bonus, commission, HRA, overtime etc. are not to be considered for calculations. [section 2(s)].

In case of employees paid on monthly wages basis, per day wages should be calculated by dividing monthly salary by 26 days to arrive at daily wages e.g. if last drawn salary of a person (basic plus DA) is Rs. 2,600 per month, his salary per day will be Rs. 100 (2,600 divided by 100). Thus, the employee is entitled to get Rs. 1,500 [15 days multiplied by Rs. 100 daily salary] for every year of completed service. If he has completed 30 years of service, he is entitled to get gratuity of Rs. 45,000 (Rs. 1,500 multiplied by 30). Maximum gratuity payable under the Act is Rs. 3.50 lakhs (the ceiling was Rs. 1,00,000 which was increased to 2.50 lakhs on 24.9.97 by an ordinance which was later increased to Rs 3.50 lakhs while converting the ordinance into Act].

MAXIMUM GRATUITY PAYABLE – Maximum gratuity payable is Rs 3.50 lakhs. [Section 4(3)]. [Of course, employer can pay more. Employee has also right to get more if obtainable under an award or contract with employer, as made clear in section 4(5)].

INCOME-TAX EXEMPTION - Gratuity received upto Rs. 3.50 lakhs is exempt from Income Tax. Gratuity paid above that limit is taxable. [section 10(10) of Income Tax Act]. - - However, employee can claim relief u/s 89 in respect of the excess amount.

No Compulsory insurance of gratuity liability – Section 4A provides that every employer must obtain insurance of his gratuity liability with LIC or any other insurer. However, Government companies need not obtain such insurance. If an employee is already member of gratuity fund established by an employer, he has option to continue that arrangement. If an employer employing more than 500 persons establishes an approved gratuity fund, he need not obtain insurance for gratuity liability. - - However, this section has not yet been brought into force. Hence, presently, such compulsory insurance is not necessary.

Gratuity cannot be attached - Gratuity payable cannot be attached in execution of any decree or order of any civil, revenue or criminal court, as per section 13 of the Act.

Industrial Disputes Act

The object of the Act is to make provisions for investigation and settlement of industrial disputes. However, it makes other provisions in respect of lay off, retrenchment, closure etc. The purpose is to bring the conflicts between employer and employees to an amicable settlement. [*The Act is achieving exactly opposite*]. The Act provides machinery for settlement of disputes, if dispute cannot be solved through collective bargaining.

'Industry' under Industrial Disputes Act – The definition of 'industry' is as follows – 'Industry means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft or industrial occupation or avocation of workmen. [section 2(j)]. Thus, the definition is very wide. - - The scope is much wider than what is generally understood by the term 'industry'.

In *Bangalore Water Supply & Sewerage Board* v. *Rajappa* (1978) 2 SCC 213 = 36 FLR 266 = 1978(2) SCR 213 = 1978(1) LLJ 349 = AIR 1978 SC 548 (SC 7 member bench 5 v 2 judgment), a very wide interpretation to the term 'industry' was given. It was held that profit motive or a desire to generate income is not necessary. Any systematic activity organized by cooperation between employer and employees for the production and/or distribution of goods and services calculated to satisfy human wants and wishes is 'industry'.

Thus, many hospitals, educational institutions, universities, charitable institutions and welfare organisations have got covered under the Act. Professions, clubs, cooperatives, research institutes etc. are also covered.

'Industry Dispute' and 'Workman' – The definition of 'industrial dispute' and 'workman' is as follows -

INDUSTRIAL DISPUTE – Industrial dispute means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms and conditions of employment or with the conditions of labour, of any person. [section 2(k)]. - - Section 2A provides that dismissal, discharge, retrenchment of even a single workman will be 'industrial dispute' even if no other workman or any union is a party to the dispute.

WORKMAN – 'Workman' means any person (including apprentice) employed in any industry to do any manual, clerical or supervisory work for hire or reward. It includes dismissed, discharged or retrenched person also. However, it does not include (i) Armed Forces i.e. those subject to Air Force Act, Army Act or Navy Act (ii) Police or employees of prison (iii) Employed in mainly managerial or administrative capacity or (iv) person in supervisory capacity drawing wages exceeding Rs 1,600 per month or functions are is mainly of managerial nature. [section 2(x)].

Adjudication of disputes – The Act provides for 'Works Committee' in factories employing 100 or more workers. [section 3]. The committee will consist of equal number of representatives of employer and employees. Representatives of employees will be selected in consultation with Registered Trade Union. The Works Committee will first try to settle disputes. If dispute is not solved, it will be referred to 'Conciliation Officer'. He is appointed by Government. [section 4]. The matter may also be referred to 'Board of Conciliation'. [section 4]. He will try to arrive at fair and amicable settlement acceptable to both parties. If he is unable to do so, he will send report to appropriate Government. [section 12(4)]. The Government may then refer the industrial dispute to Board of conciliation, Labour Court or Industrial Tribunal. [section 12(5)].

Employer and employees can voluntarily refer the matter to arbitration. [section 10A]. [This provision is very rarely used by employer and workmen. Generally, they prefer the Court route].

If no settlement is arrived at, there is three tier system of adjudication – Labour Court, Industrial Tribunal and National Tribunal. The order made by them is 'award'.

'Award' means an interim or final determination of any industrial dispute or of any question relating thereto by any Labour Court, Industrial Tribunal or National Tribunal. It also includes arbitration award. [section 2(b)]. - - The 'award' is required to be published by State/Central Government within 30 days. [section 17]. The award becomes effective 30 days after its publication. [section 17A].

LABOUR COURT – Labour Courts are constituted by State Governments u/s 7. It will be presided over by 'Presiding Officer'. The Labour Court has powers in respect of * Interpretation of Standing Orders * Violation of Standing Orders * Discharge or dismissal of a workman * Withdrawal of any customary concession or privilege * Illegality or otherwise of a strike or lock-out * Other matters which are not under Industrial Tribunal. [Second Schedule to the Act]

INDUSTRIAL TRIBUNAL – Industrial Tribunal is constituted by State Government u/s 7A. The tribunal will be presided over by 'Presiding Officer. The Industrial Tribunal has powers in respect of * Wages, including period and mode of payment * Compensatory and other allowances * Hours of work and rest intervals * Leave with wages and holidays * Bonus, profit sharing, provident fund and gratuity * Shift working changes * Classification by grades * Rules of discipline * Ratinlanisation and retrenchment of workmen. [Third Schedule to Act].

NATIONAL TRIBUNAL – National Tribunal is formed by Central Government for adjudication of industrial disputes of national importance or where industrial establishments situated in more than one States are involved. [section 7B].

REFERENCE OF DISPUTE – Appropriate Government can refer any dispute to Board of Conciliation, Court of Enquiry, Labour Court or Industrial Tribunal. [section 10(1)]. - - Appropriate Government means * Central Government in case of railways, docks, IFCI, ESIC, LIC, ONGC, UTI, Airport Authority, industry carried on by or under authority of Central Government * State Government in case of other industrial disputes [section 2(a)].

COURT/TRIBUNAL CAN REDUCE PUNISHMENT AND ORDER REINSTATEMENT - As per section 11A, the Labour Court and Tribunal have wide powers. They can reappraise evidence. They can also see whether the punishment is disproportionate to the gravity of the misconduct proved. If the Court or Tribunal is of the view that the punishment is disproportionate, it can impose lesser punishment or even set aside the termination and order reinstatement. - - If Court orders reinstatement and employer files appeal in Higher Court, the employer is required to pay full wages to the employee during the period of pendency of proceedings with High Court or Supreme Court. However, if the workman was gainfully employed elsewhere, Court can order that payment of such wages is not to be made. [section 17B].

SETTLEMENT - 'Settlement' means a settlement arrived at in the course of conciliation proceedings. It includes a written agreement between employer and workmen arrived at otherwise than in course of conciliation proceedings (i.e. outside the conciliation proceedings). - - The difference is that settlement arrived at in course of conciliation or an arbitration award or award of labour court or Tribunal binds all parties to industrial dispute including present and future workmen and all parties who were summoned to appear in the proceedings. [section 18(3)]. If settlement is arrived at by mutual agreement, it binds only those who were actually party to agreement. [section 18(1)]. - - The settlement is binding during the period it is in force. Even after that period is over, it continues to be binding, unless a 2 month notice of termination is given by one party to another. [section 19(2]. - - If no period has been specified, settlement is valid for 6 months and an award is valid for one year.

JURISDICTION OF CIVIL COURT QUA INDUSTRIAL DISPUTE – Termination of a workman constitutes an Industrial Dispute. Relief sought can be given by forum under Industrial Disputes Act and hence, jurisdiction of civil court is impliedly barred. – *Chandrakant Tukaram Nikam* v. *Municipal Corporation* 2002 AIR SCW 710 = 2002(2) SCALE 77 = 2002 LLR 498 = 100 FJR 519 (SC 3 member bench).

***Lay off, retrenchment and closure* –** 'Lay off' means failure, refusal or inability of employer on account of shortage of coal, power or raw materials or accumulation of stock or break down of machinery or natural calamity; to give employment to a workman on muster roll. - - 'Lay off' means not giving employment within two hours after reporting to work. - - Lay off can be for half day also. In such case, worker can be asked to come in second half of the shift. [section 2(kkk)].

A factory employing 50 or more but less than 100 employees on an average per working day can lay off the workmen, who have completed one year of service, by paying compensation equal to 50% of salary (basic plus DA) (section 25C of IDA). - - Employer can offer him alternate employment, if the alternate employment does not call for any special skill or previous experience, and lay off compensation will not be payable if employee refuses to accept the alternate employment (section 25E).

Above provisions of compensation for lay off do not apply to (a) Industrial establishments employing less than 50 workmen (b) seasonal industry (c) Establishments employing 100 or more workmen, as in their case, prior approval of Appropriate Government is necessary u/s 25M(1).

RETRENCHMENT – 'Retrenchment' means termination by the employer of service of a workman for any reason, other than as a punishment inflicted by a disciplinary action. However, 'retrenchment' does not include voluntary retirement or retirement on reaching age of superannuation or termination on account of non-renewal of contract or termination on account of continued ill-health of a workman. [section 2(oo)].

'Retrenchment' means discharge of surplus labour or staff by employer. It is not by way of punishment. The retrenchment should be on basis of 'last in first out' basis in respect of each category, i.e. junior-most employee in the category (where there is excess) should be retrenched first. [section 25G]. If employer wants to re-employer persons, first preference should be given to retrenched workmen. [section 25H].

A worker who has completed one year of service can be retrenched by giving one month notice (or paying one month's salary) plus retrenchment compensation, at the time of retirement, @ 15 days' average wages for every completed year of service (section 25F).

In *Parry's Employees Union* v. *Third Industrial Tribunal* 2001 LLR 462 (Cal HC), it was held that for purposes of retrenchment compensation under ID Act, the monthly salary should be divided by 30. [Under Gratuity Act, it has to be divided by 26].

If number of workmen are 100 or more, prior permission of Appropriate Government is necessary u/s 25N(1)].

MEANING OF 'CONTINUOUS SERVICE' – Provisions of compensation for lay off and retrenchment are applicable only to workman who is in 'continuous service' for one year. As per section 25B, 'continuous service' includes service interrupted by sickness, authorised leave, accident or strike which is not illegal, or lock-out or cessation of work which is not due to fault of workman. -- In *Workmen* v.*Management of American Express* AIR 1986 SC 548 = 1985(4) SCC 71, it was held that 'actually worked' cannot mean only those days where workman worked with hammer, sickle or pen, but must necessarily comprehend all those days during which he was in the employment of employer and for which has been paid wages either under express of implied contract of service or by compulsion of statute, standing orders etc.

CLOSURE – 'Closure' means permanent closing down of a place of employment or part thereof. [section 2(cc)]. - - Thus, closure can be of part of establishment also. - - 60 days notice should be given for closure to Government, if number of persons employed are 50 or more. 60 days notice is not necessary if number of persons employed are less than 50. [section 25FFA]. Compensation has to be given as if the workman is retrenched. [section 25FFF(1)]. - - If number of workmen employed are 100 or more, prior permission of Government is necessary for closure u/s 25-O.

Provisions for large industries for lay off and closure - Large industries employing 100 or more workmen on an average for preceding 12 months cannot lay-off, retrench or close down the undertaking without permission from Government (sections 25M to 25-O of Industrial Disputes Act). Invariably, such permission is almost never given, whatever may be the merits of the case.

Provisions of section 25M in respect of prior permission for lay off have been upheld in *Papnasan Labour Union* v. *Madura Coats* AIR 1995 SC 2200. Provisions of section 25N were upheld in *Workmen* v. *Meenakshi Mills Ltd.* - (1992) 62 Taxman 560 = 1992(1) SCALE 1248 = 1992 AIR SCW 1378 = (1992) 3 SCC 336 = JT 1992(3) SC 446 = 1992 LLR 481 = AIR 1994 SC 2696 (5 member bench). In this case, it was held that powers to give prior permission are quasi-judicial and hence opportunity of hearing must be given and the order giving permission or refusing permission is subject to judicial review. In *Bharatia Electric Steel Co. Ltd.* v. *State of Haryana* 1998 LLR 322 (P&H HC DB), it was observed that operation of section 25-O should be limited to cases where employer is acting arbitrarily or unfairly. If the reasons given by employer for closure are genuine and adequate, permission cannot be refused.

In *Orissa Textiles* v. *State of Orissa* 2002 AIR SCW 333 = 2002 LLR 225 = 100 FJR 342 (SC 5 member Constitution Bench), it was held that order u/s 35-O should be in writing with reasons. The order can be reviewed after one year, even for the same reasons.

If Banks refuse to give further loans to run the plant, the employer has to either abandon the plant or devise some dubious ways to surmount the difficulties. One of the major reason why foreign investors are reluctant to come to India in a big way is lack of 'exit policy'. Some industrial sickness and closures are inevitable in a 'market oriented economy'. Absence of official exit policy creates problems for honest employers (Dishonest employers devise their own ways).

Notice of change in conditions of service – Section 9A provides that an employer cannot effect any change in the conditions of service applicable to any workman without giving 21 days notice. Such notice is not required if there is settlement or award of Labour Court or Tribunal. As per fourth schedule to the Act, such 21 day notice is required if there is going to be change in wages, wage period, PF contribution, allowances, hours of work and rest intervals, shift timings, new rules of discipline, increase or decrease in number of persons employed in any department or shift.

Strike and lock-out – 'Strike' means a cessation of work by a body of persons employed in any industry, acting in combination, or a concerted refusal, or a refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accept employment. [section 2(q)].

As per section 23, workman should not go on strike in * during pendency of conciliation proceedings and 7 days thereafter * during pendency of proceedings before Labour Court, Industrial Tribunal or National Tribunal * During period of arbitration proceedings * During period when settlement or award is in operation in respect of the matters covered by award or settlement.

PROHIBITION OF STRIKE AND LOCK OUT IN PUBLIC UTILITY SERVICE - .In case of public utility, employees have to give at least 14 days notice for strike. The notice is valid only if strike commences within 6 weeks. Otherwise, fresh notice is required. - - Similarly, an employer cannot declare lock out without giving 14 days notice. [section 22]. If such notice is received, Government authority should be informed within five days. - - As per section 2(n), 'Public Utility Service' includes railways, major port and docks, section of industry on the working of which safety of establishment depends, postal/telegraph/ telephone services, industry supplying power/ light/ water; system of public conservancy or sanitation. [section 2(n)]. In addition, Government can declare industry specified in Schedule I as 'Public Utility Services'. Such declaration can be made for 6 months at a time [section 2(n)(vi)]. [Industries in first schedule include banking, transport, cement, coal, defence establishments, security press, hospitals and dispensaries, oil fields, mining of certain specified ores, foodstuff, cotton textiles, iron and steel etc].

LOCK-OUT – 'Lock-out' means temporary closing or a place of employment or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him. [section 2(l)]. - - Workers go on strike, while 'lock-out' is to be declared by employer.

Wages during strike period - Wages during strike period are payable only if the strike is both legal and justified - *Syndicate Bank* v. *K Umesh Naik* (1994) 5 SCC 572 = 1994 AIR SCW 4496 = 1994 II LLJ 836 = 1994 II LLN 1296 = (1994) 3 SCALE 565 = AIR 1995 SC 319 = 1994 II CLR 753 = 1994 LLR 883 (SC constitution bench) - followed in *HMT Ltd.* v. *HMT Head Office Employees Assn* 1997 AIR SCW 153 = AIR 1997 SC 585 = 1997 LLR 758. In *HAL Employees Union* v. *Presiding Officer* 1996 LLR 673 (SC), it was held that when lockout by employer is legal and justified, workmen are not entitled to payment of wages for the period during which the lock-out continued.

No work no pay - Principle of 'No work no pay' has been accepted by Supreme Court. - *Bank of India* v. *T S Kelawala* 1989 LLR 277 (1990 LLR 313 ?) = 1990(SUP) SCALE 140(2) = (1990) 4 SCC 744 (SC) * *Syndicate Bank* v. *K Umesh Naik* (1994) 5 SCC 572 = 1994 AIR SCW 4496 = 1994 II LLJ 836 = 1994 II LLN 1296 = AIR 1995 SC 319 = 1994(3) SCALE 565 = 1994 II CLR 753 = 1994 LLR 883 (SC constitution bench). The principle of 'no work no pay' is also applicable when a man was eligible for promotion but was not promoted and in fact did not work in the higher post. In such case, he is not eligible to get pay for higher scale - *Paluru Ramkrishnaiah* v. *UOI* - (1989) 2 SCR 92 - followed in *State of Haryana* v. *OP Gupta* - 1996(1) SCALE 602.

ILLEGAL STRIKE OR LOCK-OUT – Strike or lock out in violation of sections 22 or 23 and when it is continuing in violation of order issued by Government u/s 10(3) (when matter is referred to Conciliation Board or Tribunal) is illegal. [section 24]. Fine upto Rs 50 per day to workman and Rs 1,000 to employer can be imposed. In addition, he can be imprisoned upto one month. [section 26].

***Restrictions on employer pending proceedings* –** If any conciliation proceedings or proceedings are pending before arbitrator, labour court or Industrial Tribunal, following restrictions are applicable to employer.

NO CHANGE IN CONDITIONS OF SERVICE IN MATTERS RELATED TO DISPUTE – Employer shall not make any change in condition of service connected to dispute without permission of authority before whom proceedings are pending. [section 33(1)(a)]. Change which is not related to dispute can be made in accordance with standing orders without any permission. [section 33(2)(a)]

NO REMOVAL OF WORKMAN IN MATTERS RELATED TO DISPUTE – Employer shall not discharge, dismiss or punish any workman in matter for any misconduct concerned to dispute, without permission of authority before whom proceedings are pending. [section 33(1)(b)]. Punishment which is not connected to dispute can be made in accordance with standing orders without any permission. However, dismissal or discharge of workman will require approval of the action. Application for approval should be made after action is taken. [section 33(2)(b)]. Prior permission is not necessary. Application for approval is required to be submitted after action is already taken. - -In *Jaipur Zila Sahakari Bhoomi Vikas Bank* v. *Shri Ram Gopal* 2002 AIR SCW 249 = 2002 LLR 237 (SC 5 member constitution bench), it was held that if the approval is not granted u/s 33(2)(b) of Industrial Disputes Act, the order of dismissal becomes ineffective from the date it was passed and employee becomes entitled to wages from date of dismissal to date of disapproval of application.

PROTECTED WORKMAN - In every establishment, 1% of total workmen are recognised as 'Protected workman' u/s 33(3) (but minimum 5 and maximum 100). In case of such workmen, order for his dismissal, discharge or punishment cannot be passed without permission of authority before whom proceedings are pending, *whether the issue is related to dispute or not*. Such permission is required only during the period proceedings are pending and not after main reference is decided.

Unfair Labour Practices – Section 25T prohibits unfair labour practices by employer or workman or a trade union. If any person commits unfair labour practice, he is punishable with fine upto Rs 1,000 and imprisonment upto 6 months. [section 25U]. Fifth schedule to Act gives list of what are 'Unfair Labour Practices'. Then major are as follows –

IN CASE OF EMPLOYER - * Interfering in Trade Union activities * Threatening workmen to refrain them from trade union activities * Establish employer sponsored Trade Union * Discourage trade union activities by various means * Discharge or dismiss by way of victimization or falsely implicating workman * Abolish work of regular nature and to give that work to contractors * *Mala fide* transfer of workman under guise of management policy * Employ badli or casuals and continue them for years * Recruitment workmen during strike which is not illegal * Acts of force and violence * Not implementing settlement or agreement or award * Refuse collective bargaining * Continue illegal lock-out

IN CASE OF WORKMEN AND TRADE UNIONS - * Support or instigate illegal strike * Coerce workmen to join or not to join a particular trade union * Threatening or intimidating workmen who do not join strike * Refuse collective bargaining in good faith * Coercive actions including 'go slow', 'gherao', 'squatting on work premises after working hours' etc. * Wilful damage to employer's property * Acts of force or violence or intimidation.

Industrial Employment (Standing Orders) Act

There are 'service conditions' or 'service rules' for various employees like Government employees, bank employees, LIC employees etc. The Industrial Employment (Standing Orders) Act, 1947 is designed to provide service rules to workmen.

The object of the Act is to require employers in industrial establishments to formally define conditions of employment under them.

What are 'Standing Orders' - 'Standing Orders' means rules of conduct for workmen employed in industrial establishments. 'Standing orders' means rules relating to matters set out in the schedule to the Act. [section 2(g)]. The schedule to the Act requires that following should be specified in Standing Orders - (a) classification of workmen i.e. temporary, badli, casual, permanent, skilled etc. (b) manner of intimating to workmen working hours, shift working, transfers etc. (c) Holidays (d) Attendance and late coming rules (e) Leave rules (f) Leave eligibility and leave conditions (g) Closing and reopening of sections of industrial establishment (h) termination of employment, suspension, dismissal etc. for misconduct and acts or omissions which constitute misconduct (i) Retirement age (j) Means of redressal of workmen against unfair treatment or wrongful exactions by employer (k) Any other matter that may be prescribed.

Coverage of Act - The Act is applicable to all 'industrial establishments' employing 100 or more workmen. [section 1(3)].

'Industrial establishment' means (i) an industrial establishment as defined in section 2(i) of Payment of Wages Act (ii) Factory as defined in section 2(m) of Factories Act (iii) Railway (iv) Establishment of contractor who employs workmen for fulfilling contract with owner of an industrial establishment. [section 2(e)].

The term 'industrial establishment' includes factory, transport service, construction work, mines, plantation, workshop, building activity, transmission of power etc.

WORKMAN - 'Workman' has meaning assigned to it under section 2(s) of Industrial Disputes Act. [section 2(i)]. Thus, 'workman' includes skilled, unskilled, manual or clerical work. However, 'workman' does not include employees engaged in managerial or administrative capacity or supervisory capacity. 'Workman' does not include workers subject to Army Act, Navy Act or Air Force Act or to police or prison services.

Approval of Standing Orders - Every employer covered under the Act has to prepare 'Standing Orders', covering the matters required in the 'Standing Orders'. Five copies of these should be sent to Certifying Officer for approval. [section 3(1)]. 'Certifying Officer' means Labour Commissioner and any officer appointed by Government to be 'Certifying Officer'. [section 2(c)].

The Certifying Officer will inform the Union and workmen and hear their objections. After that, he will certify the 'Standing Orders' for the industrial establishment. [section 5]. Till standing orders are certified, 'Model Standing Order' prepared by Government will automatically apply. [section12A].

Standing order should be displayed in English and local language on special notice boards at or near entrance of the establishment. [section 9]. Modifications of Standing Order shall be done by following similar procedure. [section 10].

Once the 'Standing Orders' are certified, they supersede any term and condition of employment, contained in the appointment letter. If there is inconsistency between 'Standing Order' and 'Appointment Letter', the provisions of 'Standing Order' prevail - *Eicher Goodearth Ltd.* v. *R K Soni* - (1993) XXIV LLR 524 = 1993 LLR 524 (Raj HC) * *Printers House* v. *State of Haryana* 1982 II LLN 327.

Standing orders are binding on employer and employee. These are statutorily imposed conditions of service. However, they are not statutory provisions themselves (meaning that the 'Standing Orders' even when approved, do not become 'law' in the sense in which Rules and Notifications issued under delegated legislation become after they are published as prescribed.) - *Rajasthan SRTC* v. *Krishna Kant* - AIR 1995 SC 1715 = (1995) 5 SCC 75 = 71 FLR 211 = 87 FJR 204 = 1995 AIR SCW 2683 = 1995 LLR 481 (SC).

Model Standing Orders - The Act has prescribed Model Standing Orders. These are automatically applicable till employer prepares his own 'Standing Orders' and these are approved by ‘Certifying Officer’. [section 12A].

Disciplinary Action - The most important use of ‘Standing Orders’ is in case of disciplinary action. A workman can be punished only if the act committed by him is a ‘misconduct’ as defined under the ‘Standing Orders’. The ‘Model Standing Orders’ contain such acts like insubordination, disobedience, fraud, dishonesty, damage to employer’s property, taking bribe, habitual absence or habitual late attendance, riotous behaviour, habitual neglect of work, strike in contravention of rules etc. as misconducts. The ‘Certified Standing Orders’ may cover other acts as ‘misconduct’, if approved by ‘Certifying Officer’.

Subsistence Allowance – Where a workman is suspended by employer pending investigation or enquiry into complaints or charges of misconduct against him, the workman shall be paid subsistence allowance equal to 50% of wages for first 90 days of suspension and 75% of wages for remaining period till completion of disciplinary proceedings. [section 10A(1)]. - - ‘Wages’ has same meaning as under section 2(rr) of Industrial Disputes Act. [section 2(i)].

Minimum Wages Act

The purpose of Act is to provide for fixing of minimum rates of wages in certain employments.

WAGES – Wages means all remuneration capable of being expressed in terms of money. It includes house rent allowance but does ***not***include * value of house accommodation, supply of light, water, medical attendance * Value of any other amenity provided, if excluded by Government order * Contribution to pension fund or provident fund or insurance * Traveling allowance * special expenses incurred by the nature of employment * Gratuity payable on discharge. [section 2(h)].

FIXING OF MINIMUM WAGES – Minimum wages will be fixed by Appropriate Government after following prescribed procedure. The rate fixed can be revised periodically. [section 3(1)].The rate can be fixed on * time work basis * piece work basis * a ‘guaranteed rate’ when rate is fixed on piece work basis and * overtime rate. [section 3(2)]. Different minimum wage rates can be fixed for * different scheduled employments * different class of work in the same scheduled employment * adults, adolescents, children and apprentices * Different localities. [section 3(3)(a)]. Rates can be fixed on basis of hour, day or month, or even larger period. [section 3(3)(b)]. - - The rate shall consist of basic rate of wages with or without allowance for cost of living allowance based on ‘cost of living index number’. An all inclusive rate allowing for basic wage, cost of living allowance and cash value of concession can also be fixed. [section 4].

PROCEDURE FOR FIXING MINIMUM WAGES – Minimum wages will be fixed after appointing a committee. Their proposals will be published by way of notification. After hearing representations, rate of minimum wages will be notified. [section 5].

Government is required to constitute Advisory Board to recommend minimum wages. The recommendations of Advisory Board are not binding on Government. – *State of AP* v. *Narayana Vellur Beedi Mfg Factory* AIR 1973 SC 307.

IT IS SUFFICIENT IF TOTAL WAGES PAID ARE MORE THAN MINIMUM WAGES - Even if State Government notification prescribes variable dearness allowance which is linked with cost of living index, amount paid on basis of DA is not to be taken as an independent component of minimum wages, but as part and parcel of process of computing minimum wages. Hence, in cases where employer is paying total sum which is higher than minimum rates of wages fixed under the Act including the cost of living index (VDA), he is not required to pay VDA separately. - *Airfreight Ltd.* v. *State of Karnataka* 1999(4) SCALE 451 = 1999 AIR SCW 2608 = AIR 1999 SC 2459 = 95 FJR 395 = 1999 LLR 1008 = 83 FLR 126 (SC) – same view in *Harilal Jechand Doshi* v. *Maharashtra General Kamgar Union* 2000(1) Bom CR 620 (Bom HC) * *Management of Ramkrishna Pharmaceuticals* v. *State Authority* 2002 LLR 988 (AP HC) * *Andhra Pradesh Hotels Association* v. *Government of AP* 2002 LLR 1122 = 101 FJR 703 (AP HC DB). – Thus, even if rates fixed by State Government indicate basic and DA separately, it is not necessary to show them separately by employer in his wage sheet. It is sufficient if employer pays total amount which is equal to or more than total minimum wages (including DA) as specified by State Government in a notification.

EMPLOYER TO CLOSE UNIT IF HE CANNOT AFFORD TO PAY MINIMUM WAGES - If an employer cannot pay minimum wages, he has to close down the undertaking. * *Crown Aluminium Works* v. *Their Workmen* AIR 1958 SC 30 = 1958 I LLJ 587 (SC) * *Deepak Photos* v. *State of Kerala* 2001 LLR 10 (Ker HC DB) * *Andhra Pradesh Hotels Association* v. *Government of AP* 2002 LLR 1122 = 101 FJR 703 (AP HC DB). Paying capacity is not relevant consideration for rate of minimum wages. Cost of living and general wages in locality are relevant. – *Chandrabhavan Boarding* v. *State of Mysore* AIR 1968 Mys 156 = 1968 Lab IC 879.

Minimum wages are payable irrespective of financial position of individual employer. – *Hindustan Aeronautics* v. *Workmen* AIR 1967 SC 948.

Payment of Wages Act

The Act is to regulate payment of wages to certain class of employed persons. The Act applies to payment of wages to persons employed in factory or railways. It also applies to any 'industrial or other establishment' specified in section 2(ii). [section 1(4)]. 'Factory' means factory as defined in section 2(m) of Factories Act. - - Industrial or other establishment specified in section 2(ii) are - * Tramway or motor transport services * Air transport services * Dock wharf or jetty * Inland vessels * Mines, quarry or oil-field * Plantation * Workshop in which articles are produces, adopted or manufactured. - - The Act can be extended to other establishment by State/Central Government.

Presently, the Act applies to employees drawing wages upto Rs 1,600. [section 1(6)]. The limit is being increased to Rs 6.500 by amending the Act.

Every employer is responsible for payment to persons employed by him on wages. [section 3].

MEANING OF WAGES - Wages means all remuneration expressed in terms of money and include remuneration payable under any award or settlement, overtime wages, wages for holiday and any sum payable on termination of employment. However, it does not include bonus which does not form part of remuneration payable, value of house accommodation, contribution to PF, traveling allowance or gratuity. [section 2(vi)]

HOW WAGES SHOULD BE PAID - Wages can be paid on daily, weekly, fortnightly or monthly basis, but wage period cannot be more than a month. [section 4]. Wages should paid on a working day. Wages are payable on or before 7th day after the 'wage period'. In case of factories employing more than 1,000 workers, wages can be paid on or before 10th day after 'wage period' is over. [section 5(1)]. [Normally, 'wage period' is a 'month'. Thus, normally, wages should be paid by 7th of following month and by 10th if number of employees are 1,000 or more]. - - Wages should be paid in coins and currency notes. However, with authorisation from employee, it can be paid by cheque or by crediting in his bank account. [section 6].

DEDUCTIONS PERMISSIBLE - Deduction on account of absence of duty, fines, house accommodation if provided, recovery of advance, loans given, income tax, provident fund, ESI contribution, LIC premium, amenities provided, deduction by order of Court etc. is permitted. Maximum deduction can be 50%. However, maximum deduction upto 75% is permissible if deduction is partly made for payment to cooperative society. [section 7].

FINES – Specific notice specifying acts and omissions for which fine can be imposed should be exhibited on notice board etc. Such notice can be issued only after obtaining specific approval from State Government. Fine can be imposed only after giving employee a personal hearing. Fine can be maximum 3% of wages in a month. Fine cannot be recovered in instalments. [section 8].

Trade Unions Act, 1926

The object of Trade Unions Act, 1926 is to provide for registration of Trade unions and to define law relating to registered trade unions in certain aspects.

Trade Union – Trade Union means any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or between employers and employers, or for imposing restrictive conditions on the conduct of any trade or business. It includes federation of two or more trade unions. [section 2(h)].

Thus, technically, there can be 'union' of employers also, though, almost universally, the term 'trade union' is associated with union of workmen or employees.

'Trade dispute' means any dispute between workmen and employers or between workmen and workmen, or between employers and employers. However, it should be connected with employment or non-employment, or the conditions of labour, of any person. 'Workman' means all persons employed in trade or industry, whether or not in the employment of the employer with whom the trade dispute arises. [section 2(g)].

Any seven or more members of a Trade Union can apply for registration, by subscribing their names to rules of trade Union and complying with provisions of the Act for registration of Trade Union. [section 4(1)]. Right and liabilities of a Registered Trade Union are specified in section 15.

Registration of trade union – Appropriate Government shall appoint a person as Registrar of Trade Unions for each State. [section 3(1)]. Application for registration is required to be made signed by at least 7 members. Application should be accompanied by rules of trade union. and other required details. [section 5]. Rules should contain provisions as prescribed in section 6. Registrar shall register Trade Union and enter particulars in the register maintained by him. [section 8]. Trade Union will have a registered office. [section 12].

Other provisions – Other important provisions are as follows -

TRADE UNION IS A BODY CORPORATE – Registered Trade Union shall be a body corporate by the name under which it is registered. It will have perpetual succession and a common seal. It can acquire both movable and immovable property in its own name and contract in its own name. [section 13].

FUND FOR POLITICAL PURPOSES - Trade Union can constitute separate fund for political purposes. [section 16].

EXECUTIVE COMMITTEE AND OFFICE BEARERS OF UNION – The management of trade union will be conduced by 'executive'. It is a body by whatever name called. [section 2(a)]. Thus, controlling body of Trade Union may be called as 'Executive Body' or 'Governing Body' or 'Managing Committee' or any such name. The members of the executive body are termed as 'Officer Bearers'. [section 2(b)]. At least 50% of office bearers of registered trade union shall be persons actually engaged or employed in an industry wit which the trade union is connected. [section 22].

ANNUAL RETURNS – Every registered trade union will prepare a general statement of assets and liabilities of trade Union as on 31st December. The statement will be sent to Registrar along with information about change of office bearers during the year. [section 28(1)].

IMMUNITY FROM PROVISION OF CRIMINAL CONSPIRACY IN TRADE DISPUTES – Office bearer of a trade union shall not be liable to punishment u/s 120B(2) of Indian Penal Code in respect of agreement made between members for purpose of object of trade union, unless the agreement is agreement to commit an offence. [section 17]. - - Thus, office bearer of trade union cannot be prosecuted for criminal conspiracy in respect of agreement relating to object of trade union.

IMMUNITY FROM CIVIL SUIT – A civil suit or other legal proceeding is not maintainable against any registered trade union or office bearer in furtherance of trade union activity on the ground that (a) such act induces some person to break a contract of employment or (b) It is in interference with the trade, business or employment of some other person. [section 18(1)].

REGISTRATION DOES NOT MEAN RECOGNITION – Registration and recognition of Union by an employer are independent issues. Registration of Trade Union with Registrar has nothing to do with its recognition in a particular factory/company. Recognition of Trade Union is generally a matter of agreement between employer and trade union. In States like Maharashtra and Madhya Pradesh, there are specific legal provisions for recognition of a trade union.

Workmen's Compensation Act, 1923

This is a very old enactment for providing social security to workmen. Under this Act, a workman who dies or suffers disablement (partial or total) due to accident is entitled to get compensation from employer.

Act does not apply where workman covered under ESI Act - Since a workman is entitled to get compensation from ESIC, a workman covered under ESI Act is not entitled to get compensation under Workmen's Compensation Act, as per section 53 of ESIC.

However, Act is applicable to factories, mines, plantations, transport establishments, construction work etc. (who are not covered under ESI Act).

Employer's liability for compensation – An employer is liable to pay compensation if personal injury is caused to a workman by accident arising out of and in the course of his employment. [section 3(1)]. An employer is not liable in following cases –

Injury which does not result in total or partial disablement of workman for a period exceeding 3 days
Injury caused by an accident directly attributable to * workman under influence of drinks or drugs * wilful disobedience of express orders for safety * wilful removal of safety guard or device. [Even if such case, if the workman dies or suffers permanent total disablement, the employer will be liable].

EMPLOYMENT DISEASE – Employer is liable if a workman contracts any specified occupational disease, while he is in service of employer for at least 6 months. [section 3(2)].

EMPLOYER'S FAULT IS IMMATERIAL - The compensation is payable even when there was no fault of employer. In *New India Assurance Co. Ltd.* v. *Pennamna Kuriern* - (1995) 84 Comp. Cas. 251 (Ker HC DB), claim of workmen for compensation under Motor Vehicle Act was rejected due to negligence of employee, but compensation was awarded under Workmen's Compensation Act on the principle of 'no fault'.

COMPENSATION PAYABLE EVEN IF WORKMAN WAS CARELESS - Compensation is payable even if it is found that the employee did not take proper precautions. An employee is not entitled to get compensation only if (*a*) he was drunk or had taken drugs (*b*) he wilfully disobeyed orders in respect of safety (*c*) he wilfully removed safety guards of machines. However, compensation cannot be denied on the ground that workman was negligent or careless. – *Mar Themotheous* v. *Santosh Raj* 2001 LLR 164 (Ker HC DB).

NUMBER OF WORKMEN EMPLOYED IS NOT CRITERIA – In definition of 'workman' in schedule II, in most of the cases, number of workmen employed is not the criteria. In most of cases, employer will be liable even if just one workman is employed. - - The Act applies to a workshop even if it employs less than 20 workmen and is not a 'factory' under Factories Act. – *Sunil Industries* v. *Ram Chander* 2000 AIR SCW 4109 = 2001 LLR 64 = 2000(7) SCALE 415.

Workman under the Act – 'Workman' means * railway servant * crew of ship * Crew of aircraft * Driver, cleaner, helper or mechanic of motor vehicle * Person recruited abroad * Employed in capacity specified in Schedule II.

The Schedule II covers many activities like manufacturing process, explosives, mine, ship, loading/unloading, construction, electricity generation and distribution, drivers, horticulture, circus etc. - - Cultivation of land, fishing, rearing of live stock is covered if more than 25 persons are employed. - - Persons employed outside are also covered. However, persons employed in clerical capacity are excluded.

Compensation payable under the Act – Mode of computation of compensation is given in section 4 of the Act. Compensation is payable to workmen. It is payable to dependents of workman in case of death.

In case of death resulting from injury, minimum compensation is Rs. 80,000. Maximum compensation is an amount equal to 50% of monthly wages of deceased workman multiplied by factor depending on age (More the age, lower the compensation). If salary exceeds Rs 4,000, it will be considered as Rs 4,000 only for purpose of calculating the compensation. Maximum compensation is Rs. 4,57,080 if a person at the time of death was 16 years of age an. In addition, funeral expenses upto Rs 2,500 are payable. [section 4(3)].

In case of permanent total disablement, minimum compensation is Rs. 90,000. Maximum compensation is an amount equal to 60% of monthly wages of deceased workman multiplied by factor depending on age (More the age, lower the compensation). Maximum compensation payable is Rs. 5,48,496, if workman was 16 years of age at the time of accident. - - In case of permanent partial disablement, compensation is payable on basis of percentage of loss of earning capacity.

No compensation is payable if disablement is upto only three days.

PROTECTION TO COMPENSATION - The compensation paid under the Act is protected, i.e. it cannot be attached or assigned. [section 9].

Liability of Principal Employer - Principal Employer is liable to pay the amount of compensation for the injury suffered by workman employed through contractor, if the accident arises as a result of accident arising out of and during the course of employment. [section 12].

Payment of compensation only through Commissioner - A Commissioner for Workmen's Compensation is appointed by Government. The compensation must be paid only through the Commissioner in case of death or total disablement. Any lump sum payment to workman under the Act must be made only through Commissioner. Direct payment to workman or his dependents is not recognised at all as compensation. However, in case of death, if employer has paid some compensation to dependent, that will be refunded to employer. [section 8(1)].

Expenditure made by employer for medical treatment of workman is not considered for purposes of the compensation.

Employees entitled - Every employee, including those employed through contractor, but excluding casual employees who is engaged for purpose of employer's business is eligible. The Act does not cover employees employed in clerical capacity. However, workmen in manufacturing processes, mines, ships, construction, tractor or mechanical appliances in agriculture, circus etc. and also drivers, watchmen etc. are covered. The compensation is payable if accident arises out of and during the cause of employment, and such accident causes either death or disablement.

Injury arising out of and during the course of employment - The employee is eligible to get 'disablement benefit' only when the injury arises out of and during the course of employment. Similarly, a workman is entitled to get compensation only if accident is 'arising out of and during the course of employment'.

Punishment to Employee

Any punishment of suspension or dismissal can be imposed after conducting a 'Domestic Enquiry'. Principles of natural justice have to be followed. Termination of an employee without following principles of natural justice is violative of Article 21 of Constitution - *D K Yadav*v. *JMA Industries Ltd*. 1993(67) FLR 111 (SC) = 1993 LLR 584 = 1993 AIR SCW 1995 = (1993) 3 SCC 259 = 1993(3) SCALE 39 = JT (1993) 3 SC 617 = 1993(2) LLN 575 (SC).

For proper conduct of enquiry (1) Employee should be informed of charges leveled against him (2) Witnesses should be ordinarily examined before him. (3) The employee should be given fair opportunity to cross examine the witnesses, including himself (4) The enquiry officer should record his findings with reasons. – *Sur Enamel* v. *Workmen* (1964) 3 SCR 616 = (1963) 2 LLJ 367 (SC)

* *Calcutta Dock Labour Board* v. *J Imam* (1965) 3 SCR 453 = 1965(2) LLJ 112 (SC).

The workman is issued with a ‘Show Cause Notice’ giving details of charges of misconduct against him. He has to give his reply. Then, enquiry into charges is conducted by an ‘Enquiry Officer’ appointed by Management. Such ‘Enquiry Officer’ can be an employee of the company or an outsider. The workman can defend himself before the Enquiry Officer or he can be defended by his co-worker or a Union Representative. The workman is not allowed to engage a lawyer to defend his case. After enquiry, the ‘Enquiry Officer’ has to give his findings and state whether he finds the workman ‘guilty’ or ‘not guilty’. He should give reasons for his views. However, the ‘Enquiry Officer’ should not give his opinion about the punishment that should be imposed on the workman. Copy of the report of Enquiry Officer has to be given to the workman. - *UOI* v. *Mohd Ramzan Khan* - (1991) 1 SCC 588 = AIR 1991 SC 471 = JT (1990) 4 SC 456 = 1990(2) SCALE 1094 = 1991 I CLR 61 (SC). The workman has right to state his case on the basis of ‘Enquiry Report’ e.g. the workman may agree that he is guilty but may plead for leniency, or he may point out discrepancies in the report of ‘Enquiry Officer’. After the reply of workman, the authorised Manager will go through enquiry papers, report of Enquiry Officer and observations/reply of workman on the report of Enquiry Officer. The Authorised Manager will then issue suitable order. The ‘Disciplinary Authority’ should not be lower in rank or grade than the ‘Appointing Authority’.

COMPANY ACT

Company Law

1 Incorporation of company

Formation of a company involves following procedures –

(a) Approval of name.
(b) Drafting of Memorandum of Association, typed on stamp paper and signed
(c) Articles of Association duly typed on stamp paper and signed (not essential in case of public limited company limited by shares, but still almost invariably submitted).
(d) E-filing of documents
(e) Submission of required papers like Statutory declaration of compliance, Power of Attorney
(f) Payment of filing Fees.
(g) Correcting Memorandum and Articles if required by ROC by person holding Power of Attorney
(h) Filing final copy of Memorandum and Articles in pdf format, if corrections were made.
(i) Collect certificate of incorporation by holder of Power of Attorney.

1-1 ***Approval of name*** – The first step in formation of a company is getting the proposed name approved from Registrar of Companies of the State where the company is to be incorporated. Availability of a name can be checked using the 'Check Company Name' service under 'Other Services' tab on homepage of MCA i.e. www.mca.gov.in. Once this is done, chances of rejection of proposed name will be much less.

Name should be indicative of the main object of the proposed company.

Purpose of application is to confirm that the proposed name is not undesirable as per section 20. Same procedure applies for change of name also.

The procedure for approval of name of company has been changed w.e.f. 16-11-2007. Application for approval of name should be made to regional ROC electronically in form 1A with fees of Rs 500.

If some key words or coined words are used, its significance should be stated. If proposed name is based on registered trade mark or application has been made for registration of trade mark, details should be furnished.

Two persons in case of a private company and seven persons in case of public company should be named as promoters/subscribers. They should have obtained DIN.

Registrar of Companies is required to inform approval of name / rejection of proposed name within seven days.

Six names are required to be submitted. If none of these names is found to be acceptable, ROC will give opportunity to propose new names. These are to be submitted within three days. Two opportunities will be given for re-submission of names. If despite this, none of the names is found to be acceptable by ROC, the fees paid will lapse. Then fresh application for name approval with fresh fees should be paid.

Name approved is valid for 60 days. The approval can be renewed once for a period of 30 days by paying fees of Rs 250. If the company is not incorporated within 60 days (or within further 30 days if extension s obtained), the name approved will lapse. Of curse, fresh application with fresh fees can be made [Rule 4A as amended w.e.f. 16-11-2007].

As per circular No. 1/95, dated. 16-2-1995, the persons who have applied for approval of name as promoters should be subscribers to the memorandum and articles. If not, at least one person should be common and others should have no objection.

SRN after submission of application - Applicant will get SRN (Service Request Number), which can be used to trace position about approval of name.

Words private limited or Limited - Name of a company must contain the word 'Limited' or 'Private Limited' at the end. Exemption from this provision is given only to section 25 companies. Such company is termed as' licensed company'. The license is given to chamber of commerce, trade associations, charitable organisations etc. which are not for profits. A Government company formed as a private company can delete the word 'Private' from its name.

Criteria in approving a name - Name should be indicative of the main object of the proposed company. If some key words or coined words are used, its significance should be stated. If proposed name is based on registered trade mark or application has been made for registration of trade mark, details should be furnished. Name should not be identical or should not too nearly resemble the name of another registered company.

Name should not be considered undesirable by Central Government [section 20(1)] Offensive name or name suggesting unlawful activity is not permissible.

Name should not violate provisions of Emblems and Names (Prevention of Improper Use) Act, 1950.

Name misleading i.e. key word suggesting a great scale while company is with small resources. Thus, following are restrictions - word ‘Corporation’ permitted when authorised capital is Rs 5 crores. Words like International, Global, Asia etc. is permitted if authorised capital is Rs 1 crore. Words like Hindustan, India, Bharat permitted when authorised capital Rs 50 lakhs. Words like Industries/Udyog permitted if capital is Rs 1 crore. Words like ‘Enterprise’, ‘Business’ ‘Manufacturing’ permitted when capital is Rs 10 lakhs.

Change of name of company to reflect business of software (e.g. name containing words like Infosys, Software, Cyber, Cyberspace, Computers etc.) will be permitted only if a substantial portion of its income is derived from software business. - PIB press release dated 16-8-1999.

Consent of other companies in group for using group name in name of a company - If a company intends to use group name as part of its name (e.g. Kirloskar, Birla, Tata, Reliance etc.) it is standard practice of ROC to obtain no objection letters from other group companies.

1-2 Procedure after obtaining approval of name

Following documents are to be submitted electronically as scanned attachment to e-form No. 1. After submission, a SRN (Service Request Number) will be generated by system.

(a) Memorandum of Association duly stamped as per State Stamp Act [section 33(1)(a)] Memorandum and articles have to be signed by all signatories, writing (by hand) their names, address, occupation and number of shares they are subscribing to.

(b) Articles of Association, if any, duly stamped as per State Stamp Act [compulsory for private company, optional for public company, but almost always filed]

(c) If company proposes to appoint a person as Managing Director or wholetime director or Manager, a copy of agreement is to be enclosed [section 33(1)(c)]

(d) Statutory Declaration of Compliance in form 1 u/s 33(2) on stamp paper. The declaration can be signed by Advocate, Practising Company Secretary, practising Chartered Accountant, or by a person named in the articles as Director, Manager or Secretary of the company. The stamp paper should be purchased in name of applicant-subscriber and not in name of company which is yet to be incorporated

(e) Power of attorney to correct memorandum and Articles and to collect certificate of incorporation (PoA should be on stamp paper as per State Stamp Act. The stamp paper should be purchased in name of applicant-subscriber and not in name of company which is yet to be incorporated).

(f) If Articles of public company having share capital specify names of directors, their written consent as attachment to e-from 32.

(g) Original letter of ROC approving name of company

(h) Notice of registered office as required u/s 146(1) – It can be filed within 30 days from incorporation in e-form 18. However, as per instructions to e-form 1, e-from 18 is to be filed along with form No. 1.

(i) Proof of payment of filing fees. The fee payable is specified in Schedule X.

Submission of original papers in physical form - The original memorandum of association and articles of association duly stamped signed should be submitted to ROC of concerned State, giving reference to SRN. Original Statutory Declaration of Compliance in form 1 u/s 33(2) on stamp paper and Power of attorney should also be submitted.

1-3 Fees payable for registration of a company

Fees payable for registration of a company having share capital depends on nominal share capital and varies from Rs 4,000 to Rs 2,00,04,000. [Rs two crore and four thousand], as follows –

Nominal share capital (Authorised Capital)	Registration fees Rs
Not exceeding Rs One lakh	4,000
Above Rs one lakh and upto Rs five lakhs	4,000 plus Rs 300 for every Rs 10,000 or part thereof above Rs one lakh
Above Rs five lakhs and upto Rs fifty lakhs	16,000 plus Rs 200 for every Rs 10,000 or part thereof above Rs five lakhs
Above Rs fifty lakhs and upto Rs One crore	1,06,000 plus Rs 100 for every Rs 10,000 or part thereof above Rs fifty lakhs
Above Rs one crore and upto Rs 397.96 crore	1,56,000 plus Rs 50 for every Rs 10,000 or part thereof above Rs One crore
Rs 397.96 crore and above	Rs two crore and Rs 4,000 (2,00,04,000)

Company not having a share capital – Fee payable is Rs 5,000 when number of members as stated in Articles is unlimited. Fees for filing or registering a document is Rs 50.

Section 25 companies – Companies licensed under section 25 will have to pay same registration fees as above [Till 31-12-2007, they were required to pay nominal fee of Rs 50].

Fee for increase in nominal capital - If nominal share capital is increased, difference in fees is payable, while filing notice of increase in nominal capital. The differential fees payable is equal to fees payable on increased capital as per Schedule less the amount payable on share capital equal to nominal capital before the increase, at the rates prevailing on date of filing the notice. [Thus, if nominal share capital is increased from Rs 10 lakhs to Rs 50 lakhs, calculate fees payable on Rs 50 lakhs, calculate fees payable if nominal capital was Rs 10 lakhs and then pay the difference].

1-4 Procedure after e-filing and submission of original documents

The documents are scrutinised by ROC. If the Memorandum/Articles is corrected as required by ROC, final soft copy in PDF format will have to be submitted.

After correction and completion of all requirements, certificate of incorporation will be issued by ROC with CIN (Corporate Identity Number).

Certificate of commencement of business - A private company can commence business immediately, while a public company can commence business only after obtaining certificate of commencement of business.

1-5 Alterations to Memorandum and Articles of Association

Any provision in Articles can be changed by a special resolution.

Provisions in respect of change of Memorandum are as follows.

Clause in Memorandum	Procedure of amending the clause
Name Clause	Special resolution with approval by Registrar of Companies [section 21]
Registered Office	* Change outside State - Special Resolution and approval of CLB [section 17(2)] * Board resolution for change within same city or town * Change within same State by Special Resolution (Resolution by postal ballot in case of listed company) [section 146] * If change within Same State but under jurisdiction of another ROC will require permission of Regional Director (section 17A) [Really, in second and third case, there is o alteration in Memorandum, as memorandum states only name of State in which registered office of the company is situated]
Object Clause	Special Resolution [Section 17(1)] (Postal ballot in case of listed company)
Liability Clause	Unlimited to limited by special resolution and getting fresh registration from ROC [section 32(3)]
Capital Clause	* Increase, consolidation or division - Ordinary Resolution and notice to ROC [section 94] * Reduction in Capital - Special Resolution and confirmation from Company Court - Section 100
Subscription Clause	No need to change arises and hence there is no provision in law to change the subscription clause.

Overall control of company by Shareholders

2 The body of members (shareholders) are real owners of the company. However, they have no authority to look after day to day affairs of the company or enter into contracts on behalf of company. They have limited powers. They must meet at least once a year at Annual General Meeting. (AGM).

Ordinary Business at AGM - Following is the ordinary business of the company. Normally, this business should be transacted at every AGM. [section 173(1)]—

- Consideration of accounts - to receive and adopt annual accounts of the company.
- Consideration of report of Board of Directors and auditors - To receive and adopt Report of Board of Directors and Auditors
- To declare dividend
- To appoint directors in place of retiring directors
- To appoint auditors for ensuring year and fix their remuneration.

Special Business - All business at the meeting other than the aforesaid 'ordinary business' is termed as 'special business'.

2-1 Businesses in which the resolutions shall be passed through Postal Ballot only

As per rule 4, following business of public listed company *shall* be transacted through postal ballot. -

Alteration of Object clause - alteration in the Object Clause of Memorandum [section 17(1)] – Requires special resolution.

Alteration of Articles defining private company - alteration of Articles of Associations in relation to insertion of provisions defining private company. [*This is meaningless as the provision of postal ballot is only for listed company and a listed company cannot be a 'private company'*]. – Requires special resolution.

Buy back of shares - buy-back of own shares by the company under section 77A(1). [*However, postal ballot is not required for buy back of 'other specified securities' which includes Employees Stock Option*]. [Buy back of shares upto 10% of total paid up equity capital and free reserves can be made every year with resolution of Board, as per amendment to section 77(2)(b) w.e.f. 23-10-2001. In such cases, postal ballot will not be required]. – Requires special resolution.

Issue of sweat equity to promoters - Issue of Sweat equity shares to promoters u/s 79A(1)(d) in case of listed company – It should be by passing ordinary resolution through postal ballot. Promoters will not participate in such resolution, i.e. resolution shall be passed excluding the voting of promoters. [SEBI (Issue of Sweat Equity) Regulations, 2002].

Issue of shared with differential voting rights - issue of shares with differential voting rights as to voting or dividend or otherwise under section 86(a)(ii) – Requires ordinary resolution.

Change of registered office outside city but within State - change in place of Registered Office outside local limits of any city, town or village as specified in section 146(2) – Requires special resolution.

Sale of substantially whole undertaking - sale of whole or substantially the whole of undertaking of a company as specified under section 293(1)(a). [*The words 'lease or otherwise dispose of'' are missing. Thus, postal ballot is not required for usufructuary mortgage of the undertaking. Lease of undertaking is also excluded from provision of postal ballot*]. – Requires ordinary resolution.

Loans or guarantees in excess of limits - giving loans or extending guarantee or providing security in excess of the limit prescribed under section 372A(1). [*The words inter corporate investment is missing. Thus, for making corporate investment exceeding the limit u/s 372A, postal ballot is not necessary*] – Requires special resolution.

Election of small shareholders - election of a small shareholders' director under proviso to section 252(1) – Requires ordinary resolution

Variation of rights to class of shares or debentures - variation in the rights attached to a class of shares or debentures or other securities as specified under section 106 [*In fact, section 106 only provides for variation of rights of shareholders. Thus, extending it to debentures by rules does not seem to be correct*]. – Requires special resolution.

Waiver of public offer in case of takeover - Under SEBI code, in case of takeover, the acquirer is required to make public offer to purchase at least 20% of shares. Such public offer is not necessary if change in control takes place in pursuance to special resolution of target company. Such special resolution should be passed by postal ballot. [second *proviso* to regulation 12 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 1997]) – Requires special resolution as per SEBI guidelines

2-2 Resolutions which are required to be passed as special resolutions

Some important sanctions requiring special resolution are as follows -

Section No.	Details
17 and 17A	Alter object clause, name of company, registered office to other State. Change to other State requires confirmation of Central Government (postal ballot required in case of listed companies). Change within the State but under jurisdiction of different ROC requires permission of RD u/s 17A – see 146(2))
21	Change name of Company, subject to approval of Central Government.
25(3)	To omit the name 'Limited' or 'Private Limited' in case of licensed company.
31(1)	Alter Articles of Association (postal ballot required in case of listed companies for insertion of provisions relating to private company).
77A	Buy back of securities (postal ballot required in case of listed companies, if in excess of 10% of total paid up capital in a year).
79A	Issue of sweat equity shares (postal ballot required in case of listed companies).
81(1A) and 81(3	Offer further shares to persons other than existing members (i.e. not to make a rights issue)
81(3)	Convert loans or debentures into shares, if approved before issue of debentures or raising of loans.
99	To determine that any portion of share capital shall not be called up except in winding up.
100(1)	Reduction in share capital (subject to confirmation by Court)
106	Varying rights of holders of class of shares (postal ballot required in case of listed companies for variation of rights attached to class of shares or debentures or other

	securities).
146(2)	Remove registered office out of city limits, but within the State (postal ballot required in case of listed companies).
149(2A)(b)	To commence new business.
163(1)	Keep statutory registers at any place within city / town other than the registered office.
208(2)	Authorise payment of interest out of capital - approval of Central Government is required
224(A)(1)	Appoint statutory auditors when share-holding of Government, financial institutions and nationalised banks is 25% or more.
237(a)(i)	Have affairs of the company investigated by inspector appointed by Central Government.
269 (read with Schedule XIII)	Approval of minimum remuneration to MD/WD/Manager, if more than prescribed 'normal' limit.
294AA(3)	Appoint sole selling agents in certain cases if paid-up capital is Rs 50 lakhs or more.
309(1)	Determine remuneration payable to a director (other than MD) - necessary only if Articles require a special resolution - applicable only to a public company or its subsidiary.
309(4)	Authorising payment by way of commission on basis of percentage of profit, to a director who is not MD or whole time director - applicable only to a public company or its subsidiary.
314(1), (1B)	Approval for holding office of profit under the company or subsidiary for director or his relative or partner, firm, private company etc. in certain cases.
323(1)	To alter memorandum of association so as to render unlimited liability of its directors or manager - resolution can be passed only if articles so authorise - such resolution can only apply to future director/s and manager. It does not apply to existing director / directors / manager during his current term, unless he has accorded his consent to his liability becoming unlimited.
372A(1)	Make / give investment / loans / guarantee / security beyond 60% / 100% limit (postal ballot required in case of listed companies for giving loans or extending guarantee or providing security in excess of limits).
433(a)	To get the company wound up by Court.
484(1)(b)	To have the company voluntarily wound up.
494(1)	To authorise liquidator in a voluntary winding up to accept shares as consideration for company's property.
512(1)(a)	To authorise liquidator in a members' winding up to exercise powers specified in section 457(1)(a) to (d).
517(1)	To accord sanction for any agreement between company and its creditors so as to bind company and its creditors.
546(1)(b)	To authorise liquidator to exercise certain powers in a voluntary winding up.
550(1)(b)	To direct disposal of books and papers after completion of winding up and about to be dissolved, in case of members' voluntary winding up.
579(1)	To alter form of constitution of a company registered under part IX of the Act, e.g. a partnership firm registered as a company.
581H to 581ZL	Resolutions relating to producer company.
SEBI	Resolution that acquirer need not make public offer to take 20% shares of target company (Required as per SEBI Takeover Regulations) (postal ballot required in case of listed companies).

In addition, in some cases, approval of Central Government, Court or CLB is required.

2-3 Resolutions requiring special notice

Special notice is required for following resolutions - (a) Resolution appointing an auditor other than the retiring auditor or resolution that the retiring auditor shall not be appointed (section 225) (b) Resolution to remove director before expiry of his period and a resolution to appoint another director in place of removed director (section 284). - - Interestingly, in both the cases, only ordinary resolution is required to pass the motion and not special resolution.

As per section 190 of Companies Act, a member intending to move such resolution has to give at least 14 days' clear notice to the company before the general meeting. 'Clear notice' means date of giving notice and date of the general notice will have to be excluded for calculating period of 14 days. On receipt of such intimation, the company must give its members notice of the resolution in the same manner as notice of general meeting is given. If this is not practicable, notice should be given by advertisement or other mode as may be prescribed in Articles of Association. Such notice must be given at least seven clear days before the meeting.

2-4 Resolutions which can be passed as ordinary resolutions

Some important sanctions requiring ordinary resolution are as follows—

Section No.	Details
22(1)(a)	Rectify name of company with approval of Central Government
61	Vary terms of contract referred to in prospectus or statement in lieu of prospectus.
79(2)	Issue shares at discount subject to sanction of CLB
81(1A)(b)	Issue further shares without making rights issue with approval of Central Government.
86(a)(ii)	Issue of shares with differential voting rights as to voting or dividend or otherwise. (postal ballot required in case of listed companies).
94(2)	Alter company's share capital, if authorised by articles.
98	Increase nominal capital by an unlimited company.
121(1)	Reissue redeemed debentures.
149(2B)	Commencement of new Business with approval of Central Government.
165	Adopt statutory report.
173 and Article 85 of table A	Declare dividend.
210	Adopt balance sheet and report of Board of Directors and Auditors at AGM.
214(1)	Authorisation by holding company to its representative to inspect books of account of its subsidiaries.
224(1)	Appoint auditors and fix their remuneration (power to fix remuneration can be delegated to Board of Directors).
224(5)	Remove auditor and appoint another nominated by any member.
224(6)	Fill casual vacancy in the office of auditor caused by resignation.
252(1) *proviso*	Election of small shareholders' director (postal ballot required in case of listed companies).
255(1)	Appoint first directors who are liable to retire by rotation.
256(3)	Fill vacancy created by retiring director – same or other person can be appointed as director
257(1)	Appoint person other than the retiring director or regularise appointment of additional director or director appointed in casual vacancy.
258	Increase or reduce number of directors within limits of Articles of company.
269	Appoint MD/WD/Manager and approving his remuneration [If proposed minimum remuneration is more than prescribed 'normal' limit special resolution is required as per Schedule XIII to Companies Act]
284(1)	Remove director before expiry of his term and appoint another in his place.
292(5)	Restrict powers of Board u/s 292(1).
293(1)	Approval when Board's powers are restricted e.g. (a) to give consent to dispose of whole or substantially whole of undertaking of the company (b) to remit or give time for debt due from a director (c) to invest otherwise than in trust securities amount of compensation received by the company in respect of compulsory acquisition of its properties (d) to borrow money in excess of aggregate of paid up capital and free reserves (e) to contribute to charitable funds beyond Rs 50,000 or 5% of company's average net profit. (postal ballot required in case of listed companies for consent to dispose of whole or substantially whole undertaking of company).
294	Approve or disapprove appointment of sole selling agent – special resolution required if capital exceeds Rs 50 lakhs and Government approval is required.
309(1)	Determine remuneration of directors [special resolution required only if Articles require]

313(1)	To appoint an alternate director in the absence of any power given in the Articles.
391(2)	Approve arrangement and compromise subject to Court's approval.
484(1)(a)	Wind up company voluntarily.
490(1)	Appoint liquidator and fix his remuneration in members' voluntary winding up.
491	To authorise directors to exercise some of their powers even after appointment of a liquidator in members' voluntary winding up.
492(1)	Fill vacancy in the office liquidator in members' voluntary winding up.
502(1) and 503(2)	In case of creditors' winding up (a) To nominate liquidator (b) Nominate members of committee of inspection and (c) to consider and pass accounts laid in meeting.
565	To register an existing company under 1956 Act.
581S to 581ZN	Resolutions relating to producer company.

Board of Directors

3 Directors elected by members form a 'Board of Directors', which supervises and regulates the activities of the company. It exercises overall control over the affairs of the company. Section 291(1) makes it clear that the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to do. The Board must meet at least once in every quarter, i.e. four times a year.

Quorum for the Board Meeting - Quorum for a Board meeting should be one-third of total strength of the Board, or two directors, whichever is higher. [section 287(2)]. If number of interested directors is two-third or more, it will be impossible to form a quorum of uninterested directors. In such case, the uninterested directors present will form the quorum. However, minimum two uninterested directors must be present. [*proviso* to section 287(2)].

3-1 Restrictions on Powers of Board

The Board of Directors has vast powers in management of the company. However, certain powers cannot be exercised by Board. These powers can be exercised only by members by resolution at a general meeting. [section 293(1)].
The restrictions u/s 293 are applicable only to public company or a private company which is subsidiary of a public company. Some of these restrictions do not apply to a private company.

However, restrictions u/s 293A (political contributions) and 294 (Appointment of sole selling agent) apply to private company also.

Restrictions u/s 293(1) are –

- Sale or lease of undertaking
- Remitting or giving time for recovery of loan from director
- Investment of compensation received after compulsory acquisition
- Borrowing money in excess of paid up capital and free reserves
- Contribution to charitable trusts

A company can make / give loans / investment / guarantee / security to another company only subject to restrictions as per section 372A.

Payment of commission or sitting fees to directors, payment of remuneration to MD / WD / Manager are as per limits prescribed under Companies Act.

A public company cannot appoint any firm or body corporate to any office or place of profit under the company for a term exceeding five years at a time [section 204(4)].

Sole selling agents - Central Government has issued notification No. GSR 272(E) dated 5-4-2007, prohibiting appointment of sole selling agents for bulk drugs, drugs and formulations (as defined in DPCO) for three years., i.e. upto 4-4-2010. There is no prohibition to appoint sole selling agents for sale of bulk drugs in export market. The prohibition will not apply to any *bona fide* preparation included in Ayurvedic (including Siddha) or Unani (Tibb) system of medicine or homeopathic system medicine (earlier notification No. GSR 130(E) dated 23-2-2004 which was valid upto 23-2-2007).

There is no other restriction at present on appointing sole selling agents.

Contributions than can be made by other companies - A non-Government company cannot make political contributions in first three financial years after it is incorporated. A non-Government company which is in existence for more than three years can contribute upto 5% of its average net profits during three preceding financial years. The profits should be calculated after allowing the expenditure and after making provisions of depreciation, as per sections 349 & 350. *These restrictions are applicable to a private company also.* **Disclosure in balance sheet is required.**

Limit on Board powers in respect of investment / loan / guarantee

3-2 The overall limit of 60% of paid up capital of the company plus free reserves *or* 100% of free reserves, whichever is more has been prescribed for the following -

- Making loan to any other body corporate.
- Giving any guarantee, or providing security, in connection with a loan made by any other person to any body corporate (i.e. loan given to a body corporate)
- Giving any guarantee, or providing security, in connection with a loan made to any other person by any body corporate (i.e. loan given by body corporate)
- Acquiring by way of subscription, purchase or otherwise the securities of any other body corporate

It may be noted that the loan / investment / guarantee / security may be direct or indirect. All these will be covered in the overall ceiling.

The overall limit of all these together is 60% of paid up capital of the company plus free reserves *or* 100% of free reserves, whichever is more. [section 372A(1)]. Loan / guarantees / investment / security above this ceiling can be made / given only with previous approval by a special resolution in general meeting.

Unanimous Approval of Board - The investment / loan / security / guarantee should be approved by Board of Directors. The Board resolution should be passed at a meeting, circular resolution or resolution of a committee will not be permissible. All directors present at the meeting must vote in favour of the resolution. [section 372A(2)].

Delegation of powers for investment - Section 292 permits delegation of powers of making loans or investment to Committee / MD / Manager / Principal Officer by specifying amounts, nature and purpose. The harmonious construction is that such delegation is permissible, but only after passing unanimous resolution of the Board. Any other interpretation will make provisions of section 292 redundant.

3-3 Powers that can be exercised by Board with consent of Central Government

Following powers can be exercised by Board only subject to consent of Central Government –

Amendment to Articles providing that a MD / WD / director will not be liable to retire by rotation in public company - In case of public company or its subsidiary private company, amendment providing that a MD / WD / director will not be liable to retire by rotation - section 268. It has been clarified that Government approval is required only for 'amendment' of provision of Articles in respect of non-rotational directors. Government approval is not required for insertion of a *new*provision in the Articles. – Letter No. 1(120)/(2001) 43 CLA –I/65 dated 4-11-1965. If permission is required, application should be made in Form No. 25B.

Appointment of sole selling agents if paid up capital exceeds Rs 50 lakhs - Appointment of sole selling agents if paid up capital exceeds Rs 50 lakhs *or* such person has a substantial interest in the company - section 294AA(2) and (3) [Restrictions apply to private company also]

Making loans to a director or providing guarantee - Making loans to a director or providing guarantee for loan taken by him - section 295 [Restrictions apply to private company also]

Contract with a director or his relative for purchase of goods or supply of services, if paid up share capital is Rs one crore or more - Entering into contract with a director or his relative for purchase of goods or supply of services, if paid up share capital is Rs one crore or more – proviso to section 297(1) [Restrictions apply to private company also]

Appointment to a place of profit of a relative or partner of director, firm in which director or relative is partner - Appointment to a place of profit of a relative or partner of director, firm in which director or relative is partner, or private company where director or his relative is director of member, place of profit in the company carrying a monthly salary of not less than Rs 20,000 - section 314(1B) [Restrictions apply to private company also].

3-4 Powers of Board that cannot be delegated by Board to Committee

Following powers cannot be delegated to the Committee –

Section No.	Details
292(1)(a)	Power to make calls on shareholders in respect of money unpaid on their shares.
292(1)(b)	Power to issue debentures.
297(4)	Approval of contracts in which particular director is interested.
299(1)	Noting of disclosure of interest by a Director.
316(2) and 386(2)	A person who is MD / Manager of one public company can be appointed as MD / Manager of another company only with unanimous resolution at Board meeting.. This resolution cannot be passed in committee meeting.
SS-3	As per Secretarial Standard (SS-3) of ICSI on Dividend (which is presently recommendatory in nature), recommendation of dividend/declaration of interim dividend should be done at the Board Meeting. It should not be done by circular resolution or by Committee of Board.

All powers except above can be delegated.

3-5 Board Resolutions that cannot be passed by circulation

Some resolutions cannot be passed by circulation by Board. These must be passed only at the Board meeting. Such resolutions are as follows –

Section No.	Details
58A	Acceptance or invitation of public deposits [This is because as per Deposit Rules, date of approval by the Board of text of advertisement/statement in lieu of advertisement has to be specified. It has to be signed by majority of directors].
77A(2)(b) *proviso*	Authorising buy back upto 10% of paid up equity capital and free reserves as per *proviso* to section [section 292(1)(aa) added w.e.f. 23-10-2001]
77A(6)	Adoption of declaration of solvency in case of company intends to buy back its shares.
262(1)	Filling of casual vacancy in Board.
292(1)(a)	Make calls on shareholders in respect of money unpaid on their shares.
292(1)(aa)	Authorising buy back upto 10% of paid up equity capital and free reserves as per *proviso* to section 77A(2)(b)
292(1)(b)	Issue debentures.
292(1)(c)	Borrow moneys otherwise than on debentures
292(1)(d)	Invest funds of the company.
292(1)(e)	Make loans.
292(1) *proviso*	Delegation of powers to borrow moneys, invest funds of the company or to make loans to the extent permissible u/s 292(2), 292(3) and 292(4) - proviso to section 292(1).
293A(2)	Approve contributions to political party or for political purposes.
297(4)	Approval of contracts in which a particular director or his relative or his partner is interested.
299(3)(c)	Taking note of general notice given by director in respect of companies or firms in which he is director or a member and should be regarded as interested in any contract or arrangement with it.
308(2)	To receive notice of disclosure of interest by a deemed director u/s 307(10).
316(2)	Appointing a person as Managing Director who is already Managing Director or Manager of

	another company - special notice of proposed resolution has to be given to all directors, and resolution must be passed with consent of all the directors present at the meeting.
372A(2)	Making / giving Investment / loan / guarantee / security to other companies. [However, delegation within limits is permissible].
386(2)	Appointing a person as Manager who is already Managing Director / Manager of another company - special notice of proposed resolution has to be given to all directors, and resolution must be passed with consent of all the directors present at the meeting.
488(1)	Declaration of solvency in case of members' voluntary winding up. All directors or majority of directors have to make such declaration at the meeting of Board of Directors.
SEBI	Approving quarterly unaudited operating results of the listed company for publication. However, such recording can be done in a meeting of committee of Board of Directors consisting at least one-third of total number of directors. [This is as per clause 41(II)(a) of Listing Agreement – same stipulation in Secretarial Standard (SS-1) of ICSI (which is presently recommendatory in nature)].
	Approving annexure and proforma prescribed with Cost Audit Report (Rule 7 of Cost Audit Report Rules).
SS-1	As per Secretarial Standard (SS-1) of ICSI (which is presently recommendatory in nature), Annual Accounts should be approved at a Meeting of Board and not by a circular resolution. Similarly, in case of listed company, if there is more than 20% variance between un-audited and audited results, or half yearly report and the limited review report of auditors, reasons are required to be given to stock exchange. This should be discussed in Board meeting and should not be approved by circular resolution.
SS-3	As per Secretarial Standard (SS-3) of ICSI on Dividend (which is presently recommendatory in nature), recommendation of dividend/declaration of interim dividend should be done at the Board Meeting. It should not be done by circular resolution or by committee of Board.
SEBI	Constitution of Audit Committee, Remuneration Committee, Shareholders Grievance Committee and Nomination Committee and fixing their authorities/responsibilities should be done in Board meeting, as a good corporate governance practice (though there is no such statutory provision).

Excluding these, any other resolution can be passed by circulation e.g. - * Authorising officers to file suits, signing tax returns, sales tax forms * Fixing record date * Forming sub-committees (other than audit committee, shareholders' grievance committee and nomination committee) * Appointing additional director, alternate director * Authorising officer to file criminal complaint for dishonour of cheque * Appointing cost Auditor/Practising company Secretary.

3-6 Resolutions requiring unanimous voting

All decisions of Board are by simple majority. However, in following cases, the resolution must be unanimously passed, i.e. all directors present must vote in favour of the resolution. If a director is present, he must vote in favour of resolution. If he abstains, the resolution cannot be treated as passed. If the director is interested in a resolution, he cannot vote. Hence, the resolution should be unanimously passed by remaining directors.

Appointment of MD/Manager in two companies - Appointment of a person as Managing Director or Manager of a public company or private company which is subsidiary of a public company, if the person is already MD / Manager of another public company or private company which is subsidiary of a public company. A specific notice of the meeting and proposed resolution has to be given to all directors in India. All directors present should vote in favour of resolution - sections 316(2) & 386(2)

Making of loan or investment or giving security or guarantee by the company - The resolution should be passed with consent of all directors present at the meeting - section 372A(2). [Power to make loans or investment can be delegated to Committee of directors / MD / Manager / Principal Officer of company / Principal officer of branch u/s 292(3) and 292(4) by specifying total amount, nature and purpose. The harmonious construction is that such delegation is permissible, but only by unanimous resolution of the Board. If this interpretation is not adopted, section 292(3) and 292(4) become redundant].

4 Appointment of Directors

Every public company must have at least three directors. A private limited company or a 'deemed public company' should have minimum two directors. [section 252]. Maximum number of directors depends on Articles of the Company. If Articles do not provide number of directors, or specify number of maximum directors as less than 12, the number of directors can be increased upto 12 in the general meeting by ordinary resolution. If number of directors is to be increased beyond 12, approval of Central Government is necessary. [section 259].

A public limited company or a private company which is a subsidiary of a public company can appoint at the most 1/3 directors as permanent directors, but at least 2/3 of directors must retire by rotation. In case of private company, they need not retire by rotation. [section 255].

4-1 Formalities after appointment of director

Following formalities should be completed after appointment of director–

(a) Obtain from the director details required to be entered in Register of Directors maintained u/s 303(1) – see form 32. Also obtain election commission identity card No (if issued) which is required to be given in Annual return.

(b) Each director is required to intimate his DIN with copy of DIN allotment letter to company where he is director, in form DIN-2. This intimation should be obtained and details should be informed to ROC within one week in form DIN-3, as per section 266E of Companies Act.

(c) Confirmation that his number of directorships are within the prescribed limits.

(d) Obtain from him disclosure of his shareholding and debenture holding in company or subsidiary or holding company of the company in which he is appointed as director, to enable company to maintain prescribed register – section 308(1).

(e) List of committees of various companies in which he is member and Chairman of any committee (excluding private limited companies, foreign companies and section 25 companies), to ensure that if he is appointed as member / chairman of any committee, SEBI guidelines are not violated (A per clause 49I(C)(ii) of Listing Agreement, a director cannot be Chairman of more than five committees or member of more than 10 committees).

(f) Obtain declaration from non-executive directors about shareholding in company held either on own or on beneficial basis [Clause 49IV(E)(v) of Listing Agreement].

(g) Obtain declaration from director that he is not disqualified u/s 274(1)(g). Get declaration in form DD-A (if not obtained before appointment) [If possible, obtain confirmation letters from all companies in which he is director that that company has submitted all annual returns in time and is not defaulter in payment of deposit, interest on deposit, redemption of debentures or dividend].

(h) Obtain general notice from him about his directorships or membership of firms and companies where he should be regarded as interested and place it before Board – section 299(3)(a).

(i) List of his relatives as defined in section 2(41) read with section 6

(j) Make entry in register of directors maintained u/s 303(1)

(k) Make entry in register of directors' shareholding maintained u/s 307(1)

Annual declaration from director - Companies (Central Government's) General Rules and Forms prescribe form 24AA for giving declaration under section 299. Such declaration should be obtained every year in last month of financial year. It should be placed before Board at the next meeting and should be noted.

Change in directorship to be informed within 20 days - In addition to general disclosure every year, if a director, managing director, secretary or manager of any company becomes or ceases to be director, managing director, manager or secretary of other company, he must disclose the change to the company within 20 days. Any failure may entail penalty upto Rs 5,000/-. A 'deemed director' also has to submit these details to company. [section 305(1)]. The purpose is that this will enable company to maintain register of directors as required u/s 303(1).

4-2 *Suggested form to obtain information from director*

Information may be obtained in following form from director. In addition, declaration should be obtained every year in form 24AA. If required, both can be combined. The information should be updated every year.

Full Name (Surname, middle name and first name)	
Former Name (if any)	
Father's/Husband's Name	
Usual Residential Address	
DIN Number	

Address for communication (if different)	
Telephone Nos – landline and mobile	
E-mail address	
Fax Number	
Nationality	
Nationality of Origin (if different from present nationality)	
Business Occupation	
Date of Birth	
PAN Number	
Election Commission identity Card No. (if issued)	
Particulars of directorship or other offices held in other body corporates	
Name of body corporate/firm which has nominated me on the Board (only in case of nominee Directors)	
Shareholding in company either on own or on beneficial basis	
Shareholding and debenture holding in company and subsidiary or holding company of the company	
List of relatives as defined in section 2(41)	

Relative - Section 2(41) read with section 6 of Companies Act, 1956 defines 'relative' as follows : - A person shall be deemed to be a relative of another if, and only if, - (*a*) they are members of a Hindu undivided family; or (*b*) they are husband and wife; or (*c*) the one is related to the other in the manner indicated in Schedule I-A of Companies Act. This Schedule contains following relatives : (*1*) Father (*2*) Mother (including step-mother) (*3*) Son (including step-son) (*4*) Son's wife (*5*) Daughter (including step-daughter) (*6*) Father's father (*7*) Father's mother (*8*) Mother's mother (*9*) Mother's father (*10*) Son's son (*11*) Son's son's wife (*12*) Son's daughter (*13*) Son's daughter's husband (*14*) Daughter's husband (*15*) Daughter's son (*16*) Daughter's son's wife (*17*) Daughter's daughter (*18*) Daughter's daughter's husband (*19*) Brother (including step-brother) (*20*) Brother's wife (*21*) Sister (including step-sister) (*22*) Sister's husband.

4-3 Sitting fees to directors

Directors (other than whole time directors and Managing Director) work only on part time basis. These directors are 'Non Executive Directors'. These directors are entitled to get fees for attending the Board meetings or Committee meetings.

Section 309(2) states that directors can be paid remuneration by way of fee for each meeting of Board or Committee attended by him. *Proviso* to Section 310 provides that increase in sitting fees upto prescribed limit will not require approval of Central Government.

As per rule 10B of Companies General Rules (as amended on 24-7-2003), maximum sitting fees payable per meeting of Board of directors or its committee is as follows – (a) Rs. 20,000 if paid up capital plus free reserves are Rs 10 crore or more ***or*** turnover is Rs 50 crore or more [Since word used is '*or*', it is sufficient if one of the conditions is satisfied] (b) Rs 10,000 in other cases (i.e. company whose paid up capital plus free reserves is less than Rs 10 crores ***and*** turnover is less than Rs 50 crores). per meeting. Sitting fees more than Rs. 10,000/20,000 can be paid only with Government approval.

In addition, they are entitled to get reimbursement of all reasonable expenses incurred in attending the Board meeting, committee meetings and general meetings of company as per regulation 65(2)(a) as per model Articles Table A.

Expenses for Attending general meetings - Directors are not entitled to get sitting fees for attending general meetings but they can claim reimbursement of expenses incurred for attending general meeting as per regulation 65(2)(a) of model Articles as per Table A Articles. If company has not adopted Article A, directors will be entitled to get reimbursement of expenses in attending general meetings, if company has made provision in Articles similar to regulation 65(2)(a) of model Articles Table A.

Approval for payment of sitting fees - Sitting fee is part of managerial remuneration. *Proviso* to section 310(1) makes it clear that sitting fee is part of managerial remuneration. As per section 198(1), managerial remuneration is payable on basis of percentage of profit. However, section 198(2) provides that the percentage shall be exclusive of sitting fees. Thus, sitting fees can be paid to directors even if company is making losses.

Model Articles as per Table A do not make any specific provision in respect of sitting fee. Hence, it will be necessary either to amend the Articles or approve payment of sitting fees in general meeting by way of ordinary resolution (unless Articles of company require special resolution for approval of managerial remuneration). It is advisable that Articles are amended to provide that sitting fees upto to limit prescribed under Companies Act and rules/regulations made under the Act can be paid to directors, and sitting fees can be decided by Board within those limits. In such case, any further approval from shareholders is not required.

Approval in AGM not required for payment of sitting fees - As per clause 49I(B) of Listing Agreement, in case of listed company, managerial remuneration of non-executive directors should be fixed by Board and approved in general meeting. However, sitting fees paid to non-executive directors as authorized by the Companies Act, 1956 would not require the approval of shareholders – SEBI press release No. PR-182/2005 dated 30-12-2005 and circular dated 13-1-2006.

No sitting fee to MD/WD - A managing director or wholetime director who is getting remuneration as per schedule XIII, is not entitled to sitting fee - Department letter dated 18-8-1990. Even if sitting fee is paid, it will be treated as 'other allowance' and overall limit on salary will be subject to limit of managerial remuneration specified in schedule XIII.

Sitting fee and allowances for adjourned meeting – If meeting is adjourned for want of quorum, sitting fee is payable for adjourned Board meeting also, since fee and allowance is for 'attending' the meeting. Even if meeting was adjourned for want of quorum, it does not mean that the director did not attend the meeting – DCA circular No. 1 of 1972 dated 2-2-1972.

Ceiling of total managerial remuneration

4-4 The total managerial remuneration payable by a public company to its directors and manager shall not exceed 11% of net profits of that company, computed in accordance with sections 349 and 350, except that remuneration of the directors shall not be deducted from the gross profits. [section 198(1)]. Ceiling on remuneration payable to MD / WD together shall not exceed 5% if there is only one MD / WD. If there are more than one MD / WD, the remuneration shall not exceed 10% of net profits for all of them together.

Remuneration to non-executive (part-time) directors based on profits – In addition to sitting fees, the part time directors may be paid remuneration by way of share of 'net profit'. Such remuneration is payable only if there is provision in the Articles of the company or by a resolution in the general meeting. All the non-executive directors together can get remuneration either (a) on monthly / quarterly / yearly basis with approval of Central Government, *or* (b) by way of commission. Remuneration by way of commission is payable only when special resolution is passed.

The upper ceiling on such remuneration is as follows - (a) upto 1% of 'net profits', if the company has Managing Director, whole-time Director or Manager. (b) Upto 3% of 'net profits', if the company does not have any MD, Whole-time director or Manager. Remuneration in excess of 1% / 3% is payable only with approval of Central Government [section 309(4)]. This percentage is exclusive of sitting fees. [section 198(2)].

No remuneration free of income tax - Company cannot pay remuneration which is free of income tax, i.e. the remuneration is subject to income tax at the hands of the director. [section 200]

Following chart gives a summary of provisions at a glance.

Sl. No	*Person entitled to remuneration*	*Maximum % of net profit*
1.	For all Non-Executive Directors where the company has one or more Managing/Whole time Director or a Manager [proviso (i) to section 309(4)]	1%
2.	For all Non-Executive Directors where there is no Managing or Whole time Director or Manager [proviso (ii) to section 309(4)]	3%
3.	For Managing Director where there is only one Managing Director	5%
4.	For Whole time Director where there is only one Whole time Director	5%
5.	For all Managing Directors/Whole-time Directors where there is more than one Managing Director/Joint Managing Director/Deputy Managing Director or more than one whole time Director (to all managerial personnel put together should not exceed 10%) [Part II section I of Schedule XIII of Companies Act]	10%
6.	Manager (there cannot be more than one Manager) [Part II section I of Schedule XIII of Companies Act]	5%
7.	Total Managerial Remuneration to all Directors, Manag ing Directors/Whole time Directors/manager put together, excluding sitting fees [section 198]	11%

Managing and wholetime Director

5 The Board of Directors cannot look after day to day affairs of the company. They, therefore, appoint a Manager, Managing Director or wholetime Director to look after day to day affairs of the company. Such Manager, Managing Director or wholetime Director works under overall supervision and control of the Board of Directors.

Compulsory appointment in some cases - A company having paid-up share capital of Rs five crores or more must appoint a ‘Managerial Person’. ‘Managerial Person’ means a Managing Director, whole-time director or Manager. Appointment or re-appointment of any one of these ‘Managerial Person’ is enough. These provisions are applicable only to public company or a private company which is subsidiary of a public company [section 269(1)]. When his appointment or re-appointment is made, a return electronically in form 25C should be filed within 90 days with Registrar of Companies. [section 269(2)].

How MD acquires powers - As the aforesaid definition makes clear, the MD can acquire substantial powers by (a) Agreement with the company - naturally such agreement will have to be approved either in the general meeting or by Board of Directors (b) Resolution passed by a company in the general meeting (c) Resolution passed by Board of Directors or (d) Providing those powers in the Articles of the company itself. Model Articles in Table A do not provide any specific powers to Managing Director/Manager.

No approval or restrictions in case of private company - No approval of Central Government is necessary for appointment or re-appointment of a ‘Managerial Person’ of a private company which is not a subsidiary of a public company. In such companies, there are no restrictions regarding remuneration or terms and conditions, as per section 269(2).

Age Limit for appointment **-** A person can be appointed as 'Managerial Person' when he has attained age of 25 years but is less than 70 years of age. A person above 18 years but below 25 years or even a person who is over 70 years of age can be appointed as 'Managerial Person' by a special resolution passed by the company in general meeting. If such special resolution is passed, further approval from Central Government is not necessary. If special resolution is not passed, approval of Central Government is necessary. [Schedule XIII Part I].

Residential status of Managerial Person **-** Following person can be appointed as 'Managerial Person ' - * Resident of India * Person who has been staying in India for a continuous period of at least 12 months immediately preceding his appointment and who has come to stay in India for taking up employment or for carrying on business or vocation in India. If the person does not satisfy the criteria, approval of Central Government is required.

The aforesaid condition is not applicable for appointment of a non-resident as MD/WD in Special Economic Zone (SEZ). He should have a proper employment *visa* from Indian mission abroad and should furnish details of company, principal employer and terms of appointment along with visa application. In such case, approval of Central Government is not required. – GSR 670(E) dated 30-9-2002.

When approval of Central Government is necessary for appointing MD/WD **-** Appointment or re-appointment of 'Managerial Person' (Managing Director, Whole-time Director or Manager) requires approval only when the appointment or re-appointment is not according to terms and conditions specified in Schedule XIII. If the appointment or re-appointment is according to those terms, approval of Central Government is not necessary [section 269(2)].

Broadly, Approval or appointment of Managerial Person from Central Government is necessary only in following cases - (a) He has been convicted under economic offence (b) He has been detained under COFEPOSA (c) His age is over 18 but less than 25 or over 70 years of age and special resolution is not passed in the general meeting. (d) He is non-resident and was not staying in India for at least 12 months prior to his appointment. ***or*** (e) Remuneration proposed is more than the amount prescribed in Part II of Schedule XIII. *In all other cases, approval of Central Government is not necessary.*

Appointment of MD/Manager in more than two companies **-** Normally, a person is expected to be appointed as Managing Director/Manager in one company. However, if a person is appointed as MD/Manager in one company, he can be appointed as MD/Manager in another company. Such appointment has to be made or approved at a meeting of Board of Directors with the consent of all directors present. A specific notice of proposed resolution has to be given to all directors then in India [section 316(2) for appointment of MD and section 386(2) for appointment of Manager].

5-1 Appointment of MD/WD

Appointment and fixation of remuneration of a 'Managerial Person' (MD / WD / Manager) is subject to approval in the general meeting by ordinary resolution. [Schedule III Part III]. If such approval is not accorded in the first general meeting after his approval, he ceases to act as MD / WD / Manager. However, special resolution u/s 314 is not required, as appointment of MD / WD is not considered as a 'place of profit'.

Appointment of MD only five years at a time **-** A person can be appointed as 'Managing Director' only for five years at a time. He can be re-appointed, re-employed or his term may be extended, but only for five years at a time. Such re-appointment or extension cannot be sanctioned earlier than two years from the date when earlier appointment is expiring and new appointment will come into force, i.e. after three years of his initial appointment. [section 317]. This section does not apply to private company which is not a subsidiary of a public company. [section 317(4)].

This section mentions only Managing Director and not 'wholetime director'. However, as per definition of Managing Director in section 2(26), any director who is entrusted with substantial powers of management, by whatever name called, will be 'Managing Director'. Hence, it will not be proper to appoint a wholetime director for more than 5 years at a time. Even a director appointed as 'Manger' may come under definition of 'Managing Director'. In that case, he cannot be appointed for more than 5 years at a time.

5-2 Remuneration to MD/WD

Remuneration upto following limits can be paid to a Managerial Person (MD/WD/Manager). Remuneration above these limits require approval of Government. [section 310]. Remuneration of MD/WD/Manager can be increased by company within the ceilings prescribed. Remuneration above those limits require approval of Government. [section 311]. Provisions of remuneration to MD / WD are applicable to remuneration of Manager also. [section 387].

Part II of Schedule XIII contain guidelines for remuneration of MD/WD/Manager. If the remuneration is within these limits, approval of Central Government is not necessary.

Private company exempted - This provision is applicable only in respect of public company or a private company which is subsidiary of a public company. Thus, these provisions do not apply to a private company, which is not a subsidiary of a public company.

Remuneration when company is making profits **-** If the company is a profit making company, remuneration payable is 5% of net profits, calculated as per calculations under sections 198 & 309 of Companies Act. The remuneration may be by way of salary, Dearness allowance, perquisites, commission and other allowances. [The term 'perquisites' includes contribution to PF, superannuation fund, gratuity and encashment of leave as these have been clearly specified as 'perquisites' in section II, part II of schedule XIII].

If there are more than one MD/WD/Manager, total managerial remuneration shall not exceed 10% of net profits of the company. A MD/WD/Manager can draw remuneration from two companies, but total remuneration received by him shall not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

5-3 Minimum Remuneration when profit is inadequate or company is in loss

MD/WD/Manager is entitled to minimum remuneration if company is making losses or if the profit is inadequate. The ceiling on minimum remuneration has been prescribed in Part II of Schedule XIII. Company can pay remuneration to a MD/WD/Manager lower than the ceiling but not more. A person can draw remuneration from two companies, but total remuneration received by him shall not exceed the higher maximum limit admissible from any one of the companies of which he is a MD/WD/Manager.

If the requirements are not satisfied, approval of Central Government will be required to pay minimum remuneration to a MD/WD/Manager.

Basis of minimum remuneration - The remuneration is based on ‘effective capital’ of the company, and whether the remuneration is (a) approved by Remuneration Committee and passed as ordinary resolution in general meeting or (b) approved by remuneration committee and in general meeting by special resolution for period upto 3 years (c) approved by remuneration committee, special resolution in general meeting by special resolution for upto 3 years and approval by Central Government.

Normal Minimum Remuneration - The normal minimum remuneration that can be paid without approval of Central Government is as per the following slabs - (a) Effective capital less than Rs 1 crore - Maximum Remuneration Rs 75,000 per month. (b) Effective capital Rs 1 crore and above but less than Rs 5 crores - Maximum Remuneration Rs 1,00,000 per month. (c) Effective capital Rs 5 crores and above but less than Rs 25 crores - Maximum Remuneration Rs 1,25,000 per month. (d) Effective capital Rs 25 crores and above but less than Rs 50 crores - Maximum Remuneration Rs 1,50,000 per month (e) Effective capital Rs 50 crores and above but less than Rs 100 crores - Maximum Remuneration Rs 1,75,000 per month (f) Effective capital Rs 100 crores or more - 2,00,000 per month.

The conditions for payment of above remuneration are (a) The remuneration should be approved by Remuneration Committee of Board ***and*** (b) The company should not have made any default in repayment of any debts (including public deposits) or debentures or interest payable thereon for a continuous period of 30 days in the preceding financial year before the date of appointment of the managerial person. [In other words, a sick company which is in default in payment of interest or repayment of debt cannot pay any ‘minimum remuneration’ at all without approval of Central Government. – a very hard step indeed].

Higher i.e. upto double the normal remuneration with special resolution - The aforesaid ‘normal’ minimum remuneration in absence of profits can be increased upto double the amount, as per following higher slabs - (a) Effective capital less than Rs 1 crore - Maximum Remuneration Rs 1,50,000 per month. (b) Effective capital Rs 1 crore and above but less than Rs 5 crores - Maximum Remuneration Rs 2,00,000 per month. (c) Effective capital Rs 5 crores and above but less than Rs 25 crores - Maximum Remuneration Rs 2,50,000 per month. (d) Effective capital Rs 25 crores and above but less than Rs 50 crores - Maximum Remuneration Rs 3,00,000 per month (e) Effective capital Rs 50 crores and above but less than Rs 100 crores - Maximum Remuneration Rs 3,50,000 per month (f) Effective capital Rs 100 crores or more - 4,00,000 per month.

The conditions for payment of above i.e. upto double the normal minimum remuneration are (a) The remuneration should be approved by Remuneration Committee of Board ***and*** (b) The company should not have made any default in repayment of any debts (including public deposits) or debentures or interest payable thereon for a continuous period of 30 days in the preceding financial year before the date of appointment of the managerial person ***and*** (c) A special resolution should be passed in general meeting. [provisions of 'special resolution' and 'Remuneration Committee' are discussed later] ***and*** (d) Such special resolution cannot be passed for a period exceeding three years ***and*** (e) Required disclosures in the Corporate Governance Section of Directors Report, if Directors' Report has such a section.

Remuneration above double normal limit with Government approval - Minimum remuneration even higher than the aforesaid limits can be paid. The company has to comply with all the five conditions specified above, i.e. remuneration committee, no default in debt repayment and interest, special resolution for three years and disclosure in Corporate Governance Section of Directors' Report. ***In addition***, Central Government approval will be required. *However, such higher remuneration (i.e. more than double the normal remuneration) cannot be paid if the effective capital of the company is negative*. [There is drafting mistake in the Schedule, and exact intention is not clear].

Special provisions in respect of units in SEZ – Restrictions in respect of managerial remuneration under Companies Act have been relaxed in case of companies in Special Economic Zones. The remuneration can be upto Rs 20 lakhs per month (Rs 2.40 crores per annum) without approval of Central Government. The relaxation is applicable if (a) The company has not raised any money by public issue of shares or debentures in India. (b) The company has not made any default in India in repayment of any of its debts (including public deposits) or debentures or interest payable thereon for a continuous period of 30 days in any financial year. [GSR 565(E) dated 14-8-2002].

Perquisites allowable - In addition to above remuneration, a managerial person is entitled to following perquisites - (a) Contribution to Provident Fund, superannuation fund or annuity fund to the extent not taxable under Income-tax Act (b) Gratuity at rate not exceeding half month's salary for each completed year of service ***and*** (c) Leave encashment at the end of tenure.

Leave encashment - There are no provisions in respect of leave and encashment of leave. It is expected that the company will have standard rules in this regard applicable to all employees and the same will be applicable to the managerial person. Similarly, in case of foreign or NRI director, rules of LTC (Leave Travel Concession) framed by the company will be applicable.

Reimbursement of travel expenses after expiry of tenure - Though there is no provision for reimbursement of expenses of travel of MD / WDs, his family members and transportation of his personal luggage from his place of duty to his home town after expiry of his tenure, department has clarified that reimbursement of such expenses is permissible, if relevant travelling rules of company so provide. Approval of Central Government is not required - Circular No. 9/93 dated 28-7-1993.

No payment for past services - It has been clarified that no payment should be made to retired directors or managers for their past services - Department press note dated 9-8-1963.

Sitting fees within overall remuneration only - Managing Director / Wholetime directors are not entitled to sitting fees. If any sitting fee is paid, it will be treated as 'other allowances' and the overall managerial limit shall be including such sitting fees.

Special resolution of minimum remuneration above 'normal' limits – As explained above, minimum remuneration above 'normal remuneration' can be paid, for which approval in general meeting by special resolution is required. While sending notice of general meeting for purpose of passing a special resolution approving minimum remuneration, a statement giving prescribing information shall be sent. The prescribed details, in brief are – (a) General information about industry, financial performance, export performance (b) Information about appointee about his background, past remuneration, job profile, pecuniary relationship with company, remuneration proposed (c) Reasons for loss or inadequate profits and steps taken for improvement and expected profits (d) Disclosure of remuneration package.

Disclosure in Directors report if remuneration above normal remuneration - In addition to the prescribed disclosures in notice to shareholders, specified disclosures should be made in Directors' Report in the section on 'Corporate Governance'.

5-4 Company Secretary

Every company having prescribed paid-up share capital (presently prescribed as Rs two crores w.e.f. 11-6-2002) must appoint a whole-time Secretary. [section 383A(1)].

Where the appointment is compulsory based on paid-up share capital, the Secretary must be a member of the Institute of Company Secretaries of India [ICSI]. He should be wholetime Secretary. A person can be whole-time Secretary of only one company at a time.

Penalty for not appointing qualified Secretary is Rs 500 per day, payable by every officer who is in default. No penalty will be imposed if company proves that (a) It took all reasonable efforts to comply with the requirement of appointing a whole-time Secretary, but could not appoint one *or* (b) It is beyond the financial capacity of the company to engage a full time Secretary. [section 383(1A)].

Companies having less than prescribed capital for compulsory appointment of Secretary can also appoint a secretary. Such appointment is optional.

6 Contracts in which directors are interested

Since directors in nature of trustees of company, restrictions have been placed in respect of contracts in which directors are interested.

Restrictions on loans to directors - There are prohibitions in granting loans or giving guarantees or providing security to directors directly or indirectly, without previous approval of Central Government. [section 295].

Sanction of Board essential when director is interested in a contract - If a director is interested in a particular contract, the contract cannot be entered into unless it is approved in the meeting of Board of Directors. [section 297].

This provision is applicable when the contract is with * Director * Relative of Director * Firm in which the director or his relative is partner * Any other partner in the firm in which the director is partner * Any private company of which the director is a member or director. Thus, if the company is entering into contract with another public limited company this section is not applicable ! {*good and useful loophole*}. The consent must be obtained in the Board meeting and not otherwise. i.e. circular resolution is not permissible to approve the contract or arrangement. [section 297(4)].

The section is not applicable in following situations - (a) Purchase or sale of goods and materials for cash at prevailing market prices *or* (b) Purchase of goods when such director/his relative/firm/partner/private company regularly deals or trades in that product, provided that the value of goods or services is Rs 5,000 or less than Rs 5,000 *or* (c) In the case of transaction of any banking or insurance company in the ordinary course of business. [section 297(2)].

If the contract is for more than Rs 5,000 in a year, it is enough if contract is entered into in case of urgent necessity and consent of Board is obtained within 3 months. [section 297(3)].

However, if such consent is not accorded by Board within 3 months, anything done in pursuance of contract is voidable at the option of the Board. [section 297(5)]. Thus, the contract is valid till it is voided by the Board.

Non-applicability of section 297 – Section 297 is applicable when the contract is (a) for sale, purchase or supply of any goods, material or services *or* (b) for underwriting the subscription of any shares or debentures to be issued by the company. Thus, section 297 is not applicable for contracts other than these contracts, e.g. section 297 is not applicable to following contracts -

- Giving or taking loans
- Contract in respect of immovable property (as it is not 'goods') – DCA letter No. 9/41/90-CL-X dated 27-3-1990.
- Contract between two public companies.
- Contracts between A Ltd. and B Pvt. Ltd. where directors of A Ltd. are not members or directors of B Pvt. Ltd. , but only relatives of directors of A Ltd. are members/directors of B Pvt. Ltd.
- Hiring of office premises on rent as the transaction is in immovable property - Department clarification dated 10.9.1990 - CS October, 1990 page 877.
- Contract for professional services [As per DCA circular No. 8/11/75-CL-V dated 5-6-1975 (No. 13 of 75), services of advocates and solicitors are obtained on basis of professional expertise and not on tender basis. Such services cannot be bracketed with supply of goods and materials. - - This principle should equally apply to professional services like accounting, management, taxation, valuation etc., if provided by qualified professionals]

- Employment of MD/WD, since supply of service s not the same as 'rendering of personal service' [DCA circular No. 8/11/75-CL-V dated 5-6-1975 (No. 13 of 75)].
- Contract for employment of relative of director [see note below]

Contract for employment is not contract for services – There is distinction between 'contract of service' and 'contract for service'. The employment is 'contract of service' and hence not covered u/s 297. However, provisions of section 299 and 314 will apply.

Previous approval of Central government if paid up capital exceeds Rs one crore - If the paid up capital of company is Rs one crore or more, ***previous approval*** of Central Government is necessary. [proviso to section 297(1)]. The powers have been delegated to Regional Director. Application should be made electronically in e-form 24A.

6-1 Disclosure of interest in contract or arrangement

A director must disclose his interest or concern in any contract or arrangement or any proposed contract or arrangement by or on behalf of the company. Such interest should be disclosed to Board of Directors. [section 299(1)]. If the contract or arrangement is between companies, i.e. the company in which the person is director and the other company, the director is deemed to be interested in the contract only if he singly, or along with other directors, hold 2% or more shares in other company. [section 299(6)]. While calculating the 2% shares in other company, only investment of directors is considered. Investment of his relatives is not to be considered.

If the director is a partner in any firm, the provisions in respect of interest apply irrespective of the investment of the director in the firm or the ratio of profit in such partnership firm, i.e. even if his share of profit is less than 2% in partnership firm, or his investment is less than 2% in the firm, he is regarded as interested in the contract with that partnership firm.

6-2 Restrictions on holding office of profit by director or his relative / partner etc

Section 314 provides for restrictions on holding office or place of profit by director or his relative or firm in which he is partner etc. Provisions of sections 297 and 299 (in respect of disclosure of interest, etc. will also have to be complied with.

Approval in general meeting to appoint director to hold place of profit - A director cannot hold office of profit in the company without approval in general meeting by a special resolution, irrespective of the quantum of remuneration drawn.

Approval in general meeting in certain cases - Following persons cannot hold office of profit in the company without approval in general meeting by a special resolution, if the total monthly remuneration is Rs 10,000 or more - # Director [The lower ceiling of Rs 10,000 does not apply to director. Thus, a director cannot hold office of profit, irrespective of remuneration drawn by him] # Partner or relative of *such* director # Firm in which such director or his relative is a partner # Private company in which the director is a director or member # Director or manager of such private company (i.e. director or manager of the private company in which the director of company is a member or director). [section 314(1)(b)]. [The provision does not apply if the person is director in a public limited company. Thus, the section can be overcome by the director forming a limited company instead of a private limited company. For example, 'X' is director of company 'A'. He is also director in company 'B'. Now, if 'B' is a private company, that private company cannot hold office or place of profit in A company. However, if 'B' is a public company, the 'B' company can hold office or place of profit in the 'A' company. Good loophole !]

Provision applies only in cases where director himself is holding place of profit - In *AR Sundaram* v. *The Madras Purasawal Kam Hindu Nidhi Ltd.* (1987) Comp LJ 402 = 57 Comp Cas 776 (Mad), it was held that section 314(1) applies only to a partner or relative of a director who is holding some office of profit, in view of the term used *'such* director' in section 314(1)(b). In other words, restriction of section 314 in respect of appointment of partner or relative apply only when the director himself is holding office of profit. Thus, section 314(1) does not apply where relative, partner etc. of an ordinary sitting director (i.e. director who does not hold office of profit) holds an office or place of profit in the company.

Since post of MD/WD is not considered a 'place of profit', this section should not apply where relative or partner of MD/WD is to be appointed.

Further, if remuneration is Rs 20,000 or more, special resolution and approval of Central Government will be required u/s 314(1B).

Restriction does not apply if person was already employed - The restriction is not applicable if the relative of director or firm in which such relative is a partner, holds office of profit before the director becomes director of the company. [section 314(1A)].

Restrictions apply to appointment in subsidiary company also - The restrictions are applicable in respect of office of profit held in the company or in its subsidiary company.

Provision does not apply to appointment of MD, WD, manager, banker or trustee - The restrictions do not apply to appointment of managing director, manager, banker or trustee for the holders of debentures of the company, either under the company or under subsidiary of such company. [section 314(1)].

Provision does not apply to appointment of wholetime director - The section does not make specific provision in respect of appointment of relative/partner of director as a whole-time director (WD). However, department has clarified that section 314(1) only precludes a director to hold office or place of profit other than a 'director'. The restriction u/s 314(3)(a) is not applicable to remuneration drawn by a person as director. Hence, the restrictions u/s 314 *do not* apply to appointment of whole-time director. - circular No. 4/76 dated 11-2-1976. Department, vide further letter dated 29-5-1989 to Thane Manufacturers' Association, has confirmed that section 314(1) does not apply for appointment of relative of a director as a whole time director.

No restriction in appointing director as solicitor or advocate - Provisions of section 314(1B) do not apply for appointment of solicitors and advocates, as the advocate or solicitor appears before Court as an officer of court in pleading cause of justice. Receiving fees on this account cannot lead to an inference of an office or place of profit u/s 314. However, if such solicitor/advocate is appointed on a regular basis for rendering legal advice other than appearance in Courts, provisions of section 314 will be applicable. – DCA circular No. 14/75 dated 5-6-1975.

Not applicable to director appointed by Central Government u/s 408 - Provisions of section 314 are not applicable if a person who is holding office of profit in the company, is appointed as director by Central Government under section 408.

Central Govt. approval if remuneration is above prescribed limits - If the remuneration is not less that the sum prescribed, prior consent of members by a special resolution and approval of Central Government is necessary. [section 314(1B)]. The sum prescribed is Rs 20,000, vide rule 10C(2) of Companies (Central Government) General Rules & Forms.

This provision applies to following –

- Partner or relative of a director or manager
- Firm in which such director or manager, or relative of either, is a partner
- Private company of which such a director or manager, or relative of either, is a director or member.

Procedure for obtaining approval - Application for his appointment should be made in Form No 24B. Since the term used is ‘approval’ and not ‘prior approval’, it can be argued that application for approval to Central Government can be made even after appointment.

Special procedure if monthly remuneration exceeds Rs 50,000 – Special procedure has been prescribed vide Director’s Relatives (Office or Place of Profit) Rules, 2003. The procedure applies if monthly remuneration exceeds Rs 50,000.

Is Government approval required if remuneration is between Rs 20,000 to Rs 50,000? – Section 314(1B) read with rule 10C(2) requires approval of Central Government if remuneration is Rs 20,000 or more, while Director’s Relatives (Office or Place of Profit) Rules, 2003 prescribes procedure only when remuneration exceeds Rs 50,000. The question is whether Government approval is required when remuneration is between Rs 20,000 to Rs 50,000. It can be argued that the limit of Rs 20,000 [prescribed in Rule 10C(2)] has been impliedly repealed by 2003 Rules and approval of Central Government is not required. Another interpretation is that approval is required, but the special procedure prescribed in Director’s Relatives (Office or Place of Profit) Rules, 2003 is not to be followed when remuneration is between Rs 20,000 to Rs 50,000. The later view is a safe view and I would support that view. In any case, special resolution will have to be passed u/s 314(1), but that can be done at first AGM after appointment, while section 314(1B) requires *prior* consent in general meeting.

7 Annual Accounts and Annual General Meeting

Every company must keep proper books of account on accrual basis as per Accounting Standards. Every company is required to prepare a balance sheet at the end of ‘financial year’ and profit and loss account for the period of ‘financial year’. In case of company not carrying on business for profit, it will prepare ‘Income & Expenditure Account’ instead of ‘Profit & Loss’ account. The duty audited annual accounts should be presented at the annual general meeting (AGM) of members. [section 210(1)]. Annual accounts should be accompanied by report of Board of Directors.

The annual accounts must be presented within 6 months from close of ‘financial year’. This period can be extended by further 3 months (i.e. total 9 months) by Registrar of Companies.

Requirements and presentation of accounts - The balance sheet and P&L account has to be prepared as per requirements in Schedule VI to Companies Act. [given later]. The details required may be given in the form of notes.

Financial Year - A 'financial year' of a company can be less or more than 12 months, but the 'financial year' cannot be for more than 15 months. The 'financial year' can be extended to 18 months by obtaining special permission from Registrar of Companies. [section 210]. Application for extending the period of annual accounts upto 18 months should be submitted electronically in e-form No. 61.

Income Tax Act requires that all companies must submit their income-tax returns on the basis of 'Uniform Financial Year' closing on 31st March every year. All companies have to prepare their accounts for income tax purposes on 31st March every year. Hence, now most of the companies close their accounting year on 31st March, both for income-tax purposes as well as for Companies Act purposes. This avoids duplication of work. Hence, last date of holding AGM is usually 30th September. **4 *Authentication of the balance sheet & P&L account -*** Every balance sheet and P&L account of the company shall be signed, on behalf of the Board, by Manager or Secretary and at least two directors of the company. One of the directors should be Managing Director if the company has one. [section 215(1)(ii)]. If there is only one director available in India, he can sign the account with a statement giving reasons why two directors have not signed the accounts. [section 215(2)].

7.1 Normal schedule of accounts and AGM

Activity	**Target date**
Preparation of accounts and checking by auditors	X-60
Checking of accounts by auditors	X-35
Board meeting for approval of accounts, approve Board report, declaration of dividend, fixing dates of book closure	X-30
Information to stock exchange about accounts, book closure and proposed dividend	X-30
Printing of balance sheet, Board Report, Notice of AGM	X-25
Posting of notice, annual accounts to members, stock exchange	X-23
Inform stock exchange if bonus or dividend is proposed	X-7
Notice of book closure – usually starts earlier and ends on date of AGM	X-7
Finalise speech of Chairman	X-3
AGM ('X' is latest by 30th September if accounts closed on 31st March)	X
Inform stock exchange	X
Transfer amount of dividend to separate account	X+5
Post Dividend Warrants	X+15
Credit ECS accounts with dividend where facility is available	X+30
Filing of special resolutions passed and Annual Accounts	X+30
Filing of Secretarial Compliance Certificate (if applicable)	X+30
Signing of minutes of AGM by Chairman	X+30
Filing Annual Return to ROC electronically with e-form 20B	X+60

7-2 Accounts as per Accounting Standards

Accounting Standards have been notified *vide* Companies (Accounting Standards) Rules, 2006 on 7-12-2006. AS1 to AS-7 and AS-9 to AS-29 have been notified. Earlier**,** Institute of Chartered Accountants of India (ICAI) had issued various accounting standards. All of these standards have been reproduced almost verbatim in the Rules notified by Central Government on 7-12-2006.

The standards are as follows -

AS 1	Disclosure of Accounting Policies – w.e.f. 1-4-1991 for companies and 1-4-1993 for others (Original was effective from November 1979)
AS 2	Valuation of Inventories [Revised w.e.f. 1.4.1999] (Original in June 1981)

AS-3	Cash flow statement – It is made mandatory w.e.f. 1.4.2001 for listed companies and all other commercial enterprises whose turnover exceeds Rs 50 crores. [Though it is mandatory, it is not a 'specified accounting standard', as it is not with reference to P&L account or balance sheet].
AS 4	Contingencies and Events occurring after the Balance Sheet date – mandatory w.e.f. 1-4-1995. After coming into force of AS-29 w.e.f. 1-4-2004, paragraphs in AS-4 'contingencies and events occurring after balance sheet date' stand withdrawn. However, aspects of impairment of assets will continue (original November 1982).
AS 5	Net profit or loss for the period, Prior period and extraordinary items and changes in Accounting Policies – mandatory w.e.f. 1-4-1996 (Original November 1982)
AS 6	Depreciation Accounting – mandatory w.e.f. 1-4-1995 (Original November 1982)
AS 7	Accounting for construction contracts - Revised - mandatory w.e.f. 1-4-2003] (Original December 1983)
AS 8	[now withdrawn as AS-26 has become mandatory – earlier it was Accounting for Research & Development]
AS 9	Revenue Recognition – mandatory w.e.f. 1-4-1991 for companies and 1-4-1993 for others
AS 10	Accounting for Fixed Assets – mandatory w.e.f. 1-4-1991 for companies and 1-4-1993 for others
AS 11	Accounting for effects of changes in Foreign Exchange rates –Revised AS-11 will be mandatory from 1-4-2004 [Earlier was mandatory from 1-4-1995 to 31-3-2003] (Original June 1989) The standard does not apply to forward contracts taken to hedge foreign currency risks of a firm commitment or a highly probable forecast transaction.
AS 12	Accounting for Government Grants and Disclosure of Government Assistance– mandatory w.e.f. 1-4-1994
AS 13	Accounting for Investments – mandatory w.e.f. 1-4-1995
AS 14	Accounting for Amalgamations – mandatory w.e.f. 1-4-1995 (limited revision in February 2004)
AS 15	Accounting for retirement benefits in the financial statements of Employers – mandatory w.e.f. 1-4-1995
AS 16	Borrowing Costs - mandatory w.e.f. 1-4-2000.
AS 17	Segment reporting – The standard requires that information should cover at least 75% of total enterprise revenue in group business in different business and geographical segments. It is made mandatory w.e.f. 1.4.2001 for listed companies and all other commercial enterprises whose turnover exceeds Rs 50 crores (modified in November 2003).
AS-18	Related Party Disclosures – It is mandatory w.e.f. 1.4.2001 to all listed companies and other enterprises whose turnover exceeds Rs 50 crores (modified in November 2003).
AS-19	Leases – mandatory in respect of all assets leased on or after 1-4-2001 (modified in November 2003).

AS-20	Earning Per Share (EPS) - mandatory w.e.f. 1.4.2001 (modified in November 2003, limited revision in Feb 2004).
AS-21	Consolidated Financial Statement – mandatory w.e.f. 1.4.2001. It is applicable only to those enterprises which want to present consolidated financial statement. [Note that under Company Law, presenting consolidated financial statement is not required. It can only be given voluntarily as additional information].
AS-22	Accounting for deferred taxes – It is mandatory w.e.f. 1.4.2001. For non-corporate enterprises, it is mandatory w.e.f. 1-4-2006.
AS-23	Accounting for investments in Associates in consolidated Financial Statements – It is mandatory in respect of accounting periods commencing on or after 1-4-2002. It is mandatory only if an enterprise presents consolidated financial statements.
AS-24	Discontinuing Operations – It is mandatory w.e.f. 1-4-2004 to all listed companies and other enterprises whose turnover exceeds Rs 50 crores and for other enterprises, it will be mandatory from 1-4-2005 (modified in November 2003).
AS-25	Interim Financial Reporting – applicable to any enterprise which is required or elects to present Interim Financial Report (IFR). It is mandatory for all accounting periods commencing on or after 1-4-2002 (limited revision in February 2004).
AS-26	Intangible Assets - mandatory and applies to all listed companies and other enterprises whose turnover exceeds Rs 50 crores in respect of accounting period commencing on or after 1-4-2003 and for other enterprises, for accounting period commencing on of after 1-4-2004. [After AS-26 becomes mandatory, AS-8 will be withdrawn].
AS-27	Financial reporting of interest in joint ventures. It is mandatory in respect of accounting period commencing on or after 1-4-2002 (limited revision in February 2004).
AS-28	Impairment of Assets – effective from 1-4-2004 and applies to all listed companies and other enterprises whose turnover exceeds Rs 50 crores and for other enterprises, it is mandatory from 1-4-2005. In small enterprises, its applicability will be from 1-4-06 to 1-4-2008 (modified in November 2003).
AS-29	Provisions, contingent liabilities and contingent assets, effective from 1-4-2004

The effective dates indicated are as per ICAI announcements. Now, w.e.f. 7-12-2006 they have become mandatory as per Rules notified by Central Government. All the aforesaid standards are 'specified accounting standards', except AS-3 and AS-25, as these are not with reference to P&L account or balance sheet.

Relaxations to small and medium sized companies – SMC means a company * which is not listed * which is not a bank, FI or an insurance company * turnover (excluding other income) is less than Rs 50 crores in preceding accounting year * Borrowings (including public deposits) do not exceed Rs 10 crores * Which is not holding or subsidiary of a large company. In case of small and medium sized enterprises, AS-3, AS-17, AS-18 and AS-24 will not apply. Relaxations form some clauses of AS-19, AS-20 and AS-29 have been given.

If SMC does not disclose certain information pursuant to relaxation or exemption, this should be disclosed by way of a note. However, it can voluntarily comply with some of the standards even where relaxation/exemption is available.

7-3 Audit of accounts by auditor

A person who is a Chartered Accountant within the meaning of Chartered Accountants Act can only be appointed as an auditor. A firm of Chartered Accountants can be appointed as auditors, but all partners of the firm must be Chartered Accountants. The Chartered Accountant must hold a 'Certificate of Practice' issued by Institute of Chartered Accountants of India. [section 226(1)].

An auditor is appointed at the annual general meeting. He holds office from conclusion of that meeting till the conclusion of next annual general meeting. After his appointment, company must inform him of his appointment within seven days. [section 224(1)]. The auditor, in turn, should inform in writing to the Registrar of Companies within 30 days from receipt of intimation from the company, whether he has accepted or refused to accept the appointment. [section 224(1A)]. Appointment of auditor for more than one financial year at a time is not permissible, though same person can be re-appointed.

Disqualifications of Auditors - Following person/s cannot be appointed as Auditor/s, even if he/they are chartered accountants –

- A body corporate [section 226(3)(a)].
- An officer or employee of the company [section 226(3)(b)].
- A person who is in employment of an officer or employee of the company [section 226(3)(c)].
- A person who is a partner of an officer or employee of the company [section 226(3)(c)].
- A person who is indebted to company for more than Rs 1,000 [section 226(3)(d)].
- A person who has given any guarantee or security in connection with indebtedness of any third person to the company for amount exceeding Rs 1,000. [section 226(3)(d)].
- A person who holds any security of the company, which carries voting rights. [Thus, holding of security which does not carry any voting right is not a disqualification. Further, there is no restriction if security is held in name of wife or other relative]. [section 226(3)(e)].
- If a person is disqualified to be auditor under any of the aforesaid clause, he will also be disqualified to be auditor of subsidiary or holding company of that company or subsidiary of that company's holding company. [section 226(4)]
- An auditor has restrictions on number of audits he can accept. He cannot accept audits beyond prescribed limit on number of audits. [section 224(1B)]

If a person becomes disqualified after his appointment, he shall be deemed to have vacated his office. [section 226(5)].

As per Chartered Accountants Act, a member is disqualified if (a) he ceases to be a member of the Institute (b) His certificate of practice is cancelled (c) He is adjudged as having unsound mind (d) He is un-discharged insolvent.

Limit on number of audits - Limit on number of audits is 20 companies per Chartered Accountant, out of which only 10 companies can be having share capital of Rs 25 lakhs or more. In other words, an Auditor can audit maximum 10 companies which are having paid up share capital of Rs 25 lakhs or more and remaining companies may have paid up capital less than Rs 25 lakhs. [*Explanation* I to section 224]. The restriction does not apply to a private company. [Fourth proviso to section 224(1B)]. As per ICAI notification dated 8.5.2001, a Chartered Accountant can accept maximum 30 audit assignments including audits of private companies.

7-4 Requirements of Report of Board

The Annual Accounts of company must be accompanied by a report of Board of Directors. The report of Board of Directors shall be in respect of following -

Section No.	Details
212(3)	Statement of holding Company's interest in the subsidiary – It may be given separately or as part of Directors' Report
217(1)(a)	State of the company's affairs

217(1)(b)	Amount proposed to be carried to any reserves in the balance sheet i.e. appropriation of profits to reserve.
217(1)(c)	Amount recommended to be paid to share holders as dividend.
217(1)(d)	Material changes and comments, if any, affecting the financial position of the company occurred after the close of financial year and the date of report of Board of Directors [called 'events after balance sheet'].
217(1)(e)	Conservation of energy, technology absorption, foreign exchange earnings and outgo. These details should be submitted in prescribed form.
217(2)	Changes during financial year.
217(2A)	Statement giving details of employees whose salaries are beyond prescribed limit – presently Rs 2 lakhs per month or Rs 24 lakhs per annum.
217(3)	Fullest information and explanations about every reservation, qualification or adverse remarks in the auditors' report.
217(2B)	If company had entered into 'buy back' of shares as per approval of members, and if buy-back was not completed within specified time, Board should specify reasons for the failure. [section 77A]
217(2AA)	Directors' Responsibility Statement.
292A	Reasons for not accepting report of Audit Committee formed u/s 292A (If applicable)
292A(4)	Composition of Audit Committee – It may be given separately or as part of Directors' Report or as part of Corporate Governance Report
383A(1) *proviso*	Secretarial Compliance Certificate (if applicable) should be attached to the report of Board.
	Number of meetings of Board and Committees held during the year and meetings attended by each director [This is suggested as per Secretarial Standard (SS-1) of ICSI. The standard is presently only recommendatory in nature].
SEBI	Details of sweat equity shares issued, ESOP and ESPS
SEBI	Requirements as per stock exchange agreement in case of listed companies, as per SEBI guidelines

Signing of report of Board of Directors - Report of Board of Directors has to be approved in the meeting of Board. The Board can authorise any director to sign the report on its behalf. Usually, Chairman of the company or Chairman of the meeting or Managing Director is authorised to sign the report of Board of Directors.

7-5 Details in Board report as required under listing agreement

Listing agreement requires following disclosures/information in annual accounts. This obviously applies only to listed companies.

Compliance Report on Corporate Governance - Detailed compliance report on corporate governance should be given [clause 49VI(i) of Listing Agreement]. Non-compliance of any mandatory requirement with reasons and extent of deviation should be specifically highlighted - - In addition to disclosures as specified in clause 49 of Listing Agreement, disclosures should be made in Directors' Report in the section on 'Corporate Governance', if company intends to pay minimum remuneration to the managerial personnel in case of inadequacy of profits [See Part II, Section II of Schedule XIII to Companies Act]

Compliance certificate regarding corporate governance - Compliance Certificate from auditors/practising company secretary regarding compliance of conditions of Corporate Governance. This certificate should be annexed to Directors' Report [clause 49VII(1) of Listing Agreement]

Disclosure of remuneration to non-executive directors - Disclosure of remuneration to non-executive directors and pecuniary relationships or transactions with company, as required in clause 49(IVE) of listing agreement.

Management discussion and analysis - Management discussion and analysis report as required in clause 49(IVF) of listing agreement.

Affirmation about compliance to code of conduct - Declaration by CEO in Annual Report that Board Members and senior management have affirmed their compliance to Code of Conduct laid down by Board [clause 49I(D) of Listing Agreement].

Deviations in projected utilisation and actual utilisation of funds - If company had raised funds by issue of prospectus, the director's report should explain deviations in projected utilisation of funds and actual utilisation [clause 43 of Listing Agreement].

Cash flow statement - A cash flow statement along with balance sheet is to be given by listed companies. The cash flow statement will be prepared as per ICAI accounting standard AS-3, under indirect method as given in AS-3. - - Consolidated financial statements shall be published in the annual report in addition to the individual financial statements. These will have to be audited by statutory auditors and filed with stock exchange. Disclosures as per 'Related Party Disclosures' Accounting standard shall be made in Annual Report. It also has to make disclosure about loans/advances and investments in its own shares by subsidiaries, associates etc. Both parent and subsidiary company has to make the disclosure [Clause 32 of Listing Agreement].

Deviations from accounting standards - If company has deviated from accounting standards, reasons for same and justification why alternate treatment is more representative for true and fair view of underlying business transaction [clause 49(IVB) of Listing Agreement].

Details of ESOS/ESPS - If company has implemented Employees Stock Option Scheme (ESOS) or Employees Stock Purchase Scheme (ESPS), details about the same should be given as given in SEBI (Employee Stock Option Scheme and Employee Stock Purchase Scheme) Guidelines, 1999.

Details if name was changed - If company has changed name suggesting new line of business (including software business), turnover and income from such activity shall be disclosed separately in annual results.

Details if issue of security was made - If company has made issue of security, company in its balance sheet should give details of utilisation of money received under promoters' contribution and from allotments and reservations, indicating purpose for which it is utilised. If funds were unutilised, form in which it has been invested should be disclosed [para 6.5.7.2 of SEBI(DTP) Guidelines, 2000 [The details may be given in Corporate Governance Section or in Cash Flow Statement]

7-6 Cost Records and Cost Audit

Section 209(1)(d) makes it compulsory for certain class of companies specified by Central Government, engaged in production, manufacturing or mining activity to maintain cost records pertaining to utilisation of material and labour and other items of cost. Under these powers, Central Government has issued Cost Accounting Record Rules for maintenance of cost records, in respect of various types of industries. 41 industries for which Cost Accounting Record Rules have been prescribed are –

(1) Aluminium (2) Batteries other than dry cell batteries (3) Bearings (4) Bulk drugs (5) Cement (6) Chemical Industry (44 specified chemicals) (7) Cosmetics and toiletries (8) Cycles (9) Dry battery cell (10) Dyes

(11) Electric cables and conductors (12) Electric lamps # Electric fans # Electric motors (13) Electric Industry (14) Electronic Products (Consumer Electronics, Industrial Electronics, Computers and peripherals, communication and broadcasting equipment etc.) (15) Engineering industries (namely power driven pumps and diesel pumps, automotive parts and accessories, electric generator, power transformers, machine tools, IC engines etc.) (16) Fertilizers (17) Footwear (18) Formulations (All formulations under any system of medicine) (19) Industrial Alcohol (20) Industrial gases

(21) Insecticide (22) Jute goods (23) Milk Food (24) Mining and metallurgy – 14

metals and non-metals, ores and alloys are covered (25) Motor Vehicles (including tractors and heavy earth moving equipment) (26) Nylon (27) Paper (28) Petroleum Industry (29) Plantation (tea, coffee and other commercial plantation) (30) Rayon

(31) Refrigerators (32) Room air conditioners (33) Rubber tyres and tubes (34) Shaving systems (35) Soaps & detergents (36) Steel Plant – Production, processing or manufacture of steel and allied products (37) Steel tubes and pipes (38) Sugar (39) Telecommunication Industry (40) Textiles (cotton / art silk / rayon / wool - yarn / cloth) (41) Vanaspati

Cost audit of cost records of companies is to be conducted if order is issued by Central Government u/s 233B.

Small Scale Industries as defined under IDR Act and Companies whose aggregate value of turnover of company of all its products is less than Rs 10 crores - are exempt from provision of compulsory maintenance of cost records.

8 Some special types of companies

A company be public or private. A public company can be listed or unlisted. Company incorporated abroad is 'foreign company'. Companies Act also makes special provisions for Government companies and nidhi companies. A 'producer company' which is substitute for Multi-State Cooperative Society can also be formed.

8-1 Private company

A private company is generally considered as a 'glorified partnership', formed as a company, mainly to get benefit of 'limited liability' and easy transferability of interests in the company. It has limited restrictions, regulations and controls compared to a public company. It is a blend of partnership and a limited liability body corporate. It enjoys advantages and benefits of both, i.e. it maintains close control within a small group, and at the same time enjoys the advantage of corporate entity and limited liability. Distinctions between private company and public company are given below.

Section No.	Private Company	Public company
3(1)((iii)(a)	Must restrict transfer of shares and can refuse transfer as provided in Articles	Cannot restrict transfer of shares. It can refuse transfer only when it is against any law e.g. Companies Act, SEBI, FEMA, SICA etc.
3(1)(iii) and 3(1)(iv)(b)	Minimum paid up capital of Rs one lakh	Minimum Paid up capital Rs five lakhs
3(1)(iii)(c)	Cannot invite public to subscribe for shares or debentures	Can invite public to subscribe for shares or debentures
3(1)(iii)(d)	Can accept deposit only from members, directors or their relatives	Can accept public deposits subject to restrictions u/s 58A
3(1)(Iv)(c)	It cannot be subsidiary of a public company, as in such case, it will become a public company u/s 3(1)(iv)(c)]	It can be subsidiary of another public/private company
12(1)	Minimum 2 members,	Minimum 7 members,

	maximum 50.	no limit on maximum members
13(1)(a)	Should contain words ‘Private Limited’ at the end of its name	Should contain words ‘Public Limited’ at the end of its name
69(1)	Restrictions in respect of minimum subscription for allotment do not apply	Restrictions in respect of minimum subscription for allotment apply in case of first public issue
70(3)	Statement in lieu of prospectus not required even for first issue	Statement in lieu of prospectus required for first issue after incorporation
77(2)	Financial assistance can be given for purchase or subscribing for shares of company or its holding company.	Financial assistance cannot be given for purchase or subscribing for shares of company or its holding company.
81(3)	Further issues are not required to be right issues to existing shareholders	Further issues should be rights issues to existing shareholders, unless special resolution is passed
90	Can issue any type of shares having varying and disproportionate rights in respect of voting/dividend	Can issue only equity and preference shares and shares with differential rights
111(3)	Can restrict transfer of shares	Shares freely transferable u/s 111A except when against any law.
149(7)	Does not require certificate to commence business after incorporation	Requires certificate to commence business after incorporation
165(10)	Statutory meeting and statutory report is not required	Statutory meeting and statutory report is mandatory
170(1)	Articles can provide for meeting of AGM with short notice and that explanatory statement need not be attached to notice	Articles cannot provide for meeting of AGM with short notice. Explanatory statement must be attached to notice and no relaxation can be given
174(1)	Quorum of two members personally present at general meeting is sufficient	Quorum of five members personally present at general meeting is required
192A	Postal ballot is never required	Listed company has to pass certain resolutions only by postal ballot
204(6)	A firm or body corporate can be appointed to an office or place of profit under the company	A firm or body corporate cannot be appointed to an office or place of profit under the company
220(1) proviso	Balance sheet can be inspected by any	Both Balance Sheet and P&L is a public

	person but only member can inspect P&L account of company in office of ROC u/s 610.	document and can be inspected at office of ROC u/s 610.
252(2)	Minimum 2 directors	Minimum 3 directors
255 and 256	Directors not required to retire by rotation. Notice not required for standing for election.	At list two-third directors have to retire by rotation. Notice not required for standing for election.
263(1)	All directors can be appointed by single resolution.	Each director should be appointed by individual resolution.
264(3)	Filing of consent to act as director with ROC not required.	Filing of consent to act as director with ROC is required.
266	Restrictions on appointment or advertisement as director without filing his consent not applicable.	Restrictions on appointment or advertisement as director without filing his consent with ROC applicable
269, 309, 310, 311	No restriction on managerial remuneration	There are restriction on managerial remuneration
273	Qualification shares not required	Provisions relating to qualification shares apply, if Articles provide.
274(1)(g)	Director not disqualified even if company does not file annual accounts or annual report for three years or fails to repay deposit or its interest on due date.	Director are disqualified if company does not file annual accounts or annual report for three years or fails to repay deposit or its interest on due date.
274(3) and 283	Additional grounds for disqualification or vacation of office of director can be provided in Articles.	Additional grounds for disqualification or vacation of office of director cannot be provided in Articles
278	Directorships in private company is not counted for the limit of 15 directorships	A person cannot be director in more than 15 public limited companies.
292A	Audit committee is not required	Audit committee required if paid up capital Rs five crore or more.
293	No restrictions on power of Board regarding selling, leasing, remitting or giving time for payments of debts, investing or borrowing moneys, donations to charities or political parties etc.	Restrictions apply on power of Board regarding selling, leasing, remitting or giving time for payments of debts, investing or borrowing moneys, donations to charities or political parties etc.

295(2)	No restrictions on loans to directors.	Restrictions on loans to directors without approval of Government.
300(2)	Interested director can vote in Board meeting.	Interested director cannot vote in Board meeting.
303(1)	Date of birth need not be entered in register of directors	Date of birth is required to be entered in register of directors
316(1), 386 and 388A	Restrictions on number of companies to which a person can be appointed as MD/Manager do not apply.	A person cannot be appointed as MD/Manager of more than two companies without approval of Central Government
317(4)	MD can be appointed for more than five years at a time.	MD cannot be appointed for more than five years at a time.
349, 350 and 355	Provisions relating to determination of net profits and depreciation not applicable.	Net profits and depreciation is required to be ascertained as per the provisions (fro purpose of determining managerial remuneration).
372A(8)	No restrictions on investments, inter-corporate loans and guarantees by company	Investment, inter-corporate loans and guarantees by public company should be as per restrictions u/s 372A
409(3)	CLB cannot exercise its powers to prevent change in Board of Directors	CLB can exercise its powers to prevent change in Board of Directors which is likely to affect company prejudicially.
416(1)	Person can enter into contract on behalf of company as undisclosed Principal	Person can enter into contract on behalf of company as undisclosed Principal without informing company and Board of Directors.
Tax Liability	Directors of private company have personal liability in respect of Central Sales Tax when company is under liquidation and also in respect of income tax if tax cannot be recovered from company.	Directors of public company have personal liability in respect of income tax and Central Sales Tax liability of company.
SEBI	Corporate Governance report is not required with report of Board of Directors	Listed public companies have to give Corporate Governance Report as part of report of Board

		of Directors
Quasi Partnership	Often treated as glorified partnership in proceedings of oppression and mismanagement	Generally, partnership principles are not applied in proceedings of oppression and mismanagement

***Private company which is subsidiary of public company is public company* -** In view of various privileges, many public companies started subsidiary companies as private companies. Hence, many concessions, which were available to a private company are not available to a private company which is a subsidiary of a public company. As per section 3(1)(iv)(c), amended w.e.f. 13-12-2000, a private company which is subsidiary of a company which is not a 'private company' will be 'public company'. Thus, only subsidiary of a private company can be a 'private company'. Putting it differently, a private company which is subsidiary of a public company is a public company. Thus, it will have no privileges as are available to private company.

Note that registration of a subsidiary as a 'private company' is not prohibited under the Act and it is nowhere provided that a subsidiary of a public company must convert into a public company. Thus, a private company which is subsidiary of a public company can continue as a private company.

8-2 Holding and subsidiary companies

A company is deemed to be subsidiary of another company if **(a)** The other company controls composition of its Board of Directors *or* **(b)** The other company holds more than 50% nominal value of its equity capital *or* **(c)** The first-mentioned company is a subsidiary of any company which is that other's subsidiary e.g. if company B is subsidiary of company A and company C is subsidiary of company B, then company C is also subsidiary of A. [section 4(1)]. These are only three tests relevant. There should be direct 'one to one' relationship.

A private company which is subsidiary of a public company is a public company. It loses many benefits which are available to a private company

8-3 Section 25 Company (Licensed Company)

Chambers of Commerce, Trade Associations, Clubs, Charitable Organisations etc. can be registered as 'companies'. However, they are not formed for making profits. Such companies can obtain a licence from Central Government to register the company without the name 'Limited' or 'Private Limited' in its words.

If such a company has already been registered, licence can be obtained to remove the word 'Limited' or 'Private Limited' from its name. A company proposed to be formed u/s 25 has to submit application to Regional Director. Such companies are called as licensed companies or 'section 25 companies' [section 25(1)].

Procedure for obtaining license has been prescribed in regulations 3 to 6 and 10 to 14 of Companies Regulations, 1956. The Annexure I of Regulations give model form of Memorandum. Powers for issuing the licence have been delegated to Regional Directors.

Application for license should be submitted electronically in e-form No. 24A.

Various procedural concessions have been given to such companies, vide Notification No. SO 1578 dated 1.7.1961.

8-4 Government companies

Section 2(18) states that 'Government Company' means a Government company within the meaning of section 617 of Companies Act. As per section 617, Government company means a company in which 51% or more paid up capital is held by Central Government, State Government/s or partly by Central and partly by State Governments. A subsidiary of a Government company is also a Government Company. The 'paid up capital' may be equity or preference shares. Government company is not 'Government', but it is 'State' under Article 12 of Constitution.

Central Government can modify any provision of Companies Act in respect of Government companies, by issuing a gazette notification. Such notification should be placed before Parliament for 30 days [section 620]. Under these powers, Government companies have been exempted from many provisions of Companies Act. Important exemptions are as follows -

Section No.	Details
13 and 23	In the name clause of memorandum word 'Private' is not required, even if shareholders are less than 7
100 to 103	Reduction of capital - Where Companies Act provides for consent of Court, the consent shall be obtained from Central Government and not from Court
108	Transfer of shares/debentures need not be accompanied by share/debenture certificate if these are held by nominee of Government.
149(2A)	Special resolution for Commencement of business not required when entire paid-up capital is held by Central and/or State Government/s.
165	Statutory meeting need not be held.
166	Time for AGM can be extended by Central Government and not by ROC
166(2)	AGM can be held at any place approved by Central Government and not necessarily at the registered office
187C	Declaration of beneficial interest in shares need not be made
198, 309	Ceiling on managerial remuneration in respect of absence or inadequacy of profits is not applicable.
205A	Transfer of unpaid dividend to special dividend account need not be made.
209	Accrual system of accounting not required if Government company is engaged in business of financing industrial projects or income from loans in respect of company engaged in promotion and development of industries.
253-263	Appointment of directors and retirement by rotation, increase in number of directors, etc., is not required, when entire paid-up share capital is held by Central Government of State Government or both.
264	Filing consent of director with ROC is not necessary, , when entire paid-up share capital is held by Central Government of State Government or both.
269	Appointment of Managing Director does not require Central Government approval
274	Government company is exempt from provisions of section 274(1)(g) [These provisions are in respect of disqualification of directors of defaulting companies] – GSR 829(E) dated 21-10-2003.
294, 294AA	Approval of Central Government for appointment of sole selling agents is not required
295(1)	Loans to directors can be given with approval of concerned ministry
297(1)	Provisions in respect of contract with companies in which directors interested etc. are not applicable in respect of contracts with another Government company
307-308	Register of directors' share-holding need not be maintained when all shares are held by Government.
309, 310	Remuneration of directors and increase in their remuneration.
316, 386	Number of companies in which a person can be managing director or manager, if entire capital is held by Government, is not restricted
372A	Loan/guarantees to companies under same management can be given. However, permission from administrative ministry should be obtained.
387	Appointment of Manager, appointment for more than 5 years, remuneration of Manager etc. is permissible.
391 to 393	For words 'Court', 'Central Government' shall be substituted.
621	Only a person authorised by Central Government can file complaint and not a Registrar or shareholder of a company.

9 Other important issues in company management

9-1 Charges that are required to be filed

The term ‘Charge’ is much wider than ‘security’. Section 124 makes it clear that ‘charge’ includes a mortgage.

Following are the ‘charges’ as per section 125(4), which are required to be filed with ROC for registration—

- Charge for the purpose of securing any issue of debentures
- Charge on uncalled share capital of the company
- Charge on immovable property, wherever situated, or any interest on the immovable property
- Charge on book debts of a company (This will be usually a floating charge)
- Charge on any movable property of the company, excluding a ‘pledge’. [Pledge has been excluded, as in case of ‘pledge’ the movable property is in physical possession of the lender] (Usually, this is a floating charge). Charge is to be registered even if property is outside India and charge is created inside India or outside India, as made clear in sections 125(5) and 125(6).
- A floating charge on the undertaking or any property of the company including stock-in-trade
- A charge on calls made but not paid
- Charge on a ship or any share in a ship
- Charge on goodwill, patent or a licence under patent, trade mark, on copyright or a licence under a copyright
- Charge includes mortgage
- If property acquired is subject to charge, it is required to be registered, as clarified in section 127(1).

Mortgage is also a 'charge' only for purpose of filing charge with ROC – Mortgage is ‘charge’, but this is only for purposes of filing and registration of charges under Companies Act. As per section 100 of Transfer of Property Act, ‘charge’ does not include 'mortgage').

Codonation of delay in filing of charge or satisfaction of charge – Charge and satisfaction of charge is required to be filed within 30 days. However, delay in filing charges and satisfaction of charges upto 300 days is condonable by ROC on filing of additional fees If delay is beyond 300 days, application should be made to CLB for rectification of Register of charges u/s 141 – MCA letter F No. 8/2/2007-CL-V Circular No. 13/2007 dated 27-9-2007, based on CLB order dated 1-8-2007.

9-2 Public deposits

A public company can invite deposits from public only if following requirements are fulfilled – (a) Deposits can be invited only as per Rules made (b) An advertisement giving financial position of company is published in prescribed manner and (c) The company is not in default in repayment of deposits and interest thereon [section 58A(2)].

The limits on acceptance of public deposits are as follows –

Non Government public company - A non-Government public company can accept public deposits upto 25% of its paid up capital and free reserves. In addition, public deposits upto 10% of paid up capital and free reserves can be accepted (a) From shareholders of company and/or (b) Deposits guaranteed by director/s of a company [rule 3(2) of Companies (Acceptance of Deposits) Rules, 1975]. There are no restrictions on accepting deposits from director of the public company.

Government company - A Government company [usually termed as public sector undertaking (PSU)] can accept public deposits upto 35% of its paid up capital and free reserves [rule 3(2A) of Companies (Acceptance of Deposits) Rules, 1975].

Private company – A private company cannot accept public deposits at all [section 3(1)(iii)(d) of Companies Act]. It can accept deposits only from its members, directors and their relatives.

Period for which deposit can be accepted - The deposit can be accepted for a period of minimum 6 months and maximum 36 months (Short term deposits of minimum 3 months are permitted upto 10% of paid up capital plus free reserves of the company). Public deposit payable on demand cannot be accepted.

Maximum interest that can be paid on public deposits - Maximum interest that can be paid is same as that Non Banking Financial Companies (NBFC) can pay on public deposits as per RBI directions [presently, it is 11% compounded on monthly basis] - rule 3(1)(c) of Companies (Acceptance of Deposits) Rules, 1975.

9-3 Dividend

Dividend can be paid out of (a) Profits of current year after providing for depreciation (b) Un-distributed profits of previous year or years after providing for depreciation for previous years (c) Out of moneys provided by Central or State Government for payment of dividend in pursuance of guarantee given by that, if any. [section 205(1)]

Minimum profits to be transferred to reserves - A company must transfer certain percentage of profits of current year to reserves, before declaring a dividend. A company may transfer higher amount to reserves than prescribed. [section 205(2A)]. The prescribed percentage of profits to be transferred to general reserve as per rule 2 of Companies (Transfer of Profits to Reserves) Rules, 1975, is as follows -

- If dividend proposed is upto 10% - Nil
- If dividend proposed is 10.01% to 12.50% - 2.5% of current profits
- If dividend proposed is 12.51% to 15.00% - 5% of current profits
- If dividend proposed is 15.01% to 20.00% - 7.5% of current profits
- If dividend proposed is over 20.00% - 10% of current profits

The transfer is required only in respect of profits of current year after providing for depreciation. Transfer in respect of profits of previous years is not required.

Conditions for distributing dividend out of reserves - If, in a particular year, profits are not adequate to declare a dividend, dividend can be declared out of reserves, as per Companies (Declaration of Dividend out of Reserves) Rules, 1975. The conditions prescribed are as follows -

- Such dividend cannot be more than average of rates at which dividend was announced in previous five years, or 10%, whichever is less (i.e. maximum 10% dividend can be declared out of reserves, even if average dividend in previous five years was higher.
- If company intends to pay dividend higher than 10%, prior approval of Central Government u/s 205A(3) will be required. Application for permission should be filed electronically in form prescribed in Companies (Declaration out of Reserves) Rules, 1975 [This is a separate e-form and not be submitted as attachment to e-form No. 65)
- Total amount drawn from reserves shall not exceed an amount equal to one-tenth of the sum of its paid up capital and free reserves.
- The amount drawn from reserves shall be first utilised to set off losses incurred in the current financial year and then, surplus, if any, can be utilised towards declaration of dividend on equity and preference shares
- Balance in reserve account shall not fall below 15% of paid up capital of the company.

No restriction on dividend from accumulated profits - There are many restrictions in declaring dividend out of reserves. Hence, it is advisable to transfer only statutory minimum amount to reserves and keep the balance to credit in P&L account itself. There is no restriction in distributing dividend out of such un-distributed profit of previous years.

9-4 Inspection of company documents by public

All documents have to be filed with ROC. Thus, office of ROC is a office of records. Documents filed by a company with ROC are available for inspection as per rules prescribed. However, prospectus is available for inspection only for 14 days after the date of publication. [section 609]. The annual returns, balance sheets, charges registered by the company and other documents filed by company with ROC are available for inspection, on payment of fees of Rs 50/-. A separate folder for each company is maintained by ROC, which is available for public inspection - section 610(1)(a) read with rule 21A.

Other fees payable – Fees for inspection of documents at office of ROC is Rs 50/-. Fees for obtaining copy of certificate of incorporation is Rs 50/-. Fees for obtaining extract of other documents including hard copy of such documents on computer readable media is Rs 25/- per page. Fees are to be paid electronically through credit card or by special challan generated by computer when e-form is filed through MCA portal i.e. www.mca.gov.in.

Electronic Inspection of documents – Regulation 31 (amended w.e.f. 14-9-2006) provides that inspection of documents registered or recorded or filed with ROC electronically or documents which have been scanned and digitized and which form part of electronic registry can be made only in electronic manner through payment of prescribed fees. After requisite fees are paid, document will be available for viewing for seven days for a maximum of three hours.

Central Government has scanned and digitized permanent documents of companies and annual return and balance sheets of companies for past two years and these form part of electronic depository [para 4(9) of Annexure 'A' ofScheme notified on 26-10-2006].

Physical Inspection when document is not available electronically - If the document does not form part of electronic registry, physical inspection will be permissible in presence of person authorised by ROC during office hours (Regulation 25). Fresh payment of fee is not required if proof of payment for electronic viewing is produced at office of ROC [para 4(10) of Annexure 'A' of Scheme notified on 26-10-2006].

Obtaining certified copies – Certified copy of documents can be obtained on payment of requisite fees. After inspection of documents, a user can ask mark specified pages and number of copies required as certified copies. He then has to submit non-judicial stamp paper of prescribed value and court fee, as applicable in various States. Certified copies will be sent by post/courier under manual signature and seal of competent authority. If document is not available in electronic form, copy in manual form will be available [para 4(11) of Annexure 'A' of Scheme notified on 26-10-2006].

10 Administration of Companies Act

The work of company law is looked after by Ministry of Corporate Affairs (MCA), 5th flour, A wing, Shastri Bhavan, Dr. Rajendra Prasad Road, New Delhi 110 001. Tel -23382324, 2338 4017, 23386110. Fax - 2338 2748 ['Ministry of Company Affairs' was renamed as 'Ministry of Company Affairs' on 9-5-2007. Prior to formation of Ministry of Company Affairs, work of Company Law was looked after by 'Department of Company Affairs' (DCA) under a Ministry]. .Website is http://mca.gov.in.

10-1 Approvals of Central Government

The work of company law is looked after by Ministry of Corporate Affairs (MCA), 5th flour, A wing, Shastri Bhavan, Dr. Rajendra Prasad Road, New Delhi 110 001. Tel -23382324, 2338 4017, 23386110. Fax - 2338 2748 ['Ministry of Company Affairs' was renamed as 'Ministry of Company Affairs' on 9-5-2007. Prior to formation of Ministry of Company Affairs, work of Company Law was looked after by 'Department of Company Affairs' (DCA) under a Ministry]. Website is http://mca.gov.in.

Sanctions / permissions etc. - Many sections of Companies Act provide for permission of Central Government. Some of these powers have been delegated to Regional Director / Registrar of Companies. Some powers which are exercisable by Central Government, which are not delegated, are as follows –

Section No.	**Details**
58A(8)	Grant extension of time for repayment of fixed deposits accepted by company or class of companies (after consultation with RBI) – Application is to be filed electronically as attachment to form No. 65.
81(1A)(b)	Offering of further shares to others with ordinary resolution instead of special resolution.
81(3)	Approval of terms for providing option before issue of debenture, or raising loans with such terms, if such issue is not in conformity with Rules issued.
81(4) or 94A(2)	Ordering compulsory conversion of debenture or loan into shares.
205(1) *proviso* (c)	Payment of dividend without providing depreciation - Application to be submitted electronically in form 23AAC.
205A(3)	Approval for declaration of dividend out of reserves – Form prescribed under Rules to

	be submitted electronically.
211(4)	Modifications in form and contents of balance sheet and P&L account - . Application is to be filed electronically in e-form 23AAA.
212(8)	Exemption from inclusion of particulars of subsidiaries in balance sheet of holding company - Application is to be filed electronically in e-form 23AAB.
233B	Approval of appointment of cost auditor. Application to be filed electronically in form 23C.
237(a)(i)	Ordering investigation of a company on application.
259	Increasing number of directors beyond 12..
268	Amendment to provisions relating to MD / WD / Non rotational directors.
269	Approval of appointment of MD / WD / Manager if it is not according to Schedule XIII - section 269 - and also increase - section 310
274	Removal of disqualifications of a director.
294AA	Approval for appointment of sole selling agents. Application to be filed electronically in 'Form I' as prescribed in Rules.
295(1)	Permission to make loans to director or firm / private company in which he is partner / director etc.
309	Applications connected with managerial remuneration - e.g. * Opinion regarding exemption of professional fee paid to directors from being included in remuneration - proviso to section 309(1) * Waiver of recovery of excess managerial remuneration - section 309(5B) * Waive excess amount for holding of office or place of profit - section 314(2)
310	Increase in managerial remuneration – either in Articles or agreement, if it is not as per Schedule XIII
314(1B)	Appointment of relative of director to office or place of profit.
316(4) and 386(4)	Appointment of MD / Manager for more than 2 companies.
388E	Removal of director on basis of decision of CLB.
396	Amalgamation of companies in national interest.
408(1)	Appointment of directors on basis of order of CLB.
637B	Condonation of delay in making application to Central Government or filing any document with ROC.

Where no form has been prescribed, application is required to be made as attachment to e- form No. 65.

Procedure for application for sanction, permission etc. - When it is specified that application for permission, consent, approval, confirmation or recognition should be made to Central Government, it should be submitted to Department of Corporate Affairs. Application shall be submitted with prescribed fees. [section 637A(2)].

Application is to be submitted electronically through MCA portal.

The quantum of fees is prescribed *vide* Companies (Fees on Application) Rules, 1999. The fee payable is as follows –

(A) Company having share capital – Less than Rs 25 lakhs – Rs 500, Rs 25 lakhs to less than Rs 5 crore – Rs 1,000, Above Rs 5 crore – Rs 2,000

(B) Company limited by guarantee – Rs 500

(C) Application for license u/s 25 – Rs 500

(D) Company having license u/s 25 – Rs 500

(E) Foreign Company – Rs 1,000.

When Central Government grants an approval, consent, confirmation or recognition, it can grant such approval, sanction, consent etc. subject to such conditions, limitations, restrictions etc. as may be imposed. In case of contravention of any such condition, limitation or restriction, the approval, sanction, consent, confirmation, recognition, direction or exemption may be withdrawn [section 637A(1)].

Application for approval of MD or his remuneration - Application for approval of appointment and remuneration of

Managing Director / Wholetime Director / Manager is required if it is not as per norms prescribed in Schedule XIII. Such application should be made in prescribed form. Before making such application, a general notice should be given to members indicating the nature of application being made. Such notice shall also be published in two newspapers in the district - one in English and another in principal language of the district. Copies of such notice and advertisements shall be submitted along with application. [section 640B].

It has been clarified that payment of additional fee is required if form No. 25C (in respect of appointment of MD/WD/Manager) is filed belatedly. Section 637B(b) [providing for condonation of delay by Central Government for late filing of document] is not applicable. – DCA circular No. 15/2002 dated 17-6-2002.

10-2 Approvals from Regional Directors

Four regional directors have been appointed at Mumbai, Chennai, Kolkata and Noida (Gautam Budh Nagar) (UP) for four regions. They supervise working of offices of ROC and the official liquidators working in their regions. Almost all work relating to winding up is under Regional Director. An inspection wing is attached to office of RD to carry out inspection of companies u/s 209A.

Following are the powers delegated u/s 637 to Regional Director [GSR No. 288(E) dated 31-5-1991]-

Section No.	Details
22	Approving rectification of name of company - application in e-form - 24A
25(1), (3)	License allowing not to use the word 'Limited' or 'Private Limited' with name of the company, i.e. licensing charitable companies, associations etc. - application in e-form - 24A..
224(3)	Appointment of auditors when no auditors were appointed at AGM and fix his remuneration - application in e-form - 24A..
224(7)	Approving removal of auditor before expiry term
297(1) *proviso*	Approval to enter into contracts in which directors are interested, when paid up capital of company exceeds Rs one crore - application in e-form - 24A.
391 and 394	Court has to give notice to RD, in respect of any application received u/s 391 (compromise or arrangement with creditors or members) or section 394 (reconstruction and amalgamation)
394A	Regional Director has to submit representation to Court on application for amalgamation - section 394A.
397 and 398	CLB has to give notice to RD, in respect of application received u/s 397 (oppression) or 398 (mismanagement)
400	Regional Director has to submit representation before CLB on petition u/s 397 / 398 - section 400
433 / 439(5)	Giving permission to Registrar of Companies for presenting petition for winding up.
496(1)(a)	Granting time to liquidator to call general meeting beyond period of three months in members' voluntary winding up.
508(1)(a)	Granting time to liquidator to call general meeting beyond period of three months in creditors' voluntary winding up.
551(1)	Information by liquidator in respect of pending liquidations.
555	Notice in respect of claim to Court for payment out of liquidation account and approval of payment of interest to liquidator.
610(1) *proviso*	Inspection of prospectus filed with ROC after 14 days.
621A	Regional Director can compound certain small offences – Section 621A when fine to be imposed does not exceed Rs 50,000. Application is to be submitted electronically in e-form No. 61. It will be forwarded by ROC to Regional Director with his comments.
627(1)	Making application to judge of High Court to order production and inspection of books when offence committed.

10-3 Registrar of Companies

Offices of Registrars of Companies (ROC) have been opened in various States to look after administration of company law. ROC is with the company right from company's birth to death. Registration certificate is issued by him. The term 'Registrar' includes Additional, Joint, Deputy or Assistant Registrar. [section 2(40)].

Powers and functions of ROC - Some powers and functions of Central Government have been delegated to the Registrars under section 637. Some powers have been prescribed in the Act itself. Powers and functions of ROC are as follows -

Section No.	Details
20	Confirming availability of name - application in form 1A.
21	Approval of change of name – Application for availability of name to be submitted in e-form 1A. Then, application may be submitted electronically in e-form No. 61 [Power delegated u/s 637].
31(1) *proviso*	Alteration of Articles for conversion of public company into private company - application in form 1B [Power delegated u/s 637].
33	Registration of company.
75(3)	Extension upto one month for filing return of allotment.
108(1A)	Date stamping of share transfer form before execution.
108(1D)	Extension of time for delivery of instrument of transfer to company
125 and 141	Registration of charges, modification and satisfaction
141	Condonation of delay in filing charges and satisfaction of charges upto 300 days on filing of additional fees
166(1) second proviso	Extension of time for holding AGM upto three months
210(4)	Extension of accounting year. Application to be submitted electronically in e-form No. 61.
205B	Order for payment of dividend from general revenue account of Central Government. [Now, this provision is applicable only in respect of dividend credited upto 31st October, 1998].
560	Restoring name of a company struck off by Registrar
572	Change of name if name found to be undesirable [Power delegated u/s 637].
611	Registration of all documents required to be filed with ROC by accepting filing fee and additional fee.
621	File criminal complaint in writing in Court in respect of any offence under Companies Act..
621A	Accepting application for compounding of offences (ROC will forward it to CLB/RD as applicable). Application to be submitted electronically in e-form No. 61.

10-4 Company Law Board

A quasi-judicial authority named 'Company Law Board' has been formed u/s 10E. CLB is basically a Tribunal to decide various matters under Companies Act. CLB was constituted on 31st May, 1991. Many powers earlier exercised by High Court have been entrusted now to CLB. Company Law Board consists of members (not more than 9) appointed by Central Government. Members consist of judicial members and technical members having prescribed qualifications and experience. One of the members is appointed as Chairman.

CLB has principal bench at 5th floor, A wing, Shastri Bhavan, Dr. Rajendra Prasad Road, New Delhi - 110 001. Tel - 3382265. Additional Principal Bench has been constituted at Chennai w.e.f. 19.12.2000. CLB has four regional benches - Northern (at New Delhi), Southern (at Chennai), Western (at Mumbai) and Eastern (at Kolkata). Website of CLB is http://www.clb.nic.in.

Important powers exercisable by CLB - Following are some of the important powers which are exercisable by CLB -

Section No.	Details
10E(4B)	Formation of benches
17(2)	Change in memorandum for shifting registered office to another State.
18(4) and 19(2)	Extension of time for filing documents relating to confirmation of alteration of Memorandum or for registration of alteration
43	Grand of relief to a private company from consequences of accidental failure to comply with conditions constituting it a private company.
58A(9)	Relief to investors in case of failure to make repayment of fixed deposits in time.
58AA	Ordering repayment of small depositors.
79	Sanctioning issue of shares at discount.
80A proviso	Consent to issue further redeemable preference shares in lieu of redeemed preference shares.
111 and 111A	Rectification of Register of members.
113(1)	Extension of time for delivery of certificates of debentures and debenture stocks by 9 months.
117B	Restrictions on company in creating further liabilities if assets are insufficient to redeem debentures or interest thereon.
117C	Order redemption of debentures and payment of interest thereon.
118(3)	Direction to send copies of debenture trust deed to person requiring it
141(1)(3)	Condonation of delay in registration of charges beyond 300 days
	Ordering inspection of register of members, register of investment in nominee's name, minute book of member's meetings, register of directors, register of directors' share-holding etc. in case of refusal
167 and 186	Calling AGM / EOGM.
188	Determining whether rights of requisitionists to get their resolution circulated to members being abused and for ordering company’s costs to be paid by requisitionists
219(4)	Direction that copy of balance sheet and auditors report be furnished forthwith to person concerned
225(3) proviso	Determining whether rights of auditors to get their resolution circulated to members being abused and for ordering company’s costs to be paid by the retiring auditors
235(2)	Declaration by order that affairs of the company be investigated.
237(b)	Formation of opinion as to circumstances requiring investigation into affairs of company.
247(1A) and 250	CLB can order under section 247 (1A), for investigation of ownership of the company and related matters, in the course of any proceeding before it. During investigation, CLB can order restrictions on transfer or issue of shares, or their voting rights u/s 250
269	Reference to CLB if Central Government is of opinion that appointment of MD / WD / Manager made without approval of Central Government is in contravention of requirements of Schedule XIII. [If appointment is as per requirements of Schedule XIII, approval of Central government is not required for appointment of MD / WD / Manager].
284(4) proviso	Determining whether right of director to get his resolution circulated to members (or read at the meeting) is being abused and for ordering company’s costs to be paid by the director.
388B	Cases against managerial personnel in conduct and management of affairs of the company to decide whether a person is fit and proper person to hold office of director, manager, MD, WD etc.
397 and 398	Relief in case of oppression and mismanagement
406	CLB can impose penalty for falsification of books, fraud, fraudulent conduct of business, damages etc. as provided in Schedule XI to Companies Act.
408	Ordering appointment of Government directors.
407(1)(b)	A MD/WD or Manager whose agreement is terminated or set aside u/ss 397 or 398 cannot be reappointed for a period of five years, without leave of CLB.
409(1)	Preventing change in Board of Directors if likely to affect the company prejudicially.
610(2)	Compelling production of any document filed with Registrar of Companies.
614	Directing company to file any return, account or document with ROC which the company is required to do under the Act.
621A	Composition of offences punishable with fine above Rs 5,000 *or* punishable with fine and imprisonment. CLB has powers to compound an offence under section 621A without any

	permission from the Court. This aspect has been discussed in an earlier chapter.
RBI	Order repayment of deposits accepts by NBFC - power granted under section 45QA(2) RBI Act, 1934

Besides above, many other powers have been delegated to CLB under various sections for allowing inspection of registers by members, calling AGM or EOGM, condoning delay in filing particulars of charge or modification of charge.

10-5 National Company Law Tribunal and Appellate Tribunal

National Company Law Tribunal (NCLT) is being constituted to look after work hitherto being done by Company Courts and Company Law Board (CLB).

Certain provisions in respect of NCLT have been declared as unconstitutional and invalid in *Thiru R Gandhi* v. *UOI*(2004) 52 SCL 79 (Mad HC DB). Appeal against the decision was filed with Supreme Court. The matter has been referred to Constitution Bench on 18-5-2007 – *UOI* v. *R Gandhi* (2007) 76 SCL 350 (SC).

11 Procedures under Company Law

A company is required to maintain various records and registers. It has to file various documents and returns with Registrar of Companies [ROC]

Returns to be filed by company - Every company has to file various returns. Important among them are as follows—

- Annual Return - Every company must file annual return (section 159/160) – to be filed electronically in e-form 21A
- Three copies of balance sheet adopted at general meeting (section 220) – to be filed as scanned attachment to e-form 23AC.
- Special Resolutions, appointment of MD (sections 192)
- Charges created, modified, satisfied
- Appointment/changes/resignations of Director, Manager or Secretary.
- Consent to act as director (in case of public company)

Other returns as and when required

Some companies have to file Secretarial Compliance Certificate [section 383A(1)]

Forms for returns - Company (Central Government's) General Rules and Forms, 1956 prescribe various forms in which returns have to be filed with ROC.***Following forms have been prescribed in the Schedules to Companies Act.***

Schedule II	Requirements of Prospectus, required u/s 60(1)
Schedule III	Statement in lieu of prospectus, required u/s 70(1)
Schedule V	Annual Return, required u/s 159. [Some companies have to file Secretarial Compliance Certificate along with Annual Return]
Schedule VI	Form of Balance Sheet & requirements of P&L account
Schedule IX	Form of Proxy

Prescribed period for filing many of these documents is 30 days, except in some cases, where it is different.

11-1 Resolutions required to be filed with the ROC

Routine resolutions at the general meeting like appointment of directors, auditors, adoption of accounts and directors' report are not required to be filed with Registrar of Companies. However, following resolutions of general meeting have to be filed—

- All special resolutions (along with explanatory statement)
- Resolution regarding appointment and terms of appointment of Managing Director, whether passed in general meeting or board meeting
- Resolutions of class of shareholders binding all members of any class of share-holders
- Resolutions authorising Board of Directors u/s 293 to (a) sell, lease or otherwise dispose of whole or substantially whole of the undertaking (b) Borrowing money in excess of paid up capital and free reserves or (c) Contribute to charitable fund not directly relating to business of the company or welfare of its employees in excess of Rs 50,000 or 5% of average profits in last three years, whichever is greater.
- Resolution approving appointment of sole selling agents u/s 294
- Special Resolution passed under section 484(1) requiring a company to be wound up voluntarily.

Following resolutions of the Board of Directors and copies of some agreements have also to be filed with ROC, within 30 days—

- Resolution of Board of Directors for appointment and terms of appointment of Managing Director

- Copies of terms of appointment of a sole selling agent.

Electronic filing of resolutions – The resolutions required to be filed u/s 192 are to be filed as scanned attachment to e-form 23.

11-2 Payment of filing fees

Fees are payable for registration of a company as well as for filing any document. The fees are prescribed in Schedule X of Companies Act. Fees for filing, registering or recording a document or for making a record of or registering any fact, required to be recorded under Companies Act, as follows –

Description	Filing Fees Rs
Nominal share capital (Authorised Capital) less than Rs one lakh	100
Nominal share capital (Authorised Capital) Rs 1 lakh or more but less than Rs 5 lakhs	200
Nominal share capital (Authorised Capital) Rs 5 lakhs or more but less than Rs 25 lakhs	300
Nominal share capital (Authorised Capital) Rs 25 lakh and above	500
Company not having share capital	50
Foreign company	5,000

Electronic payment of fees - Fees are to be paid electronically through credit card or by special challan generated by computer when e-form is filed through MCA portal i.e. www.mca.gov.in.

Other fees payable – Fees for inspection of documents at office of ROC is Rs 50/-. Fees for obtaining copy of certificate of incorporation is Rs 50/-. Fees for obtaining extract of other documents including hard copy of such documents on computer readable media is Rs 25/- per page. Fees for registering document relating to foreign company is Rs 5,000. Fees are to be paid electronically through credit card or by special challan generated by computer when e-form is filed through MCA portal i.e. www.mca.gov.in.

11-3 Secretarial Compliance Certificate

A company which has paid up capital of Rs ten lakh or more but which is not required to appoint a full time Company Secretary (as its paid up capital is less than Rs 200 lakhs) is required to obtain Secretarial Compliance Certificate from a Secretary in Wholetime Practice. Such certificate should be filed with Registrar of Companies. – *proviso* to section 383A(1).

As per Rules, the certificate should be filed within 30 days from date of AGM. If AGM was not held for any reason, the certificate should be filed within 30 days from the last date on which the AGM should have been held. The certificate should also be attached to report of Board of Directors. [proviso to section 383A]. Separate filing of certificate is required even if the copy of certificate is attached to report of Board of Directors.

11-4 Registers and Records

A company has to maintain certain statutory registers and books.

The records and registers to be maintained are as follows -

Section No.	Details	Right of Inspection
49(7)	Register of investment in shares or securities not held in company's name.	Member or debenture holder without any fees
58A read with rule 7	Register of Public Deposits.	Registrar of Companies or authorised Govt officer.
77A	Register of shares bought back by a private company or unlisted public company (section 77A, read with Buy Back of Securities Rules, 1999)	Registrar of Companies or authorised Govt officer or authorised officer of SEBI
79A	Register of sweat equity shares by unlisted company [Section 79A read with rule 5 of Unlisted Companies (Issue of Sweat Equity Shares) Rules, 2003]	Registrar of Companies or authorised Govt officer or authorised officer of SEBI
86	Register of shareholders with Differential Rights with Index of Members, as per Rules.	
118(4)	Trust deed for securing any issue of debentures	Member or debenture holder
136	Copy of every instrument creating any charge requiring registration	Creditor or member or debenture holder without fees.
143(1)	Register of Charges.	Creditor or member or debenture holder without fees and by others with fess of Rs 10.
150(1)	Register of members.	Member or debenture holder without fees and by others with fess of Rs 10.
151(1)	Index of members if company has more than 50 members. Such index is not necessary if register itself is maintained in index form.	Member or debenture holder without fees and by others with fess
152(1)	Register of Debenture holders.	Member or debenture holder or trustee without fees and by others with fess of Rs 10
152(2)	Index of debenture holders if company has more than 50 debenture holders. Such index is not necessary if register itself is maintained in index form.	Creditor or member or debenture holder or trustee without fees and by others with fess of Rs 10
152A	Register and index of beneficial owners (Demat form) - required under Depositories Act. This has to be maintained by Depository.	
157(1)	Foreign register of members and of debenture holders (if any), to be maintained outside India.	Member or debenture holder without fees and by others with fess
158(4)	Duplicate of such foreign register of members and debenture holders.	Member or debenture holder without fees and by others with fess
163(1)	Copies of annual returns together with copies of certificates and documents required to be annexed thereto.	Member or debenture holder without fees and by others with fess of Rs 10
174	Record / register of shareholders attendance at general meetings (for purpose of quorum u/s 174). Register / record of proxies at general meeting is also required.	
176(7)	Proxies lodged u/s 176	Member entitled to vote.
192A	Register of postal ballot	

193(1)	Minutes of board meeting and committees of Board..	Registrar of Companies or authorised Govt officer, Auditors
196	Minutes of general meeting	Member without fees
209(1)	Books of account with respect to receipts and expenditure, sale and purchase of goods and other cost records.	Director, Registrar of Companies or authorised Govt officer or authorised officer of SEBI, Auditors
209(2)	Proper Books of account relating to transactions effected at branch office.	Director, Registrar of Companies or authorised Govt officer or authorised officer of SEBI, Auditors.
223	Statement to be published by limited banking company, insurance company or a deposit, provident or benefit society in form F in schedule I has to be displayed at registered office and in every branch office or place of business.	
230	Auditors' Report	Member at the time of AGM only.
285	Directors' Attendance Book at Board meetings [required as per Articles – regulation 71 of Table A]	
301(1)	Registrar of contracts, companies and firms in which directors are interested.	Member without charge and others on payment of fees of Rs 10
302(6)	Contracts for appointment of Managing Director / Manager.	Member without charge and others on payment of fees of Rs 10
303(1)	Register of directors, managing director, manager and secretary.	Member without fees.
307(1)	Register of Directors' shareholding in the company or its holding or subsidiary companies.	Member without charge only 14 days prior to and 3 days subsequent to AGM and during AGM. Others on payment of fees.
372A(5)	Register of loan or investments made, guarantee given or security provided by the company.	Member without charge and others on payment of fees of Rs 10
417 to 419	Post Office or Bank receipts relating to employees' deposits and PF amounts	Concerned employee.
581ZE and 581ZL	Books of account and register of Investments of Producer Company.	
	Register of Renewed and Duplicate Certificates [as per Companies (Issue of Certificate) Rules. - - Register of Share Certificates/Debenture Certificate issued	
	Register of fixed assets - required under CARO	
	Register of documents destroyed - required under Companies (Preservation and Disposal of Records), Rules, 1966.	
	Register of fixed deposits - required under Companies (Acceptance of Deposits) Rules, 1975	
	Register of share transfers	
	Record / register of documents executed under common seal. [Not statutory requirement, but it is good secretarial practice. This is also recommended in Secretarial Standard SS-4 issued by ICSI].	

The pre-printed forms of the registers can be obtained from market. A consolidated register containing all registers is also available. It is useful for small companies not having many transactions.

Registers by listed company as per SEBI regulations – A listed company is required to maintain following registers as per SEBI regulations.

- Register in terms of SEBI Takeover Regulations
- Register in terms of SEBI Prohibition of Insider Trading Regulations

Place where register should be maintained - The registers should be normally maintained at the registered office of the company. However, in some cases, exception is provided.

Copies of documents - Copies of following documents can be obtained by anyone by paying fees of Re 1 per 100 words - Register of charges (but not the instrument creating the charge) * Register of members and debenture holders and their indexes * Foreign register * Copies of annual return (section 163 of Companies Act).

12 MCA-21

Ministry of Corporate Affairs (MCA) has launched an ambitious program of introducing e-governance for managing the work relating to Ministry of Corporate Affairs. All physical filing of forms has been discontinued and converted into e-filing. It is almost a digital and paperless working of MCA except in few cases where paper work is unavoidable due to legal and statutory requirements. Presently, winding up procedures have not been covered in the programme. The project is termed as 'MCA-21' and has been implemented with help of Tata Consultancy Services and CMC. The project is fully operational on 15-9-2006 and entire work relating to MCA, all physical filing of documents and forms has been converted into e-filing.

Salient features of the scheme and the rules are discussed in following paragraphs.

12-1 Highlights of MCA-21 Scheme

The highlights of the new system are as follows -

- Existing forms meant for physical filing have been converted into e-forms. The new e-forms have already been notified.
- Some old forms have been eliminated and combined with new form (e.g. form 29 merged with form 32).
- Filing of forms and applications will be through internet.
- Form can be filed online. Alternatively, these can be downloaded, filled offline and then filed.
- Pre-scrutiny is done in the portal before the form is accepted for submission.
- E-form should be digitally signed by Managing Director, Director, Manager or Secretary. They will have to obtain DSC (Digital Signature Certificate).
- Documents to be attached must be in PDF format. Facility is available on portal to

convert document into PDF format.

- Paper documents which are to be submitted will have to be scanned and attached to the e-forms.

- In cases where payment of stamp duty is required, original document bearing stamp duty will have to be filed in office of ROC, after e-filing is done.

- Payment of fees can be through internet through credit card/internet banking. Those who do not have these facilities, can pay the fees through designated banks. Filing of form will be valid only when filing fee is paid.

- Many forms require certification by CA/CWA/CS in practice. In some cases, Secretary in full time employment of company can certify the form.

- If a company has sufficient equipment and facilities, the documents can be filed by company from its office itself. This is called 'Virtual Office'

- Those who do not have adequate facilities can file documents through Facilitation Centres established in various cities which are presently manned by TCS. Otherwise, help of facilitation centres or CFS (Certified Filing Centres) can be obtained.

- 'Certified Filing Centres' (to be operated by professionally qualified persons/bodies of CA/ICWA/CS) will facilitate e-filing of documents.

- Every director will have to obtain DIN (Director's Identification Number).

- Physical filing of documents is discontinued w.e.f. 15-9-2006 and e-filing is compulsory from that date.

- Office of ROC, Regional Director and Delhi HQ will process the documents and applications submitted electronically by companies.

- Issuance of certificates and approvals will continue to remain on paper. This will be dispatched by post or courier to applicant.

Website to be accessed - User has to access http://www.mca.gov.in to upload the forms, inspect the documents and get other details.

Round the clock working - System is available round the clock. Thus facilities are available on all days at any time of day/night [para 4(15)(c) of Annexure 'A' of Scheme notified on 26-10-2006].

Help facilities - The companies/professionals can seek help from the Ministry of Corporate Affairs by using the e-mail ID appl.helpdesk@mca.gov.in or by using the call centre number 64506000 from Delhi, Mumbai, Ahmedabad, Hyderabad and Bangalore.

Services available on MCA-21 - Following services will be available under MCA-21 project

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- Registration and incorporation of new companies.
- Filing of annual returns and balance sheets.
- Filing of forms for change of name/address/director's details.
- Registration, modification and verification of charges.
- Inspection of documents.
- Issue of certified copies.
- Applications for permissions required under various provisions of Company Law.
- Approvals from Central Government, Regional Director and ROC (It will be sent physically by post).
- Investor Grievance Redressal.

12-2 Essential steps before filing form

Following steps are required before a document/form can be filed electronically.

Corporate Identity Number - Each company (Indian or foreign) has a unique CIN (Corporate Identity Number). This is required to be quoted on all forms. Once the number is given, company details are automatically filled-in by using pre-fill function.

Existing companies can obtain their CIN by accessing MCA portal, i.e. www.mca.gov.in. CIN will be displayed when name of company, its registration number and ROC code is entered. System displays only current name and CIN. Name and CIN of company can change.

Digital Signature - Forms have to be digitally signed by Managing Director, Director, Manager or Secretary to show authenticity of person signing the same. Some forms have to be certified by practising CA/CWA/CS or Advocate. They also have to sign it digitally. In some cases, signature of third party like Bank or Financial Institution is required (e.g. registration or satisfaction of charge). They will also have to obtain a digital signature.

Digital signature should be a CLASS-2 or equivalent. Digital Signature has to be obtained from Certifying Authority. It is normally valid for one or two years and then has to be renewed. Various agencies have been authorised by Controller of Certification Authority to issue DSCs to persons. The DSC comes with a hardware to be attached to computer and password.

Registration of DSC and role-check – All directors, practicing professionals (CA/CWA/CS, Authorised Signatory (Secretary and Manager) must register their DSC on MCA portal. This is mandatory w.e.f. 1-7-2007. Role-check means the system will verify at the time of uploading of e-forms whether signature affixed belongs to the signatory whose DSC has been registered on the MCA portal.

Registration with be done by clicking on 'Register DSC' link on MCA homepage. After successfully registering the digital signature, acknowledgment message will be displayed. User can take a print-out of the acknowledgment [CS June 2007 page 719]

One person can have only one DSC even if he signs in different capacities e.g. a practicing professional or Secretary may also be a Director in some company. Their DSC can be registered multiple times on the MCA portal under the appropriate role i.e. practicing professional, Secretary, Manager or director – MCA website – reproduced in CS August 2007 issue page 1119.

Information of authorised persons - Companies registered upto 30-6-2007 are required to inform their authorised signatories in form DIN-3. In respect of companies registered on or after 1-7-2007, DIN-3 is not required, as the details will be captured through DIN-1 and form 32 – MCA DO letter No. HQ/86/2006-Computerisation dated 18-6-2007 (see CS July 2007 page 861).

Registration of user - Each user of the portal will require to be registered. He has to choose user ID or password or enter his digital certificate, depending upon the user. This ID and password/digital certificate is required to be given every time a person logs in.

Following users will require registration -

- Authorised Signatory of Business
- Professional like CA/ICWA/CS/Advocate
- Individual user
- Facilitation Centre/CFS
- Public User

Access rights for different categories of users are different. The registration is free of cost. Password can be charged. If password is forgotten, it can be retrieved by using 'Forgot Password' link and answering hint question. After that, new password will have to be entered.

12-3 How to file documents electronically

Three modes are available - (a) Virtual Office - i.e. from own office (b) Facilitation Centres manned by BOOT Operator i.e. TCS (Tata Consultancy Services) and (c) Certified Filing Centres (CFS).

The conventional forms have been modified to facilitate filing of the form in electronic format. The forms are in PDF format. The forms are being modified frequently with very short notice.

Grouping of forms - Forms have been grouped under various broad categories as follows -

- Company Registration.

- Compliance related filing e.g. annual returns, balance sheets, return of allotment, return of deposits.

- Change services e.g. change in capital structure, change in directors, change in registered offices.

- Charge Management - Registration, modification and satisfaction.

- Investor Services i.e. complaints from investors regarding shares, dividend, debentures, fixed deposits.

- Provisions relating to managerial personnel - MD, remuneration of directors, commission to directors

- Approval Services - Headquarters (where approval is to be granted by Central Government).

- Approval Services - Regional Director (where powers are delegated to RD for granting approval).

- Approval Services - ROC (where approval is to be given by ROC).

- Information Services - Information to ROC in compliance with requirements of Companies Act - form 1AA, 23, 23AA, 35A.

Filling of form - E-form can be filled on line or off line. Advantage of filling off line is that you can fill the form in stages at leisure and save completed portion. Even if your form is half filled, your efforts do not go waste.

You can use 'Prefill' button to fill in the static data automatically e.g. name and address of registered office is entered automatically after CIN is filled. The internet connection should be on.

Check form - Forms have built in facility of check and validation. This can be done by clicking 'Check Form'. The 'check form' is done without being connected to internet.

Form can be modified by clicking 'Modify' button.

Pre-scrutiny – After 'check form' is done, pre-scrutiny of forms is required to be done before the form is uploaded. The computer is required to be connected to MCA portal for this purpose. If there are errors, they are displayed. After correcting errors, again 'Pre-scrutiny' is required to be done.

Uploading after attaching digital signature - Forms are uploaded after they are filled in by clicking 'Submit' button. Forms have to be signed digitally, before pressing 'Submit' button.

Role-check of Digital Signature – All professionals certifying forms and all authorised signatories of company are required to register their digital signatures on MCA portal. The signature will be role-checked with digital signature registered on MCA portal. The e-from will be accepted only if details were filed in DIN-3 and signature is registered with MCA – MCA DO letter No. HQ/86/2006-Computerisation dated 18-6-2007 (see CS July 2007 page 861).

On line scrutiny of forms - The form submitted will be scrutinised online for completeness or discrepancy and will be accepted only if it is complete. If form is rejected, it will be returned to user with nature of defects. After form is submitted, it will go into MCA central document repository.

Payment by challan or credit card - After form is submitted, 'Pay' button should be pressed. On 'challan payment option', a challan is generated with three copies. Payment should be made in any one of the five authorised banks, by using this challan.

***Attachments to forms* -** Attachments to the forms should be scanned or converted into PDF format. The form indicates what are the attachments required. The portal has facility to convert any document format into PDF format. You have to click 'Convert to PDF' link under Services tab after logging into the portal.

Files in word, excel, jpg, tiff format etc. are not accepted. These have to be converted into pdf format.

Files of Annual Returns and Balance Sheets - Files of Annual Returns and Balance Sheet (maintained by company in word or Excel format) need not be physically signed. These can be marked 'Sd' at place of signature, converted into pdf format and then attached. Attachments should not be filed as scanned images. It is not necessary to scan signed copy of attachment, since it increases the file size considerably – Ministry press Note HQ/82/2006-Computerisation dated 31-7-2006 and para 4(7) of Annexure 'A' of Scheme as notified on 26-10-2006.

Breaking of big attachments - Big attachments cannot be accepted. These can be broken into small parts. The size of any attachment cannot be more than 2.5 MB. In case of scanned documents, attachment may be broken into parts of 15 to 20 pages. Documents in multiple parts are acceptable. Attachment with file size greater than 2.5 MB is not accepted.

How to attach a document - Document is required to be attached by clicking 'attach' button. Attached document can be removed by clicking 'Remove Attachment'.

Submission of original papers in physical form in some cases - In cases where the document is required to be stamped (e.g. Memorandum and Articles of Association, Increase in share capital, declaration on stamp paper, power of attorney), original document is required to be sent to ROC, after e-filing is done. Similarly, where order of High Court of CLB is to be filed, original will have to be sent to ROC. The user will be providing SRN (Service Request Number) while sending these original documents. This would ensure authenticity and reliability of these key documents.

Pre-certification by professionals – Some form have to be pre-certified by professional e.g. Practising CA, ICWA or CS to ensure authenticity. They will have to digitally sign the eform. Form Nos. 2, 3, 5, 8, 10, 17, 18, 23, 24AB and 32 and 61 are required to be pre-certified. Form No. 1 can be signed by PCS, CA or Advocate.

Certain other forms e.g. Form No. 1 for declaration of dividend out of reserves, form No. 1 under Investor Education and Protection Fund is also to be pre-certified.

Service Request Number – Once an uploaded form is accepted, a 'SRN' (Service Request Number) is generated. Status of any transaction can be checked anytime by entering SRN (Service Request Number). Acknowledgment will be sent by e-mail.

Legal recognition of electronic records has been provided in sections 4 and 6 of Information Technology Act. These are overriding provisions.

Payment of fees - After eForm is submitted, filing fee is payable. Fee payable is calculated by system and displayed to user. Fees can be paid online by credit card/internet banking *or* offline by way of bank challan.

Addendum to form already submitted – After form is submitted, the scrutinising officer may ask for further documents. These can be submitted as addendum to original form with the given SRN. Payment of fees is not required while submitting addendum. The system will accept 'addendum' only when status of the form is 'in Progress'.

Re-submission of forms – After the form is scrutinised, MCA authorities may ask the user to re-submit the form. Such re-submission is permissible only when MCA authority asks user to re-submit the form i.e. status of form is 'Required Re-Submission'. No fees are payable. Once new form is submitted, old form is deleted from MCA document repository.

Charge ID of existing charges – About 10 million pages relating to existing subsisting charges have been digitized and inter-linkages have been established within a company. Index of charges has been prepared. While filing form 17 (satisfaction of charge) or form 8 (modification of existing charge), Charge Identification Number is required to be given. In case of all existing charges, Charge ID (Charge Identification Number) has been generated. The Charge ID can be seen through 'View Index of Charges' link after logging MCA portal i.e. www.mca.gov.in.

ITC code of products – In e-form 23AC (form for filing balance sheet, P&L account), 8 digit ITC (Indian Trade Classification) code is required to be given. This is available on http://www.dgciskol.nic.in [This code is based on HSN and hence practically same as per Excise or Customs Tariff) [There is no ITC code for services. It is not clear what service provider should fill in 'ITC Code' and whether e-form 23AC will be accepted by system, if this column is kept blank].

12-4 Procedure after submission of form

After fee is paid, the form is assigned to appropriate MCA employee for office work. He will affix his digital signature for registering/ approving/ rejecting the form. After the processing of eForm is completed, an acknowledgment by email is sent to user regarding approval/rejection of form submitted.

Status monitoring - Status of a document submitted can be checked by entering SRN (Service Request Number). Payment status can also be viewed with the help of SRN (Service Request Number).

The status can be any of following - (a) Waiting for payment (b) Transaction cancelled - payment not received (c) Work in progress (d) Waiting for user information (e) Approval (f) Required resubmission (g) Rejected.

Procedure for registration at office of ROC – Each document filed will be assigned a unique number. Following particulars shall be endorsed electronically on every document registered, recorded or filed – (i) Number assigned to company (ii) Unique number assigned to document and (iii) Date on which it is registered, recorded or filed [Regulation 19(1) of Companies Regulations].

The endorsement on the document will be authenticated by Registrar through a digital signature [Regulation 19(2) of Companies Regulations]. If such endorsement on document is not possible, it will be attached to the document with a note regarding such attachment on the document. It will be signed digitally by Registrar [Regulation 19(3) of Companies Regulations].

In case of physical filing, the above will be done manually by Registrar.

12-5 Director Identification Number (DIN)

Every person who is a director or who intends to become a Director, must obtain DIN (Director Identification Number). It will enable Government to keep control and facilitate legal actions against erring directors. It is a life time number. One person should have only one DIN.

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

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

2006. Procedures relating to DIN have been prescribed in Companies (Director Identification Number) Rules, 2006. The prescribed procedure is as follows -

Provisional DIN - Details are to be submitted through internet in form DIN-1. On submission of form electronically, provisional DIN is given by system electronically. [Rule 3(4) of DIN Rules]. Till 30-6-2007, provisional DIN number could be used for e-filing. Now, provisional DIN number cannot be used from e-filing w.e.f. 1-7-2007 – MCA DO letter No. HQ/86/2006-Computerisation dated 18-6-2007 (see CS July 2007 page 861).

Formal application after provisional DIN - After obtaining provisional DIN, duly signed application in DIN-1 form is to be submitted within 60 days to Central Government. Application should be submitted along with proof of identity (copy of any one of PAN card, driving license, passport or voter Id card) and proof of residence (copy of any one of passport, voter ID card, ration card, telephone bill, electricity bill, bank statement). Photograph has to be affixed in the space provided.

Documents are required to be certified by (a) notary public (b) gazetted officer (c) practising CA/CS/CWA *or* (d) company secretary in full time employment of the company [rule 3(5)(ii)].

If you have made mistake in filling DIN-1 Application form, you should submit fresh form. System will throw a warning 'Potential Duplicate'. Accept the same and further processing would be done accordingly.

Fees of Rs 100 are payable along with application [rule 4]. [No fee was payable if application was made before 31-12-2006].

Where to send the completed application form - Powers of Central Government in respect of DIN u/ss 266A and 266B have been delegated to Regional Director, Joint Director, Deputy Director or Assistant Director of Northern Region, vide notification No. GSR 650(E) dated 19-10-2006.

Accordingly, if the form is sent by registered post or courier, it should be sent to MCA DIN Cell, A-14, Section 1, PDIL Bhawan, Noida 201301 (UP). If sent by ordinary post, it should be sent to MCA DIN Cell, Post Box No. 3, Noida 201301 (UP).

Allotment of DIN - Application received will be scrutinized by Central Government. Its approval or rejection will be communicated by letter of post or electronically, within one month from receipt of application. If application is rejected, it will also be informed to applicant. Status of DIN application can be checked using 'Enquire DIN Approval Status' under DIN link.

Changes in information furnished – If there is any change in information supplied while making application in DIN-1 form (e.g. change of address or other particulars), it should be informed to ROC in form DIN-4. This form is to be submitted physically and not electronically. No fees are payable while submitting form DIN-4.

The changes will also be informed to companies of which he is a director. The details will be scrutinized and then incorporated by Central Government in electronic records and will be informed to the Director [rule 7].

Intimation of DIN to company and by company – As per requirement of section 266D of Companies Act, every director is required to intimate his Director Identification Number (DIN) with a copy of DIN allotment letter to company where he is director, in form DIN-2 [rule 5].

On receipt of the intimation, company is required to intimate the DIN number of director to ROC within one week u/s 266E. The details are to be submitted in form DIN-3. The form is required to be verified by MD or director or manager of the company. Form No DIN-3 has to be certified by PCS or secretary in wholetime employment of the company.

Filing fees are payable while submitting DIN-3. No filing fees are payable if DIN-3 was submitted prior to 30-6-2007 [rule 6].

In respect of companies registered on or after 1-7-2007, filing of DIN-3 is not required, as the details will be captured through form DIN-1 and form 32 – MCA DO letter No. HQ/86/2006-Computerisation dated 18-6-2007 (see CS July 2007 page 861).

12-6 Important e-forms

New e-forms have been notified. Following are some notable changes -

- Form 13 is omitted as forms 8, 10 and 17 are themselves sufficient.
- Form 20B has been added for filing Annual Return with ROC u/s 159.
- Form 23AC has been added for filing balance sheet and other documents with ROC u/s 220. Form 23ACA is for filing of Profit and Loss Account.
- Form 29 (consent to act as director) has been omitted and the consent has to be submitted as addendum to form 32.
- Forms 61 to 66 are added to be used for submission of applications to ROC and Central Government.

Form 61 for Application to ROC - In some cases, application is required to be made to ROC e.g. compounding of offenses, extension of period for holding AGM, extension of time for holding AGM, declaring a company as defunct company, amalgamation etc. This application is to be submitted electronically as attachment to form No. 61. Practically, this form is a covering letter.

Form 62 for submission of documents to ROC - Various documents are required to be submitted to ROC e.g. statement in lieu of prospectus, altered memorandum or articles, prospectus, return of deposits, secretarial compliance certificate etc. These have to be filed as scanned attachment to form No. 62. Practically, this form is a covering letter.

Form 21 for submitting Notice of order of Court or CLB – Various sections require submission of copy of order of Court or CLB to ROC. This is done at attachment to e-form No. 21.

Form 24A for applications to RD – In some cases, application is required to be made to Regional Director e.g. approval for entering into contract u/s 297, appointment of auditor u/s 224(2), issue of license u/s 25, removal of auditor u/s 224(7) and rectification of name. This application is to be submitted electronically in e-form 24A. Practically, this form is a covering letter.

Form 65 for application to Central Government – In some cases, application is required to be made to Central Government for approval. Where no form has been prescribed, application is required to be made as attachment to form No. 65. Practically, this form is a covering letter.

List of prescribed forms - Following are some important e-forms and other forms.

Form 1	Declaration of Compliance with requirements of Companies Act for registration of company, required u/s 33(1)(2).
Form 1A	Application for availability or change of name (section 20 and 21)
Form 1AA	Particulars of person/director charged for purpose of section 5(f) or (g)
Form 1AD	Application to Regional Director for change of registered office within the State, if it involves change of jurisdiction of ROC u/s 17A
Form 1B	Application to Central Government for change of name u/s 21 or 31(1)
Form 2	Return of allotment of shares, required u/s 75(1)
Form 2B (not e-form)	Nomination form (to be filled by shareholder / debenture holder / fixed deposit holder – to be filed with company, not with ROC) (to be submitted physically, not electrically)
Form 3	Contract relating to shares allotted for consideration otherwise than in cash – section 75(2)
Form 4	Statement of % of commission payable in respect of shares or debentures – section 76(1) (not to be filed electronically)
Form 4A	Declaration of Solvency (if company is planning buy back of securities u/s 77A) – To be submitted as attachment to e-form 62.
Form 4B (not e-form)	Register of securities bought back by a company u/s 77A(9) [Buy Back of Securities] (not to be submitted to ROC) (not to be submitted electronically)
Form 4C	Return relating to buy-back of securities.- section 77A
Form 5	Notice of consolidation/division/increase in share capital – section 95, 97 or 94A(2) or 81(4)
Form 7-B (not e-form)	Share transfer form (To be filed with company, not with ROC) (to be submitted physically, not electrically)
Form 7-C (not e-form)	Application for extension of validity of transfer deed – ROC has been authorised to grant extension (to be submitted physically, not electrically)
Form 8	Creation of charge and modification of charges required u/ss 125(1), 127(1), 130, 132, 134, 135 and 600
Form 10	Particulars for registration of charges for debentures – u/ss 128 and 129
Form 15	Appointment or cessation of receiver or manager – sections 137 and 600.
Form 17	Memorandum of complete satisfaction of charges, required u/s 138(1)
Form 18	Notice of situation of company's registered office and any change of the situation, required u/s 146
Forms 19 and 20	Declaration of compliance u/s 149
Form 20A	Declaration regarding commencement of new business, required u/s 149(2A) or 149(2B).
Form 20B	Annual Return u/s 159 (This is new form).
Form 21	Notice of order of NCLT/Court (required under various sections)
Form 21A	Annual Return of company not having share capital, required u/s 160
Form 22	Statutory report u/s 165.
Form 22B	Return pursuant to section 187C(4) (declaration of beneficial interest)
Form 23	Registration of resolution and agreements. [If more than one resolutions are passed in one meeting, only one return and one filing fee is sufficient], required u/s 192.
Form 23AA	Notice of address at which books of account are maintained – section 209(1).
Form 23AAA	Application to Central Government for modifications in matters to be stated in Company's balance sheet and P&L account
Form 23AAB	Application for exemption from attaching annual accounts of subsidiary companies
Form 23AAC	Application for not providing depreciation
Form 23AC	Form for filing balance sheet and other documents (excluding Profit and Los Account) with ROC u/s 220. Notice, Directors' report and auditor's report are to be submitted as attachments to this form (This is new form)
Form 23ACA	Form for filing of Profit and Loss Account u/s 220 (This is new form). The form is to be filed alongwith form 23AC. Separate filing fee is not required.
Form 23B	Notice by auditor (informing his appointment as auditor to ROC), required u/s 224(1A)
Form 23C	Application for approval of appointment of cost auditor – to be filed with Central Government u/s 233B(2)
Form 24	Application for increase in number of directors of the company

Form 24A	Application to be made to Regional Director for approval/permission etc. (Practically, this is a covering letter)
Form 24AB	Application for giving loan, providing security or guarantee in connection with a loan
Form 24B	Application for prior consent for holding office of profit – section 314(1B).
Form 25A	Approval for appointment and remuneration payable to MD/WD/Manager [sections 198, 269, 309 and 316]
Form 25B	Application for amending provisions relating to MD, WD or non-rotational director – section 268.
Form 25C	Return of appointment of MD / WD / Manager, required u/s 269(2) and schedule XIII.
Form 32 with addendum	Particulars of Appointment of Directors, Manager or Secretary and changes among them – required u/s 303(2), 264(2), 266 (The consent of director is to be submitted as Addendum to form 32, which was previously required to be submitted in form 29)
Form 36	Receivers or Manager's abstract of receipts and payments
Form 39	Conversion of partnership firm into company [sections 565(1), 567(a), 567(c) and 568(a)]
Form 44	Documents to be filed by foreign company establishing business in India, required u/s 592
Forms 49 and 52	Returns and Notice by foreign company u/ss 593, 594, 597
Form 61	Form for filing application with ROC (practically, it is a covering letter)
Form 62	Form for submitting document with Registrar (except Secretarial Compliance Certificate) (practically, it is a covering letter)
Forms 63 and 64	Application for declaration as Nidhi company and application for opening branches by Nidhi company
Form 65	Form for filing application or document with Central Government (practically, it is a covering letter)
Form 66	Form for filing Secretarial Compliance Certificate
Form 1	Statement of amounts credited to Investor Education and Protection Fund by company
Investor complaint form	Form for filing complaint/s against company
Forms I and II	Appointment of Sole Agents
Forms DD-B and DD-C	Return by company in respect of disqualification of director u/s 274(1)(g) and application for removal of disqualification of a director
Cost Audit Report	Form pursuant to section 233B(4) and cost Audit (Report) Rules.
DIN-1	Application by director to obtain DIN
DIN-2	Intimation of DIN by director to company u/s 266D
DIN-3	Intimation by company to ROC of DIN of director u/s 266E (required in case of companies incorporated upto 30-6-2007. In case of companies incorporated on or after 1-7-2007, details will be captured through DIN-1 and form 32 – MCA DO letter No. HQ/86/2006-Computerisation dated 18-6-2007 (see CS July 2007 page 861).
DIN-4	Intimation by director to Central Government of changes in address or other particulars (to be submitted physically and not electronically).

LISTING AGREEMENTS

1 Background

SEBI (Securities and Exchange Board of India), is a statutory body constituted on 30th January, 1992 to regulate securities market. SEBI has been given various powers under the Act to enable it to fulfil its objectives. Section 11 of SEBI Act specifies that basic duty of SEBI is to (*a*) protect interests of investors in securities and (*b*) regulate the securities market

Head Office of SEBI is at 224, Mittal Court, B wing, Nariman Point, Mumbai - 400 021. Tel : 22850451-56. Fax : 22045633. E-mail – sebi@sebi.gov.in. SEBI has regional offices at New Delhi, Chennai and Kolkata. Website of SEBI is *http://www.sebi.gov.in*. The website contains information about SEBI regulations, offer documents, orders of Securities Appellate Tribunal etc.

Address of investor grievance & guidance section is P.B. No. 19972, Nariman Point, Mumbai - 400 021. Address of Office of Investor Assistance and Education is – SEBI, Exchange plaza, C-1, Block G, 4th Floor, Bandra Kurla Complex, Bandra (E), Mumbai 400 051.

1-1 Intermediaries in securities market

There are many intermediaries involved in stock exchange transactions. These are : Merchant bankers, Underwriters, Registrars, bankers, brokers, depositories, custodians etc. These intermediaries have to be registered with SEBI and follow the regulations issued by SEBI. They should appoint a 'Compliance Officer'. He should report non-compliance with SEBI Act, rules, regulations, notifications, guidelines, instructions etc. directly to SEBI. [*Quite probably, he will lose the job, if he really does so*].

SEBI Regulations in respect of intermediaries prescribe code of conduct to be followed by them.

Income Tax PAN will be sole identification number for all transactions in securities market – Income tax PAN will be the sole identification number for all participants in the securities market with an alpha-numeric prefix or suffix to distinguish a particular kind of account. The intermediaries, stock exchanges and depositories have been advised to put in place necessary systems to link PAN details with clients – SEBI circular No. MRD/DoP/Cir-05/2007 dated 27-4-2007.

2 Corporate Governance

Highlights of Corporate Governance code is prescribed by SEBI as per clause 49 of listing agreement, as follows -

Composition of Board - Provisions, as contained in clause 49(I) of Listing Agreement are as follows – Company should have optimum combination of executive and non-executive directors, with not less than 50% of directors comprising of non-executive directors. - - There should be at least 50% independent directors if Chairman is executive. In case of non-executive Chairman, at least one-third should be independent directors. [The non-executive Chairman may or may not be 'independent director'].

Meaning of independent directors - 'Independent director' means a non-executive director who - (a) apart from receiving director's remuneration, does not have any other material pecuniary relationship or transactions with company, its promoters, its directors, its senior management or its holding company, subsidiaries and associates, which may affect independence of the director. Senior management means members of management one level below executive directors including functional heads (b) is not related to promoters or management at the board level or at one level below the Board (c) Has not been executive of the company in immediately preceding three financial years (d) is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following – (i) the statutory audit firm or the internal audit firm that is associated with the company and (ii) the legal firm/s and consulting firm/s and consulting firm/s that have a material association with the entity (e) is not a *material* supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director *and* (f) is not a substantial shareholder of the company, i.e. owning two percent or more of the block of voting shares. [clause 49I(A)(iii) of Listing Agreement] [Concept of 'materiality' implies that minor transactions with company will not affect the independent character of director]

Nominee directors appointed by an institution which has invested in or lent to the company shall be deemed to be independent directors [*Explanation* (c) to clause 49-I(A) of Listing Agreement]. 'Institution' means PFI (Public Financial institution) or Bank. However, directors nominated by Government on Government companies will not be 'independent directors'. 'Associate' means 'associate' as defined in AS-23.

Independent directors may have a tenure not exceeding a period of nine years on the Board. [This is not a mandatory requirement]

Disclosures by non-executive directors – Non-executive directors are required to disclose their shareholding (own or held on a beneficial basis) before being appointed as director. These details should be disclosed in the notice to general meeting called for appointment of such director.

Restrictions on Committee membership - A person shall not be member of more than 10 committees of Board. He shall not be Chairman of more than five committees across all companies in which he is director. Every director must inform the company about committee positions he occupies in other companies annually, and notify changes as and when they take place. - - For purpose of considering the limit of committees on which a director can serve, all listed and unlisted public companies will be included, but other companies (private companies, foreign companies, section 25 companies) will be excluded. Further, only two committees i.e. Audit committee and Shareholders' Grievance Committee shall be considered for purpose of the limit, i.e. membership of other committees will not be considered [*explanation* to clause 49(IC) of Listing Agreement]

2-1 Non executive directors' compensation and disclosures

Clause 49(IB) of Listing Agreement makes following provisions in respect of remuneration to remuneration of non executive directors.

All fees/compensation paid to non-executive directors shall be fixed by the Board of Directors and shall require previous approval of shareholders in general meeting (except that sitting fees are not required to be approved in general meeting). Shareholders' resolution shall specify the maximum number of stock options that can be granted to non-executive directors including independent directors.

Thus, in case of listed company, resolution in general meeting is required to be passed for any managerial remuneration (except payment of sitting fees). As per section 309(1), managerial remuneration can be fixed by Articles or by resolution in general meeting. *Proviso* to section 309(1) provides exemption to remuneration for services rendered by director in professional capacity, if in the opinion of Central Government, director possesses requisite qualifications. However, all such remuneration will have to be approved in general meeting, except sitting fees.

Stock options to non-executive directors - Limits shall be set for the maximum number of stock options that can be granted to non-executive directors including independent directors in any financial year and in aggregate.

2-2 Board meetings and information to be given to Board

Board meetings shall be held at least four times in a year, with maximum time gap of four months between the meetings [clause 49I(C) of Listing Agreement]. Minimum information to be made available to Board has been specified in Annexure 1A of clause 49 of Listing Agreement.

Review of compliance report – Board will review compliance reports of all laws applicable to company, prepared by company and steps taken by company to rectify instances of non-compliance [clause 49I(C)(iii) of listing agreement].

Code of Conduct for directors and senior managers - Board of a company shall lay down the code of conduct for all Board members and senior management of a company. This code of conduct shall be posted on the website of the company. All Board members and senior management personnel shall affirm compliance with the code on an annual basis. The annual report of the company shall contain a declaration to this effect signed by the CEO.

The term "senior management" shall mean personnel of the company who are members of its core management excluding Board of Directors. Normally, this would comprise all members of management one level below the executive directors [clause 49(ID) of Listing Agreement].

Policy towards Subsidiary Companies of listed company - At least one independent director on the Board of Directors of the holding company shall be a director on the Board of Directors of the subsidiary company. - - The Audit Committee of the holding company shall also review the financial statements, in particular the investments made by the subsidiary company. - - The minutes of the Board meetings of the subsidiary company shall be placed for review at the Board meeting of the holding company. - - The Management should bring to notice of Board of holding company all significant transactions and arrangements entered into by unlisted subsidiary company [clause 49(III) of Listing Agreement]

2-3 Disclosures

Following disclosures shall be made -

Basis of related party transactions - A statement of all transactions with related parties including their basis shall be placed before the Audit Committee. Details of material transactions which are not in normal course of business shall be placed before audit committee. If any transaction is not on an arm's length basis, management shall provide an explanation to the Audit Committee justifying the same. [clause 49(IVA) of Listing Agreement]

Disclosure of Accounting Treatment **–** If accounting standards are not followed, the fact should be disclosed in financial statement, together with management's explanation why the alternate treatment is giving better view [clause 49(IVB) of Listing Agreement]

Disclosure of risks and risk management - Company shall lay down procedures to inform Board members about the risk assessment and minimization procedures. These procedures shall be periodically reviewed to ensure that executive management controls risk through means of a properly defined framework. [clause 49(IVC) of Listing Agreement]

Proceeds from Initial Public Offerings (IPOs) - When money is raised through an Initial Public Offering (IPO) it shall disclose to the Audit Committee, the uses / applications of funds by major category (capital expenditure, sales and marketing, working capital, etc), on a quarterly basis as a part of their quarterly declaration of financial results. Further, on an annual basis, the company shall prepare a statement of funds utilized for purposes other than those stated in the offer document/prospectus. This statement shall be certified by the statutory auditors of the company. The audit committee shall make appropriate recommendations to the Board to take up steps in this matter. [clause 49(IV-D) of Listing Agreement] [This clause makes no provision about disclosure to members. However, as per clause 43 of Listing Agreement, information about deployment funds raised through issue of securities is required to be given to members]

Remuneration of Directors - All pecuniary relationship or transactions of the non-executive director's *vis-à-vis* the company shall be disclosed in the Annual Report. Disclosure about remuneration giving prescribed details should be made in section on Corporate Governance [clause 49[IV-E)]

Management discussion and analysis report of Board - A management discussion and analysis report of Board shall form part of annual report to shareholders. The report should include following matters within the limits set by the company's competitive position - (a) Industry structure and development (b) Opportunities and threats (c) Segment-wise or product wise performance (d) Outlook (e) Risks and concerns (f) Internal control systems and their adequacy (g) Discussion on financial performance with respect to operational performance (h) Material developments in human resources / industrial relations [clause 49(IVF) of Listing Agreement].

Disclosure by senior management to Board of their interests in transactions - Disclosure shall be made by senior management to Board, relating to all material financial and commercial transactions where they have personal interest that may have potential conflict with interest of company - e.g. dealing in company shares, commercial dealings with bodies which have share-holding or management of their relatives etc. [This disclosure is to be made by senior management to Board]. [clause 49(VIIF(ii)] of Listing Agreement].

Disclosure when director is to be appointed/re-appointed - In case of the appointment of a new director or re-appointment of a director the shareholders must be provided with the following information – (a) A brief resume of the director; (b) Nature of his expertise in specific functional areas (c) Names of companies in which the person also holds the directorship and the membership of Committees of the Board and (d) Shareholding of non-executive directors in the company either own or as beneficiary [clause 49(IVG)(i) of Listing Agreement]

Information about company on web - Quarterly results and presentation made by companies to analysts shall be put on company's web-site, or shall be sent in such a form so as to enable the stock exchange on which the company is listed to put it on its own web-site [clause 49IVG(ii) of Listing Agreement].

Shareholders / investors grievance Committee - A Board committee under Chairmanship of a non-executive director should be formed to look into redressing of shareholders and investors complaints like transfer of shares, non-receipt of balance sheet / dividend etc. This Committee shall be designated as 'Shareholders/Investors Grievance Committee'. [clause 49(IVG)(iii) of Listing Agreement].

Delegation of authority of share transfer - In order to expedite process of share transfers, Board shall delegate powers of share transfer to an officer or a committee or to registrar and transfer agents. The delegate authority shall attend to share transfer formalities at least once in fortnight. [clause 49IVG(iv) of Listing Agreement]

Report on Corporate Governance to Members - Annual Report of Company shall include a separate section on report on corporate governance. This report shall give details as specified in Annexure 1C of clause 49 of Listing Agreement.

Transparency and disclosures – Besides clause 49, SEBI has initiated many amendments in listing agreements to bring transparency and ensure adequate disclosures to members and public. Some important measures are (a) Publication of quarterly unaudited reports with segment reporting within one month (b) Quarterly limited review by auditors (c) Disclosures about important events in the company (d) Disclosures in Directors' Report.

2-4 CEO/CFO certification

CEO (either the Managing Director or Manager appointed under Companies Act) and the CFO (whole-time Finance Director or other person discharging this function) of the company shall certify to Board that, they have reviewed the financial statements and the cash flow statements and to the best of their knowledge and belief these statements are true, there were not fraudulent or illegal transactions, they accept responsibility of internal control for the purpose for financial reporting, they have indicated to auditors and audit committee significant changes and instances of fraud etc. [clause 49(V) of Listing Agreement].

The certificate should be submitted to Board annually before or at the time when the annual accounts are presented to Board. It is advisable that the certificate is taken on record by Board and recorded in minutes of Board meeting accordingly.

2-5 Non-mandatory requirements

All the requirements in respect of Corporate Governance discussed above are mandatory. In addition, some non-mandatory requirements have been suggested. Even if these are not mandatory, company has to state its adoptions / non-adoption in the 'Corporate Governance' section of the Annual Report, as per clause 49VII(2) of Listing Agreement]

The non-mandatory requirements, as contained in Annexure 1-D of clause 49 of Listing Agreement are as follows -

Facilities to non-executive Chairman of Company - If the Chairman is non-executive, he should be given a Chairman's office at company's expenses and reimbursement of expenses incurred in performance of his duties.

Tenure of independent directors – Independent directors may have a tenure not exceeding a period of nine years on the Board.

Remuneration Committee - Remuneration Committee of Board of directors may be formed to decide policy on remuneration to executive directors, including pension and compensation payment. There should be at least three members of committee. All members of Committee should be non-executive directors. Chairman of remuneration Committee should be independent director. All members of Committee could be present at the meeting of remuneration committee (i.e. 100% quorum is desirable). - - Chairman of Remuneration Committee could be present at AGM to answer shareholder queries, but Chairman of meeting should decide who will answer the queries.

Half-yearly reporting to members - Shareholders should be supplied half yearly report about financial performance and significant events in last six months.

Goal towards No Audit qualifications - Company may move towards a regime of unqualified financial statements.

Training of Board Members - Company shall train its Board members in the business model of the company as well as the risk profile of the business parameters of the company, their responsibilities as directors, and the best ways to discharge them.

Mechanism for evaluating non-executive Board Members - The performance evaluation of non-executive directors should be done by a peer group comprising the entire Board of Directors, excluding the director being evaluated; and Peer Group evaluation should be the mechanism to determine whether to extend / continue the terms of appointment of non-executive directors.

Whistle Blower Policy – The company may establish a mechanism for employees to report to management concerns about unethical behaviour, actual or suspected fraud or violation of company's code of conduct or ethics policy.

2-6 Reporting compliance of corporate governance

Listing agreements provide for reporting of compliance with requirements of corporate governance.

Quarterly Compliance report to stock exchange - The companies shall submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter as per the format prescribed in Annexure IB. The report shall be submitted either by the Compliance Officer or the Chief Executive Officer of the company. The details under each head shall be provided to incorporate all the information required as per the provisions of the clause 49 of Listing Agreement. In the remarks column, reasons for non-compliance may be indicated. [clause 49(VI)(ii) of Listing Agreement]

Compliance certificate from auditors/PCS - Company shall obtain a certificate from auditors of the company or Practicing Company Secretary (PCS) regarding compliance of conditions of Corporate Governance. This certificate will be annexed to directors' report, which is sent annually to all members. Copy of the certificate shall be sent to stock exchange along with annual return which is filed with stock exchange – Clause 49(VII) of Listing Agreement.

3 Audit Committee

One of the key feature of Corporate Governance is 'Audit Committee'. This is required under clause 49 of Listing Agreement. Provision for audit committee has also been made in section 292A of Companies Act. Needless to mention, section 292A applies to listed as well as unlisted companies, while clause 49 applies only to listed companies. An audit committee is a sub-committee of Board of Directors. It should consist of independent directors with no management responsibility for company's financial operations. The Committee should report directly to Board.

Constitution of Qualified and Independent Audit Committee - A qualified and independent audit committee shall be set up by Board. The audit committee shall have minimum three members. All the members of audit committee shall be non-executive directors. Two-thirds of them being independent. [Clause 49(IIA) of Listing Agreement]

Members of committee to be financially literate - All members of audit committee shall be financially literate and at least one member shall have accounting or related financial management expertise. - - The term "financially literate" means the ability to read and understand basic financial statements i.e. balance sheet, profit and loss account, and statement of cash flows. - - A member will be considered to have accounting or related financial management expertise if he or she possesses experience in finance or accounting, or requisite professional certification in accounting, or any other comparable experience or background which results in the individual's financial sophistication, including being or having been a chief executive officer, chief financial officer, or other senior officer with financial oversight responsibilities. - - Thus, he need not be qualified CA/ICWA/CS, but he should have had reasonable exposure to accounting and financial management aspects at fairly senior level.

Chairman of Audit Committee - The Chairman of the Audit Committee shall be an independent director. The Chairman shall be present at Annual General Meeting to answer shareholder queries [clause 49II(A)(iii) of Listing Agreement].

Secretary of committee - The Company Secretary shall act as the secretary to the committee. - - Note that he is not a member of the audit committee [clause 49II(A)(vi) of Listing Agreement].

3-1 Meeting of Audit Committee

The audit committee shall meet at least thrice a year. One meeting shall be held before finalization of annual accounts and one every six months. The quorum shall be either two members or one-third of the members of the audit committee, whichever is higher and minimum of two independent directors. [clause 49(IIB) of Listing Agreement]

Invitation to executives/auditors at meeting - The audit committee may invite such of the executives, as it considers appropriate (and particularly the head of the finance function) to be present at the meetings of the committee, but on occasions it may also meet without the presence of any executives of the company. The finance director, head of internal audit and when required, a representative of the external auditor may be present as invitees for the meetings of the audit committee [clause 49II(A)(v) of Listing Agreement] [However, as per section 292A(5), auditor, internal auditor and director-in-charge of finance *shall* attend and participate at the Audit Committee meetings, though they shall not be entitled to vote. This would apply to all companies having paid up capital exceeding Rs five crores].

Powers of Audit Committee - The audit committee shall have powers which should include the following – (1) To investigate any activity within its terms of reference (2) To seek information from any employee (3) To obtain outside legal or other professional advice (4) To secure attendance of outsiders with relevant expertise, if it considers necessary [clause 49II(C) of Listing Agreement].

3-2 Role of Audit Committee

The role of the audit committee shall include the following [clause 49(IID) of Listing Agreement] -

Overview of reporting process – Audit committee should have oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible [clause 49(IID1) of Listing Agreement].

Recommend auditors and their fees – Audit committee should recommend the appointment and removal of external auditor, fixation of audit fee and also approval for payment for any other services [clause 49(IID2) and 49(IID3) of Listing Agreement]

Reviewing annual financial statements before submission to Board – Audit Committee should review with management the annual financial statements before submission to the board, with particular reference to – (a) Matters required to be included in Directors Responsibility Statement in terms of section 217(2AA) (b) Changes in accounting policies and practices and reasons (c) Major accounting entries involving estimates based on exercise of judgment by management (d) Significant adjustments in financial statement arising out of audit (e) Compliance with listing and legal requirements concerning financial statements (f) Disclosure of any related party transactions (g) Qualifications in the draft audit report [clause 49(IID4) of Listing Agreement].

Clause 49 gives some emphasis on 'related party transactions' as it is one of usual ways of siphoning out money by promoters from the company. - - The term "related party transactions" shall have the same meaning as contained in the Accounting Standard 18, Related Party Transactions, issued by ICAI.

Reviewing quarterly Financial Statements - Audit Committee should review with management the quarterly financial statements before submission to the board [clause 49(IID5) of Listing Agreement].

Reviewing performance of auditors and internal audit system – Audit committee should review with management performance of statutory and internal auditors and adequacy of internal audit system [clause 49(IID6) of Listing Agreement].

Review Internal audit function – Audit committee should review the adequacy of internal audit systems. It should review the adequacy of internal audit function, including the structure of the internal audit department, staffing and seniority of the official heading the department, reporting structure coverage and frequency of internal audit. [clause 49(IID7) of Listing Agreement].

The audit committee should have discussion with internal auditors any significant findings and follow up there on [clause 49(IID8) of Listing Agreement]. Audit committee should review the findings of any internal investigations by the internal auditors into matters where there is suspected fraud or irregularity or a failure of internal control systems of a material nature. Such matters should be reported to the board. [clause 49(IID9)]

Discussions with statutory auditors – Audit Committee should hold discussion with external auditors before the audit commences about nature and scope of audit as well as post-audit discussion to ascertain any area of concern [clause 49(IID10) of Listing Agreement].

Look into substantial defaults in payments – Audit Committee should look into the reasons for substantial defaults in the payment to the depositors, debenture holders, shareholders (in case of non payment of declared dividends) and creditors [clause 49(IID11) of Listing Agreement]

Whistle blower policy – If a company has whistle blower policy, audit committee should review functioning of whistle blower mechanism [clause 49(IID12) of Listing Agreement].

Review of specified information by Audit Committee - The Audit Committee shall mandatorily review the following information: (1) Management discussion and analysis of financial condition and results of operations (2) Statement of significant related party transactions (as defined by audit committee) submitted to management (3) Management letters / letters of internal control weaknesses issued by statutory auditors (5) Internal audit report relating to internal control weaknesses and (5) The appointment, removal and terms of remuneration of the Chief Internal Auditor shall be subject to review by the Audit Committee [clause 49II(E) of Listing Agreement]

Any other function assigned by Board – Audit committee may carry out any other function as is mentioned in terms of reference of Audit Committee (by Board of Directors) [clause 49(IID13) of Listing Agreement].

Duties of audit Committee under Companies Act – Section 292A(6) provides that the audit committee should have discussions with the auditors periodically about the internal control systems, the scope of audit including the half-yearly and annual financial statements before submission to Board. It will also ensure compliance of internal control systems. [These are already covered under duties as specified in clause 49 of Listing Agreement].

Recommendation of dividend - As per Secretarial Standard (SS-3) of ICSI on Dividend (which is presently recommendatory in nature), audit committee should consider financial statement before submission to Board. Dividend should be recommended by Board only after approval of financial statement. Similarly, in case of interim dividend, same shall be approved only after interim financial statement is considered by Committee. It should then be submitted to Board for consideration and declaration of interim dividend.

3-2 Audit Committee under Companies Act

As per section 292A of Companies Act, every public company having paid up capital of Rs five crore or more must constitute a committee of Board as 'Audit Committee'. - - Note that these provisions apply to listed as well as unlisted companies.

Composition of Committee – The audit committee of the Board shall consist of minimum three directors. Out of total members of committee, at least two third shall be non-executive i.e. those who are not Managing or Wholetime Directors. The committee shall select its own Chairman. It is provided that director-in-charge of finance shall attend the meeting of audit committee as invitee. By implication, it means that director-in-charge of finance cannot be member of the committee.

Terms of reference will be specified in writing by the Board. [section 292A(2)]. Composition of Audit Committee shall be disclosed in Annual Report of the company. [section 292A(4)].

Recommendations of Committee binding – Recommendations of Committee on any matter relating to financial management including the audit report, shall be binding on the Board. [section 292A(8)]. If the Board does not accept recommendations of Audit Committee, it shall record the reasons therefor and communicate such reasons to the shareholders. [section 292A(9)].

Chairman of committee to attend AGM – Chairman of Audit Committee shall attend the Annual General Meeting of company to provide any clarification on matters relating to audit. [section 292A(10)]. There is no provision permitting his absence for reasons beyond his control. However, the offence is compoundable.

Punishment for default – In case of default, company as well as every officer who is in default is punishable with imprisonment upto one year or fine upto Rs 50,000 or both. [section 292A(11)]. Since auditor is not an 'officer' of the company, he cannot be penalised for not attending the meeting/s of audit committee, though section 292A(5) prescribe that he shall attend the meetings of audit committee.

4 Listing agreement

Every company listing its shares in stock market must enter into a 'listing agreement' with the stock exchange. As per section 21 of Securities Contract (Regulation) Act, 1956; a listed company is bound by the listing agreement. Violation of listing agreement is an offence. Stock exchange can suspend or withdraw dealings in securities if there is violation of listing agreement. Salient aspects of 'listing agreement' are summarised here.

Closure of transfer register - Company will close its register of transfer books at least once in a year at the time of annual general meeting. Company will close register of transfer only once in a year. Closing date will not be inconvenient to stock exchange for purpose of settlement of transactions. [Clause 15] Time gap between book closure and record date will be minimum 30 days. (reduced from earlier 90 days – SEBI circular dated 6.12.2000). [Clause 16]. All transfers received upto date of closure /record date will be recorded. [Clause 17]

Intimate stock exchange after adoption of accounts - Immediately after Board meeting, company will inform stock exchange about dividend declared, total turnover, gross profit/loss, net profits, capital profit, accumulated profit, capital profits, source of dividend, provisions for taxes and depreciation etc. by letter or telegram. Such declaration will be made only after close of market hours. It can also be made at least half an hour before market opens. [Clause 22]

Prior intimation if buy back proposed - If company intends to buy back its shares, company should give seven days prior notice about the Board meeting at which proposal to buy back of securities is to be considered. Immediately after Board meeting, decision about buy back should be intimated to stock exchanges within 15 minutes of closure of Board meeting. [Clause 19]

Decision to be intimated after closure of stock market - Decision about dividends, rights or bonus shares or buy back of securities shall be informed to stock exchange immediately after the Board meeting, but after close of market hours of stock exchange, to avoid excessive volatility of stock prices. [Clause 20]

Listing fees - Company will pay listing fees to stock exchange at the time of listing and also annual fees and will abide by rules and bye-laws of stock exchange. Listing fee is payable by 30th April of the year. Non-payment of fees is deemed to be a breach of agreement between company and stock exchange concerned. [Clause 38]. Listing fee of 3 years together with initial listing fee will be paid up front and later once in every three years. [Clause 38 and 38A]

Copies of annual accounts etc. to be sent - Six copies of annual accounts, notice of meeting, directors report, etc. will be submitted to stock exchange. [Clause 31(a)] Copies of all notices of meetings convened u/s 391 or 394, together with annexures shall be sent to stock exchange [clause 31(c)].

Prior Intimation about Board meeting in certain cases - Date of meeting of Board at which recommendation of dividend or declaration of dividend or rights or bonus issue or issue of convertible debentures or passing over of dividend is proposed will be intimated in advance. Declaration of dividend must be at least 5 days before commencement of closure of books. [Clause 19]. - - At least seven days prior intimation about meeting where dividend declaration is to be considered should be given to stock exchange. [Clause 19]

Intimation about proposed bonus issue - If company intends to propose a bonus issue and agenda papers of Board meeting contain the papers of the proposal, simultaneously, notice should be given to stock exchange. However, if agenda papers do not contain any proposal of bonus issue, advance intimation is not required. [Clause 19]

Intimate if major change - Inform stock exchange about proposed change in general character or nature of its business, change in Board, MD, auditors etc. and any other information as may be required. [Clauses 29 and 30]

Intimate shareholding pattern - Inform shareholding pattern, i.e. distribution of each kind of securities (i.e. pattern of shareholding e.g. shares held by financial institutions, banks, promoters, foreign companies etc.) listed will be informed to stock exchange every year after AGM [Clause 35].

Major events to be informed - Major events e.g. strike, lock outs, power cuts etc. will be informed promptly to stock exchange [Clause 36]. Any other information required by stock exchange will be supplied at the request of stock exchange [Clause 36A]. - - Take-over offer or substantial acquisition of securities will be intimated to stock exchange.

Abridged balance sheet can be sent to members - Company can send abridged balance sheet to shareholders, as provided in section 219(1)(iv) of Companies Act. If shareholder makes written request, complete and full balance sheet should be sent to shareholder [Clause 32 amended w.e.f. 26-4-2007] [Of course, full balance sheet can be sent, if company wants].

Cash flow, consolidated statement and related party transaction disclosures in annual accounts - Company will give a cash flow statement along with balance sheet. The cash flow statement will be prepared as per ICAI accounting standard AS-3, under indirect method as given in AS-3. - - Consolidated financial statements shall be published in the annual report in addition to the individual financial statements. These will have to be audited by statutory auditors and filed with stock exchange - - Disclosures as per 'Related Party Disclosures' Accounting standard shall be made in Annual Report. - - It also has to make disclosure about loans/advances and investments in its own shares by subsidiaries, associates etc. Both parent and subsidiary company has to make the disclosure [Clause 32]

Electronic Information on SEBI website - Company will provide following information and reports on EDIFAR (Electronic Data Information Filing and Retrieval] website maintained by National Informatics Centre (NIC), in such manner and format as may be prescribed by SEBI [clause 51] - * Full version of annual report * Corporate Governance Report * Shareholding pattern statement * Statement of actions taken against company by any regulating agency * Such other statement as may be specified by SEBI from time to time. Company will appoint a compliance officer for this purpose. [Clause 51]. Initially, 200 companies have been selected for the EDIFAR project – SEBI circular dated 20-6-2002. Further 500 companies were added each vide SEBI circular No. SMD/POLICY/CIR-23/02 dated 17-9-2002, circular No. SMD/POLICY/CIR-10/2003 dated 17-3-2003 and more 500 companies vide circular No. SMD?SR/CIR-23/2003/18/06 dated 2-6-2003.

4-1 Quarterly reports and limited review by auditors

Unaudited quarterly financial results will be furnished to stock exchange within one month from closure of quarters. In case of companies which are yet to commence commercial production, details how unutilised funds have been invested should be disclosed. In the last quarter of financial year, if company wants to give audited results, the audited accounts shall be published within 3 months. However, company will have to inform stock exchange within one month of end of quarter that it will publish audited results within 3 months.

The quarterly report shall also give number of investor complaints received, disposed of and lying unresolved at the end of the quarter [Clause 41]. Proforma of quarterly results has been prescribed by SEBI. An alternative format has also been prescribed, where manufacturing and trading/service companies have followed functional (secondary) classification.

Reporting of financial results to stock exchange – Quarterly financial results shall be submitted to stock exchange within 15 minutes of conclusion of meeting of Board or committee in which they were approved – [clause 41(I)((f)].

Limited review of quarterly report - In addition to quarterly report, company shall prepare half yearly results in same proforma. Both half yearly and quarterly report will be subjected to 'limited review' by auditors of company. Copy of review report shall be submitted within two months after close of quarter. If variation in net profits or net loss after tax between quarterly results as published and after limited review is in excess of 10% or Rs 10 lakhs, whichever is higher, reason shall be informed to stock exchange. Half yearly report should indicate non promoter shareholding in prescribed form. Form of review report has been specified in Annexures V to VIII of clause 41 of Listing Agreement.

Limited Review Report of Auditors shall be placed before Board or Committee, before submitting it to stock exchange.

If the results are amended subsequent to limited review by auditors, explanation for variations shall be submitted to stock exchange. The explanation shall be approved by Board of Directors.

Quarterly report on accrual principle with segment reporting - The quarterly results should be prepared on basis of recognition and measurement principles laid down in AS-25 (Interim Financial Reporting) issued by ICAI. Segment-wise quarterly reporting of revenue, results and capital employed should be done in prescribed form. Changes in accounting policies and extra-ordinary items shall be disclosed as per AS-5 (AS-5 net Profit or Loss for the period, prior period items and changes in accounting policies).

Any material event in quarter shall be reported.

Segment reporting will be as per AS-17 issued by ICAI. Accounting for taxes on income should be done in quarterly report.

Publishing quartery consolidated financial results on optional basis – In case of companies having subsidiaries, the Company has option to publish consolidated financial results on quarterly/half yearly basis. These may be published in addition to quarterly financial result of the parent company.

Consolidated yearly financial results - Audited consolidated financial statements on annual basis shall be submitted to stock exchange along with stand alone financial result is mandatory.

Quarterly report to be approved by Board or committee- Unaudited quarterly financial results will be approved by Board of Directors or a committee thereof, other than audit committee. The committee of directors should be consisting of least one third directors with MD and at least one independent director. The report shall be signed by Chairman, Managing Director or Wholetime Director. However, Annual audited financial results shall be approved by Board of Directors of the company.

Date of Board meeting to be intimated and advertised in advance - Date of meeting of Board or Committee where quarterly unaudited/audited results are to be approved by Board/Committee will be informed to stock exchange at least seven days in advance, excluding date of intimation and date of meeting. Simultaneously, a public notice shall be issued in at least one English daily newspaper circulating in substantially whole of India and in one regional newspaper, where the registered office is situated.

Variation from audited results to be explained - Unaudited results should not materially differ from audited accounts of the company. If the variation in net profit or net loss after tax is in excess of 10% or Rs 10 lakhs, whichever is higher, an explanation shall be submitted to stock exchange.

Disclosure of audit qualifications – Company shall disclose the audit qualifications along with audited financial results published under clause 41, in addition to the explanatory statement as to how audit qualification in respect of the audited accounts of previous year have been addressed in the financial results. - - Stock exchange should ask companies to explain about audit objections. If companies fail to remove audit qualifications, stock exchange should report the matter to SEBI within 7 days. – SEBI circular No. SMD/POLICY/CIR-2 dated 10-1-2003.

Quarterly Compliance report about Corporate Governance to stock exchange - The company is required to submit a quarterly compliance report to the stock exchanges within 15 days from the close of quarter, in respect of corporate governance [clause 49(IX)(ii) of Listing Agreement]

4-2 Spread of shareholding

As per clause 40A of Listing Agreement (as amended on 13-4-2006), all listed public companies should have 25% public shareholding.

'Public shareholding' means shares ***excluding*** shares held by promoters, promoter group and shares held by custodians against IDR/GDR issued overseas).

Following are the exceptions to the aforesaid requirement –

(a) Where in the past company had offered at least 10% of its shares to public in terms of rule 19(2)(b) of Securities Contracts (Regulations) Rules, 1957, they can continue, provided public shareholding of at least 10% is maintained.

(b) Where number of outstanding listed shares are two crores or more and market capitalisation of such company is Rs 1,000 crores or more, irrespective of percentage of shares with public at the time of initial listing. However, they must have at least 10% public shareholding. (Market capitalisation means average market capitalisation for the previous financial year).

(c) Government companies, infrastructure companies and sick companies under BIFR. They need not have minimum 10% public shareholding.

Intimation about distribution of shareholding - Distribution of shareholding in prescribed form shall be informed to stock exchange on quarterly basis in prescribed form. The break up required is in respect of promoters shares, non-promoters shares, and shares held by custodians against which GDR/ADR has been issued. [Clause 35]. Stock exchange will provide this information on web. Company will also put up his information on its web site.

Existing companies to bring public shareholding to required minimum level – If the existing public holding is less then 10%/25% (as applicable), the company shall bring the public shareholding to the required level within 2 years from 1-5-2006. This period can be extended by one year by 'specified stock exchange' for genuine reasons.

Mode of increase in public shareholding – The public shareholding can be increased by any of following methods – (a) Issuance of shares to public through prospectus (b) Offer of shares held by promoters to public through prospectus (c) Sale of shares by promoters through secondary market i.e. on stock exchange or (d) Any other method which does not affect interest of minority shareholders. If company wants to adopt method specified in (c) or (d) above, prior approval of stock exchange will be required.

Effect of non-compliance by a company – If a company fails to comply with the requirements, the shares are liable to be de-listed and the company will be liable to penal action under SCRA and SEBI Act.

Provisions of rule 19(2)(b) – As per rule 19(2)(b) of Securities Contracts (Regulation) Rules, 1957, a company can offer minimum 10% public shareholding if following conditions are satisfied – (a) minimum 20 lakh securities (excluding reservations, firm allotment and promoters' contribution) was offered to public (b) Size of offer to public i.e. offer price multiplied by number of securities was minimum Rs 100 crores and (c) Issue was made only through book building and at least 60% of issue was allotted to QIB (Qualified Institutional Buyer).

Only these companies can have 10% public shareholding. Other companies must have at least 25% public shareholding.

5 SEBI Guidelines for issue of securities

SEBI has issued consolidated guidelines as SEBI (Disclosure and Investor Protection) Guidelines, 2000; in respect of issue of securities to public These have been amended from time to time.

Non-applicability of Guidelines in certain cases - SEBI guidelines are not applicable to issue of securities by private/closely held public limited and other un-listed companies, if such issue is private and is not made to public. Non-listed company can raise money without making invitation to public. However, if it wants to raise capital from the public by issuing a prospectus, it loses its non-listed character, as it is under obligation u/s 73 of Companies Act to get its securities listed on a recognised stock exchange.

Relaxation in case of Rights issue of size less than Rs 50 lakhs - As per *proviso* to clause 1.4(i) of SEBI (DIP) Guidelines, in case of the rights issue where the aggregate value of the securities offered is less than Rs.50 Lakhs, the company shall prepare the letter of offer in accordance with the disclosure requirements specified in these guidelines and file the same with the Board for its information and for being put on the SEBI website.

5-1 Procedure for issue of securities

Broadly, there are following methods for issuing shares through public –

(a) Conventional mode of obtaining applications through bankers and making allotment i.e. fixed price offer.

(b) Book building [partly or fully] This is presently most popular method. Here price is assessed on the basis of bids obtained.

(c) Issue through Qualified Institutional Buyers by existing listed companies under ‘Qualified Institutions Placement’.

(d) On line system of stock exchange (e-IPO). The system is introduced w.e.f. 28.11.2000, but does not seem to have become very popular.

5-2 Who can issue shares to public

Present listed company can make public issue for additional shares.

In addition, following can make Initial Public Offer (IPO) - (a) Unlisted company - It can make fresh issue or make offer for sale of security (b) Partnership firm converting into company and making public issue (c) Spun off unit, i.e. company formed by division of an existing company.

The IPO may be for shares or securities convertible into shares at a later stage. Such company can also make offer for sale of their existing shares.

The companies issuing securities offered through an offer document, shall satisfy the eligibility norms at the time of filing draft offer document with SEBI *and also* at the time of filing the final offer document with the Registrar of Companies./ Designated Stock Exchange [clause 2.0 of SEBI(DIP) Guidelines]. Eligibility Norm I (EN I) applies to existing profit making unlisted companies. Eligibility Norm II (EN II) applies to new companies making issue through book building or project appraisal mode.

***IPO by company having track record (EN 1)* -** A company having track record of profitability can make Initial Public Offer [IPO].- - An unlisted company may make an initial public offering (IPO) of equity shares or any other security which may be converted into or exchanged with equity shares at a later date, only if it meets all the following conditions [clause 2.2.1 of SEBI(DIP) Guidelines].

The company should have net tangible assets of at least Rs. 3 crore in each of the preceding 3 full years (of 12 months each), of which not more than 50% is held in monetary assets. If more than 50% of the net tangible assets are held in monetary assets, the company should have made firm commitments to deploy such excess monetary assets in its business/project.

The company should have a track record of distributable profits in terms of section 205 of the Companies Act, 1956, for at least three out of immediately preceding five years. - - Extra ordinary items shall not be considered for calculating distributable profits in terms of Section 205 of Companies Act, 1956. The company should have a net worth of at least Rs. 1 crore in each of the preceding 3 full years (of 12 months each)

If the company has changed its name within the last one year, at least 50% of the revenue for the preceding 1 full year is earned by the company from the activity suggested by the new name. [*Often name of company is changed to some business which is currently in demand – e.g. 'Information Technology' shares were in demand few years ago. The provision is to discourage such practices*]

The aggregate of the proposed issue and all previous issues made in the same financial year in terms of size (i.e. offer through offer document + firm allotment + promoters' contribution through the offer document), should not exceed five times its pre-issue net-worth as per the audited balance sheet of the last financial year.

IPO by Companies having no track record or required net worth (EN II) - Companies which do not fulfil the requirements of net worth, profitability, issue size etc. as specified in clause 2.2.1 of SEBI guidelines (as explained above), can make IPO (of equity shares or any other security which may be converted into or exchanged with equity shares at a later date) either through book building process or project appraisal method. [clause 2.2.2(a) of SEBI(DIP) Guidelines]. The company must have post issue capital of Rs ten crores *or* should have arrangement of 'market maker' for at least two years [clause 2.2.2(b) of SEBI(DIP) Guidelines]

Book building process – If the issue is made through the book-building process, at least 50% of net offer to public must be allotted to the Qualified Institutional Buyers (QIBs). Otherwise, the full subscription monies shall be refunded. - - The intention (or hope) is that QIBs are informed and trained investors. They will take well informed and considered investment decisions, and will not be carried away by 'sentiments' 'moods', 'rumours about premium' etc. The minimum post-issue face value capital of the company shall be Rs. 10 crore. Alternatively, there shall be a compulsory market-making for at least 2 years from the date of listing of the shares.

Project appraisal – Instead of 'book building, 'project appraisal' method can be adopted. The "project" should have at least 15% participation by Financial Institutions/ Scheduled Commercial Banks, of which at least 10% comes from the appraiser(s). In addition to this, at least 10% of the issue size shall be allotted to QIBs. If these conditions are not fulfilled, the full subscription monies shall be refunded. - - "Project" means the object for which the monies proposed to be raised to cover the objects of the issue [clause 2.2.2B of SEBI(DIP) Guidelines]. The minimum post-issue face value capital of the company shall be Rs. 10 crore. Alternatively, there shall be a compulsory market-making for at least 2 years from the date of listing of the shares.

Exemption from entry norms – Following entities have been exempted from aforesaid entry norms – (a) Private sector and public sector banks (b) Infrastructure company whose project is appraised by PFI, IDFC, IL&FS or bank which was earlier PFI and not less than 5% project cost is financed by these institutions (c) Rights issue by existing listed company.

Compulsory IPO grading - IPO (Initial Public Officer) of equity shares or any security which may be converted later into equity shares of an unlisted company must be graded by at least one credit rating agency. All grades obtained along with rationale/description furnished by credit rating agency shall be furnished in prospectus (in case of fixed price issue) or Red herring Prospectus (in case of book built issue). Expenses of grading IPO will be borne by unlisted company obtaining the grading for IPO [clause 2.5A of SEBI (DIP) Guidelines inserted w.e.f. 30-4-2007].

Others can issue shares in OTCEI - Companies not fulfilling the aforesaid conditions can raise their funds by listing in OTCEI (Over The Counter Exchange of India). The conditions are - (a) They should fulfil listing criteria of OTCEI (b) The company should be sponsored by a member of OTCEI (c) The company must appoint two market makers - one compulsory and one additional market maker. Such company will not be permitted to de-list its shares from OTCEI at least for three years from date of admission to dealing in such securities in OTCEI.

Minimum public shareholding - All existing listed public companies should have 25% public shareholding. The exceptions are – (a) Sectors where 10% is permitted as per rule 19 of SCR Rules (b) Government companies, infrastructure companies and sick companies under BIFR. Existing listed companies shall be given two years to bring public shareholding to this level i.e. upto 1-5-2008 (clause 40A of Listing Agreement as amended w.e.f. 1-5-2006).

Price to be market driven - There is no restriction on the price at which shares can be issued. The pricing can be decided by the issuer company and the lead managers. They can charge any price which they feel market can bear, but justification for price is required to be given in the offer document.

Company can charge different prices for firm allotment and public offer. However, price for firm allotment shall be higher than the price at which public issue is made. A composite issue i.e. simultaneous rights issue and public issue is permissible. Price for rights issue can be lower than price at which security is offered to public. In composite issue also, higher prices for firm allotment is permissible. Justification for price difference should be given in offer document.

Requirements applicable to all companies

5-3 Other requirements of IPO are discussed below. These are applicable to all companies making IPOs i.e. having track record of profitability as well as companies having no track record of profitability.

Minimum number of prospective allottees - An unlisted public company shall not make an allotment pursuant to a public issue or offer for sale of equity shares or any security convertible into equity shares unless in addition to satisfying the conditions mentioned in Clause 2.2.1 or 2.2.2 as the case may be (discussed above), the prospective allottees are not less than one thousand in number [clause 2.2.2A of SEBI(DIP) Guidelines]. - - Since the words used are ‘shall not make’, the requirement is mandatory.

Minimum 75% Firm arrangement of finance before making issue – A company shall not make a public or rights issue of securities unless firm arrangements of finance through verifiable means towards 75% of the stated means of finance have been made. This is of course, excluding the amount to be raised through proposed Public/Rights issue [clause 2.8 of SEBI(DIP) Guidelines].

Same conditions for offer for sale – The conditions as above in case of IPO are applicable to ‘offer for sale’ also. Clause 2.2.3.1 of SEBI(DIP) Guidelines reads as under ‘An offer for sale shall not be made of equity shares of a company or any other security which may be converted into or exchanged with equity shares of the company at a later date, unless the conditions laid down in clause 2.2.1 or 2.2.2, as the case may be and in clause 2.2.2A , are satisfied'.

Who are QIBs – As per clause 2.2.2B of SEBI(DIP) Guidelines, 'Qualified Institutional Buyer' shall mean: (a) public financial institution as defined in section 4A of the Companies Act, 1956 (b) scheduled commercial banks (c) mutual funds (d) foreign institutional investor registered with SEBI (e) multilateral and bilateral development financial institutions (f) venture capital funds registered with SEBI (g) foreign Venture capital investors registered with SEBI (h) State Industrial Development Corporations (i) insurance Companies registered with the Insurance Regulatory and Development Authority (IRDA) (j) provident Funds with minimum corpus of Rs. 25 crores (k) pension Funds with minimum corpus of Rs. 25 crores. - - The last three categories have been added under revised definition. However, in view of restrictions in investment of provident funds and pension funds, it is doubtful if they can participate in IPOs of shares.

5-4 Public Issue of Listed Companies

An existing listed company shall be eligible to make a public issue of equity shares or any other security which may be converted into or exchanged with equity shares at a later date, subject to following conditions [clause 2.3.1 of SEBI(DIP) Guidelines] -

Aggregate of the proposed issue and all previous issues made in the same financial year in terms of size (i.e. offer through offer document + firm allotment + promoters' contribution through the offer document), issue size should not exceed 5 times its pre-issue net-worth as per the audited balance sheet of the last financial year.

In case there is a change in the name of the issuer company within the last 1 year (reckoned from the date of filing of the offer document), the revenue accounted for by the activity suggested by the new name is not less than 50% of its total revenue in the preceding 1 full-year period

Listed company not fulfilling above criteria - Listed company not fulfilling aforesaid conditions as specified in clause 2.3.1, shall have to follow book building or project appraisal route and satisfy other requirements as specified in clause 2.2.2 [clause 2.3.2 of SEBI(DIP) Guidelines]

5-5 Promoters' contribution

Explanation I to clause 6.8.3.2 of SEBI (DIP) Guidelines, 2000, defines promoter and promoter group. 'Promoter' includes (*a*) person or persons who are in overall control of the company (*b*) person or persons who are instrumental in formulation of plan or programme pursuant to which the securities are offered to public (*c*) person or persons named in the prospectus as promoters. However, if a director/officer of issuing company is acting as such merely in his professional capacity, he shall not be treated as 'promoter'.

General guidelines for promoters' contribution - Promoters' contribution in respect of unlisted company should be minimum 20% of post issue capital, in case of fresh issue or offer for sale of shares. [C*lause 4.1-1 of SEBI Guidelines, 2000*]

In case of public issue of listed company, promoters should participate either to the extent of 20% of proposed public issue or 20% of the post-issue capital.

Following shares acquired in last three years by promoters will not be considered fro promoters' contribution - (a) If promoters have acquired shares for consideration other than cash or (b) by bonus shares out of revaluation reserves or reserves without cash accrual (c) against shares which are otherwise ineligible for computation of promoters' contribution - clause 4.6.1 of SEBI (DIP) Guidelines.

If promoters have acquired shares in last one year at price lower that the price at which the shares are being offered to public, these will not be treated as promoters contribution. However, if promoters bring the difference, after passing necessary resolutions, filing revised returns etc., the shares will be treated as promoter's contribution. - clause 4.6.2 of SEBI (DIP) Guidelines

This restriction shall not apply in cases where shares were acquired by transferor promoter during preceding one year at a price equal to or higher that the price at which equity is being offered to public. Similarly, the restriction shall not apply in respect of shares acquired by transferor promoter prior to one year - second *proviso* to clause 4.6.2 of SEBI (DIP) Guidelines inserted w.e.f. 10-7-2007.

Sweat equity issued before making Initial Public Offer (IPO) will also be subject to above provision while computing promoters' computation. [Para 12 of SEBI (Issue of Sweat Equity) Regulations, 2002].

Shares pledged by promoters with Banks or Financial Institutions as security shall not be eligible for computing promoters' contribution - clause 4.6.4A of SEBI (DIP) Guidelines However, *proviso* to clause 4.15.1 of SEBI (DIP) Guidelines states that locked-in securities may be pledged with financial Institutions/Banks if the loan has been granted for purposes of financing one or more objects of the issue - [What it probably means is that pledging is permitted, but if pledged, these will not be counted towards promoters' contribution].

For computing promoters contribution, minimum contribution shall be Rs 25,000 per application from each individual and Rs 1,00,000 from firms and companies (not being business associates like dealers and distributors). Shares issued in private placement to unrelated persons will not be treated as promoters' contribution.

Promoters can bring their contribution by way of equity shares plus by FCD/ PCD (fully convertible or partly convertible debentures), so that they maintain the minimum promoters contribution as prescribed.

No promoters' contribution in case of existing listed companies in certain cases - In case of listed companies, there will be no requirement of minimum promoters' contribution, in following cases - (a) If company is listed on stock exchange for three years and has track record of dividend payment for 3 immediately preceding years. (b) Professionally managed company where there is no identifiable promoter or promoter group (c) In case of rights issue. However, in case of (a) and (c), existing share-holding will be disclosed in offer document. [*Clause 4.10 of SEBI Guidelines, 2000*]

Lock-in of promoters' shares - 'Lock-in' means promoters cannot sell the shares to others during the prescribed period. The basis idea is that promoters should have stake in the company. Moreover, they are not expected to make profit by selling the shares which they earlier had.

Lock-in applies to the minimum promoters' contribution required, which is 20%. Normal lock-in period for shares issued to promoters is three years from date of allotment in case of existing companies. In case of new company, lock-in period is three years from date of allotment or three years from date of commercial production, whichever is later.

'Lock in' is also applicable inn various cases as stated in Clauses 4.11 to 4.14 of SEBI (DIP) Guidelines, 2000.

5-6 Reservation and firm allotment of Public Issue

Maximum 75% of the issue can be reserved for certain categories, if reservation is on firm allotment basis. Securities issued on firm allotment basis shall be locked in for one year from date of commencement of commercial production or the date of allotment in public issue, whichever is later. The reservation will be on competitive basis, i.e. allotment of shares will be in proportion to the shares applied for in the concerned reserved categories.

5-7 Procedure for issue of shares

SEBI has issued detailed guidelines for issue of shares - both pre-issue obligations and post-issue obligations. Appointment of Lead Merchant Banker to manage the issue is compulsory for making a public issue. Main responsibility of following all guidelines has been placed by SEBI on Lead Merchant Banker. He should exercise 'due diligence'. He should satisfy himself about all aspects of offering, veracity and adequacy of disclosure in the offer documents.

Fees to SEBI for filing the document have been prescribed in Schedule IV of SEBI (Merchant Bankers) Regulations, 1992. The fees payable vary. The fees are generally 0.1% of issue size in case of public issue and 0.05% in case of rights issue.

Draft prospectus should be filed with SEBI at least 30 days prior to filing of prospectus with ROC. If SEBI specifies changes or issues observations on draft prospectus within 30 days, the issuer shall carry out changes in prospectus or comply with observations. It is not mandatory that SEBI must send observation letter.

If SEBI seeks some clarifications or additional information from lead managers, these should be submitted. After such submission, SEBI may specify changes or issue observations within 15 days from date of receipt of satisfactory reply.

If SEBI has made reference to any regulator or other agency (like Government Agency or regulatory authority like TRAI), SEBI may send its observations or specify changes only after receipt of comments and reply from such regulator or other agency (*No time limit - It can be even months*).

After waiting for 30/15 days for observation letter from SEBI, issuer can go ahead with issue. SEBI will not vet or approve the Prospectus of offer documents.

Issue to be made within 3 months from observation letter of SEBI - An issue shall open within 3 months from the date of issuance of the observation letter by the Board, if any, or within 3 months from the 22nd day from the date of filing of the draft offer document with the Board, if no observation letter is issued [clause 8.21.1 of SEBI(DIP) Guidelines].

5-8 Book Building method for issue of securities

‘Book Building’ means accepting applications from large buyers almost on firm allotment basis, instead of asking them to apply in public offer. The advantage is that issuer can test the market and fix realistic price, as price is fixed just one or two weeks before the opening of issue. It is also fast and costs are much less compared to traditional method of inviting applications, allotment, issue etc. By book building, issuer company can assess market and build up demand before issue of prospectus. The price is investor driven and based on market forces of demand and supply.

Section 60B of Companies Act makes provision for ‘Information Memorandum’ prior to issue of red herring prospectus. Thus, in book building, initially ‘Information Memorandum’ is issued and then red herring prospectus is issued three days prior to opening of offer.

As per SEBI definition, 'book building' means a process undertaken by which a demand for securities proposed to be issued by a body corporate is elicited and built-up and the price of securities is assessed for the determination of quantum of such securities to be issued by means of a notice, circular, advertisement, document, information memoranda or offer document.

The book building process has been integrated with stock exchange procedures. Transactions will be routed through brokers. Brokers will be responsible for defaults in payment of their clients.

The book building is permitted for issue of any size. This is an alternative to the facility of reserving part of issue on firm allotment on private placement basis. Thus, issuer company can either reserve securities for firm allotment or issue securities through book building (and not both). If book building is availed of, underwriting to the extent of net public offer is mandatory.

Advantages of book building are – (a) Minimum cost (b) Fast (c) Realistic and fair price.

Book building can be either 100% route or 75% route. *Presently, 100% book building method is very popular*.

5-9 Disclosures in offer documents

It is true that investment in shares is a risky investment. However, investors must get adequate information in respect of new issues, so that they know the risks involved and take correct investment decision. In view of this, various disclosure guidelines have been prescribed by SEBI in prospectus. These are *in addition to* requirements as specified under Companies Act. The offer document shall contain all material information which shall be true and adequate so as to enable the investors to make informed decision on the investments in the issue.

6 SEBI guidelines in various matters

6-1 *Preferential Allotment of existing Companies*

As per section 81(1A) of Companies Act, further issues of existing company must be made to existing share-holders on *pro rata* basis. This is called ‘rights issue’. However, if shareholders pass a special resolution in general meeting, the shares can be offered to others. Normally, this provision is used by promoters to increase their share-holding. This provision may also be used by foreign companies to increase their holding in Indian companies. The ‘preferential allotment, can also be made to Financial Institutions, Mutual Funds, Foreign Institutional Investors etc. This is called ‘private placement’.

Such increase by preferential allotment should be as per guidelines issued by Government of India, Ministry of Industry dated 10th April, 1995 and RBI guidelines dated 9th April, 95 and 16th June, 1995. SEBI guidelines were given on 19-1-2000. These are now contained in Chapter XIII of SEBI (DIP) Guidelines.

Guidelines issued by SEBI are applicable to all preferential allotments in listed companies, while guidelines issued by RBI and Central Government are applicable only to foreign investment. Broadly, these guidelines are identical.

A special resolution in general meeting of members of company is required as per section 81(1A) of Companies Act. If required, authorised capital should be increased in general meeting.

The preferential issue can be only of fully paid shares and securities and not partly paid shares and securities [clause 13.4.2 of SEBI(DIP) Guidelines. This provision does not apply to allotment of shares and convertible securities issued pursuant to Corporate Debt Restructuring framework specified by RBI.

In case of shares not listed or shares not traded though listed, in stock exchange, the price should be calculated on basis of NAV (Net Asset Value) and PECV (Profit Earning Capacity Value), as per guidelines issued long ago by (now defunct) CCI - Controller of Capital Issues.

In case of companies listed on stock exchange for a period of 6 months or more, the price should be at least higher of the two (*a*) Average of high and low of closing prices last six months (*b*) Average of weekly high and low of closing prices in last two weeks. The period of 6 months or 2 weeks is to be calculated backward from 30 days prior to the date of meeting of shareholders for approval of preferential allotment [clause 13.1.1.1 of SEBI(DIP) Guidelines].

In case of companies listed on stock exchange for a period of less that 6 months, the issue price shall be at least higher of the following - (i) The price at which IPO was made or value per share arrived at in a scheme of arrangement under sections 391 to 394 of Companies Act (ii) Average of high and low of closing prices for the period it was listed on stock exchange or (c) Average of high and low of closing prices during two weeks preceding the relevant date. The period of share prices or 2 weeks is to be calculated backward from 30 days prior to the date of meeting of shareholders for approval of preferential allotment [clause 13.1.1.2 of SEBI(DIP) Guidelines]. However, the price will be recomputed after period of 6 months listing is over and difference, if any, will be payable by allottees - proviso to clause 13.1.1.2 of SEBI (DIP) Guidelines

Securities issued on preferential basis to promoters will have lock-in period of three years from date of allotment. The locked in shares can be transferred among promoters or new promoter, subject to compliance of Takeover regulations.

Amount of preferential issue can be only to enable promoters to increase their holdings to 26%, to thwart take-over bids. Beyond that level, promoters have to acquire the shares in market only. If promoters' stakes are diluted through Euro Issues, promoters can increase their stake through preferential allotment.

6-2 Bonus Shares

SEBI guidelines dated 19-1-2000 (which are similar to earlier dated 13-4-94), for issue of bonus shares are as follows. It is expected that Board of Directors will consider relevant financial factors and the guidelines. However, permission from SEBI is not required to issue bonus shares. These guidelines are only for listed companies.

Bonus issue should be only out of free reserves, built out of genuine profits or share premium collected in cash only. Revaluation reserves cannot be utilised for issue of bonus shares. (It may be noted that Department of Company Affairs has issued a circular dated 6-9-1994, prohibiting allotment of bonus shares out of revaluation reserves by non-listed limited companies and private limited companies). There should be provision in articles of association of company for capitalisation of reserves (otherwise, articles should be amended in AGM). If authorised capital of the company is not adequate, the same must be increased.

Company issuing bonus shares should not have defaulted in (*a*) payment of interest and principal of fixed deposits and debentures (*b*) payment of statutory dues of employees such as provident fund, ESI contribution, gratuity, bonus etc.

Other conditions for issue of Bonus shares - (*a*) Declaration of bonus shares in lieu of dividend is not permitted (*b*) Bonus issues of partly paid shares cannot be made - these should be first fully paid. (*c*) A company which announces bonus issue after approval of Board of Directors must implement the proposal within 6 months and such decision should not be changed. (*d*) If necessary, authorised capital should be increased in general meeting, before issue of bonus shares. (e) Bonus issue cannot be made within 12 months after public or rights issue.

6-3 Insider Trading

People connected with a company usually have access to information which is not known to outsiders. The 'insider' can use this information to gain undue advantage. 'Insider trading' is the illegal practice of buying or selling shares of corporate securities based on fiduciary information which is known to only a small group of persons (insiders) and which enables them to make profit at the expense of other investors who do not have access to the inside information.

The 'insider' can get some information about profits, proposed dividend, proposed bonus shares, rights issue, expansion plans, mergers, disposal of undertaking etc. before it is made public. Such information is called 'price sensitive information' as per regulation 2(k). The insider can take undue advantage of this 'price sensitive information' for his personal benefit. This is not fair in the interest of capital market in general and other investors in particular. This is particularly true in case of directors, who have a fiduciary duty towards company, similar to that of a trustee. They are not expected to make secret profit form themselves.

SEBI has, therefore, announced regulations dated 19-11-1992 termed 'SEBI (Prohibition of Insider Trading) Regulations, 1992. These were amended in February, 2002 and November, 2002.

SEBI regulations define 'insider' as a person who is or was connected with a company and who is reasonably expected to have access to unpublished price sensitive information in respect of securities of a company, or who has received or has had access to such unpublished price sensitive information. [Regulation 2(e)].

An 'insider' is prohibited from dealing in the securities or subscribing to primary issue, when in possession of unpublished price sensitive information. He also shall not communicate, counsel or produce directly or indirectly any unpublished price sensitive information to any person, who while in possession of such unpublished information shall not deal in securities, except when required as per law.

SEBI can take measures to undertake inspection of any book, register or other document or record of any listed company or a public company which intends to get its securities listed in any stock exchange, if SEBI has reasonable grounds to believe that such company has been indulging in insider trading or fraudulent and unfair trade practices relating to securities market. [section 11(2A) of SEBI Act].

Appeal against order of SEBI can be filed with Securities Appellate Tribunal.

Code of conduct - All listed companies, intermediaries, asset management company and trustees of mutual fund, recognised stock exchanges, Public Financial Institutions, auditors, law firms, analysts, consultants etc. shall frame a code of internal procedures and conduct as near to Model Code of Conduct.

6-3 Takeover Regulations

Take-over' means purchasing shares of a /company with a view to take-over management and control of a company (this is often called 'Corporate Raid' and persons taking over are called 'Corporate Raiders'). When 'acquirer' takes over control or management of 'target company', it is termed as 'take-over'. 'Target company' is a company whose shares are listed on stock exchange/s and whose shares or voting rights are acquired / being acquired or whose control is taken over / being taken over by the acquirer.

Take-over Regulations are to provide greater transparency in substantial acquisition of shares and take-overs of companies. SEBI has been empowered to make investigations in case of violation of the regulations. SEBI had appointed a committee under chairmanship of Justice P N Bhagwati, former Chief Justice of India to review the earlier take over code. Subsequently, the take-over code has been finalised and SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997 were published on 20th February, 1997. The regulations have been amended from time to time.

Minimum public shareholding as per listing agreement - As per clause 40A (i) of Listing Agreement, company is required to maintain on continuous basis the minimum level of non-promoter holding at the level of public shareholding required at the time of listing.

Disclosure if share-holding increases to more than 5/10/114/54/74% - Acquirer has to inform within 2 days of acquisition of shares or voting rights to the company and also to stock exchange where the target company is listed, if his holding or voting rights exceeds 5%, 10%, 14%, 54% or 74%. In cases where creeping acquisition upto 5% per financial year is permitted, the disclosure should be made when the acquisition aggregates to 2% and 5% of voting rights. Pre and post acquisition and voting rights shall be disclosed. The information is required to be given to stock exchange as well as to company. The information will be immediately displayed by stock exchange on the trading screen, notice board and also on website.

Continuous disclosures by Acquirer and existing promoters - When the acquirer holds more than 15% shares, he will have to make continuous disclosure every year before 21st April, to the company. Promoters of the company also have to make disclosure to company every year before 21st April, regarding their share-holdings. The target company shall, in turn, inform stock exchange before 30th April.

Compulsory offer to small shareholders - Under a negotiated takeover, if an acquirer acquires more than 15% shares in a company (including shares already held by him or by the person in concert with him), he should make a public announcement of his intention to acquire further shares of (a) at least another 20% shares in the target company.

In case of open market take-over, if acquirer acquires more than 15% shares (including shares already held by him or by the person in concert with him), he has to make public announcement of offer to buy additional 20% shares from public. If The offer must be kept open for at least 30 days. Such an offer would provide option to existing shareholders to sell their shares if they do not have confidence in the likely new management. The acquirer should appoint a 'merchant banker' for this purpose.

Offer price – The offer price shall be highest of (a) negotiated price if the shares were acquired in pursuance of agreement (usually with existing promoters) (b) Highest price paid by acquirer during previous 26 weeks to any one or even in public issue or rights issue or preferential issue (c) average of weekly high and low market price of shares in the preceding 26 weeks *or* average of daily high and low of prices of shares in last two weeks, in stock exchange where shares are frequently quoted, *whichever is higher*. The provision in respect of average of last two weeks price is not applicable in case of disinvestments of PSU undertakings. [This is to avoid manipulation of share prices].

Competitive bid - Once a person makes an open offer, another person can make a competitive bid, offering higher price. Such offer must be made within 21 days from date of public announcement of first offer. The offer must be for shares equal to holding of first bidder including the number of shares for which the present offer by first bidder is made. If such higher offer is made, the shareholders can withdraw their offer to the first bidder and make offer to second bidder. However, once such higher bid is made, the acquirer can also increase his offer at any time upto seven days of the closing of later offer, but he cannot withdraw his offer. He cannot change any other condition of his first offer.

Public offer if holding to exceed 55% - Once the promoter and acquirer reaches limit of 55% shareholding, he will have to make public offer to acquire further shares [regulation 11(2)]. He can acquire shares in excess of 55% through market purchases or preferential allotment, subject to condition of making a public offer for purchase upto 75%/90% of share capital as applicable. However, as per *proviso* to regulation 20(7), he cannot acquire shares in open market or through negotiations during the offer period.

6-4 Regulations for buy-back

Buy back of securities is permissible under Companies Act, w.e.f. 31st October, 1998. A listed company has to follow SEBI regulations for buy-back. These provisions are in addition to provisions made under Companies Act.

Buy back for de-listing not permitted – Some foreign companies were resorting to buy back so that the public shareholding falls below minimum required for listing. After that, they were de-listing from stock exchange. Now, as per SEBI (Delisting of Securities) Guidelines, 2003 and also as per amended Buy Back Regulations; buy back for delisting is prohibited.

Mode of buy back - A listed company can buy back its securities (a) from existing security-holders on a proportionate basis through tender offer or (b) From open market through book building, stock exchange or from odd lot holders. However, buy-back through negotiated deals, spot transactions or through private arrangement is not permissible. Insider shall not deal with securities on basis of unpublished information.

Intimation about Board resolution – Whether the buy back is with Board resolution or approval in general meeting, the proposal has to be first approved in Board meeting. As per listing agreement, company should give 7 days prior notice about the Board meeting at which proposal to buy back of securities is to be considered. Immediately after Board meeting, decision about buy back should be intimated to stock exchanges within 15 minutes of closure of Board meeting.

Buy back through stock exchange - In case of buy back through stock exchange, the Special resolution of members should prescribe maximum price at which securities can be bought. [In case of Board resolution, the same shall be specified in Board resolution]. Promoters or persons in control of company cannot sale their securities under buy back. Company should appoint a merchant banker. Public announcement should be made at least seven days prior to commencement of buy back. Copy of public announcement should be filed with SEBI along with prescribed fee within two days of such announcement. Buy back will be only through stock exchanges which are having electronic trading facility. Details about securities purchased every day should be informed to stock exchange and also published in national daily.

6-5 Issue of 'Sweat Equity' shares

In case of listed company, 'sweat equity' can be issued in accordance with regulations issued by SEBI [Section 79A(1)(d) of Companies Act]. SEBI (Issue of Sweat Equity) Regulations, 2002 make provisions for issue of 'sweat equity' shares in case of listed company.

Sweat Equity is a reward for hard work done or using intellectual property for benefit of company. As per Black's Law Dictionary, 'sweat equity' means financial equity created in property by the owner's labour in improving property.

Unlisted company which is coming out with IPO (Initial Public Offer) and seeking listing will have to make disclosure of 'sweat equity' issued by it prior to listing. Similarly, provisions in respect of lock-in and computation of promoters' contribution shall apply if company makes a public issue after it has issued equity shares.

'Sweat Equity' can be issued to directors or employee (and not to others -e.g. sweat equity cannot be issued to promoter, unless he is a director or an employee. The director may be wholetime or part time i.e. executive or non-executive). The resolution should be passed as special resolution. The explanatory statement should contain details as specified in the SEBI regulations.

Sweat equity can be issued to promoters by passing ordinary resolution through postal ballot [Section 79A requires special resolution for issue of 'sweat equity'. Hence, provision in SEBI regulation for 'simple majority' seems to be of very doubtful validity. Even otherwise, special resolution u/s 81(1A) will also be required as right issue is not being made. Of course, both resolutions can be passed in same general meeting]. - - Moreover, sweat equity cannot be issued to 'promoter' unless he is a director or employee. Section 79A of Companies Act envisages issue of sweat equity only to directors and employees, while SEBI Regulations allow issue to promoters also. Naturally, in case of conflict, provisions of Act will prevail.

Sweat equity shares should be priced on basis of weekly high and low of closing prices of related equity shares during last 6 months or average of weekly high and low of closing prices during last two weeks, whichever is higher. The 6 months/2 weeks shall be from date 30 days prior to date on which general meeting of members is held for approval of special resolution u/s 79A(1)(a).

Valuation of intellectual property right or know how provided or other value addition made by director/employee shall be carried out by Merchant Banker, in consultation with experts and valuers. A certificate should be obtained from Chartered Accountant that the valuation is done as per accounting standards. This certificate shall be placed before annual general meeting subsequent to issue of sweat equity shares. - - Section 79A specifically provides that sweat equity shares can be issued at discount. However, SEBI Regulations make no provision for issue of sweat equity at discount.

The sweat equity shares will have lock-in period of three years. Provisions as applicable to promoters' contribution will apply to such sweat equity also. The shares can be listed in stock exchange.

Fringe Benefit Tax on ESOP and sweat equity – Company issuing ESOP or sweat equity is liable to FBT (Fringe Benefit Tax) in respect of ESOP issued after 1-4-2007. Company (employer) will have to pay FBT at 33.99%. Fair market value on date on which option vests with the employee as reduced by amount actually paid by employee or recovered from employee shall be the value of fringe benefit [section 115WB(1)(d) of Income Tax Act]. FBT can be recovered from employee.

6-6 Employees Stock Option / Purchase Plan

Some companies intend to issue equity shares to their employees. The purpose is to ensure more employee's loyalty and participation.

As per section 2(15A) of Companies Act, 'Employees Stock Option' means the option given to the Wholetime directors, officers or employees of a company, which gives such directors, officers or employees the benefit or right to purchase or subscribe at a future date, the securities offered by the company at a pre-determined price. [same definition in SEBI Guidelines, 1999].

In case of Employee Stock Option Scheme [ESOS] [more popularly termed as Employees Stock Option Plan (ESOP)], employees are given an option to purchase shares at a later date, at a pre-determined price (which is usually price lower than current market price). In case of Employee Stock Purchase Scheme [ESPS], shares are offered on the spot to employees at a discounted price.

SEBI guidelines in respect of Employee Stock Option Scheme [ESOS] or Employee Stock Purchase Scheme [ESPS] apply to listed companies.

6-7 Depositories Scheme

Normally, share transfer form has to be accompanied by original share certificate. This was creating tremendous problems in share market as there had to be physical movement of hundreds and thousands of share certificates. A scheme of 'Depository' was introduced to overcome the difficulty. Depositories Act, 1996 was passed. The aim of depositories is to introduce paperless trading and smooth functioning of settlements of security transactions.

'Dematerialisation' is the process by which physical share certificates held by an investor are taken back by company/Registrar and converted into equivalent number of shares which are credited to the investor in the form of electronic holding, through the depository participant.

'Depository' is an agency with whom securities are deposited for safe-keeping and handling / dealing in them on behalf of owner of securities. The securities are deposited through DP (Depository Participants). Depository holds these securities in electronic form. There is no paper or share certificate involved. Such shares are termed as 'Demat Shares'.

There are two depositories - NSDL and CDSL. (a) National Securities Depository Ltd. (NSDL) has been formed to work as depository. Its bye-laws were approved by SEBI on 15.10.1996. NSDL has HO at Trade World, 4th Floor, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai 400 013. Tel 022 – 4972964/70 email - info@nsdl.co.in Website – www.nsdl.co.in (b) 'Central Depository Services (India) Ltd.' (CDSL). It has HO at Phiroze

Jeejeebhoy Towers, 28th Floor, Mumbai 400023. Tel 022-2723333. Website – www.centraldepository.com E-mail – investors@cdsindia.com

'Depository Participant' is an intermediary between investor and depository. Investor has no direct access to the depository. Such 'participants' could be banks, financial institutions or large brokers. The depositories and participants have to be registered with SEBI. There are 538 DPs registered with SEBI as on 31-3-2006.

Individual investor (termed as BO – Beneficiary Owner) has to open account with 'participant'. He can open account with more than one participants, if he wants. This is similar to opening a bank account. Introduction by present account holder, proof of address, PAN number and photo are to be given.

PAN number is mandatory, except in few cases. Instructions in respect of PAN are given in SEBI circular No. MRD/DoP/Dep/Cir-9/06 dated 20-7-2006 and MRD/DoP/Dep/Cir-8/06 dated 13-7-2006.

Depository system is very similar to a banking environment. A depository performs the function of holding, safe-keeping, transferring and allowing withdrawal of securities. (like bank performs the function of holding, safe-keeping, transferring and withdrawal of money). When you deposit your money, your account will be credited. When you withdraw cash, your account will be debited. The currency notes paid to you will be different from the ones you deposited. Thus, serial number of currency notes deposited and withdrawn will never be same - same will be the situation in Depository scheme. It holds securities in the electronic form. There is no 'physical' share certificate and hence question of loss of share certificate does not arise.

Bank and depository can be compared as follows.

Bank	Depository
Holds funds of customer in his account.	Holds securities of customer in his account.
Keeps money safe.	Keeps securities safe.
All money in one account. Multiple accounts permitted.	All securities in one account. Multiple accounts permitted.
Minimum balance required.	Minimum balance of securities not required.
Transfers funds from and to customer's account as per his instructions.	Transfers securities from and to customer's account as per his instructions.
Facilitates transfer of funds without physical handing of cash.	Facilitates transfer of securities without physical handing of securities.
Transfer of account to another branch/bank permissible.	Transfer of account to another branch of same DP or another DP is permissible.
Gives periodic statement of account to	Gives periodic statement of account to

customer.	customer.
Holds money in form of record.	Holds securities in form of record.
Joint account and Nomination permitted. Either/or type account permitted.	Joint account and nomination permitted. Ether/or account is not permitted. All joint account holders are required to sign DIS (Delivery Instruction Slip).
Power of attorney for operation of accounts permissible.	Power of attorney for operation of accounts permissible.
Automatic credit of money in account possible.	Automatic credit of securities (in case of public issue, bonus, split, consolidation, amalgamation) possible.

6-8 Penalties under Chapter VIA of SEBI Act

SEBI has been empowered to adjudicate and impose penalties under chapter VIA of SEBI Act [sections 15Ato 15JA]. Appeal against order of SEBI lies with Securities Appellate Tribunal (SAT).

Consent order by SEBI for settling proceedings – 'Consent order' means an order settling administrative or civil proceedings between SEBI and a party who may *prima facie* be found to have violated securities law. A consent ordered may or may not include a determination that a violation has occurred.

In case of matters of administrative or civil nature, SEBI can pass 'consent order' which is indirectly permitted under section 15T(2) of SEBI Act. This may be relating to issuing directions, suspension or cancellation of certificate of registration, imposition of monetary penalty, pursuing suits and appeals in Courts and SAT. In such cases, SEBI can pass consent order, with twin goal of appropriate sanction, remedy and deterrence without resorting to litigation, lengthy proceedings and consequent delays.

Consent order can be passed by SEBI at any stage of proceeding i.e. even when matter is pending with SAT or Court. Details are given in SEB circular No. EFD/ED/Cir-1/2007 dated 20-4-2007 [75 SCL 43 (St) and 77 SCL 4(St)] and CS May 2007 page 622.

Compounding of offence – 'Consent order' is similar to 'compounding'. However, in compounding, an accused pays compounding charges in lieu of undergoing consequences of prosecution. Under section 24A of SEBI Act, 'Compounding' can be done by SAT or Court in case of criminal prosecution.

TAXATION IN INDIA

1. Income Tax Liability
2. Income from salary
3. Income from House Property
4. Profits and Gains of Business or Profession
5. Capital Gains
6. Income from other sources
7. Other provisions of Income Tax
8. Fringe Benefit Tax
9. Wealth Tax

Income Tax Liability

1 The legal position discussed is as applicable for financial year 2008-09 (Assessment Year 2009-10) unless specified otherwise. Provisions as applicable for financial year 2007-08 (Assessment Year 2008-09) are also given, where these are different from provisions applicable to AY 2009-10.

Income tax is levied under Entry No. 82 of List I of Seventh Schedule to Constitution (Union List), which reads, 'Tax on income other than agricultural income'. Entry No. 46 of List II of Seventh Schedule to Constitution (State List) reads, ' Taxes on agricultural income '.

Income Tax Act, 1961 imposes tax on income other than agricultural income. Tax on agricultural income can be imposed only by State Governments.

Section 4 of Income Tax Act, which is the charging section, states that where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income tax) of this Act (i.e. Income Tax Act) in respect of the total income of the previous year of every person.

Income tax Rates fixed under Finance Act every year - The 'Central Act' as referred to in section 4 of Income Tax Act is the 'Finance Act' enacted every year. Income Tax is payable by every assessee at the rates prescribed by Finance Act every year. The Finance Bill is presented at the time of presenting Budget, usually on last day of February every year. The relation between Finance Act and Budget is so close that often people associate budget only with taxation. Really, taxation is only one of the aspects of the Budget.

1-1 ***Who is assessee ?*** - Assessee means a person by whom any tax or any other sum of money is payable under Income tax Act. It includes deemed assessee [section 2(7) of Income Tax Act]

Person - 'Person' includes * Individual * HUF * Company * Partnership Firm * Association of Persons (AOP) or body of individuals whether incorporated or not * Local Authority like Municipality etc. * Artificial Judicial person not falling in any of the aforesaid categories e.g. a Hindu deity [section 2(31) of Income Tax Act]

1-2 ***Previous Year and Assessment Year***

One very confusing aspect of Income Tax for a common man is the difference between Previous Year and Assessment Year.

Assessment year means the period of twelve months commencing on the 1st day of April every year [section 2(9) of Income Tax Act]

Previous year means the financial year immediately preceding the assessment year. If a business/profession is newly set up, previous year is the period from date of setting up that business or profession and ending with the financial year [section 3 of Income Tax Act]

The Financial Year for income tax purposes (called 'Previous Year') is always the year ending 31st March. The 'assessment year' is next to the 'Financial Year' or 'Previous Year' e.g. for Financial Year (FY) 2007-08 (1st April 07 to 31st March 2008), the 'Assessment Year' (AY) is 2008-09.

It may be noted that an assessee can have separate accounting year for his own purposes e.g. a Company can close its accounts on any day of the year, an individual may start his year on Diwali or any other auspicious day. However, for income tax purposes, the accounts must be closed only on 31st March.

1-3 ***Residential status***

Income tax liability depends on residential status of a person.

Income Tax liability of a person depends on the residential status. Assessees are either resident in India, or non-resident in India.

A firm, an association of persons, a company and every other person can be either a resident *or* a non-resident.

In case of individuals and HUF, if they are residents, they can be either resident and ordinarily resident, or resident but not ordinarily resident.

Section 6 gives the test of residence for various types of assessees e.g. an individual, a Hindu undivided family, a firm or an association of persons or a body of individuals, a company ; and every other person.

An assessee can have different residential status for different assessment years. It is possible that a person who is resident in India for income tax purposes, may be resident in any other country for the same assessment year.

Residential status of an individual **-** An individual is resident in India in any previous year, if he satisfies at least one of the following conditions **-** (a) He is in India in the previous year for a period of 182 days or more ***or*** (b) He is in India for a period of 60 days or more during the previous year and 365 days or more during 4 years immediately preceding the previous year [section 6(1) of Income Tax Act]

However, in case of an Indian citizen who leaves India during the previous year for the purpose of employment outside India or an Indian citizen who leaves India during the previous year as a member of the crew of an Indian ship, or Indian citizen or person of Indian origin, the period of 60 days stands extended to 182 days.

In short, if a person was in India for at least 182 days in the previous year, he will be 'resident' for that year. Otherwise, he will be 'non resident'.

A resident individual will be "resident and ordinarily resident" in India if (a) He has been resident in India in at least 2 out of 10 previous years immediately preceding the relevant previous year ***and*** (b) He has been in India for a period of 730 days or more during 7 years immediately preceding the relevant previous year [section 6(6) of Income Tax Act].

A resident who does not satisfy any one of the aforesaid conditions, will be 'resident but not ordinarily resident'.

Residential status of a HUF **-** In case of HUF, if control and management of its affairs is wholly or partly situated in India, it will be 'resident in India'. If control and management of its affairs is wholly out of India, it will be 'non-resident in India' [Sec. 6(2 of Income Tax Act]

A resident Hindu undivided family (HUF) can be either ordinarily resident or not ordinarily resident.

A resident Hindu undivided family will be 'ordinarily resident in India' if the *karta* or manager of the family (including successive *karta*) (a) has been resident in India in at least 2 out of 10 previous years immediately preceding the relevant previous year ***and*** (b) has been present in India for a period of 730 days or more during 7 years immediately preceding the previous year.

If even one of the conditions is not satisfied, the HUF will be 'resident but not ordinarily resident in India' [section 6(*6*)(*b*) of Income Tax Act].

Residential status of the firm and association of persons **-** A partnership firm and an association of persons will be resident in India if control and management of their affairs are wholly or partly situated within India during the relevant previous year. If control and management of their affairs are situated wholly outside India, it will be non-resident in India. [Sec. 6(2)]

Residential status of a company **-** A company incorporated in India is an Indian company. It will always be 'resident in India'. A foreign company (i.e. company incorporated abroad), is resident in India ***only*** if, during the previous year, control and management of its affairs is situated ***wholly*** in India. [Sec. 6(3) of Income Tax Act]

Residential status of "every other person" **-** Every other person will be resident in India if control and management of his affairs is wholly or partly situated within India during the relevant previous year. If control and management of his affairs is wholly situated outside India, it will be non-resident [Sec. 6(4) of Income Tax Act]

1-4 Tax liability depending on residential status

Income can be broadly classified as 'Indian Income' and 'Foreign Income'.

'Indian income' is always taxable in India in case of all tax payers, whether resident or non-resident.

'Foreign income' is taxable in India if the assessee is (**a**) resident (in the case of a firm, AOP company and every other person) or (**b**) resident and ordinarily resident (in the case of an individual or a Hindu undivided family) in India.

If an individual or a HUF is resident but not ordinarily resident, foreign income is taxable only if it is (*a*) business income and business is controlled from India, or (*b*) professional income from a profession which is set up in India. Otherwise, foreign income is not taxable in the hands of resident but not ordinarily resident taxpayers [section 5(1) of Income Tax Act]

Foreign income is not taxable if the assessee is non-resident in India [section 5(2) of Income Tax Act]

Section 9 of Income Tax Act defines 'income deemed to accrue or arise in India'. It will be 'Indian Income' and taxable in all the cases.

1-5 *Different heads of income*

All income is classified under following heads of income - * Salaries * Income from House property * Profits and gains of business or profession * Capital Gains * Income from other sources (e.g. interest on securities, lotteries, races) [section 14 of Income Tax Act]

Calculation of income tax - Income from each of these sources is first calculated. All this income is added to find out total income of the assessee. Permissible deductions are reduced and then income-tax payable is calculated at the prescribed rates.

Income from one head can be set off against loss from other head, unless specifically prohibited.
In *Rajasthan State Warehousing Corporation* v. *CIT* 2000 AIR SCW 629, it was held that if income is derived from various heads, assessee is entitled to claim deduction permissible under respective head whether or not computation under each head results in taxable income. If income to assessee arises under any of the heads of income but from different items e.g. different house properties or different securities etc., and income from one or more items alone is taxable whereas income from the other item is exempt under the Act, the entire permissible expenditure in earning the income from that head is deductible. - . - If assessee carries business in various ventures, entire expenditure incurred on all ventures is deductible if all ventures constitute one business

1-6 Broad mode of computation of Income

		Rs.
1	Income from salaries, allowances and perquisites	
2.	Less : Deduction under section 16, entertainment allowance and professional tax:	
3.	Taxable income under the head "Salaries" (1-2)	.
4.	Income from house property - Adjusted net annual value	
5.	Less : Deductions under section 24	

6	Taxable income under the head Income from house property (5-6)	
7.	Profits and gains of business or profession - Profit/loss as per P&L account after deducting amounts not allowable as deduction, adding amounts which are allowable as deduction and adding income taxable under this head, though not credited/debited to P&L account	
8.	Less : Incomes which are credited to P & L A/c but are exempt under sections 10 to 13A or are taxable under other heads of income	
9.	Taxable income under the head Profits and gains of business or profession (7-8)	
10.	Capital gains	
11.	Less : Amount exempt under sections 54, 54B, 54D, 54EC, 54ED, 54F, 54G and 54GA	
12	Taxable income under the head Capital gains (10-11)	
13	Income from other sources	
14.	Less : Deductions under section 57	
15	Taxable income under the head Income from other sources (13-14)	
16.	Total Income (3+6+9+12+15)	
17	Less : Adjustment on account of set-off and carry forward of losses	
18.	Less : Deductions under sections 80C to 80U	
19	Total income or net income liable to tax (16-17-18)	
20	Income subject to special rate of tax (e.g. capital gains)	
21	Balance income subject to normal rate (20+21 = 19)	
	Computation of tax liability	
A1.	Tax on net income at special rates	
A2	Tax on income at normal rates	
B	Less : Rebate under section 88E in respect of STT (available for AY 2008-09 but not available for AY 2009-10)	
C	Add : Surcharge	
D	Add: Education cess and secondary and higher education cess	
E	Less : Rebate under sections 86, 89, 90, 90A and 91	
F	Net Tax payable (A1+A2-B+C+D-E)	
G	Tax paid on self-assessment	
H	Tax deducted or collected at source	
I	Tax paid in advance	
J	Balance Tax payable (F-G-H-I)	

Rates of Income Tax

2 Major types of assessees and the rates of tax applicable is summarised here.

2-1 ***Individual*** - An individual may get income from salary, house rent, business, profession, interest etc. He does not have to pay income tax on dividend income at all. An individual may carry out business under some different name. However, this is only for convenience of business or trade. The income of a proprietary firm is added to his income for purpose of income tax. If a person gets salary from a partnership firm where he is a partner, the income is treated as ‘business income’ though termed as ‘salary’.

The income tax rates are as follows :

Tax rates for the assessment year 2009-10 (FY 2008-09) are as follows -

For resident woman (who is below 65 years at any time during the previous year), rates for AY 2009-10 are as follows –

Net income	*Income-tax rates*
Up to Rs. 1,80,000	*Nil*
Rs. 1,80,000 – Rs. 3,00,000	10% of (total income *minus* Rs. 1,80,000)
Rs. 3,00,000 – Rs. 5,00,000	Rs. 12,000 + 20% of (total income *minus* Rs. 3,00,000)
Rs. 5,00,000 – Rs. 10,00,000	Rs. 52,000 + 30% of (total income *minus* Rs. 5,00,000)
Above Rs. 10,00,000	Rs. 2,02,000 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

.

For resident senior citizen (who is 65 years or more at any time during the previous year), rates for AY 2009-10 are as follows –

Net income range	*Income-tax rates*
Up to Rs. 2,25,000	*Nil*
Rs. 2,25,000 – Rs. 3,00,000	10% of (total income *minus* Rs. 2,25,000)
Rs 3,00,000 – Rs 5,00,000	Rs 7,500 + 20% (total income *minus* Rs. 3,00,000)
Rs. 5,00,000 – Rs. 10,00,000	Rs. 47,500 + 30% of (total income *minus* Rs. 5,00,000)
Above Rs. 10,00,000	Rs. 1,97,500 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

For any other individual, every HUF/AOP/BOI/artificial juridical person, rates for AY 2009-10 are as follows –

Net income range	*Income-tax rates*
Up to Rs. 1,50,000	*Nil*
Rs. 1,50,000 – Rs. 3,00,000	10% of (total income *minus* Rs. 1,50,000)
Rs. 3,00,000 – Rs. 5,00,000	Rs. 15,000 + 20% of (total income *minus* Rs. 3,00,000)
Rs. 5,00,000 – Rs. 10,00,000	Rs. 55,000 + 30% of (total income *minus* Rs. 5,00,000)
Above Rs. 10,00,000	Rs. 2,05,000 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

Notes:

***1. Surcharge* -** Surcharge is 10 per cent of income-tax if net income of an individual, Hindu undivided family, association of persons, or body of individuals, exceeds Rs. 10,00,000. In the case of an artificial juridical person, surcharge is 10 per cent of income-tax (*i.e.*,income-tax *minus* rebate under section 88E), even if net income is less than Rs. 10,00,000.

Rebate u/s 88E (in respect of STT) is not available for AY 2009-10.

Marginal relief - In the case of the aforesaid person having a net income of exceeding Rs. 10,00,000, the net amount payable as income-tax and surcharge shall not exceed the total amount payable as income-tax on total income of Rs. 10,00,000 by more than the amount of income that exceeds Rs. 10,00,000.

2. ***Education cess and SAH Education Cess -*** Education cess payable is 2 per cent of income-tax and surcharge. Secondary and higher education cess is 1 per cent of income-tax and surcharge. This is in addition to income tax.

Tax rates for the assessment year 2008-09 were as follows -

For resident woman (who is below 65 years at any time during the previous year), rates for AY 2008-09 are as follows –

Net income	*Income-tax rates*
Up to Rs. 1,45,000	*Nil*
Rs. 1,45,000 – Rs. 1,50,000	10% of (total income *minus* Rs. 1,45,000)
Rs. 1,50,000 – Rs. 2,50,000	Rs. 500 + 20% of (total income *minus* Rs. 1,50,000)
Rs. 2,50,000 – Rs. 10,00,000	Rs. 20,500 + 30% of (total income *minus* Rs. 2,50,000)
Above Rs. 10,00,000	Rs. 2,45,500 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

.

For resident senior citizen (who is 65 years or more at any time during the previous year), rates for AY 2008-09 are as follows –

Net income range	*Income-tax rates*
Up to Rs. 1,95,000	*Nil*
Rs. 1,95,000 – Rs. 2,50,000	20% of (total income *minus* Rs. 1,95,000)
Rs. 2,50,000 – Rs. 10,00,000	Rs. 11,000 + 30% of (total income *minus* Rs. 2,50,000)
Above Rs. 10,00,000	Rs. 2,36,000 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

For any other individual, every HUF/AOP/BOI/artificial juridical person, rates for AY 2008-09 are as follows –

Net income range	*Income-tax rates*
Up to Rs. 1,10,000	*Nil*
Rs. 1,10,000 – Rs. 1,50,000	10% of (total income *minus* Rs. 1,10,000)
Rs. 1,50,000 – Rs. 2,50,000	Rs. 4,000 + 20% of (total income *minus* Rs. 1,50,000)
Rs. 2,50,000 – Rs. 10,00,000	Rs. 24,000 + 30% of (total income *minus* Rs. 2,50,000)
Above Rs. 10,00,000	Rs. 2,49,000 + 30% of (total income *minus* Rs. 10,00,000) plus 10% of income tax as surcharge

Notes:

1. Surcharge - Surcharge is 10 per cent of income-tax if net income of an individual, Hindu undivided family, association of persons, or body of individuals, exceeds Rs. 10,00,000. If a person, having taxable income exceeding Rs. 10,00,000, is eligible for tax rebate under section 88E, then you have to calculate income-tax on his income, then from the tax so calculated deduct tax rebate under section 88E. 10 per cent of the balancing amount is surcharge. In the case of an artificial juridical person, surcharge is 10 per cent of income-tax (*i.e.*,income-tax *minus* rebate under section 88E), even if net income is less than Rs. 10,00,000.

Rebate u/s 88E (in respect of STT) is not available for AY 2009-10.

Marginal relief - In the case of the aforesaid person having a net income of exceeding Rs. 10,00,000, the net amount payable as income-tax and surcharge shall not exceed the total amount payable as income-tax on total income of Rs. 10,00,000 by more than the amount of income that exceeds Rs. 10,00,000.

2. ***Education cess and SAH Education Cess -*** Education cess payable is 2 per cent of income-tax (after rebate under section 88E) and surcharge. Secondary and higher education cess is 1 per cent of income-tax (after tax rebate under section 88E) and surcharge. This is in addition to income tax.

Rebate u/s 88E (in respect of STT) is not available for AY 2009-10.

2-2 *HUF* - An Hindu Undivided Family (HUF) consists of all persons lineally descended from a common male ancestor. It is assessable in respect of income derived from the joint family corpus. However, income earned by individual members of HUF in their individual and personal capacities is taxed as their personal income. Such income is not treated as income of HUF. Thus, it is possible to have an income from a proprietary firm (in individual capacity) as well as income from a business of HUF. Both are eligible for separate tax exemptions. Business of HUF can, of course, be conducted in a different name. In such case, the HUF will be proprietor of the firm in the name of which business is being conducted.

It may be noted that there is no question of 'forming' an HUF, as every male Hindu automatically has 'HUF'. A Hindu male can have his own separate HUF even if his father or son has separate HUF. One HUF with only one male member is permissible. Any 'HUF' can have business run by head of the HUF called '*karta*'.

If an individual throws his separate property into the property of HUF, income from such converted property will be included in the total income of such individual. Hence, the HUF business should be from independent source of capital and not from the funds provided by an individual member of the HUF. Thus, if an HUF intends to conduct a business, its financial resources have to be carefully planned.

HUF should start business with loans / gifts from unrelated persons / bankers. Accounts and finances of HUF business should be kept separate. Otherwise, there is a possibility that income of HUF will be clubbed with the income of an individual.

The income of HUF is chargeable at the same rate as individual income as stated above. Thus, if an individual splits his business - partly in his individual capacity and partly in name of firm owned by HUF, considerable tax saving is possible, if done systematically and carefully.

2-3 *Partnership Firm* - Income of the partnership firm has to be calculated after deducting salary and interest payable to partners at prescribed rates. Specific provisions in respect of partnership firm have been explained later.

A firm is taxable at the rate of 30 per cent for the assessment year 2008-09 and 2009-10. Surcharge @ 10 per cent of income-tax [*i.e.*, income-tax after rebate under section 88E] is payable, if net income exceeds Rs. 1 crore. Marginal relief is available where net income exceeds Rs. 1 crore. In addition, Education cess is 2 per cent of income-tax (after rebate under section 88E) and surcharge. Secondary and higher education cess is 1 per cent of income-tax (after tax rebate under section 88E) and surcharge.

2-4 *Company* - The tax on income is as follows -

In case of domestic company, income tax is @ 30% for assessment year 2008-09 and 2009-10.. Surcharge @ 10 per cent of income-tax [*i.e.*, income-tax after rebate under section 88E], if net income exceeds Rs. 1 crore. Rebate u/s 88E is not available for Assessment Year 2009-10.

In case of foreign company, income tax is @ 40% for assessment year 2008-09 and 2009-10. Surcharge @ 10 per cent of income-tax [*i.e.*, income-tax after rebate under section 88E], if net income exceeds Rs. 1 crore. Rebate u/s 88E is not available for Assessment Year 2009-10.

Marginal relief is available where net income exceeds Rs. 1 crore. In addition, Education cess is 2 per cent of income-tax (after rebate under section 88E) and surcharge. Secondary and higher education cess is 1 per cent of income-tax (after tax rebate under section 88E) and surcharge.

Dividend Distribution Tax - A domestic company paying dividend will have to pay dividend distribution tax u/s 115-O. The rate applicable w.e.f. 1-4-2007 is 15% plus surcharge @ 1.5% plus education cess @ 2% plus SAH education cess of 1% of income tax. Total 16.995%.

Dividend distribution tax is payable within 14 days from date of declaration/distribution/payment of dividend whichever is earlier. The dividend will be tax free at the hands of assessees.

Mutual funds have to pay dividend distribution tax u/s 115R of Income Tax Act. The rate as applicable w.e.f. 1-4-2007 is 12.5% on income distributed to any individual or HUF and 20% on income distributed to any other person. In addition, surcharge, education cess @ 2% and SAH education cess @ 1% will be payable. Total is 14.1625% in case of individual or HUF unit holder and 22.66% in other cases.

In case of money market mutual fund or a liquid fund, rate is 25%. Including surcharge and education cess, it is 28.325%.

The dividend will be tax free at the hands of assessees.

Income distributed to unit holders of open ended equity oriented funds or US 64 is exempt from dividend distribution tax.

2-5 Minimum Alternate Tax

Many companies charge depreciation in their books on straight line method. Thus, the profit shown is higher in the accounts maintained for company law purposes and they can declare dividend. However, for income tax purposes, they charge depreciation on WDV which is higher. Thus, for income tax purposes, they may show low profit or even loss, while in balance sheet prepared for company law purposes, they will show high profits, which is called 'book profits. Hence, such companies have to pay minimum income tax [section 115JB]. This tax is termed as 'Minimum Alternate Tax' (MAT).

In *Apollo Tyres* v. *CIT* (2002) 122 Taxman 562 (SC 3 member bench), it was held that the assessing officer cannot reopen the accounts certified by auditors and adopted in general meeting. He has limited powers of making additions and reductions as provided in the section. [In this case, it was held that assessing officer cannot add back the depreciation for earlier years provided in accounts].

Rate of minimum alternate tax, as % of book profit is as follows, for Assessment Year 2008-09 and 2009-10.

	If book profit does not exceed Rs. 1 crore			*If book profit exceeds Rs. 1 crore*			
	IT %	*EC and SAHC %*	*Total*	*IT*	*SC*	*EC and SAHC*	*Total*
Domestic company	10	0.3	10.30	10	1	0.33	11.33
Foreign company	10	0.3	10.30	10	0.25	0.3075	10.5575

Marginal Relief **-** If book profit of a company for the assessment year 2008-09 exceeds Rs. 1 crore, the minimum alternate tax cannot exceed the following : (Rs. 10 lakh + Book profit – Rs. 1 crore) + EC + SAHC.

2-6 Co-operative societies **-** Following rates are applicable to a co-operative society for the assessment year 2008-09 and 2009-10 -

Net income	**Rate of income-tax**
Up to Rs. 10,000	10
Rs. 10,000 - Rs. 20,000	20
Rs. 20,000 and above	30

No surcharge applies, but education cess @ 2% of tax and SAH education cess @ 1% of tax is payable.

Various exemptions are available to cooperative societies u/s 80P of Income Tax Act. However, there is no exemption to urban cooperative banks.

7 *Local authorities* - Tax rate is 30%. No surcharge applies, but education cess @ 2% of tax and SAH education cess @ 1% of tax is payable.

2-7 Capital gains

In case of short term gains covered under section 111A of Income Tax Act , the rate is 10% for AY 2008-09 and 15% for Assessment Year 2009-10. Section 111A is applicable in respect of securities transactions which are subject to securities transaction tax.

In case of long term capital gains, tax rate is 20% for AY 2008-09 and 2009-10 [section 112].

Surcharge for AY 2008-09 is 10% in case of (a) individual/HUF/BOI/AOP if income exceeds Rs 10 lakhs and (b) in case of company/firm if income exceeds Rs one crore.

In addition, education cess @ 2% of tax and SAH education cess @ 1% of tax is payable.

2-8 *Wealth-tax* - Wealth tax for individual, HUF or a company is 1% in respect of wealth over Rs 15 lakhs for Assessment Year 2008-09 and 2009-10. There is no surcharge or education cess.

One house or part of house belonging to an individual or HUF is excluded for purpose of wealth tax. The assets have to be valued as per Valuation Rules.

Income from salary

1. Income under the head ‘salary’ comprises of remuneration in any form (including perquisites) received by an employee from employer. Thus, there should be contractual employer-employee relationship. The contract may be express, oral or implied.

Salary is chargeable on due or receipt basis. Arrears of salary paid or allowed are includible if not charged to income tax for any earlier previous year [section 15 of Income Tax Act]

‘Salary’ includes * wages * dearness allowance * Bonus * gratuity * annuity or pension * advance of salary * Fees / Commissions perquisites/ profits received from employer in addition to salary * Leave encashment while in service * Employer’s contribution to provident fund in excess of 12% of salary of employee * profit in lieu of salary [section 17(1) of Income Tax Act]

In *Karamchari Union* v. *UOI* 2000 AIR SCW 806 = AIR 2000 SC 1226 = (2000) 109 Taxman 1 = 2000 LLR 897 = 243 ITR 143 (SC), it has been held that CCA (City Compensatory Allowance), DA (Dearness Allowance) and HRA (House Rent Allowance) are in nature of income forming part and parcel of salary and are taxable.

1-1 Allowances

House rent allowance - Exemption will be *lowest of* (a) 50% of salary where residential accommodation is in Mumbai, Kolkata, Delhi or Chennai and 40% of at other place (b) Excess of rent paid over 10% of salary (c) Actual allowance paid. There will be *no exemption* if the residential accommodation is owned by employee or employee has not paid any rent for residential accommodation used by him [section 10(13A) of Income Tax Act and rule 2A]

Salary means basic plus DA (if forming part of retirement benefits) plus commission (if fixed as a percentage of turnover).

Gratuity - Gratuity for Government employees is fully exempt [section 10(10)(i)]. In case of employees covered under Payment of Gratuity Act, exemption is upto Rs 3,50,000 to be reduced by such exemptions claimed in the past or 15 days salary for every completed year of service, whichever is lower.. Salary means basic plus DA (if forming part of retirement benefits) [section 10(10)(ii) of Income Tax Act] Any other gratuity is also exempt to same extent [section 10(10(iii)]of Income Tax Act]

Leave encashment - Encashment of earned leave on retirement of employees of Central/State Govt is fully exempt [section 10(10AA)(i) of Income Tax Act] . Leave encashment while in service is treated as part of salary. In other cases, leave encashment of earned leave on retirement will be lowest of 10 months' salary, Rs three lakhs or actual sum received [section 10(10AA)(ii) of Income Tax Act]

LTA/LTC - Leave Travel Assistance/Leave Travel Concession is allowed twice in a block of four years. It is limited to amount actually spent on travelling of employee and his family members. It is limited to economy class of air fare or AC first class fare [section 10(5) of Income Tax Act and rule 2B]

The allowance is exempt subject to amount of expenses actually incurred by the employee for such travel. The employee will have to keep account of actual expenses incurred. It appears that actual travel by air or AC is not required, but the overall ceiling on expenses is subject to limit of air fare / rail fare.

VRS (Voluntary Retirement) - It is exempt upto Rs five lakhs if VRS is as per prescribed conditions.

Medical treatment - Reimbursement of amount actually spent for medical treatment upto Rs 15,000 is exempt in a financial year. In addition, reimbursement of insurance premium for self, spouse, children and dependent brothers, sisters and parents is exempt.

In case of treatment in Government or approved hospital, or expenditure on medical treatment outside India, reimbursement of medical expenses is exempt without any ceiling.

1-2 *Valuation of perquisites* - The employer often gives some perquisites to the employees. Value of these perquisites is added to the income of employees. The valuation of perquisites is done as follows :

Rent Free unfurnished Accommodation - - In case of private sector employees, value of perquisite of rent free unfurnished accommodation is taken as follows - (a) If owned by employer - If population of city exceeds 25 lakhs - 15%, if population exceeds 10 lakhs but below 25 lakhs - 10% (c) In other cases - 7.5%.

In case of Government Employees, value will be rent as per rules framed by Government, as reduced by sum actually paid

Salary includes basis, DA (if taken into account for retirement benefit), bonus, commission, fees and all taxable allowances.

Valuation of furnished accommodation - If accommodation is furnished, in addition to above, 10% of cost of furniture (including TV, radio, refrigerator, AC etc.), if owned by employer, will be treated as perquisite. If the furniture is hired from third party, actual hire charges less any amount recovered from employee will be the perquisite.

Gas electricity or water supply - Some benefits like gas, electricity, water are valued at actual cost to employer. If these are provided from own sources, value will be manufacturing cost incurred per unit, less amount recovered from employee.

Domestic servants - Actual cost to employer for sweeper, gardener, watchman or personal attendant will be value of perquisite.

Use of movable assets - If some movable asset is provided to employee, perquisite will be @ 10% of the cost of asset or rent paid, as reduced by sum paid by employee.

Loans to employees at concessional rate - Calculate interest on basis of SBI lending rates, reduced interest paid by employee and difference will be the value of perquisite.

1-3 Perquisites which will not be added to salary if employer covered under FBT

Remaining perquisites will be considered as Fringe Benefit and will be considered for FBT. Hence, perquisites like motor car, lunch, refreshment, travelling, touring, gift, credit card, club etc. will be added to salary only in cases where employer in individual or HUF and is not liable to FBT.

Valuation of motor car -.If car is owned or hired by employer and provided for personal purposes of employees, valuation will be expenditure incurred by employer on running and maintenance plus remuneration of chauffer plus normal wear and tear @ 10% on actual cost less amount charged to employees.

If motor is partly for official and partly for personal purposes and expenses are reimbursed by employer, perquisite value per month is Rs 1,2000 per month if engine cubic capacity is upto 1.6 liters and Rs 1,600 per month if cubic capacity of engine exceeds 1.6 liters.

If motor is partly for official and partly for personal purposes and expenses are reimbursed by employer, perquisite value per month is Rs 1,200 per month if engine cubic capacity is upto 1.6 liters and Rs 1,600 per month if cubic capacity of engine exceeds 1.6 liters. If chauffer is provided, value of perquisite will be Rs 600 per month.

If motor is partly for official and partly for personal purposes and expenses are met by employee, perquisite value per month is Rs 400 per month if engine cubic capacity is upto 1.6 liters and Rs 600 per month if cubic capacity of engine exceeds 1.6 liters. If chauffer is provided, value of perquisite will be Rs 600 per month.

Other amounts paid - Club fees paid on behalf of employee, insurance premiums paid on behalf of employee, income tax paid on behalf of employee are all treated as perquisites and its cost is added to income of employee.

Gifts - Gifts upto Rs 5,000 per year are exempt.

1-4 *Deductions from Salary Income* - Following deductions are permissible from salary income -

Professional Tax paid to State Government is allowable as deduction

Entertainment allowance upto Rs 5,000 is allowable to Government employees.

1-5 *Exemptions for salary income* - Following are exempt from income tax-

Transport allowance upto Rs 800 per month granted to an employee to meet his expenditure for the purpose of commuting between place of residence and the place of his duty.

Conveyance and transport allowance granted to employee to meet cost of travel on tour are exempt. Allowance granted to meet expenditure incurred on conveyance in performance of duties of an office or employment are exempt. In *LIC Officers* v. *LIC of India* (2000) 112 Taxman 227 (Bom HC DB), it was held that conveyance allowance is exempt only if expended for meeting expenses wholly and necessarily incurred or to be incurred in performance of duties of office. Conveyance allowance at flat rate irrespective of place of residence, work and posting will *not* be exempt from income tax.

Conveyance and transport allowance granted to employee to meet cost of travel on transfer are exempt. Expenses granted to meet cost of travel on transfer and cost of packing and transportation of personal effects on such transfer are exempt.

Use of employer's vehicle or transport provided for journey of employee from residence to his place of work and back is not treated as perquisite and its cost is not treated as income.

Refreshments during office hours to employees and recreational facilities provided to group of employees are not treated as perquisites.

Income from House Property

Income from house property consists of buildings and/or lands appurtenant thereto. However, income only from vacant plot or land is treated as 'income from other sources'. Following should be noted.

In case of let out property, income will be 'fair annual value' i.e. sum reasonably expected to be received from letting or 'actual rent received' whichever is higher. Deduction is allowable for unrealized rent.

'Annual Value or Property' is the sum for which the property could reasonably be expected to let from year to year. Municipal Valuation of ratable value can be taken as one of the tests to determine *bonafide* value of the property. If the house property is given on rent, actual rent received will be the 'annual value of the house property'.

From the 'Annual Value of House Property', in case of let out property, following will be allowed as deduction – (a) Municipal tax – The deduction will be permitted on actual payment basis (b) Standard deduction of 30% of (gross annual value less municipal tax) [section 24(a) of Income Tax Act] (c) Interest on capital borrowed to acquire or construct the house property subject to limit explained below [section 24(b) of Income Tax Act]

Annual Value of a self-occupied property is taken as 'Nil', if it is not let out. In such cases, none of the aforesaid expenses are allowed as deduction. However, if the self-occupied property is acquired or constructed or repaired from borrowed funds, interest payable on such funds upto Rs 1,50,000 per annum is allowed as deduction. Interest on borrowed capital for repairs is allowable as deduction upto Rs 30,000.

Naturally, this will be a 'loss' as the annual value of self occupied property is 'Nil'. This 'loss' can be set off against any other income of the assessee. In other words, if funds are borrowed to acquire or construct or repair self-occupied property, interest upto Rs 1,50,000/30,000 paid per annum is allowable as deduction from any other income.

House property or any portion thereof occupied by the owner for purpose of his business or profession is excluded and any expense of current repairs, municipal taxes, depreciation on property etc. is allowable as business expenditure.

Profits and Gains of Business or Profession

Profit and gains of business as specified in section 28 of Income tax Act are taxable.

The term 'business' includes trade, commerce or manufacture or adventure or concern in nature of trade, commerce or manufacture [section 2(13) of Income Tax Act]

'Professional Income' is income from exercise of any profession or vocation which calls for an intellectual or manual skill. It covers doctor, lawyers, accountants, consulting engineers, artists, musicians, singers etc.

Profits of business or gains from profession are calculated after allowing all legitimate business expenditure. Some important deductions admissible in computing income from business or profession are as follows [sections 30 to 36 of Income Tax Act] —

* Rent, rates, taxes, repairs and insurance for business or professional premises [section 30 of Income Tax Act]

* Current repairs and insurance of machinery, plant and furniture [section 31 of Income Tax Act]

* Depreciation on building, machinery, plant or furniture [section 32 of Income Tax Act] (discussed below)

* Revenue expenditure on scientific research [section 35(1) of Income Tax Act]

* Capital expenditure on scientific research related to business (except land) [section 35(2) of Income Tax Act]

* Preliminary expenses in relation to formation of a company or in connection with extension of an undertaking or setting up of a new industrial unit can be amortised in 5 equal installments over 5 years. The preliminary expenditure is permitted only upto 5% of cost of project [section 35D]

* Insurance expenses [section 36(1)(i) of Income Tax Act]

* Insurance premium on health of employees [section 36(1)(ib) of Income Tax Act]

* Bonus or commission to employees [section 36(1)(ii) of Income Tax Act]

* Interest on borrowed capital [section 36(1)(iii) of Income Tax Act]

* Contributions towards approved provident fund, superannuation fund and gratuity fund [section 36(1)(iv) and 36(1)(v) of Income Tax Act]

* Bad debts in respect of income considered in previous years can be written off and allowable as deduction [section 36(1)(viii) of Income Tax Act]

* Banking cash transaction tax [section 36(1)(xiii) of Income Tax Act]

* Advertisement expenditure is fully allowed as deduction. However, expenditure incurred on advertisement in any souvenir, brochure, pamphlet etc. of a political party is not allowed as a deduction [section 37(2B) of Income Tax Act]

* Expenditure in maintenance of guest house is permissible as deduction [section 36(1)(i) of Income Tax Act]

* Any other expenditure which is not of capital nature or personal expenses of the assessee is allowed if it is expended wholly and exclusively for the purposes of business or profession. However, it should not have been for purpose which is an offence or is prohibited by any law [section 37 of Income Tax Act]

5-1 *Depreciation* - Depreciation means diminution in value of an asset on account of wear and tear and obsolescence.

In any business, raw material is used fully and immediately, while plant and machinery is used slowly over a period of time. After the estimated life of machinery, its value becomes Nil. Hence, it is fair that cost of machinery is charged over the period of its estimated useful life. This is the basic principle of depreciation on capital goods. Since land does not depreciate, no depreciation is allowed on land.

Under Income Tax, depreciation is calculated on the basis of 'block of assets'. 'Block of assets' means a group of assets falling within a class of assets, in respect of which the same % of depreciation rate has been prescribed. e.g. all machinery having rate of depreciation as 25% will form one block of asset, machinery having 40% rate of depreciation will form another 'block of asset' and so on.

Depreciation is allowed on actual cost of the asset. Interest paid on borrowed funds and capitalised as pre-commencement expenses before the asset is commissioned is added to cost of the asset and depreciation claimed on such expenditure. Thus, pre-production expenditure can be included in cost of the machinery and depreciation can be charged on such 'actual cost'. In *Chellapalli Sugar* v. *CIT*AIR 1975 SC 97 = 98 ITR 167 (SC), it as held that it includes all expenditure necessary to bring such asset into existence. [Thus, it will include installation charges]. It was held that interest on loans upto date of commencement of business forms part of 'actual cost' of plant for purpose of depreciation.

Depreciation is calculated on Written Down Value (WDV) method. If the asset is put to use for purpose of business for less than 180 days, only 50% of normal depreciation is permissible. In other words, full depreciation for the year is permissible only if asset is commissioned before 30th September of that year.

If depreciation cannot be fully claimed in a particular year for want of profits, the un-absorbed depreciation can be carried forward for any number of succeeding assessment years. [section 32(2)].

The depreciation rates in respect of some important assets are as follows :

* Residential building – 5%. Others (including hotels and boarding houses) – 10%. Purely temporary structures – 100%.

* Furniture and fittings including electrical fittings – 10%

* Motor cars 15% . Buses, lorries, and taxis used in business of running them on hire – 30%,

* Pollution control equipment and specified energy saving devises - 100%

* General machinery - 15%, aeroplane – 40%, Ships – 20%

* Computers including software - 60%.

* Books by professionals – 100% for annual subscription and 60% for others - books in library - 100%.

* Intangible assets - know-how, patents, copyrights, trade marks, licenses, franchises or any other right of similar nature - 25%.

In *Mysore Minerals* v. *CIT* 1999 AIR SCW 3146 = 1999(5) SCALE 340 = 239 ITR 775 = AIR 1999 SC 3185 = 106 Taxman 166 (SC), it was held that claimant of depreciation need not be owner of asset in legal sense. Person in whom for the time being vests the dominion over the asset and who is entitled to use it in his own right is eligible to claim depreciation. – followed in *Dalmia Cement* v. *CIT* 2000 AIR SCW 4198 (SC 3 member bench).

However, if assessee has not acquired dominion over the asset, he will not be entitled to depreciation on that asset. – *Tamilnadu Civil Supplies* v. *CIT* (2001) 116 Taxman 369 = 2001 AIR SCW 4777 (SC 3 member bench).

Depreciation compulsory – As per Explanation 5 to section 32(1)(ii), inserted w.e.f. 11.5.2001, depreciation is compulsory in computing total income even if assessee had not claimed the same. This amendment applies to AY 2002-03 onwards. [In *CIT* v. *Mahendra Mills*(2000) 2 SCALE 384 = AIR 2000 SC 1960 = 243 ITR 56 = (2000) 109 Taxman 225 (SC), it was held that assessee has option to claim or not to claim depreciation. The depreciation cannot be thrust upon him. Now, this judgement is ineffective from AY 2002-03]

Depreciation in case of imported machinery obtained on loan in foreign currency – If machinery is imported on loan repayable in foreign currency, the amount payable in rupees will go on changing due to fluctuations in foreign exchange rates, as the installments and interest are spread over a period. In such case, the value of machinery should be increased on basis of entire loan outstanding and not merely installments of loans that fell due during the accounting period. – *CIT* v. *Arvind Mills* (1992) 193 ITR 255 = 60 Taxman 192 (SC) – quoted and followed in *CIT* v. *Madras Fertilizers* (2002) 124 Taxman 581 (Mad HC DB).

5-2 *Expenditure not allowed as deduction* - Following expenditures are not allowed as deduction for purpose of income tax.

Deduction of taxes, interest etc. Only on actual payment basis - Tax, duty, cess, fees payable under any law, Employer's contribution to provident fund or ESIC, bonus to employees, commission to employees, interest on any loan or borrowing from financial institutions, banks, SFC, leave encashment are eligible as deduction only if they are paid on 'due dates' on which these were payable. Even if these are not paid on due dates but are paid before filing of return, these are allowed as deduction, if proof of payment is filed along with the return. However, in case of employer's contribution to provident fund, superannuation fund or gratuity fund, the same is allowed as deduction only if it was paid before due date of payment [section 43B of Income Tax Act]

Expenditure in excess of Rs 20,000 in cash fully disallowed - If expenditure is incurred in business or profession by payment of cash over Rs 20,000 in a day, entire expenditure is disallowed [Earlier, 20% of such expenditure was disallowed upto AY 2007-08]. All cash transactions in a day to a party should not exceed Rs 20,000. [Till 31-3-2008, each transaction was considered for the limit of Rs 20,000. Now, total transactions in a day will be considered [section 40A(3) of Income Tax Act]

Payment over Rs 20,000 should be made by cheque or demand draft.

This restriction is not applicable in case of payments to # RBI, other banks and financial institutions, LIC # Government payments, payment by book adjustment, railway freight * Payment for agricultural produce, poultry, fish etc. to the cultivator, grower or producer (i.e. payments to middlemen are not excluded from this provision) [rule 6DD]

Similarly, a person can accept loans or deposits of Rs 20,000 or more only by account payee bank draft or cheque.

Interest on delayed payment to small industries - Interest on delayed payment made to Small Scale Industries is not allowable as deduction.

Expenditure for any purpose which is an offence in law - Section 37(1) of Income Tax Act states that any expenditure incurred for any purpose which is an offence or which is prohibited by law shall not be allowed as deduction.

5-3 ***Different accounting for balance sheet and income tax purposes*** - Method of depreciation, valuation of stock etc. is different under Companies Act and Income Tax Act. Hence, one method of accounting for income tax and other for Companies Act is permitted. The practice has been specifically approved in *United Commercial Bank* v. *CIT* 1999 AIR SCW 4050 = AIR 2000 SC 94 = 106 Taxman 601 (SC).

Accounting profits and assessable profits are conceptually different. – *CIT* v. *Bipinchandra Maganlal* (1961) 41 ITR 290 (SC).

Other important provisions in respect of business income

6 Some important provisions in relation to income from business or profession are as follows -

Maintenance of books of account - In respect of professional in legal, medical, engineering, architecture, accountancy or technical consultancy must maintain books, if their gross receipts are less that Rs 1.50 lakhs, they have to maintain such books of account as may enable Income Tax Officer to compute their taxable Income. If their gross receipts exceed Rs 1.50 lakhs, they have to maintain books of account as specified in rule 6F i.e. cash book, journal, ledger, copies of bills exceeding Rs 25 issued by him, original bills in respect of expenditure and payment vouchers etc. Person carrying on medical profession has to maintain additional books as prescribed. [Section 44AA and rule 6F]

Persons carrying on business or professionals other than those mentioned above have to maintain books of accounts if annual income exceeds Rs 1,20,000 or gross receipts or turnover exceed Rs. ten lakhs in case of business also have to maintain books of account.

Accounts on mercantile or cash basis - Accounts should be maintained either on mercantile basis or cash basis. Hybrid i.e. mixed system is not permitted. [In cash system, income or expenditure is considered only when it is actually received / paid. In mercantile system, income/expenditure is considered on accrual and payable basis. Actual receipt or payment may occur in subsequent financial year and may not happen in that particular year.]

Income tax audit report - If gross receipts or turnover of business exceeds Rs 40 lakhs per annum, the accounts have to be compulsorily audited. In case of professional income, accounts have to be audited if gross receipts exceed Rs ten lakhs. This audit report should be submitted along with income tax return, before 30th September. [section 44AB].

Income from other sources

All income other than income from salary, house property, business and profession or capital gains is covered under 'Income from other sources'. Provisions in respect of some important sources of 'other income' are summarised below.

Dividends - Dividends on shares of domestic companies or units of UTI or mutual fund received from a company on or after 1-4-2003 will not be taxable at the hands of the assessee [section 10(34) and 10(35)]. [The dividend distribution tax will be payable by company/mutual fund u/s 115-O] However, deemed dividend as defined in section 2(22) of Income Tax Act will be considered as 'income from other sources'.

Winning from lotteries, races etc. - Winning from lotteries, card games, horse races are taxable as other income. This is taxable @ 30.3% without claiming any allowance or expenditure.

Interest on securities, bank deposits and loans - Interest on bank deposits and loans is treated as 'other income', if not taxable u/s 28.

Gifts - Gifts in a year exceeding Rs 50,000, except gifts from certain relatives and gifts on certain specified occasions will be taxable [section 56(2)(vi) of Income Tax Act]

Income from letting - Income from letting of furniture, machinery, plant and building which is not separable fro, composite letting with machineries is taxable as other income. Current repairs, insurance and depreciation are allowed as deductions [section 56(2)(ii) and (iii) of Income Tax Act]

Capital Gains

Capital gains means any profit or gains arising from transfer of a capital asset. Such capital asset may be building, non-agricultural land, machinery, shares, jewellery etc. However, stock in trade, agricultural land in rural area and personal effects (other than jewellery) are not 'capital assets'.

From AY 2008-09, archaeological collections, paintings, sculptures will not be treated as 'capital assets'.

Broadly, 'capital gain' is the difference between the price at which the asset was acquired and the price at which the same asset was sold. In technical terms, capital gain is the difference between cost of acquisition and the full value of consideration. Incidental expenditure and cost of improvement is allowable as deduction.

The 'cost of acquisition of capital asset' is to be increased by Cost Inflation Index. The index is announced by Central Government every year. The index was 100 for 1981-82, 172 for 1989-90, 244 for 1993-94, 331 for 1997-98, 351 for 1998-99, 389 for 1999-2000, 406 for 2000-01, 426 for 2001-02, 447 for 2002-03, 463 for 2003-04 and 480 for 2004-05, 519 for 2006-07, 551 for 2007-08 and 582 for 2008-09.

The cost of acquisition will be adjusted on basis of the above index and then capital gain will be calculated. The formula is Cost of acquisition x Cost Inflation Index of the year in which the asset is transferred / Cost Inflation Index of the year of acquisition. If the asset was acquired before 1.4.1981, the Cost Inflation Index of that year will be treated as 100. Thus, if an asset was brought in 1989-90 for Rs one lakh and sold in 1997-98 for Rs three lakhs, the adjusted cost of acquisition will be (1,00,000 x 331)/172 i.e. Rs 1,92,442, and capital gains will be Rs 1,07,558 (3,00,000 - 1,92,442). *Such adjustment is permissible only for long term capital gains and not for short term capital gains.*

Expenditure incurred on any improvement in asset is permitted as deduction and that cost can also be adjusted on the same principles as above.

If a company issues bonus shares, the cost of acquisition of bonus shares will be treated as 'Nil'. Thus, if the bonus shares are sold, net sale proceeds of bonus shares will be liable to capital gains.

Expenditure incurred in connection with transfer (like stamp duty, registration charges, legal fees, brokerage etc.) are allowed as deduction. Capital gain is charged as income of the financial year in which the transfer took place.

Capital gain can be classified as 'short term' or 'long term'. A short term capital gain is when the asset was held by the assessee for a period of upto 36 months. If the asset was held for more than 36 months, the gain will be long term gain. The period is only 12 months (instead of 36 months) in case of shares or any other security listed in stock exchange or units of UTI or units of mutual fund.

The income tax rate is 20% on long term capital gains, while calculating the long term capital gains, indexation of purchase price is required. *Tax on long term capital gain shall be subject to ceiling of 10% of capital gains calculated without indexing.*

The short term gains are added in other income of the assessee and the income tax is payable according to the normal rate applicable to the assessee.

In case of short term gains covered under section 111A of Income Tax Act , the rate is 10% for AY 2008-09 and 15% for Assessment Year 2009-10. Section 111A is applicable in respect of securities transactions which are subject to securities transaction tax.

Capital gains arising from sale of residential house is exempt if the original asset (i.e. the house) was held for more than three years and a new house was purchased within one year before or two years after the sale of original asset, or a new residential house is constructed within three years. The cost of new asset (residential house) should be more than the amount of capital gains [section 54 of Income Tax Act]

Any other long term capital gain is exempt if the capital gains are invested within 6 months in 3 year bonds issued by REC or NHAI and that investment is retained for three years. Investment cannot exceed Rs 50 lakhs - section 54EC of Income Tax Act.

Rebate / Exemption from Income Tax Liability

9 Following rebates / exemptions are available.

9-1 ***Deductions under chapter VI-A and rebates***

Investments and deposits - Investments in PPF, Provident Fund, LIC, repayment of housing loans, NSIC, 5 year FDR with scheduled banks, 5 year time deposit in post office, deposit in Senior Citizens Saving Scheme etc. are allowed as deduction upto Rs 1,00,000 u/s 80C.

Deduction of medical insurance premium, pension fund **-** Following deductions are permissible - (a) Medical insurance premium upto Rs 20,000 for senior citizen and Rs 15,000 for others. For the Assessment Year 2009-10, additional deduction of Rs 15,000 will be allowed if insurance policy of parents is taken (section 80D). (b) Contribution to pension fund within overall ceiling of Rs one lakh (section 80CCC)

Donations - Contribution to approved charitable institutions - in some cases 50% of amount paid is allowed as deduction, while in some cases, 100% amount paid is allowed as deduction (section 80G).

Exemption to EOU, SEZ - Income In case of EOU, STP, EHTP and BTP, the concession will continue upto 31-3-2010. In case of SEZ, exemption is for larger period.

Other provisions of Income Tax

10 Certain other important provisions of income tax are discussed here.

10-1 ***Clubbing of Income*** - Often salary or other expenses from business are shown in name of close relatives like spouse (wife / husband) or minor child, to reduce tax liability. In such case, if the individual has a substantial interest in the concern, the income of such wife, husband or minor child will be added to the income of such individual. This is termed as 'clubbing of income'.

The clubbing provision is not applicable if spouse possesses technical or professional qualifications and the income is solely due to application of his / her technical knowledge and experience [section 64(1)(ii) of Income Tax Act]

If an asset is transferred to the spouse, income from such asset is also treated as income of the individual. [e.g. by transferring shares, house property etc.].

Similarly, if an individual throws his separate property into the property of HUF, income from such converted property will be included in the total income of such individual [section 64(2) of Income Tax Act]

The clubbing provision has obviously been made to plug avoidance of income tax liability, by 'showing' some income in the name of spouse / minor child / HUF.

10-2 *Set off and carry forward of loss*

***Carry forward of loss other than speculation loss* -** Carry forward of loss is permitted only when return is filed in time. In case of closely held company, unabsorbed loss can be carried forward only if at least 51% of shares are held beneficially by same persons who were holding them in previous year.

Unabsorbed depreciation - Unabsorbed depreciation can be set ff against any head of income other than salary. It can be carried forward to any number of years. It can be carried forward by same assessee except in case of amalgamation, demerger and business reorganization.

Speculative loss - Loss from speculative transactions involves sale and purchase of commodities including stocks and shares. It can be set off against speculative profits only and can be carried forward for four years.

10-3 *Permanent Account Number* - Every person whose total sales, turnover or gross receipts are over Rs 5,00,000 are required to apply and obtain a Permanent Account Number (PAN) [section 139A].

Any other person can obtain PAN voluntarily.

In addition, ITO can allot PAN *suo moto* to a person by whom income tax is payable.

Government has decided to use PAN as a common business identification number to be used by various agencies and departments like customs, excise, DGFT, SEBI etc.

10-4 *Advance Income Tax* - Tax is deducted from salary payable to an employee. Since a businessman or professional earns his own income, there is no TDS (Tax Deduction at Source). Hence, he is liable to pay advance tax as he earns income. This is ‘Pay Tax as you Earn’. Thus, advance tax is payable on the basis of estimated income of the current financial year. [The income is ‘estimated’ because, actual income will be known only after the financial year is over].

Advance tax is payable only in cases where tax payable is in excess of Rs 5,000. The assessee has to pay advance tax on his own accord and no notice will be issued to him. The advance tax is payable in installments as follows -

In case of company - # 15% on or before 15th June # 30% on or before 15th September # 30% on or before 15th December # Remaining 25% on or before 15th March. If there was shortfall in earlier installment, it should be made up in subsequent installment.

* ***In case of partnership firms, proprietors, professionals etc*. -** # 30% on or before 15th September # 30% on or before 15th December # Remaining 40% on or before 15th March. If there was shortfall in earlier installment, it should be made up in subsequent installment.

Thus, 100% income tax in respect of estimated income of current financial year is payable by 15th March. If any instalment is not paid on due date, it can be paid subsequently.

If advance tax is not paid or short paid on due dates, mandatory interest is payable as follows :

* If advance tax was not paid before 31st March of the financial year, or advance tax paid was less than 90% of the assessed tax, interest @ 1% per month or part thereof is payable from 1st April till the month of payment. [section 234B]. The interest is not payable if total tax liability is less than Rs 5,000 or if at least 90% of assessed tax was paid before 31st March.

* If installments of advance tax are not paid on due dates, interest on shortfall is payable @ 1% per month. In case of last instalment which is due on 15th March, interest @ 1% is payable for one month if tax is not paid at all or is paid after 15th March. [section 234C]. Note that this interest is calculated only upto 31st March, as from 1st April, interest @ 1% becomes payable on entire tax due under section 234B.

This interest is mandatory and there is no provision to grant exemption form payment of this interest.

If the return is not filed within due date, interest @ 1% is payable u/s 234B. In addition, interest @ 1% is payable u/s 234A. Thus, if return is not filed on or before due date, interest payable is 2% for every subsequent month.

10-5 ***Special provisions in respect of Partnership firm***

A partnership firm is presently assessed on the lines similar to the assessment of a company. The firm can pay salary and interest on capital to the partners. Income tax is payable on profits calculated after deducting salary and interest paid to partners. The salary paid to partners is treated as 'business income' in their hands and is taxable accordingly.

The partnership firm may or may not be registered. However, the partnership must be evidenced by a partnership deed. The deed should indicate * individual shares of the partners * Salary payable to working partners * Interest payable to partners. A true copy of partnership deed certified and signed by all the partners should be filed along with the first return of income. Subsequently, the copy is not required to be filed along with every return. However, if there is any change in the partnership agreement, a fresh copy has to be filed.

Return of partnership firm can be signed by managing partner.

Salary to working partners - The salary payable to partners is as follows -

* Professional partnership firms - # upto book profit of Rs 1,00,000 - 90% of book profit - minimum Rs 50,000 # On next Rs 1,00,000 book profit - 60% # On balance of book-profit - 40%.

* Other than professional partnership firms (i.e. business firms) - # upto book profit of Rs 75,000 - 90% of book profit - minimum Rs 50,000 # On next Rs 75,000 book profit - 60% # On balance of book-profit - 40%.

The salary can be paid only to working partners. Such payment should be authorised by partnership deed. This salary is allowed as deduction from income of the partnership firm and is taken as business income of the individual partner.

Interest to partners - Income Tax Act provides that interest upto 12% paid to the partners will be allowable as deduction from income of partnership firm [section 40(b)((iv) of Income Tax Act]. [The interest rate was 12% upto 31-5-2002]. Such payment should be authorised by partnership deed. This interest is allowed as deduction from income of the partnership firm and is taken as 'other income' of the individual partner.

10-6 ***Tax deduction at source (TDS)***

A person is under liability to deduct income tax at source and pay it to Government. He should issue a certificate to the person from whom tax is deducted, so that the person can submit the same to Income Tax authorities. Tax deducted at source should be paid to Government within one week from date of deduction. At the end of the year, a return in prescribed form has to be filed with ITO.

TDS is rightly called 'tedious', but not deducting tax at source can invite penalties.

As can be seen from following, if the person making payment is individual or HUF, he is exempt from the provisions of TDS in most of the cases, if he is not required to submit income tax audit report u/s 44AB. However, TDS provisions apply to (a) salary payments made by an individual or HUF even if he is not required to submit any income tax audit report u/s 44AB (b) If the individual/HUF is required to submit Income Tax Audit report.

TDS from salary - Every employer has to deduct tax from salary of employees. Payer should calculate tax payable on salary at the [section 192].

While deducting tax at source, the employer can consider the investments made by employee which qualify for exemption, payment for purchase or construction of house, mediclaim insurance premium etc. Income tax is to be deducted every month and should be paid to Government within a week after deduction. The employer can adjust deductions from month to month so that total deductions from salary of the whole year is equal to tax payable by employee on salary income.

Deduction under section 80G is not to be considered by employer (except some specified funds like PM Relief Fund etc.) while calculating tax liability of employee. The tax relief has to be claimed by employee through tax return.

The employer has to file an annual return of tax deducted at source from all employees.

TDS from Interest other than interest on securities - Tax should be deducted from interest paid if interest payable in financial year exceeds Rs 10,000 in case of banks, post office and cooperative society and Rs 5,000 in case of others [section 194A].

If recipient is a resident other than domestic company, TDS is as follows - (a) If recipient is individual/HUF/AOP where aggregate payment or credit is upto Rs 10 lakhs, cooperative society, local authority, firm where aggregate payment or credit does not exceed Rs one crore - 10.3% (b) If recipient is individual/HUF/AOP where aggregate payment or credit exceeds Rs 10 lakhs, firm where aggregate payment or credit exceeds Rs one crore - 11.33%

If recipient is a domestic company, TDS rate is as follows - (a) If recipient is domestic company where aggregate payment or credit does not exceed Rs one crore - 20.6% (b) If recipient is domestic company where aggregate payment exceeds Rs one crore - 22.66%

An individual who is 65 years of age or above can get interest without deduction of tax at source, if he submits a self-declaration to the payer in duplicate, in form No. 15H. Others have to submit declaration in form 15G.

The payer has to submit one copy of declaration (form 15G/15H as applicable) to Commissioner of Income Tax under whose jurisdiction his tax is being assessed.

Individuals and HUF are required to deduct tax on interest payment, if they is required to submit income tax audit report u/s 44AB. Provisions of making payment of TDS do not apply to small HUF and individuals who do not have to submit income tax audit report.

TDS from Payments to contractors, sub-contractors and advertising contracts - TDS provisions apply if contract value exceeds Rs 20,000 for single payment or Rs 50,000 in aggregate for a financial year [section 194C].

In case of contract other than advertising contract, TDS is at following rates - (a) If recipient is individual/HUF/AOP where aggregate payment or credit is upto Rs 10 lakhs, cooperative society, local authority , firm/domestic company where aggregate payment or credit does not exceed Rs one crore - 1.03% (b) If recipient is individual/HUF/AOP where aggregate payment or credit exceeds Rs 10 lakhs, firm/domestic company where aggregate payment exceeds Rs one crore - 1.133%

In case of advertising contract, TDS is at following rates - (a) If recipient is individual/HUF/AOP where aggregate payment or credit is upto Rs 10 lakhs, cooperative society, local authority , firm/domestic company where aggregate payment or credit does not exceed Rs one crore - 2.06% (b) If recipient is individual/HUF/AOP where aggregate payment or credit exceeds Rs 10 lakhs, firm/domestic company where aggregate payment exceeds Rs one crore - 2.266%

TDS is also required to be deducted, if payment to contractors/sub-contractors is made by an individual or HUF, who is required to submit income tax audit report u/s 44AB. Provisions of making payment of TDS do not apply to small HUF and individuals who do not have to submit income tax audit report.

TDS from payment on advertising contracts - See above. Provision of TDS applies when client makes payment to advertising agency and not when advertising agency makes payment to the media i.e. print media or elecronic media.

TDS from commission / brokerage – TDS applies in respect of payment of commission or brokerage to resident. There is no TDS if commission / brokerage paid during the financial year is less than Rs 2,500. [section 194H]

TDS is at following rates - (a) If recipient is individual/HUF/AOP where aggregate payment or credit is upto Rs 10 lakhs, cooperative society, local authority , firm/domestic company where aggregate payment or credit does not exceed Rs one crore - 10.3% (b) If recipient is individual/HUF/AOP where aggregate payment or credit exceeds Rs 10 lakhs, firm/domestic company where aggregate payment exceeds Rs one crore - 11.33%

TDS provisions are applicable, if payment of commission/brokerage is made by an individual or HUF, who is required to submit income tax audit report u/s 44AB. Provisions of making TDS payment do not apply to small HUF and individuals who do not have to submit income tax audit report.

TDS from Payments of Rent - TDS provisions apply if aggregate sum of rent paid exceeds Rs 1,20,000 per annum [section 194-I]

The TDS rates vary between 10.3% to 22.66% depending on whether rent is for plant, machinery, land, furniture etc. and who is the recipient.

TDS provisions are applicable, if payment of rent is made by an individual or HUF, who is required to submit income tax audit report u/s 44AB. Provisions of making payment of TDS do not apply to small HUF and individuals who do not have to submit income tax audit report.

TDS from Payments for professional or technical services - TDS provisions apply if aggregate sum paid for professional or technical services exceed Rs 20,000 per annum [section 194J]. TDS should be on total payment including reimbursement of expenses, as per CCBDT circular No. 715 dated 8-8-1995. However, I ITO v. Dr. Willmar Schwabe (2005) 3 SOT 71 (ITAT), it has been held that reimbursement of expenses for which bill is separately raised did not attract the provisions of section 194J.

TDS is at following rates - (a) If recipient is individual/HUF/AOP where aggregate payment or credit is upto Rs 10 lakhs, cooperative society, local authority , firm/domestic company where aggregate payment or credit does not exceed Rs one crore - 10.3% (b) If recipient is individual/HUF/AOP where aggregate payment or credit exceeds Rs 10 lakhs, firm/domestic company where aggregate payment exceeds Rs one crore - 11.33%

TDS provisions are applicable, if payment for professional or technical services is made by an individual or HUF, who is required to submit income tax audit report u/s 44AB. Provisions of making TDS payment do not apply to small HUF and individuals who do not have to submit income tax audit report.

TAN number – Assessee should obtain TAN (Tax Deduction Account Number) which is required to be quoted on all TDS returns. It is a 10 digit alphanumeric code.

TDS Return – Person who has deducted tax at source is required to file return to Income Tax department on annual basis. In case of companies, the return is to be filed on computer media, i.e. for them, filing of e-TDS is compulsory. The form has been prescribed. 'Electronic Filing of Returns of Tax Deducted at Source Scheme, 2003' has been notified by CBDT for this purpose. The return has to be filed in prescribed form in floppy. NSDL (National Securities Depository Ltd.) has been given task of handling e-TDS returns.

10-7 *No income tax clearance certificate*

Income Tax department has discontinued giving Income Tax Clearance Certificates for various purposes like filing tender, bidding contracts etc. No such certificate will be issued by Income Tax department. The contractors etc. should quote PAN – CBDT circular No. 2/2004 dated 10-2-2004.

Income Tax Returns

11 Every assessee should file an annual return in prescribed form. The prescribed forms are as follows -

Form No.	Applicable to	Details
ITR 1	Individuals	Salary (including pension and family pension) and interest
ITR 2	Individuals and HUF	Any income other than business income
ITR 3	Individuals and HUF	Who are partners in firm but not carrying on business or

		profession as proprietor
ITR 4	Individuals and HUF	Who are proprietors having income from business or profession
ITR 5	Firm, AOP, BOI	Including return of FBT
ITR 6	Companies except charitable companies claiming exemption u/s 11	Including return of FBT
ITR 7	Charitable trusts etc. including cases covered by section 139(4A) to 129(4D)	Including return of FBT
ITR 8	Persons liable to FBT	FBT return only
ITR-V	All except charitable trusts who have filed return electronically without digital signature	Verification form for persons who have filed return electronically but without digital signature

The income tax return is really a self assessment memorandum. The assessee should calculate the tax and interest payable by him and pay it by challan. The payment will of course be after deducting the advance tax which he might have already paid.

E-return – Beginning has been made in 2003 for electronic filing of return under Electronic Furnishing of returns of Income Scheme, 2003. Filing of e-return is compulsory for corporate employees.

Due dates for filing return - The due dates for filing return are as follows -

* (a) Individuals having only salary income (b) Non-corporate assessees (Individuals, HUF, partnership firms or societies) having income from business or profession but who do not have to get their accounts audited under Income Tax or any other law - 31st July

* (a) Non corporate assessees (Individuals, HUF, partnership firms or societies) having income from business or profession and who have to get their accounts audited (b) A working partner where the firm in which he is a working partner has to get its accounts audited (c) Corporate Assessee (d) Persons who have to file return under one by six scheme – 30th September (Till 2007, it was 31st October).

The dates are mandatory and there is no provision to extend the due date. If the return is filed beyond due date, mandatory interest @ 1% per month of tax due is payable. Belated return upto one year beyond due date is permissible. Mandatory interest is payable, but no penalty is payable. Thus, if no tax was due, belated return upto one year can be submitted without payment of any interest.

A loss return must be filed in time. Otherwise, the carry forward of loss is not permitted. However, CBDT can grant extension for submitting return by a loss making company.

Signature on return - The return should be signed by individual, karta of HUF, managing partner, managing director etc. In some cases, return can be signed by authorised representative.

No intimation will be sent by Income Tax Officer, if any tax / interest / refund is not due on the basis of return of income / wealth filed.

Correction of arithmetical mistakes and incorrect claims – Arithmetical mistakes and incorrect claim apparent from the return can be corrected by department and intimation sent to assessee within one year from end of financial year in which return is made [section 143(1) amended vide Finance Act, 2008]. If no such intimation is made, acknowledgment of return will be deemed to be an intimation.

Scrutiny of returns - Some of the returns are taken by ITO for detailed scrutiny. Notice for scrutiny has to be served withi 6 months from close of financial year in which return is furnished i.e. by 30th September. The ITO can require assessee to attend his office or produce evidence in support of the return filed [section 143(2) of Income Tax Act – section 115WE(2) i respect of FBT]

Payment of tax - The advance tax and self-assessment tax should be paid vide prescribed challan. Facility of e-payment is available.

Employer gives various benefits to employees. The benefits which are individually given to employee can be identified with the particular employee and taxed in his hands. However, where benefits are given collectively and it is difficult to identify individual employee, these should be taxed at the hands of employer.

FBT (Fringe Benefit Tax) has been introduced with this idea in mind w.e.f. 1-4-2005 (AY 2006-07).

However, practically, some benefits which can be identified with individual employee are taxable under FBT. Similarly, some expenses incurred by employer which hardly benefit employees are also taxed under FBT.

1-1 *Who is 'employer'?*

Employer means a company; a firm; an association of persons or a body of individuals; a local authority; and every artificial juridical person, not falling within any of the above. However, "employer" does not include (*a*) a political party, or (*b*) a person who is eligible for exemption under section 10(*23C*) or registered under section 12AA of Income Tax Act [section 115W(a) of Income Tax Act]

Thus, a proprietary firm or HUF is not liable to pay FBT. Similarly, Central Government; a State Government and a political party is not 'employer' and not liable to pay FBT.

Fringe benefit tax will apply to foreign companies if it has employees based in India. Fringe benefit tax will apply to liaison offices of foreign companies in India if the liaison offices have employees based in India - CBDT Circular No. 8/2005 dated 29-8-2005.

1-2 *When FBT is payable?*

As per section 115WA(1), fringe benefit tax is applicable if — (a) Fringe benefits are provided or deemed to be provided (b) These are provided by an "employer" as defined in section 115W(a) and *(c)* These benefits are provided to his employees.

1-3 *Quantum of FBT*

FBT is in addition to income tax. FBT is payable by employer. FBT is calculated at the rate of 30 per cent on the "value" of fringe benefits. Surcharge is as follows – (a) In case of AOP/BOI -10% of tax if fringe benefit is above Rs 10 lakhs (b) In case of firm, company or artificial judicial person – 10% of tax irrespective of amount of fringe benefit (c) In case of non-domestic company – 2.5% and (d) In case of local authority and cooperative society - Nil.

In addition education cess @ 2% and SAH education cess @ 1% is payable.

Thus, total FBT payable is as follows, for Assessment Year 2008-09 and 2009-10 –

Employer is AOP/BOI and fringe benefit is upto Rs 10,00,000	30.9%
Employer is AOP/BOI and fringe benefit exceeds Rs 10,00,000	33.99%
Employer is cooperative society or local authority	30.9%
Employer is non-domestic company	31.6725%

Return of FBT – Return has to be filed by 30th September.

2 Meaning of Fringe Benefit

Fringe Benefits are defined in two parts - (a) Fringe Benefits as defined in section 115WB(1) (b) Deemed Fringe Benefits as defined in section 115WB(2).

Valuation of each fringe benefit is to be done as per provisions of section 115WC.

Perquisites taxable at hands of employees - Perquisites in respect of which tax is paid or payable by the employee are not taxable as perquisites under FBT.

Transport to employees to and from home - Free or subsidised transport or allowance provided by the employer to his employees for journeys by the employees from their residence to the place of work or such place of work to the place of residence will also not be taxable under FBT.

2-1 Defined fringe benefits

"Fringe benefits", as defined in section 115WB(1), means any consideration for employment provided by way of the following -

Privilege or facility to employees - It covers any privilege, service, facility or amenity, directly or indirectly, provided by an employer, whether by way of reimbursement or otherwise, to his employees (including former employees). If any amount is recovered from employee, it will be deducted.

Free or concessional ticket for travel - It covers any free or concessional ticket provided by the employer for private journeys of his employees or their family members. It includes free or concessional tickets given by a transport undertaking to its employees and family members. It is not applicable if such tickets are given by an employer who is not engaged in the business of transport undertaking. Leave travel assistance or leave travel concession given by an employer to his employees is not covered by section 115WB(1)(*b*). In respect of transport facility provided by a transport undertaking to its employees, the value of fringe benefit shall be calculated at "cost" of which the same benefit is provided by the employer to the public as reduced by the amount, if any, paid by, or recovered from his employees. The cost at which the ticket is provided by the employer to the general public shall be the price of the ticket which an ordinary passenger is expected to pay on the date of purchase of the ticket for the date, time and the class of travel. Similarly, in a case where an open ticket is issued a number of days in advance but the reservation is generally confirmed a few hours before departure, the value of the free or concessional ticket shall be the cost of the ticket which an ordinary passenger seeking reservation a few hours before departure is liable to pay as reduced by the amount, if any, paid by or recovered from the employees - CBDT Circular No. 8/2005 dated 29-8-2005.

Contribution to superannuation fund - It covers contribution by the employer to an approved superannuation fund for employees. It may be noted that Employers' contribution to an approved superannuation fund is subject to fringe benefit tax. However, employers' contribution to gratuity fund/provident fund is not subject to fringe benefit tax. Value of fringe benefit will be 100% of amount in excess of Rs 1,00,000 for each employee. Thus, contribution upto Rs 1,00,000 per employee will not be considered as fringe benefit.

Security or sweat equity to employee - It covers any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer free of cost or concessional rate to his employee and former employees. Value of fringe benefit will be 100% of fair market value of security or sweat equity on the date on which the option vests with the employee, less amount paid by employee.

Specified security includes employee's stock option. Tax will be on securities allotted under the option and not on option itself.

2-2 Deemed Fringe Benefits

Following benefits shall be deemed to have been provided by the employer to his employees if the employer has in the course of his business and profession incurred these expenses [section 115WB(2) of Income Tax Act]

Entertainment - 20% of expenditure will be considered as value of 'fringe benefit'. It includes the reimbursement of entertainment expenditure by an employer to employees/directors/others and also expenditure on meeting/ get-togethers of employees and their family members on non-festival occasions including annual day.

Provision of hospitality - 20% of expenditure will be considered as value of 'fringe benefit'. In case of hotels and carriage of passenger or goods by air/cargo, value of fringe benefits will be only 5%.

It covers provision of hospitality of every kind by the employer to any person, whether by way of provision of food or beverages or in any other manner whatsoever. It includes expenditure on food/meals incurred by employees and later on reimbursed by employer and expenditure on food and beverages provided by employer at a training centre taken on hire by employer. However, it does not include any expenditure on, or payment for, food or beverages provided by the employer to his employees in office or factory and any expenditure on or payment through paid vouchers which are not transferable and usable only at eating joints or outlets.

From Assessment Year 2009-10, it will not include pre-paid electronic meal cards issued to employees.

Conferences - 20% of expenditure will be considered as value of 'fringe benefit'. In case of construction, pharma and software industries, value of fringe benefit will be 5%.

It covers any expenditure on conveyance, tour and travel, on hotel, or boarding and lodging in connection with any conference shall be deemed to be expenditure incurred for the purposes of conference. It includes expenditure on attending training programmes organized by trade bodies and on conferences for agents/dealers/development advisor. However, it does not include the fixed conference allowance to employees/directors, fees for participation by employees in any conference (excluding travelling, boarding and lodging expenses) and expenditure on in house training of employees (excluding travelling, boarding and lodging expenses).

Sale promotion - 20% of expenditure will be considered as value of 'fringe benefit'. It covers sales promotion including publicity. It includes payment for use of brand/brand ambassador/celebrity endorsement but not payment to a person of repute for promoting sales. It expenditure on free offers (with products) such as freebies like tattoos, cricket cards or similar products, to trade or consumers, but does not include expenditure on free samples of products distributed to any person. Expenditure on product marketing research carried on through its own employees is includible.

It does not include the following - (a) Expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system (b) Expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition (c) Expenditure on sponsorship of any sports event or any other event organized by any Government agency or trade association or body (d) Expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or tribunal (e) Expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards or display of products or by way of such other medium of advertisement (f) Expenditure by way of payment to any advertising agency for the above purposes (g) Brokerage and selling commission paid for selling goods (h) Expenditure relating to salesmen appointed by distributors for companies' products reimbursed through credit notes (i) Sale discount to wholesellers/customers or bonus points to customers (j) Expenditure on incentives given to distributors for meeting quantity targets (k) Expenditure on product marketing research paid to an outside agency (l) Expenditure in the nature of call centre charges for canvassing sales (cold calls) or carrying out post sales activities (m) Expenditure on making ad-film.

Employees' welfare - 20% of expenditure will be considered as value of 'fringe benefit'. Employees' welfare. It includes the following - (a) Payment for group personal accident/workman compensation insurance not under a statutory obligation (b) Medical expenditure reimbursement up to Rs. 15,000 (c) Expenditure on garden, site cleaning, light decoration etc. in employees colony (d) Expenditure on group health insurance not under a statutory obligation (e) Expenditure at a hospital/dispensary for injuries incurred during course of employment (hospital not run by employer) not under a statutory obligation (f) Subsidy provided to a school not meant exclusively for employees' children (g) Reimbursement of expenditure on books/periodicals to employees (h) Expenditure incurred on prizes/awards to employees (i) Expenditure on providing transport facility to employees' children (j) Expenditure on meeting/ get-togethers of employees and their family members on non-festival occasions including annual day.

This does not cover any expenditure incurred or payment made to fulfil any statutory obligation or mitigate occupational hazards or provide first aid facilities in the hospital or dispensary run by the employer. It also does not include medical facilities, reimbursement of medical expenses etc. which are not considered as perquisities of an employee.

From Assessment Year 2009-10, Employees' welfare will not cover (a) crèche facility for children of employees (b) Sponsorship of a sportsman who is employee and (c) Organise sports events for employees.

Conveyance - 20% is treated as Fringe Benefit. It includes (a) Reimbursement of car expenses including driver salary to employees on the basis of declaration or on the basis of bills submitted by employees (b) Travelling expenditure/conveyance expenditure/tour or travel expenditure incurred in respect of a project assigned by a client which is later on reimbursed by the client (c) allowances for meeting lodging and boarding given to employees.

It does not include Reimbursement of travelling expenditure/conveyance expenditure/tour or travel expenditure to a consultant in respect of a project assigned to him, fixed conveyance allowance/travelling allowance/transport allowance given to employees/director and expenditure for providing leave travel concession (LTC) to employees.

Hotel and lodging - 20% of expenditure will be considered as value of 'fringe benefit'. In case of carriage of passenger/goods by air/ship, pharma and software industries, value of fringe benefit will be 5%.

It covers use of hotel, boarding and lodging facilities. It includes any expenditure on use of hotel, boarding and lodging facilities. It also includes reimbursement of hotel bills to employees/directors. However, it does not include fixed hotel allowance to employees/directors

Repairs and maintenance of motor cars - 20% of expenditure will be considered as value of 'fringe benefit'. In case of carriage of passenger/goods by car business, value of fringe benefit will be 5%.

It covers repair, running (including fuel), maintenance of motorcars and the amount of depreciation thereon. It includes expenditure on repair of motor car, expenditure on running of motor car including fuel, maintenance expenditure of motor car, depreciation of motor car (as per Income-tax Act), lease rent of motor car, salary paid to drivers of motor cars, rent of garage for motor cars and interest on loan taken to purchase motor cars. However, it does not include any expenditure on running, maintenance of delivery vans, display vans, lorries, ambulances, tractors, buses, trucks, tempos, etc.

Repairs and maintenance of aircrafts - It covers repair, running (including fuel) and maintenance of aircrafts and the amount of depreciation thereon. It includes all expenses as applicable to repair and maintenance of motor cars. 20% of expenditure will be considered as value of 'fringe benefit'. In case of carriage of passenger/goods by air business, value of fringe benefit will be Nil.

Telephones - It covers use of telephone (including mobile phone) other than expenditure on leased telephone lines. 20% of expenditure will be considered as value of 'fringe benefit'.

Guest house accommodation - It covers maintenance of any accommodation in the nature of guest house (other than accommodation used for training purposes). 20% of expenditure will be considered as value of 'fringe benefit'. This has been excluded from fringe benefit from Assessment Year 2009-10.

Festival celebrations - It includes any festival celebration expenditure but does not include expenditure on celebration on Independence Day and Republic Day. 50% of expenditure will be considered as value of 'fringe benefit' for AY 2008-09 and 20% for AY 2009-10.

Use of health club and similar facilities - It includes reimbursement of health club expenditure to employees/directors and payment of entrance fees. It does not include depreciation on club building and fixed club allowance to employees/directors. 50% of expenditure will be considered as value of 'fringe benefit'.

Use of any other club facilities - It includes payment for entrance fees to a club and reimbursement of club expenditure to employees.50% of expenditure will be considered as value of 'fringe benefit'.

Gifts - Gift may be in cash or kind. Even gifts on promotion of company's products to distributors/ retailers are covered under fringe benefit. 50% of expenditure will be considered as value of 'fringe benefit'.

Scholarships - It includes expenditure on training of employees in an educational institute. 50% of expenditure will be considered as value of 'fringe benefit'.

Tour, travel, foreign travel - 5% of expenditure will be considered as value of 'fringe benefit'.

3 Other provisions

Advertisement not as deemed benefit - The following expenditure on advertisement shall not be taken as "deemed fringe benefit" * the expenditure (including rental) on advertisement of any form in any print (including journals, catalogues or price lists) or electronic media or transport system * the expenditure on the holding of, or the participation in, any press conference or business convention, fair or exhibition * the expenditure on sponsorship of any sport event or any other event organized by any Government agency or trade association or body * the expenditure on the publication in any print or electronic media of any notice required to be published by or under any law or by an order of a court or tribunal * the expenditure on advertisement by way of signs, art work, painting, banners, awnings, direct mail, electric spectaculars, kiosks, hoardings, bill boards or by way of such other medium of advertisement * the expenditure by way of payment to any advertising agency for the purposes of above * the expenditure on distribution of free samples of medicines or of medical equipment, to doctors * the expenditure by way of payment to any person of repute for promoting the sale of goods or services of the business of the employer.

***No segregation of capital/revenue/preoperative expenses* -** All specified expenses are7 covered under fringe benefit, whether capital or revenue nature - CBDT Circular No. 8/2005 dated 29-8-2005.

***Fringe benefit is not allowable as expense under income tax but can be shown as expense in P&L account* -** For the purposes of computation of total income under the Income-tax Act, fringe benefit tax is not an allowable deduction by virtue of section 40(*a*)(*ic*). However, the accounting treatment of fringe benefit tax for the purposes of reporting to shareholders and complying with the obligations under the Companies Act will be governed by the Accounting Standards issued by the Institute of Chartered Accountants of India - CBDT Circular No. 8/2005 dated 29-8-2005.

FBT is deductible for computing book profit - The fringe benefit tax is an allowable deduction in the computation of 'book profit' under section 115JB - CBDT Circular No. 8/2005 dated 29-8-2005.

3-1 *Advance payment of fringe benefit tax*

Every employer shall pay advance tax on his current fringe benefits. The advance tax shall be payable on basis similar to one under which advance income tax is payable. The only difference is that advance FBT is payable even if tax is less than Rs 5,000.

Interest - For non-payment/short payment of advance fringe benefit tax, interest will have to be paid. The mode of computation of interest as provided in section 115WJ(3)/(4)/(5) is similar to the provisions regulating interest for non-payment or short payment of advance income-tax given in sections 234B and 234C.

4 Fringe Benefit Tax on ESOPs

The Finance Act,2007 has introduced FBT on ESOPs (Employees Stock Option Plan) w.e.f. Assessment Year 2008-09. The salient features of these provisions are:

(i)FBT shall apply in all cases where any specified security or sweat equity shares has been allotted or transferred by the employer to his employees;

(ii) FBT shall be payable in the previous year in which such allotment or transfer has taken place;

(iii)the provisions of this new clause shall apply irrespective of the allotment or transfer being direct or indirect;

(iv) the provisions of this new clause shall apply irrespective of the allotment or transfer being free of cost or at concessional rate;

(v) the provisions of this new clause shall apply irrespective of the allotment or transfer being to current or former employee or employees;

(vi) the provisions of this new clause shall apply in cases where the allotment or transfer is on or after 1st day of April, 2007.

(vii) the value of fringe benefit in such cases shall be determined in accordance with the formula

A-B

Where, A = the Fair Market Value (FMV) of the specified security or sweat equity shares on the date of vesting of the option; and

B = the amount, if any, actually paid by, or recovered from the employee;

FBT is payable only if A exceeds B. No FBT is payable where B exceeds A.

The expressions specified security and sweat equity shares have also been defined. The value of fringe benefit is subjected to FBT at the prevailing rate, which is currently 30% plus surcharge plus education cess.

The expression fair market value has been defined to mean the value determined in accordance with the method as may be prescribed by the Board. Option has been defined to mean a right but not an obligation granted to an employee to apply for the specified security or sweat equity shares at a predetermined price.

The Central Board of Direct Taxes (CBDT) vide notification S.O. No. 1805(E) dated 23rd October, 2007 has inserted Rule 40C in the income-tax Rules; which has prescribed the method for determination of fair market value of specified security or sweat equity share, being a share in the company. Salient features of this rule are:

(i)In a case where, on the date of the vesting of the option, the share in the company is listed on a recognized stock exchange, the fair market value shall be the average of the opening price and closing price of the share on that date on the said stock exchange;

(ii)If on the date of vesting of the option, the share is listed on more than one recognized stock exchanges, the fair market value shall be the average of opening price and closing price of the share on the recognised stock exchange which records the highest volume of trading in the share;

(iii) If on the date of vesting of the option, there is no trading in the share on any recognized stock exchange, the fair market value shall be,-

(a)the closing price of the share on any recognised stock exchange on a date closest to the date of vesting of the option and immediately preceding such date; or

(b) the closing price of the share on a recognised stock exchange, which records the highest volume of trading in such share, if the closing price, as on the date closest to the date of vesting of the option and immediately preceding such date, is recorded on more than one recognized stock exchange.

(iv)In a case where, on the date of vesting of the option, the share in the company is not listed on a recognized stock exchange, the fair market value shall be such value of the share in the company, as determined by a Category 1 Merchant Banker registered with the Security and Exchange Board of India, on the specified date.

(v) The specified date has been defined as to mean,-

(i) the date of vesting of the option; or

(ii) any date earlier than the date of the vesting of the option, not being a date which is more than 180 days earlier than the date of the vesting

Further, the Central Board of Direct Taxes has inserted a new rule 40D in the Income-tax Rules, vide notification S.O. No. 113(E), dated 18-012008, prescribing the method for determination of fair market value of specified security, not being an equity share in the company. Through the same notification, rule 40C has been amended to omit the definition of equity share.

A new section 115WKA has also been inserted enabling the employer to recover the fringe benefit tax from the employee in respect of specified security or sweat equity shares, if such security or shares are transferred or allotted to the employee on or after 1st April, 2007.It has been prescribed that the employer can vary the agreement or scheme under which such specified security or sweat equity shares has been allotted or transferred. The agreement or scheme can be varied with a purpose to recover from the employee the fringe benefit tax to the extent to which such employer is liable to pay the fringe benefit tax in relation to the allotment or transfer of such specified security or sweat equity shares to such employee.

Wealth Tax

1 Introduction

Wealth tax is not a very important or high revenue tax in view of various exemptions. Wealth tax is a socialistic tax. It is not on income but payable only because a person is wealthy.

Wealth tax is payable on net wealth on 'valuation date'. As per Section 2(q), valuation date is 31st March every year. It is payable by every individual, HUF and company. Tax rate is 1% on amount by which 'net wealth' exceeds Rs 15 lakhs. No surcharge or education cess is payable.

No wealth-tax is chargeable in respect of net wealth of any company registered under section 25 of the Companies Act, 1956; any co-operative society; any social club; any political party; and a Mutual fund specified under section 10(*23D*) of the Income-tax Act [section 45]

Net wealth = Value of assets [as defined in section 2(ea] plus deemed assets (as defined in section 4) less exempted assets (as defined in section 5), less debt owed [as defined in section 2(m)].

Debt should have been incurred in relation to the assets which are included in net wealth of assessee. Only debt owed on date of valuation is deductible.

In case of residents of India, assets outside India (less corresponding debts) are also liable to wealth tax. In case of non-residents and foreign national, only assets located in India including deemed assets less corresponding debts are liable to wealth tax [section 6].

Net wealth in excess of Rs. 15,00,000 is chargeable to wealth-tax @ 1 per cent (on surcharge and education cess).

Assessment year - Assessment year means a period of 12 months commencing from the first day of April every year falling immediately after the valuation date **[Section 2(*d*)]**

All.).

1-1 Assets

Assets are defined in Section 2(*ea*) as follows.

Guest house, residential house or commercial building **-** The following are treated as "assets" **-** (a) Any building or land appurtenant thereto whether used for commercial or residential purposes or for the purpose of guest house (b) A farm house situated within 25 kilometers from the local limits of any municipality (whether known as a municipality, municipal corporation, or by any other name) or a cantonment board [Section 2(ea)(i)]

A residential house *is* not asset, if it is meant exclusively for residential purposes of employee who is in whole-time employment and the gross annual salary of such employee, officer or director is less than Rs. 5,00,000.

Any house (may be residential house or used for commercial purposes) which forms part of stock-in-trade of the assessee is not treated as "asset".

Any house which the assessee may occupy for the purposes of any business or profession carried on by him is not treated as "asset".

A residential property which is let out for a minimum period of 300 days in the previous year is not treated as an "asset".

Any property in the nature of commercial establishments or complex is not treated as an "asset".

Motor cars **-** Motor car is an "asset", but not the following **-** (a) motor cars used by the assessee in the business of running them on hire (b) motor cars treated as stock-in-trade [Section 2(ea)(ii)]. In the case of a leasing company, motor car is an asset.

Jewellery, bullion, utensils of gold, silver, etc. [Section 2(ea)(iii)] **-** Jewellery, bullion, furniture, utensils and any other article made wholly or partly of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals are treated as "assets" [Section 2(ea)(ii)]

For this purpose, "jewellery" includes ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, and also precious or semi-precious stones, whether or not set in any furniture, utensils or other article or worked or sewn into any wearing apparel.

Where any of the above assets (*i.e.*, jewellery, bullion, utensils of gold, etc.) is used by an assessee as stock-in-trade, then such asset is not treated as "assets" under section 2(*ea*)(*iii*).

Yachts, boats and aircrafts **-** Yachts, boats and aircrafts (other than those used by the assessee for commercial purposes) are treated as "assets" [Section 2(ea)(iv)]

Urban land **-** Urban land is an "asset" [Section 2(ea)(v)]

Urban land means land situated in the area which is comprised within the jurisdiction of a municipality and which has a population of not less than 10,000 according to the last preceding census.

Land occupied by any building which has been constructed with the approval of the appropriate authority is not 'asset'.

Any unused land held by the assessee for industrial purposes for a period of 2 years from the date of its acquisition by him is not an asset. Any land held by the assessee as stock-in-trade for a period of 10 years from the date of its acquisition by him is also not an asset.

Cash in hand **-** In case of individual and HUF, cash in hand on the last moment of the valuation date in excess of Rs. 50,000 is an 'asset'. In case of companies, any amount not recorded in books of account is 'asset' [Section 2(ea)(vi)]

1-2 Deemed assets

Often, a person transfers his assets in name of others to reduce his liability of wealth tax. To stop such tax avoidance, provision of 'deemed asset' has been made. In computing the net wealth of an assessee, the following assets will be included as deemed assets u/s 4.

Assets transferred by one spouse to another **-** The asset is transferred by an individual after March 31, 1956 to his or her spouse, directly or indirectly, without adequate consideration or not in connection with an agreement to live apart will be 'deemed asset' [Section 4(1)(a)(i)]

If an asset is transferred by an individual to his/her spouse, under an agreement to live apart, the provisions of section 4(1)(*a*)(*i*) are not applicable. The expression "to live apart" is of wider connotation and even the voluntary agreements to live apart will fall within the exceptions of this sub-clause.

Assets held by minor child **-** In computing the net wealth of an individual, there shall be included the value of assets which on the valuation date are held by a minor child (including step child/adopted child but not being a married daughter) of such individual [Section 4(1)(a)(ii)]

The net wealth of minor child will be included in the net wealth of that parent whose net wealth [excluding the assets of minor child so includible under section 4(1)] is greater.

Assets transferred to a person or an association of persons **-** An asset transferred by an individual after March 31, 1956 to a person or an association of person, directly or indirectly, for the benefit of the transferor, his or her spouse, otherwise than for adequate consideration, is 'deemed asset' of transferor [Section 4(1)(a)(iii)]

***Assets transferred under revocable transfers* -** The asset is transferred by an individual to a person or an association of person after March 31, 1956, under a revocable transfer is 'deemed asset' of transferor [Section 4(1)(a)(iv)]

Assets transferred to son's wife [Section 4(1)(a)(v)] **-** The asset transferred by an individual after May 31, 1973, to son's wife, directly or indirectly, without adequate consideration will be 'deemed asset' of transferor [Section 4(1)(a)(iv)]

***Assets transferred for the benefit of son's wife* -** If the asset is transferred by an individual after May 31, 1973, to a person or an association of the immediate or deferred benefit of son's wife, whether directly or indirectly, without adequate consideration, it will be treated as 'deemed asset' of the transferor [Section 4(1)(a)(vi)].

***Interest of partner*-** Where the assessee (may or may not be an individual) is a partner in a firm or a member of an association of persons, the value of his interest in the assets of the firm or an association shall be included in the net wealth of the partner/member. For this purpose, interest of partner/member in the firm or association of persons should be determined in the manner laid down in Schedule III to the Wealth-tax Act [Section 4(1)(b)].

Admission of minor to benefits of the partnership firm **-** If a minor is admitted to the benefits of partnership in a firm, the value of his interest in the firm shall be included in the net wealth of parent of minor in accordance with the provisions of section 4(1)(*a*)(*ii*) [*see* para 546.2]. It will be determined in the manner specified in Schedule III.

***Conversion by an individual of his self-acquired property into joint family property* -** If an individual is a member of a Hindu undivided family and he converts his separate property into property belonging to his Hindu undivided family, or if he transfers his separate property to his Hindu undivided family, directly or indirectly, without adequate consideration, the converted or transferred property shall be deemed to be the property of the individual and the value of such property is includible in his net wealth [Section 4(1A)]

If there was such transfer and if the converted or transferred property becomes the subject-matter of a total or a partial partition among the members of the family, the converted or transferred property or any part thereof, which is received by the spouse of the transferor, is deemed to be the asset of the transferor and is includible in his net wealth.

***Gifts by book entries* -** Where a gift of money from one person to another is made by means of entries in the books of account maintained by the person making the gift, or by an individual, or a Hindu undivided family, or a firm or an association of persons, or a body of individuals with whom he has business connection, the value of such gift will be included in the net wealth of the person making the gifts, unless he proves to the satisfaction of the Wealth-tax Officer that the money had actually been delivered to the other person at the time the entries were made [Section 4(5A)]

***Impartible estate* -** For the purpose of the Wealth-tax Act, the holder of an impartible estate shall be deemed to be the owner of all the properties comprised in the estate [Section 4(6)]

***Property held by a member of a housing society* -** Where the assessee is a member of a co-operative housing society and a building or part thereof is allotted or leased to him, the assessee is deemed to be the owner of such building and the value of such building is includible in computing his net wealth. In determining the value of such building, any outstanding instalments, payable by the assessee to the society towards the costs of such house, are deductible as debt owed by the assessee. The above rules are also applicable if the assessee is a member of a company or an association of persons [Section 4(7)]

***Property held by a person in part performance of a contract [Section 4(8)]* -** A person who is allowed to take or retain possession of any building or part thereof in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882. Similarly, a person can acquire any rights, excluding any rights by way of a lease from month to month or for a period not exceeding one year, in or with respect to any building or part thereof, by virtue of transaction as is referred to in section 269UA(f) of the Income-tax Act.

In above cases, the assets are taxable in the hands of beneficial owners, in the same manner in which they are taxed under the Income-tax Act :

1-3 Assets which are exempt from tax

The following assets are exempt from wealth-tax, as per section 5.

***Property held under a trust* -** Any property held by an assessee under a trust or other legal obligation for any public purpose of charitable or religious nature in India is totally exempt from tax. [Section 5(i)].

Business assets held in trust, which are exempt **-** The following business assets held by as assessee under a trust for any public charitable/religious trust are exempt from tax **-** (a) where the business is carried on by a trust wholly for public religious purposes and the business consists of printing and publication of books or publication of books or the business is of a kind notified by the Central Government in this behalf in the Official Gazette (b) the business is carried on by an institution wholly for charitable purposes and the work in connection with the business is mainly carried on by the beneficiaries of the institution (c) the business is carried on by an institution, fund or trust specified in sections 10(23B) or 20(23C) of the Income-tax Act.

Any other business assets of a public charitable/religious trust is not exempt.

Coparcenary interest in a Hindu undivided family **-** If the assessee is a member of a Hindu undivided family, his interest in the family property is totally exempt from tax [Section 5(ii)].

Residential building of a former ruler **-** The value of any one building used for the residence by a former ruler of a princely State is totally exempt from tax [Section 5(iii)]

Former ruler's jewellery **-** Jewellery in possession of a former ruler of a princely State, not being his personal property which has been recognised as a heirloom is totally exempt from tax [Section 5(iv)]

The jewellery shall be permanently kept in India and shall not be removed outside India except for a purpose and period approved by the Board. Reasonable steps shall be taken for keeping that jewellery substantially in its original shape. Reasonable facilities shall be allowed to any officer of the Government, or authorised by the Board, to examine the jewellery as and when necessary.

Assets belonging to the Indian repatriates **-** Assets (as given below) belonging to assessee who is a person of Indian origin or a citizen of India, who was ordinarily residing in a foreign country and who has returned to India with intention to permanently reside in India, is exempt. A person shall be deemed to be of Indian origin if he, or either of his parents or any of his grand-parents, was born in undivided India.

After his return to India, following shall not be chargeable to tax for seven successive assessment years **-** (a) moneys brought by him into India (b) value of asset brought by him into India (c) moneys standing to the credit of such person in a Non-resident (External) Account in any bank in India on the date of his return to India and (d) value of assets acquired by him out of money referred to in (*a*) and (*c*) above within one year prior to the date of his return and at any time thereafter [Section 5(v)]

One house or part of a house **-** In the case of an individual or a Hindu undivided family, a house or a part of house, or a plot of land not exceeding 500 sq. meters in area is exempt. A house is qualified for exemption, regardless of the fact whether the house is self-occupied or let out. In case a house is owned by more than one person, exemption is available to each co-owner of the house [Section 5(vi)]

2 Valuation of assets

The value of an asset, other than cash, shall be its value as on the valuation date determined in the manner laid down in Schedule III.

Valuation of a building **-** Value of any building or land appurtenant thereto, or part thereof, is to be made in accordance with Part B of Schedule III to the Wealth-tax Act

The first step is to find out gross maintainable rent. Gross maintainable rent is (a) annual rent received/receivable by the owner or annual value of the property as assessed by local authority, whichever is higher (if the property is let out) or (b) annual rent assessed by the local authority or if the property is situated outside the jurisdiction of a local authority, the amount which the owner can reasonably be expected to receive as annual rent had such property been let (if the property is not let).

In the following cases "actual rent" shall be increased in the manner specified below : (a) Taxes borne by tenant (b) If property is rented, one-ninth of actual rent will be added, if expenditure on repairs in respect of the property is borne by the tenant (c) Interest @ 15% on deposit given by tenant or difference (d) Premium received as consideration for leasing of the property or any modification of the terms of the lease will be divided over the number of years of the period of the lease and will be added to 'actual rent' (d) If the derives any benefit or perquisite as consideration for leasing of the property or any modification of the terms of the lease), the value of such benefit or perquisite shall be added to actual rent.

Net maintainable rent is determined by deducting from the gross maintainable rent (a) the amount of taxes levied by any local authority in respect of property (deduction is available even if these are to be borne by the tenant) ; and (b) *A* sum equal to 15% of gross maintainable rent.

The net maintainable rent is finally capitalized to arrive as value of net asset.. This can be done by multiplying the net maintainable rent by 12.5. If the property is constructed on leasehold land, net maintainable rent is to be multiplied by 10 when the unexpired period of lease of such land is 50 years or more and multiplied by 8 where the unexpired period of lease of such land is less than 50 years).

If a property is acquired/constructed after March 31, 1974, then the value of the house property is determined as above. Original cost of construction/acquisition *plus* cost of improvement of the house property is calculated. The higher of the above is taken as capitalised value of net maintainable rent. This exception is applicable in respect one house property. The cost of acquisition/construction (*plus* cost of improvement) does not exceed Rs. 50 lakh, if the house is situated at Bombay, Calcutta, Delhi and Madras (Rs. 25 lakh at any other place).

If unbuilt area of the plot of land on which the property is built exceeds the specified area, premium is to be added to the capitalised value determined above.

***Valuation of self-occupied property* -** If assessee owns a house (or a part of the house), being an independent residential unit and is used by the assessee exclusively for his residential purposes throughout 12 months ending on the valuation date, valuation will be as per provisions of section 7(2).

Assessee can either take value of the house as determined above on the valuation date relevant for the current assessment year or he take value of the house, as determined above, on the first valuation date next following the date on which he became the owner or the valuation relevant for the assessment year 1971-72, whichever is later. The choice is of the assessee.

Where the house has been constructed by the assessee, he shall be deemed to have become the owner thereof on the date on which the construction of such house was completed.

***Valuation of assets of business* -** If the assessee is carrying on a business for which accounts are maintained by him regularly, the net value of the assets of the business as a whole, having regard to the balance sheet of such business on the valuation date, is taken as value of such assets [Part D, Schedule III].

(A) The assets are valued as follows **-** ***Depreciable assets* -** Written down value, plus 20%**,** ***Non-depreciable assets (other than stock-in- trade)* -** Book value, plus 20%, ***Closing stock* -** Value adopted for the purpose of income-tax, plus 20%.

(B) Then value of house property, life interest, jewellery and other assets is calculated as per other provisions of Wealth Tax Act.

Higher of A or B is taken as value of assets.

***Value of interest in firm or association of persons* -** The net wealth of the firm on the valuation date is ascertained.. For determining the net wealth of the firm (or association), no account shall be taken of the exemptions given by section 5. The portion of the net wealth as is equal to the amount of the capital of the firm or association is allocated amongst the partners or the members in the proportion in which capital has been contributed by them.

The residue of the net wealth is allocated amongst the partners or the members in accordance with the agreement of the partnership or association of persons for the distribution of assets in the event of dissolution of the firm or association or in the absence of such agreement, in the proportion in which the partners (or members) are entitled to share profits [Part E, Schedule III]

***Value of life interest* -** The value of life interest of an assessee shall be determined as per Part F, Schedule III. Average net annual income of the assessee derived from the life interest during 3 years ending on the valuation date is calculated. While computing net annual income, expenses incurred on the collection of such income (maximum of 5% of the average of annual gross income) shall be deducted. This is multiplied as per formula prescribed to arrive at value of asset.

Valuation of jewellery **-** The value of jewellery shall be estimated to be the price which it would fetch if sold in the open market on the valuation date (*i.e.*, fair market value). Where the value of jewellery does not exceed Rs. 5,00,000, a statement in Form No. O-8A is to be submitted. Where the value of the jewellery exceeds Rs. 5,00,000, a report of a registered valuer in Form No. O-8 should be submitted. The report is not binding on assessing officer (Valuation Officer) and he can determine fair market value of jewellery.

The value of jewellery determined by the Valuation Officer for any assessment year shall be taken to be the value of such jewellery for the subsequent four assessment years subject to the prescribed adjustments.

Valuation of any other asset **-** The value of any asset, other than cash (being an asset which is not covered in above paras) shall be estimated either by the Assessing Officer himself or by the Valuation Officer if reference is made to him under section 16A. In both these cases, the value shall be estimated to be the price which it would fetch if sold in the open market, on the valuation date. If the asset is not saleable in the open market, the value shall be determined in accordance with guidelines or principles specified by the Board from time to time by general or special order.

3 Other issues relating to wealth tax

Charitable or religious trusts **-** A trust can forfeit exemption for any of the following reasons - (a*)* any part of the trust's property or any income of the trust, including income by way of voluntary contributions, is used for the benefit of the settlor, the trustee, their relatives etc.; or (b) any part of the income of the trust, created on or after April 1, 1962, including income by way of voluntary contributions, enures directly or indirectly, for the benefit of any of the persons referred to in section 13(3) of the Income-tax Act ; or (c) any funds of the trust are invested or deposited or any shares in a company are held by the trust in contravention of the investment pattern for trust funds laid down in section 11(5) of the Income-tax Act.

In such case, tax shall be leviable upon and recoverable from the trustee or manager in respect of the property held by him under trust at the rate of tax applicable to a resident in India.

These provisions are not applicable in the case of a scientific research association [Section 10(*21*) of the Income-tax Act] and in the case of any institution, fund or trust referred to in section 10(*22*), (*22A*), (*22B*) or (*23C*) of the Income-tax Act in specified situations [Section 21A]

Association of persons where shares of members are indeterminate/unknown **-** If assets chargeable to wealth-tax are held by an association of persons and the individual shares of the members in the income or assets of the association are indeterminate or unknown, wealth-tax is levied to the same extent as it would be leviable upon and recoverable from an individual who is citizen of India and resident in India [Section 21AA]

3-1 Return of wealth and assessment

Every person is required to file with the Wealth-tax Officer a return of net wealth in Form BA, if his net wealth or net wealth of any other person in respect of which he is assessable under the Act on the valuation date is of such an amount as to render him liable to wealth-tax. Return can be filed on or before the "due date" specified under section 139 of the Income-tax Act.

Return in response to a notice **-** In the case of any person who, in the opinion of Wealth-tax Officer, is assessable to tax, the Wealth-tax Officer may, before the end of the relevant assessment year, issue a notice requiring him to furnish, within 30 days from the date of service of such notice, a return of net wealth in the prescribed form.

Assessment **-** The assessee is required to pay the tax before filing of the return and such return is to be accompanied by the proof of such payment. Provisions of regular assessment, as applicable under Income Tax, will apply to wealth tax also.

Interest or penalty and prosecution **-** Interest @ 1% per month is payable for failure to pay wealth tax on due date. Penalty and prosecution provisions also apply.

Mr. A has the following assets on 31-3-2008:

Asset	Market value on 31-3-2008 Rs. lakhs	Loan outstanding On 31-3-2008 Rs. Lakhs (loans taken acquire the asset)	Security Given for Taking the Loan
Gold and silver	80	6	Shares
Shares	10	3	House B
Residential House A	50	4	Gold
Residential House B	42	38	Personal
Commercial House C(used for Carrying on own business)	95	5	Personal
Boat	8	12	Gold
Motor cars	11	1	Silver
Bank deposit	1	1	------
Residential House D(let out throughout The financial year 2007-08)	55	40	House D
Commercial complex (having 20 offices)	190	100	Commercial Complex

A also took a bank loan of Rs. 75,000 against the security of his car for his friend's marriage. Out of the Rs. 12 lakh loan taken by him for purchasing the boat, he utilized Rs. 1 Lakh for his foreign visit. Compute the net wealth for assessment year 2008-09

Answer

	Assets (Rs. Lakh)	**Debts owed Rs. Lakhs**
Gold and silver	**80**	**6**
Shares- not an "asset" within the meaning of section 2*(ea)*	**----**	**----**
Residential House A[exempt under Section 5*(vi)*]	**---**	**----**
Residential House B	**42**	**38**
Commercial House C(used for Carrying on own business-Therefore it is not an "asset" within the meaning of section 2*(ea)*)	**----**	**----**
Boat	**8**	**11**
Motor cars	**11**	**1**
Bank deposit[not an asset within the meaning of section 2*(ea)*]	**----**	**---**
Residential House D(let out throughout the financial year 2005-06) –	**----**	**---**

Residential house not an "asset" if let out for 300 days or more in the previous year.		
Commercial complex (having 20 offices) not an "asset" within the meaning of section 2*(ea)*	**----**	**----**
Total	**141**	**56**

Net wealth = Rs 141 lakhs *minus* Rs 56 Lakhs = Rs. 85 lakhs

Mr. A owns a commercial house property which is situated at Pune. The difference between unbuilt area and specified area is 22% of the aggregate area. The property was acquired on 31-5-1988 for Rs. 12,50,000. The property is built on freehold land. How will the property be valued for wealth-tax purposes?

As the difference between unbuilt area and specified area exceeds 20% of the aggregate area, value shall be estimated by the Assessing Officer himself or by the Valuation Officer under section 16A if the reference is made to him under section 16A. In either case, the value shall be estimated to be the price which it would fetch if sold in the open market, on the valuation date. If the property is not saleable in the open market, valuation shall be as per CBDT's guidelines specified from time to time.